

MED-ARB: STANDARDS OF CONDUCT¹

1. GENERAL

- 1.1 These standards are to be read and construed in their entirety. There is no priority significance attached to the sequence in which the standards appear.
- 1.2 The objectives of these standards are to define principles to guide med-arbitrator conduct, enhance public protection and promote confidence in the med-arb process for those who choose to use it.
- 1.3 Med-arb is neither a mediation, nor an arbitration. While it contains elements of each, it also has its own unique character. As a result, the roles and safeguards afforded to those involved in a “pure” mediation or “pure” arbitration do not necessarily apply to med-arb.
- 1.4 While there are benefits to choosing med-arb, including the potential to reduce the time, effort and cost of resolving a dispute, care must be exercised so that the parties and the med-arbitrator fully understand the implications of any modifications from “pure” mediation or arbitration. Those may include:
 - Impairment of the mediation process through the parties’ reluctance to be candid or to share interests with the med-arbitrator;
 - Impairment of the med-arbitrator’s effectiveness due to an enhanced need to maintain the appearance of impartiality;
 - Movement to arbitration too quickly;
 - Confusion or uncertainty over what evidence is used in the arbitration process;
 - A lack of confidence in the med-arbitrator’s ability to disabuse himself or herself of knowledge or information gained in the mediation process;

¹ These standards were produced by a working group convened by Mediate BC in consultation with the British Columbia Arbitration and Mediation Institute. The group consisted of both experienced mediators and arbitrators some of whom act as med-arbitrators in med-arb proceedings. This document reflects their experience, their review of published materials from various jurisdictions, and the feedback of their peers.

It is recognized that while not all mediators or arbitrators are prepared to recommend or participate in the med-arb process, it remains an option for those who wish to consider it. It is also recognized that these standards may not be appropriate in the context of labour relation matters.

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- A lack of clarity as to where the process stands at any particular moment.

1.5 The core principles of med-arb are:

- The primary benefit of med-arb is the opportunity to reach a mutually acceptable agreement balanced with the certainty of resolution.
- The parties, in consultation with the med-arbitrator, are free to craft their own process provided that they do so with informed consent and due regard to these standards.
- The med-arbitrator is bound by the rules of natural justice².

1.6 The use of the term “must” indicates that a med-arbitrator is obliged to adhere to the practice described. The use of the term “should” indicates that the practice described is highly desirable, but not required, and is to be departed from only after careful use of judgment and discretion.

1.7 These standards are not to be construed as a competing code of behaviour displacing other professional codes, but as additional standards for med-arbitrators.

1.8 Where there is a conflict between these standards and a med-arbitrator’s professional code, the professional code prevails. However, a med-arbitrator should make every effort to comply with the spirit and intent of these standards in resolving such conflicts. This effort should include honouring all remaining standards not in conflict with other codes.

2. DEFINITIONS

2.1 “*Arbitration*” means a process where disputing parties agree to an impartial and independent third party deciding the outcome of issues submitted by them for adjudication.

2.2 “*Evaluative comments*” includes any expression of an opinion or conclusion, preliminary or otherwise, on the issues in dispute in the med-arb.

2.3 “*Family law dispute*” has the meaning set out in the *Family Law Act*.

2.4 “*Informed consent*” means the expression of a party’s understanding of the nature of the med-arb process, and their consent to participate in it.

² The rules of natural justice include a requirement that an arbitrator be free from bias, or apparent bias, and that the proceeding be conducted fairly. The obligation to be fair includes ensuring that all parties are aware of the case to be met, and have the opportunity to be heard.

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- 2.5 “*Mediation*” means a process where an impartial and independent third party with no decision-making power attempts to facilitate a mutually acceptable agreement between disputing parties.
- 2.6 “*Med-arb*” is a hybrid process where, pursuant to a binding agreement, a med-arbitrator assists disputing parties to resolve their issues through mediation, or by deciding any unresolved issues through arbitration.³
- 2.7 “*Med-arbitrator*” means the impartial and independent third party conducting a med-arb.
- 2.8 “*Participants*” means all persons in attendance at a med-arb, including the parties.
- 2.9 “*Parties*” means those persons who are a party to the dispute which is the subject matter of a med-arb.
- 2.10 “*Workplace med-arb*” means a med-arb involving issues in the management and possible restoration of relationships within the workplace.

3. MED-ARB AGREEMENT

- 3.1 A written Med-Arb Agreement must be negotiated and signed by the parties and the med-arbitrator at the outset of a med-arb.
- 3.2 At a minimum, the Med-Arb Agreement must contain the following:
- An explanation of the med-arb process and its unique nature including the dual role of the med-arbitrator;
 - A statement that if a screening process is used, all information obtained during that process, including any notes or records made, are confidential and will not be relied on during the med-arb;
 - A statement of the issues to be submitted for adjudication if arbitration of one or more of them is necessary⁴, and the law applicable to the arbitration;
 - Rules of procedure for conducting the arbitration, if one is necessary, including the process for giving evidence; and

³ A mediation conducted by one person followed by an arbitration conducted by another may be considered to be a med-arb, but does not carry the same degree of risk or compromise compared to the use of a single med-arbitrator.

⁴ The Med-Arb Agreement should also recognize that the parties may, by consent, supplement or amend those issues during the med-arb.

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- An agreement as to what use, if any, the med-arbitrator may make of information provided to him or her during the med-arb whether in joint session or in caucus⁵.

3.3 The Med-Arb Agreement should specify that a single party cannot terminate the med-arb, and that it will proceed (including through the arbitration) even if one party ceases to participate in the process.

3.4 The Med-Arb Agreement in a workplace med-arb should confirm whether the outcome of the med-arb will be disclosed to any person or persons (such as the employer) who is neither a party nor a participant in the med-arb.

4. INFORMED CONSENT

4.1 A med-arbitrator must:

- Explain the med-arb process to the parties including the dual role of the med-arbitrator; and
- Obtain the informed consent of each party in writing.⁶

5. INCORPORATION OF STANDARDS

5.1 The Mediate BC [Mediator Standards of Conduct](#) apply to a med-arbitrator whenever he or she is conducting the mediation portion of a med-arb.

5.2 The ADR Institute of Canada [Code of Ethics](#) apply to a med-arbitrator whenever he or she is conducting the arbitration portion of a med-arb.

6. DUTY OF IMPARTIALITY

6.1 A med-arbitrator must conduct a med-arb in an impartial manner and avoid conduct that gives the appearance of partiality. Impartiality means freedom from favoritism, bias or prejudice.

⁵ The Med-Arb Agreement must be specific as to what information from the mediation process, if any, forms part of the evidence in arbitration process.

⁶ At a minimum, informed consent will be evidenced by the Med-Arb Agreement signed by the parties. It may also be reflected in Certificates of Independent Legal Advice, if obtained, a separate document drafted by the med-arbitrator, if required, or in discussions between the med-arbitrator and the parties. It is up to the med-arbitrator to decide how to best manage this aspect of his or her practice.

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- 6.2 A med-arbitrator should neither give nor accept a gift, favour, loan or anything of value that raises a question as to the med-arbitrator's actual or perceived impartiality.
- 6.3 A med-arbitrator may accept or give *de minimis* gifts or incidental items or services that are provided to facilitate a med-arb or respect cultural practices so long as they do not raise questions as to a med-arbitrator's actual or perceived impartiality.

7. DUTY TO AVOID CONFLICT OF INTEREST

- 7.1 A med-arbitrator must make reasonable efforts to determine and disclose any monetary, personal, professional, family, social or business relationship or affiliation which is likely to constitute, or reasonably be perceived to constitute, a conflict of interest.
- 7.2 A med-arbitrator must not have a direct or indirect monetary or personal interest in the outcome of a dispute unless otherwise acknowledged and agreed to by the parties.
- 7.3 A med-arbitrator must disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the med-arbitrator and could reasonably be seen as raising a question about the med-arbitrator's impartiality. After disclosure, if all parties agree, the med-arbitrator may proceed with the med-arb, otherwise he or she must withdraw.

8. MED-ARBITRATOR COMPETENCY

- 8.1 A med-arbitrator must acquire and maintain knowledge, skills and abilities sufficient to provide competent med-arb services.
- 8.2 A med-arbitrator must engage in sufficient continuing education to ensure that the med-arbitrator's knowledge, skills and abilities are current and effective.
- 8.3 A med-arbitrator must provide services only for cases where he or she is qualified by experience or training.⁷
- 8.4 Due to the potential for bias or apparent bias, the med-arbitrator should exercise great care in the making of any evaluative comments⁸.

⁷ For example, and without limiting the generality of the foregoing, a med-arbitrator must not conduct med-arbs involving family law disputes, family businesses, family inheritance and estates, responsibility for care of elderly parents, or other similar disputes unless qualified to do so. Special skills may also be required for multi-party med-arbs or med-arbs involving complex subject matter.

⁸ Before making any evaluative comments, the med-arbitrator should consider whether he or she should obtain the consent of the party or parties to whom the comments are to be directed.

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8.5 If a med-arbitrator's ability to conduct a med-arb is impaired by drugs, alcohol, medication or otherwise, the med-arbitrator must not conduct the med-arb.

9. MED-ARBITRATOR INTEGRITY

9.1 A med-arbitrator must be honest and diligent, act in good faith and put the interests of participants above those of the med-arbitrator.

9.2 A med-arbitrator must not act in a way that raises legitimate questions about the integrity of the med-arb process.

9.3 A med-arbitrator who is a roster mediator of Mediate BC must respond to any complaints regarding his or her conduct in accordance with the requirements of the Mediate BC Complaints Process.

10. MED-ARB QUALITY

10.1 A med-arbitrator should make information relevant to the med-arbitrator's training, education, experience and approach to conducting a med-arb available to the parties.

10.2 A med-arbitrator must conduct a med-arb in a way which provides the parties with an opportunity to fully participate in the process and which encourages respect and civility among the participants.

10.3 A med-arbitrator must ensure, to the extent that such matters are within the med-arbitrator's control, that the med-arb process is conducted with integrity and must maintain procedural fairness throughout the med-arb.

11. TRANSITIONING BETWEEN MEDIATION AND ARBITRATION

11.1 Whenever the med-arb process moves between mediation and arbitration, the med-arbitrator should:

- Confirm in writing to the participants that one process has ended and the other commenced;
- Confirm the issues for arbitration; and
- Remind the participants what information from the mediation process, if any, forms part of the evidence in arbitration process.

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11.2 The med-arbitrator should also consider, and discuss with the parties, whether a brief break or an adjournment is needed in order for the parties to appropriately prepare for the new process.

12. SAFETY AND APPROPRIATENESS OF MED-ARB

12.1 A med-arbitrator must make reasonable efforts to identify risk factors which may affect the safety of any participant, and must make the med-arb process safe or end it.

12.2 A med-arbitrator conducting a family law dispute med-arb⁹ must:

- Assess whether med-arb is appropriate for the parties by screening for family violence¹⁰ by way of individual interviews by the med-arbitrator;
- If the med-arbitrator identifies the existence or risk of family violence, the med-arbitrator must assess whether a fair and safe med-arb is still possible; and
- If the med-arb continues, the med-arbitrator must manage the med-arb using current best practices so that any vulnerable participant is protected appropriately in the med-arb.

12.3 If a med-arbitrator terminates a med-arb because of safety concerns, he or she must take whatever steps are reasonable to ensure the safety of all participants, and must consider whether to refer the participants to appropriate resources and professionals.

13. TERMINATION OF A MED-ARB

13.1 A med-arb is terminated only when:

- All issues are resolved by the parties;
- A final award of all issues that remain in dispute is delivered;
- The med-arbitrator resigns for good cause;¹¹ or

⁹ A med-arbitrator should also consider these practices in med-arbs involving family businesses, family inheritance and estates, responsibility for care of elderly parents, or other similar disputes.

¹⁰ As defined in the [Family Law Act](#).

¹¹ Good cause may include real or apparent bias on the part of the med-arbitrator; a conflict of interest that is not waived by the parties, an inability of a party to participate effectively, or safety concerns.

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- All parties agree to terminate.

14. MED-ARB REGULATION

14.1 Various statutes and organizations regulate aspects of a med-arb in relation to family law disputes. They include:

The [Family Law Act](#) and [regulations](#);
The [Arbitration Act](#); and
The [Law Society of British Columbia](#).

14.2 All med-arbitrators should be familiar with those regulations, and any med-arbitrator conducting a med-arb in relation to family law disputes must be familiar with and have regard to them.

14.3 In accordance with its assessment of “best practices”, Mediate BC requires that members of its Med-Arb Roster be qualified as both family law mediators and family law arbitrators under the regulations to the *Family Law Act* before conducting the med-arb of a family law dispute.

15. PROCESS VARIATIONS

15.1 It is recognized that the med-arb process may move between mediation and arbitration on one or more occasions and in any sequence. While these standards were developed with the “traditional” med-arb model in mind (i.e., a mediation process followed by an arbitration process, if needed, conducted by the same med-arbitrator) they are broad enough to be applied to variations on that model including:

- Completing the arbitration process except for delivery of the sealed award before commencing a mediation (“arb-med”).
- Interrupting an arbitration to attempt to mediate one or more issues before returning to the arbitration (“arb-med-arb”).
- Interrupting a mediation to arbitrate one or more issues before returning to the mediation (“med-arb-med”).
- Having two different med-arbitrators (one for mediation and one for arbitration).

15.2 Ultimately it is up to the parties, and the med-arbitrator, to decide what process best serves their collective interests including, for example, whether and when to hold caucuses.

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Decisions on process may even be made in the midst of the med-arb with the informed consent of the parties. If so, such decisions should be recorded in writing.

16. LIMITS ON ADVERTISING AND PROMOTION

- 16.1 A med-arbitrator must not make any false, misleading, or exaggerated claims including claims about the med-arb process, its costs and benefits, or about the med-arbitrator's skills or qualifications.
- 16.2 A med-arbitrator may state that he or she is a member of a Roster of the Society, but must not state or imply that such membership implies a particular level of skill or ability.
- 16.3 A med-arbitrator must not solicit in a manner that gives an appearance of partiality for or against a party or otherwise undermines the integrity of the med-arb process.
- 16.4 A med-arbitrator must not communicate to others in promotional materials or other forms of communication the names of participants served without their written consent.

17. RETAINER AND BILLING

- 17.1 Upon being retained a med-arbitrator must advise the parties in writing about the following:
- The scope of the med-arbitrator's services, and the rate of remuneration for those services;
 - The particulars of any disbursements or expenses for which the med-arbitrator will seek reimbursement;
 - Who is responsible for payment; and,
 - If appropriate, the method of payment and the requirement, if any, for a deposit of funds.
- 17.2 A med-arbitrator must bill for the med-arbitrator's services by delivering a written statement of account to the person or persons responsible to make payment.
- 17.3 The account must clearly and separately detail the amounts charged as fees and disbursements, any funds received or applied to the account, and any balance due.
- 17.4 A med-arbitrator should be ready to explain the basis of the fees and disbursements charged, and should, if requested, provide further particulars of the same.