

- 44 Grant, Kidder, Logan, McIntosh, McLean, Mercer, Morton, Oliver,
45 Sheridan, and Sioux counties.
- 46 b. The Northeast Central Judicial District, including Grand Forks and
47 Nelson counties.
- 48 c. The Southwest Judicial District, including Stark, Hettinger, Adams,
49 Bowman, Slope, Golden Valley, Billings, and Dunn counties.
- 50 d. The Northwest Judicial District, including Ward, Mountrail,
51 McKenzie, Williams, Divide, and Burke counties.
- 52 e. The Northeast Judicial District, including Walsh, Ramsey, Benson,
53 Pierce, McHenry, Renville, Bottineau, Rolette, Towner, Cavalier, and
54 Pembina counties.
- 55 2) **Program Management:**
- 56 a. A full-time Family Mediation Program Administrator will manage and
57 oversee the operation of the Program under the auspices of the North
58 Dakota Supreme Court.
- 59 b. The Administrator will directly report to the State Court Administrator
60 and will act as a liaison to the ~~two~~ five judicial districts and the Joint
61 Committee on Alternative Dispute Resolution, and the Subcommittee
62 on Family Mediation.
- 63 c. The Administrator will be an employee of the State of North Dakota
64 and compensated at a rate commensurate with market value and state
65 policies.
- 66 d. The University North Dakota Conflict Resolution Center will offer
67 assistance to the Program as needed by providing expertise,
68 professional assistance, training and education. Compensation will be
69 negotiated as required.
- 70 3) **Research and Evaluation:** The Program will include a research and
71 evaluation component. Bids will be solicited through an Request For
72 Proposal process according to North Dakota State regulations, and require
73 approval by the Administrator and the Joint Committee on Alternative
74 Dispute Resolution.
- 75 4) **Implementation Model for Court Annexed Referral to Family Mediation:**
- 76 a. Within 10 days of filing, the following new cases will be referred by
77 the clerk to the Family Mediation Program Administrator:
- 78 i. Any ‘civil proceeding’ in which ~~legal custody, physical~~
79 ~~custody, or visitation~~ parental rights and responsibilities or
80 relocation with respect to a child is an issue; this term includes
81 an original proceeding for a divorce, separation, paternity, and
82 guardianship in which the issue may appear. This term also
83 includes a proceeding for post-judgment ~~custody modification,~~
84 ~~visitation modification~~ to parental rights and responsibilities
85 and requests to remove a child from the state.
- 86 ii. When the proceeding is a post-judgment motion for ~~custody~~
87 ~~modification or for a change or enforcement of visitation~~

88 change of enforcement of parental rights and responsibilities,
89 then the referral will be made only after a court order has
90 determined that a prima facie case has been established, and if
91 the court believes mediation may be useful to the parties and
92 the children.

- 93 b. **Mediation and Orientation:** The Family Mediation Pilot Program
94 will automatically provide up to 6 hours of combined pre-mediation
95 orientations and mediation. Mediators will be compensated at the rate
96 of \$170/hour with a cap of \$1020 per case. The Family Mediation
97 Pilot Program requires that:

98 The parties will individually attend a pre-mediation orientation
99 and screening with a designated mediator, and at least one joint
100 mediation session. The Program will provide up to 6 hours of
101 mediation without charge to the parties. Should the parties
102 require additional sessions, they may purchase mediation from
103 the mediator who will offer mediation at the rate of \$170/hour.
104 Parties may also apply to the Administrator for additional
105 mediation sessions and may apply for a fee waiver or sliding
106 scale fee should they qualify based upon economic factors. If
107 the parties qualify for a fee reduction and have been approved
108 for additional mediation, any “gap” between \$170/hour and
109 their ability to pay will be paid to the mediator under this
110 program.

- 111 c. **Exclusions:** The clerk shall not refer proceedings where the parties
112 have already started mediating prior to the time frame for starting the
113 pilot program; where ~~the custody and/or visitation issues~~ parental
114 rights and responsibilities are stipulated by the parties at the time of
115 filing; or where a current domestic violence protection order or other
116 order for protection between the parties currently exists.¹ In these
117 cases, the court may not require mediation except in unusual cases
118 where:

- 119 i. Mediation is requested by the victim of the domestic violence
120 or sexual abuse, and an exception to the order of protection is
121 made by the court;
122 ii. The mediation is provided by a mediator trained to address the
123 needs and safety of victims where domestic violence is at
124 issue;
125 iii. The victim of domestic violence is provided the opportunity
126 for separate meetings during the mediation, and to mediate
127 using separate rooms if they choose;

¹ Cross Ref. N.D.C.C. § 14-09.1-02. This rule is intended to comply with the statute on mediation and the exclusion for domestic violence.

- 128 iv. The mediation takes place in a courthouse or other building
129 where security measures are in place; and
130 v. The victim has an advocate or support person of their choice in
131 the mediation.

132 d. **Additions:** In addition to the clerk referrals, a district judge or referee
133 assigned to ~~a custody or visitation proceeding~~ a parental rights and
134 responsibilities proceeding may at any time refer a case to family
135 mediation, except as prohibited by this or any other rule or statute.

136 e. **Court Procedures:** Upon receipt of a case from the clerk, ~~a mediator~~
137 ~~will be assigned the case by the FMPP Administrator who will~~ the
138 Family Mediation Program Administrator will assign a mediator to the
139 case and prepare an order and schedule for mediation (Form A) for
140 signature by the assigned judge. The order will be sent to the parties,
141 attorneys, and the mediator, setting the following time frame for the
142 mediation to take place:

- 143 i. The parties must contact the mediator and attend a pre-
144 mediation orientation separately within 20 days of the date of
145 the Mediation Scheduling Order.
146 ii. The mediation sessions must take place within 90 days of the
147 date of the Mediation Scheduling Order.
148 iii. Any requests to deviate from this time frame must be
149 submitted to the judge presiding over the case in writing by the
150 mediator and the parties, and the judge may allow a time
151 extension for good cause.
152 iv. Once a case is assigned, the mediator will manage the case and
153 report to the court as required in the Family Mediation Pilot
154 Program Protocol.
155 v. Should any party fail to appear for orientation or mediation
156 sessions, the mediator shall promptly notify the administrator
157 for assistance, and who may report such violation to the court
158 which may order the party(s) to show cause.
159 vi. The mediation process is not a stay on any interim process.

160 f. **Pre-Mediation Orientation:** The Family Mediation Pilot Program
161 will provide a mediation orientation session for all parties in ~~child~~
162 ~~custody or visitation disputes~~ parental rights and responsibilities
163 disputes. The orientation sessions are provided to the parties separately
164 by the assigned mediator in a way that best meets the needs of the
165 parties. The orientation session should be designed to make the parties
166 aware of the following non-inclusive list:

- 167 i. What mediation is and is not;
168 ii. What to expect from the mediators;
169 iii. What the parties goals are for mediation;
170 iv. Any guidelines necessary to have constructive conversations;
171 v. ow to prepare for the mediation process;

- vi. The role of the court, lawyers, and other experts;
- vii. How fee payment works;
- vii. The time line for mediation;
- ix. Any relevant requirements of the Family Mediation Pilot Program;
- g. **Selection of Mediators:** In order to mediate within the Family Mediation Pilot Program, mediators must meet the criteria set forth in Rule 8.9 or have a minimum of 40 hours of mediation training and 4 years of experience in family mediation with an average of 6 cases per year and follow the policies and procedures set forth. They may apply to be placed on the roster of family mediators in the manner indicated in Rule 8.9, and will be approved by the Family Mediation Program Administrator. Mediators must carry malpractice insurance that covers their mediation practice.
 - i. **Mediation Assignment:** Mediators will be assigned cases by the Administrator and will manage cases assigned to them from orientation and screening through conclusion of mediation.
 - ii. **Conflicts of Interest & Bias:** A mediator may not be removed unless the mediator and/or the parties' petition the Administrator based upon bias or conflicts of interest. Parties and attorneys may not request a change of mediator unless they present clear evidence of bias or conflict of interest as described in the standards provided in the Family Mediation Pilot Program Protocol.²
 - iii. **Standards:** All mediators must agree to follow the standards set forth in Protocol. Any violation of standards may be reported to the Administrator.
- h. **Confidentiality:** The pilot program shall require confidence in the process by upholding highest ethical standards, including confidentiality. Mediators are prohibited from discussing or revealing the details of mediation discussions or about any party to any judge, magistrate, or third party.³
 - i. **Program Evaluation:** All mediators and parties must cooperate with the research and evaluation protocol to help measure the impact and success of the pilot program. This may include written comments, personal interview, and occasional observation during mediation, etc.
 - j. **Additional Sessions:** Should the parties require additional sessions,

² The Family Mediation Pilot Program Protocol is a guide to ensure quality and efficacy of the process as well as a working document for guiding the Program as a whole.

³ Cross Ref. Rule 8.8(b); N.D.C.C. § 14-09.1-06 (Confidentiality); N.D.C.C. § 31-04-11 (Mediation - Inadmissibility of evidence – Exception).

210 they may purchase mediation from the mediator who will offer
211 mediation at the rate of \$170/hour. Parties may also submit a request
212 to the Administrator for additional mediation sessions and may apply
213 for a fee waiver or sliding scale fee should they qualify based upon
214 economic factors. If the parties qualify for a fee reduction, any “gap”
215 between \$170/hour and their ability to pay will be paid to the mediator
216 under this program. Form B.

217 k. **Agreements and Decision Summaries/Case Closing:**

218 i. At the close of every case, the mediator and parties will create
219 a written decision summary for the parties that notes any and
220 all agreements made and uses the parties’ own language. The
221 parties will have 5 business days to reconsider the decisions
222 made in mediation. If neither party files a written request to
223 reconsider within 5 business days, the mediator shall send a
224 copy of the decision summary to the parties and their attorneys,
225 along with the Mediation Case Closing Form. (Form ~~D~~ G). A
226 copy of the form closing form shall be ~~sent to the FMPP~~
227 Administrator filed with the clerk of court with a copy to the
228 judge presiding over the case.

229 ii. At the close of every case, the mediator and the parties will
230 complete the required evaluation forms and the mediator will
231 submit those to the Administrator along with the ~~Mediation~~
232 ~~Case closing form~~ form, mediator log and the mediator’s
233 invoice form. The Mediator is responsible for collecting fees
234 from the parties if appropriate.

235 l. **Case Closing/Notification:** The mediator will notify the Family
236 Mediation Program Administrator when a case has concluded for any
237 reason, and offer the following reasons: 1) Agreement has been
238 reached in whole or part; or 2) The parties were unable to reach
239 agreement. If the parties and the mediator believe more mediation
240 sessions would help to resolve the case, the parties and the mediator
241 can join in a request for additional sessions that will be paid by the
242 parties on a sliding fee basis directly to the mediator.
243

244 **Form A**

245 **SCHEDULE & ORDER FOR MEDIATION**

246 STATE OF NORTH DAKOTA

IN DISTRICT COURT

247
248 COUNTY OF _____

_____ JUDICIAL DISTRICT

249
250
251 CIVIL NO. _____

252 A.B.,)

253 Plaintiff,)

254 vs.)

255 C.D.,)

256 Defendant.)

**FAMILY MEDIATION PILOT PROGRAM
SCHEDULE & ORDER FOR MEDIATION**

257
258 a) The above named parties are required to attend separate mediation orientation
259 sessions in order to prepare for mediation, and shall attend mediation sessions in order to
260 discuss and resolve issues related to their ~~custody or visitation dispute~~ parental rights and
261 responsibilities and related issues.

262 b) **Mediator:** The following mediator has been assigned to this case:

263 Name:

264 Address:

265 Phone Number:

266 Email Address:

267 *If you know this mediator and have a conflict of interest, please notify the Family
268 Mediation Program Administrator at 701-328-2695 within 3 days of receipt of this order.

269 c) Each party must contact the mediator immediately upon receipt of this order and
270 schedule and participate in a pre-mediation orientation session within 20 days of this order.

271 d) The parties must complete mediation within 90 days of this order unless the
272 mediator and the parties join in a request to the Court for additional time to mediate.

273 e) Any failure to appear for pre-mediation orientation sessions or mediation sessions
274 may result in issuance of an Order To Show Cause to the party who failed to appear. The
275 mediator and the parties will make their best efforts to schedule orientation and mediation
276 sessions within the time frame set forth here and within reasonable times that take into
277 account each person's needs.

287 Contact the ~~FMPP Administrator, Cathy Ferderer at 701-328-2695.~~

288

289 Signed this ____ day of _____, ~~2008~~ 2009.

290

291 By the Court:

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Name/Judge

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Form B

REQUEST FOR ADDITIONAL MEDIATION SESSIONS

STATE OF NORTH DAKOTA IN DISTRICT COURT
COUNTY OF _____ _____ JUDICIAL DISTRICT
CIVIL NO. _____

A.B.,)
Plaintiff,)
) **FAMILY MEDIATION PILOT PROGRAM**
vs.) **REQUEST FOR ADDITIONAL MEDICATION SERVICES**
)
C.D.,)
)
Defendant.)

The following party/parties makes the following request for additional mediation sessions:

Names: _____

a) Reasons for additional sessions:

Number of additional sessions requested: _____

Proposed date for completion of mediation: _____

b) The mediator in this case (name) _____ agrees that additional mediation sessions are warranted for the above-stated reasons:

Signature: _____ Date: _____

Decision: The Family Mediation Program Administrator ___denies ___grants addition sessions as requested above. If granted, all mediation must be completed by the following date:

Signature _____ Date _____
(Family Mediation Program Administrator)

cc: Judge _____, Parties/Attorneys, Mediator

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Form B1

Family Mediation Pilot Program Fee Reduction Request

Date: _____

Name of Party Requesting Reduction/Waiver: _____

Case Number: _____

Please attach all of the following in order to have your case considered for further mediation sessions that are provided financially in whole or part by the Family Mediation Pilot Program:

- 1) Your most recent W2 from;
- 2) Your most recent Tax Return;
- 3) Proof of income from your current employers for the past 12 months;
- 4) List all property you own and the value of the property (vehicles, real estate, retirement savings, bank accounts, pension plans, etc.)
- 5) List monthly debts and provide documentation
- 6) Provide name and age of all children living with you or for whom you pay child support; provide a copy of any court order for child support, spousal support, medical and other insurance for the children, and day care expenses.
- 7) Any other documentation as required by the Family Mediation Program Administrator

Once the Family Mediation Program Administrator has made a determination of your eligibility to pay for mediation services, you will be notified of the decision. You may be required to pay in full or part for the mediation services (\$170/hour or less). The mediator in your case will provide you with an invoice if appropriate, and you are required to pay for mediation services rendered if ineligible for fee reduction.

Under penalty of perjury, I agree that I have provided full and truthful disclosure and evidence of my financial condition.

Date

Name (print)

Signature: _____

380 **Legal Services of North Dakota Eligibility Requirements**

381 Eligibility Standards Effective April 1, 2007 2009

382
383 Financial Eligibility Standards for Persons Served By Legal Services of North Dakota
384 Offices, General Law, Indian Law staff and Private Attorney Involvement Component

385
386 **Income Limitations**

387
388 **Standard Gross Income Level - 125% of poverty**

Household Size	1	2	3	4	5	6	7
Annual Income	12,763	17,113	21,463	25,813	30,163	34,513	38,863
Monthly Income	1,064	1,426	1,789	2,151	2,514	2,876	3,239
Weekly Income	245	329	413	496	580	664	747

389
390
391
392
393 (Add \$4,350 yearly for each additional member in households with more than 7 Part 1611,
394 Effective Feb. 1, 2007)

395
396 **Standard Gross Income Level - 125% of poverty**

Household Size	1	2	3	4	5	6	7
Annual Income	13,538	18,213	22,888	27,563	32,238	36,913	41,588
Monthly Income	1,128	1,518	1,907	2,297	2,687	3,076	3,466
Weekly Income	260	350	440	530	620	710	800

397
398
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400
401 (Add \$4,675 yearly for each additional member in households with more than 7 Part 1611,
402 Effective Jan 30, 2009)

403
404 **How to Determine Income for Eligibility Purposes**

405 Income means total cash receipts before taxes of all persons who are resident members and
406 who contribute to the support of a household. For those with seasonal income, figure the
407 annual income before making a determination. Seasonal income should be figured on an
408 annual basis to determine eligibility. Describe type of job, length of employment, and
409 regularity of the employment.

410 **Form C**

411 **GUIDE FOR PARTICIPANTS IN MEDIATION**

412 **(TO BE SENT TO THE PARTIES WITH THE SCHEDULING ORDER AND REVIEWED**
413 **WITH THE GIVEN TO PARTIES DURING ORIENTATION AND AT THE BEGINNING**
414 **OF MEDIATION)**

415
416
417 Mediation is a process in which an impartial mediator assists people in conflict to have a
418 constructive conversation about their dispute in a neutral setting. It is expected that each
419 participant say what they need to say and hear what they need to hear, so each person can
420 develop a better understanding about his/her concerns and the perspectives of other
421 participants. Through the discussion, the parties are able to make sound decisions for
422 themselves and others affected by their decisions.

423
424 Parties are asked to adhere to the following principles:

- 425
- 426 1. **Mediation is voluntary.** Participants should not feel forced into making decisions
427 during mediation and always have the option not to participate or discontinue the
428 mediation at anytime (except as provided by law or court order).
429
 - 430 2. **Mediation involves informed decision-making.** Participants are free to access any
431 information that may help them make informed decisions during the mediation.
432 Participants may want to consult with outside experts if they have specific questions or do
433 not have knowledge about a particular issue in order to help facilitate the decision-
434 making process. Attorneys are welcome to participate.
435
 - 436 3. **Participants make the decisions in mediation.** Participants are solely responsible for
437 making all decisions. There are many types of decisions that participants may make,
438 including whether or not to pursue mediation, who should be involved in the discussion,
439 how to explore additional information, what options are preferable, how parenting is
440 shared among parents, how costs are shared, and other decisions, etc. However,
441 participants should be careful to follow the law in North Dakota when making critical
442 decisions about parenting, custody, visitation, and child support.
443
 - 444 4. **Mediators are impartial.** Mediators will not make decisions for the participants or
445 make any judgments about who is right or wrong. Mediators have no stake in any
446 particular outcome and treat all participants in a fair and balanced way. Their main goal
447 is to help create a helpful environment so the parties can discuss what is important and
448 make voluntary, informed decisions. The parties will report any conflicts of interest or
449 perceived bias by the mediator directly to the mediator and/or the Family Mediation
450 Program Administrator.
451

- 452 5. **Mediation is a confidential process.** Mediators will not reveal anything that is said
 453 during mediation to any other person except as permitted by law and as required by the
 454 Family Mediation Pilot Program Research & Evaluation. Allegations of child abuse or
 455 threats of harm to any person will *not* be held confidential and may be revealed as
 456 appropriate by the mediator. Likewise, participants themselves are asked to keep
 457 confidential everything that is communicated during mediation, except as they agree
 458 otherwise or as permitted by law. No record of the mediation will be made, unless the
 459 parties reach agreements in which case a decision summary will be written by the
 460 mediator and provided to the parties, and then to the Court.
 461
- 462 6. **Summary of decisions.** Mediators will assist the parties in developing a written
 463 summary of the decisions made at the mediation table. Each party will receive a copy
 464 and the mediator will keep a copy. The writing should be in the parties' language,
 465 capture what both parties have agreed to, and follow the form attached hereto and
 466 depending on what the case requires. Parties will have 5 business days within which to
 467 reconsider decisions made at the mediation table, and to review the decision summary
 468 with their attorneys. The mediator will not draft legal documents for the parties to sign
 469 and to be presented to the Court. ~~However, the mediator shall present the Court with the~~
 470 ~~decision summary following the 5-day wait period.~~
 471
- 472 7. **Research & evaluation.** The Family Mediation Pilot Program requires that everyone
 473 participating in the process complete the evaluation tools provided in a timely manner.
 474 You will be asked to complete a form at the end of mediation, and may be contacted for
 475 an interview about your experiences in the process.
 476

477 I have read and understand the principles related to mediation as described in the Guide for
 478 Participants in Mediation. (Signatures are required).
 479

480 _____ Date

481 Signature of Participant

482 _____ Phone Number

483 Address

484 _____ Date

485 Signature of Participant

486 _____ Phone Number

487 Address

488 Additional Participants:

489 _____ Date

490 Signature and relationship to the parties

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Address

Phone Number

Signature and relationship to the parties

Date

Address

Phone Number

*Signatures are voluntary if mediation is mandated.

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Form D

COMPONENTS OF MEDIATION ORIENTATION

*This is a general guide for mediators to consider, leaving discretion with mediators to develop a personal style for orientation sessions

Pre-mediation orientations help build rapport with parties; help parties make voluntary, informed decisions about proceeding with mediation; provide opportunities for the parties to tell their story and become clearer about their issues and goals; and encourage parties' abilities to act and decide for themselves. It is also a time where the mediator begins to screen for ethical issues such as violence, capacity, and other issues.

Considerations

The purposes of pre-mediation orientation illustrated below, and relate primarily to ensure that each party is prepared to participate in mediation. Preparation occurs on many dimensions: emotional, intellectual, financial, legal, etc. Pre-mediation orientation sessions allow mediators to explore their clients goals, issues, fears, and other matters, including screening for violence and issues of capacity.

Build Rapport

- Introduce yourself and talk generally with the party, setting a friendly, helpful and comfortable tone for the meeting.
- Ask if you can get anything for the party coffee, water, paper/pen.
- Talk about the purpose of the orientation.
- Tell the party you are glad the party is here today and considering mediation. Let the party know you are here to help the party with the conflict.

Listening to the Parties and Explaining the Mediation Process

- Answer any questions the party may have about mediation and/or the orientation.
- Listen to the party and discuss how mediation can work with the parties' issues.
- Screen for issues that are inappropriate for mediation and/or may negatively impact the parties' decision-making.
 - ✓Incapable of making decisions (under the influence drugs/alcohol).
 - ✓Magical thinking — someone thinking the mediator or the process will “solve” the issue for them.
 - ✓Domestic violence or any fear from other party (see domestic violence screening).
- Explain the *Agreement to Mediation* and *How to Prepare for Mediation* (see sample forms in this section).
- Identify who needs to be at the table and their willingness to mediate.
- Help the parties understand how the process works.
- Explain the role of the mediator (may need to explain the difference between a mediator and an evaluator, advocate or arbitrator).
- Explain the role of the parties (decision makers).
- Explain the role of outside experts (help parties make informed decisions) and work with parties to determine what experts they may want to talk with prior to mediation.

- 556 • Discuss confidentiality (mediator, parties, exceptions -- for more information see Section
557 7) and Discuss the need for disclosure (success of the process).
558 • Explain the role of a caucus/separate meeting.
559 • Provide forms for divorce mediation or ~~custody~~ parental rights and responsibilities
560 mediation as appropriate.

561

562 **Help Develop Clarity**

- 563 • Help parties become clearer about:
- 564 ✓What issues they would like to bring to the table; helping parties reframe an issue in
 - 565 words they are comfortable saying to the other party or words that can be better heard
 - 566 by the other party.
 - 567 ✓What will help them say what they need to say and hear what they need to hear.
 - 568 ✓What the parties hot buttons are and whether the parties need guidelines.
 - 569 ✓What has or has not worked in talking with the other party in the past.
 - 570 ✓What would improve the parties' ability to communicate.

571

572 **Help Parties Take the Perspective of Other**

- 573 • Help parties become clearer about:
- 574 ✓How they view the other parties' role in the conflict.
 - 575 ✓What would help them be more open and responsive to the other party.
 - 576 ✓What hot buttons they push in the other party.

577

578 **Help Parties Explore What They Want**

- 579 • Ask each party what they hope to accomplish during mediation.
- 580 • Explore any goals they have for conflict resolution.
- 581 • Determine if parties want to continue to mediation and support the parties' decision.

582

583 **Scheduling & Fees**

- 584 • Clearly describe fees to parties.
- 585 • Discuss availability and scheduling (possible dates and times).
- 586 • Explain that parties will be asked to complete the Program research and evaluation forms
- 587 rating their satisfaction with the process following the mediation session (see sample
- 588 forms in this section).

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Form E

HOW TO PREPARE FOR MEDIATION
(GIVEN TO PARTIES DURING ORIENTATION)

All parties will go through the pre-mediation process and should have a similar understanding of how the process will work. Mediators will *not* negotiate points between the parties prior to the mediation. If there are issues that need to be negotiated or clarified, the parties must do that independently or wait until they come to mediation. Please be clear that you may be in violation of an order of the Court should you fail to cooperate in the mediation process and ask your attorney, the mediator, or the Family Mediation Pilot Program Administrator if you have any questions.

Scheduling: The mediator will work with the parties to make arrangements for a date and time that will work for all parties. Inform the mediator of any concerns or constraints that you may have. If you need to cancel, reschedule, or change your availability to mediate, please call the mediator as soon as possible. Failure to communicate and appear for mediation could result in further action by the Court.

Process: As outlined in the *Agreement to Mediate*, the mediation process has several components that can make this a beneficial option for parties in conflict. Some of the issues to consider include:

- Voluntary nature of mediation
- Informed decision making by the parties
- Confidentiality
- Family legal issues
- The role of outside experts
- The role of the mediators
- The role of the parties
- The role of attorneys

Fees: Fees are paid by a grant from the North Dakota Supreme Court for mediation including the pre-mediation orientation sessions. Should you require more sessions, you may petition the Family Mediation Program Administrator to have the fees covered in whole or part if you are qualify by demonstrating your income to the Administrator. The fee paid to mediators is \$170/hour. Any fees you owe must be paid to your mediator within 10 days of completion of the mediation.

Who should participate in mediation?

Identify who you think should be present in order to fully discuss the issues and to help you reach your goals. Should there be a conflict about who is present, that issue will be explored with the participants before the first mediation session.

Questions to consider:

What do you hope to accomplish by mediating? What are your goals?

What are the issues or topics that you need to address to accomplish your goals?

Are there outside experts that you need to consult or is there information you need before you come to mediation?

636 Is there anything that will help you to communicate better during the mediation?

637 **Form € F**

638 **MEDIATOR DOMESTIC VIOLENCE SCREENING TOOL⁴AND**

640 **SAFETY PLANNING**

641 (Structure and Guidelines for Assessing Domestic Violence)

642

643 As you conduct the mediation orientation, it is important to be aware of the questions in the

644 Mediator Screening Tool, so you can use them to assess for the presence of domestic

645 violence. Integrate the questions in the Mediator Screening Tool so you are able to assess for

646 the presence of domestic violence, and more importantly determine if mediation is

647 appropriate for the party.

648

649 **A. QUESTIONNAIRE**

650

651 A mediator should ask the following questions during an orientation to assess for domestic

652 violence between the parties.

653

654 **Section 1: Control, Coercion, Intimidation, Fear**

655

656 (a) When you look back over time, how were decisions made in your marriage/relationship?

657

658

659 (b) What happens when you speak your mind and express your point of view to the other

660 party?

661

662

663 (c) When you and the other party fight and/or are angry at each other, what happens?

664

665

666 (d) Has the other party ever prevented you (or tried to prevent you) from having contact with

667 family or friends, or your children?

668

669

670 (e) Has the other party ever denied you access to money for food, shelter, clothing, medical

671 needs, etc.?

672

673

674 (f) Has the other party ever threatened to hurt or kill you or him/herself?

675

676

677 (g) Do you have any concerns about sitting in the same room mediating with the other party?

⁴Michigan Supreme Court Office of Dispute Resolution. (2005). Domestic Violence and Child Abuse/Neglect Screening for Domestic Relations Mediation [On-line]. Available: <http://courts.michigan.gov/scao/resources/standards/odr/dvprotocol.pdf>

*The FMPP Administrator and the Subcommittee on Family Mediation will work together with the experts in the domestic violence community to ensure that best efforts are made to protect victims of violence.

678 If yes, ask the following questions:

679

680 (i) What are your concerns?

681

682 (ii) If your attorney or an advocate was present with you in the room would you still
683 have these concerns?

684

685 (iii) If you and the other party were in separate rooms during the mediation, would
686 you still have these concerns?

687

688 **Section 2: Violence/Fear of Violence**

689

690 (a) Has there ever been any physical confrontation between you and the other party? If so,
691 what happened?

692

693

694 (b) Do you ever feel afraid of the other party? What are you afraid of?

695

696

697 (c) Has the other party ever pushed, shoved, hit, kicked, choked or restrained you, or pulled
698 your hair? If so, what happened?

699

700

701 (d) Has the other party ever used or threatened to use a weapon to harm you? Are there guns
702 or weapons in your home? Does the other party have access to guns or other weapons?

703

704

705 (e) Has the other party ever damaged or destroyed your property, or harmed or threatened to
706 harm your pets?

707

708

709 (f) Have you ever had medical treatment as a result of an injury caused by the other party?

710

711

712 (g) Has the other party ever harassed you by following you, interfering with your work or
713 education, making repeated phone calls to you or sending you several unwanted letters, e-
714 mails, faxes or gifts?

715

716

717 (h) Have you ever sought to have a Personal Protection Order issued against the other party?
718 Was an order issued?

719

720

721 (i) Have you or any one else ever called the police because of problems in your home? If so,
722 what happened?

723

724 (j) Are you afraid that the other party will physically harm you during the mediation or after

725 you leave because of what you say in mediation?
726

727
728 (k) Are you in immediate danger?
729

730
731 **If yes, stop the screening and proceed to *Safety Planning*.**
732

733 **If a party answered “yes” to any one of questions 2(a) through 2(j), this is an indication**
734 **that mediation may not be appropriate for this party.** However, do not terminate the
735 screening process until the entire questionnaire is completed. Information gathered in the
736 following sections may be useful if the party wishes to mediate despite the mediator’s
737 advice. This will assist the mediator to make a decision about whether or not to mediate.
738

739 **Section 3: Children**

740
741 (a) How are your children doing?
742

743
744 (b) Do you have any concerns about the safety of your children?
745

746
747 (c) Has the other party ever threatened to take the children or threatened to stop you from
748 seeing them, or stopped you from seeing them?
749

750
751 **Section 4: Other Considerations Regarding Ability to Participate**
752

753 (a) Does either of you have a problem with alcohol or drugs? If so, please describe the
754 problem.
755

756
757 (b) Does either of you have a history of mental illness or emotional problems? If so, please
758 describe the history.
759

760
761 **Final Note:**
762

763 Monitoring by the mediator is a continuous responsibility throughout the mediation process.
764 On-going screening for domestic violence should take place throughout all phases of
765 mediation. It is the mediator’s responsibility to terminate the orientation and/or mediation if
766 she/he believes either of the parties is unable to mediate safely, fully and without fear or
767 intimidation. There are times when during the course of an orientation no behaviors or
768 comments suggest the presence of domestic violence, but during the course of the mediation
769 something suggests domestic violence. If the mediator determines that mediation should not
770 proceed, see *Safe Termination* .
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B. MAKING A DECISION ABOUT WHETHER OR NOT TO MEDIATE⁵ & SAFETY PLANNING (Based on responses to Questionnaire section in *Mediator Screening Tool*)

1) **Party is in Immediate Danger** (party answered “yes” to Question 2(k) in the *Mediator Screening Tool*)

If a party is in immediate danger, the mediator should advise the party that mediation is not appropriate. There are no circumstances under which mediation should proceed. You should then help the party with Safety Planning. If during the orientation no behaviors or comments suggest the presence of domestic violence, but something is revealed during the mediation and the party is in danger, go to *Safe Termination of Mediation* and then to *Safety Planning*.

2) **No Apparent Immediate Danger, but the Abused Party Disclosed Violence by or Fear of the Other Party** (party answered “no” to Question 2(k) but “yes” to any other question in Section 2 of the *Mediator Screening Tool*)

The mediator should advise the parties that mediation is not appropriate. The abusive party’s willingness to proceed with mediation is irrelevant. **Advise against mediation:** “*I do not think it is advisable for you to participate in mediation.*”

If the abused party concurs with the advice not to mediate, there are no circumstances under which mediation should proceed.

If the abused party disagrees with the advice against mediation and wants to mediate, then mediation should proceed only if **ALL** of the following apply:

- The situation is not dangerous for the abused party or the mediator. Consider answers to Section 2 of the *Mediator Screening Tool*.
- The mediation is conducted by a skilled mediator.
- The attorney for the abused party or an advocate for the abused party (such as a advocate from the local domestic violence program or a friend or family member) will be present during the mediation.
- Both parties agree to these specific conditions.
- Parties wait in separate waiting areas; parties are not left alone together.
- The mediator assesses that the parties have the ability to participate voluntarily, fairly, safely, fully and relatively free of fear and intimidation. Consider answers to Sections 1 and 2 of the *Mediator Screening Tool*.

3) **Non-Violent, but Abusive/Controlling** (party answers “no” to all questions in Section 2, but “yes” to any question in Section 1(d) – 1(g) or answers in Section 1(a) – 1(c) indicate the existence of control, coercion or intimidation).

⁵Michigan Supreme Court Office of Dispute Resolution. (2005). Domestic Violence and Child Abuse/Neglect Screening for Domestic Relations Mediation [On-line]. Available: <http://courts.michigan.gov/scao/resources/standards/odr/dvprotocol.pdf>

815 The mediator must determine whether either party lacks the ability to fully participate in the
816 mediation and whether mediation could go forward under specific conditions, relatively free
817 of fear and intimidation. Mediation should proceed only if **ALL** of the following apply:

- 818 • The situation is not dangerous for the abused party or the mediator. Consider answers
819 to Section 2 of the *Mediator Screening Tool*.
- 820 • The mediation is conducted by a skilled mediator.
- 821 • The mediator assesses that the parties have the ability to voluntarily, fairly, safely and
822 fully participate, with or without an attorney or advocate present for the abused party,
823 or with or without specific conditions to address concerns for safety and ability to
824 participate and make decisions without coercion or fear. Consider answers to Sections
825 1 and 2 of the *Mediator Screening Tool*.
- 826 • The abused party wants to mediate.
- 827 • Parties wait in separate waiting areas; parties are not left alone together.
- 828 • If, to ensure the ability to fully participate, the abused party requires the presence of
829 an attorney or advocate during mediation, or a specialized process to which both
830 parties agree, the mediation must be conducted with those accommodations.

831
832 4) **Non-Violent, Non-Abusive and Non-Controlling, but Either Party Otherwise Lacks**
833 **Capacity to Mediate** (party answers “no” to all questions in Sections 1, 2 and 3 of the
834 *Mediator Screening Tool*, but “yes” to any question in Section 4)
835

836 Regardless of the existence of domestic violence, if screening reveals any of the following
837 the mediator must determine whether either party lacks the ability to fully participate in
838 mediation or whether mediation could go forward under specific conditions.

- 839 • There is a history of substance abuse or mental illness that is not presently controlled.
- 840 • A party is not able to fully participate for themselves and/or articulate their needs.

841
842 Mediation should proceed only if **ALL** of the following apply:

- 843 • The situation is not dangerous for the parties or mediator.
- 844 • The mediation is conducted by a skilled mediator.
- 845 • The mediator assesses that the parties have the ability to participate voluntarily, fairly,
846 safely and fully, with or without an attorney or advocate present, or with or without
847 specific conditions to address concerns about capacity and ability to participate in
848 mediation.
- 849 • The parties want to mediate.
- 850 • If, to ensure the ability to participate, a party requires the presence of an attorney or
851 advocate during mediation, or a specialized process to which both parties agree, the
852 mediation must be conducted with those accommodations.

853
854 5) **Protection Order or Restraining Order In Effect** (one party has a protection
855 order/restraining order against the other party)
856

857 Any case between parties with a protection order or restraining order in effect should not be
858 mediated. In addition, a mediator *should not* advise a party to have the protection order or
859 restraining order temporarily rescinded in order to do mediation. Parties may believe that
860 mediation is an extension of the court and the court’s protection. Mediation cannot offer the
861 same level of protection to a party. Most courts will not refer a case to mediation if a

862 protection order or restraining order is in effect between the parties.
863

864 And finally, mediators should be concerned about potential consequences of mediating cases
865 that involve domestic violence. Mediator malpractice liability is an issue. The process may
866 do harm (physical and psychological). It may violate ethical and state laws or regulations.
867

868 C. SAFETY PLANNING⁶ 869

870 A safety plan is a tool to help an abused party identify ways to stay safe. Most victims of
871 domestic violence have a variety of methods that have helped keep them safe in the past.
872 **The mediator should take all discussions of fear and safety seriously.** If a mediator has
873 any questions at all during the course of the discussion with the abused party, call a local
874 domestic violence program (e.g., Community Violence Intervention Center, Grand Forks,
875 701-746-8900) or the National Domestic Violence Hotline at 1-800-799-SAFE(7233). Here
876 are several options to consider depending on the situation:
877

- 878 1. Ensure that there is a safe and private area in the office where the mediator can speak to
879 the abused party alone.
- 880 2. Offer the use of a telephone so that the abused party can contact the local domestic
881 violence program or the National Domestic Violence Hotline. Both of these
882 organizations have trained professionals who are able to offer confidential services and
883 should be able to the abused party create a safety plan.
- 884 3. If the abused party does not want to contract the hotlines, the mediator may ask the
885 party's permission to call one or both of the hotlines for consultation. They should be
886 able to walk the mediator through some basic safety planning strategies. The mediator
887 should assure the abused party that this information is confidential and that the mediator
888 will not disclose any of the information.
- 889 4. The party may be able to identify friends or family that have been helpful in the past or
890 who are able to offer a place to stay. The mediator should offer the use of a telephone so
891 that the party can contact family or friends, if the party wishes to do so.
- 892 5. Consider what the party will do when she/he leaves the mediator's office and where
893 she/he will go. Work with the party to ensure that she/he will be safe during the rest of
894 the day. Ask questions like: "What is your mode of transportation and is it safe? Where
895 is your car parked? Do you have a safe place to spend the night?"
- 896 6. Discuss with the party whether she/he would like to contact the police to file a report or
897 to request an escort.
- 898 7. Ask some of the following questions as you discuss safety:
 - 899 • In what way can I (and others) help you?
 - 900 • What do you feel you need to be safe?
 - 901 • What particular concerns do you have about your children's safety?
 - 902 • What have you tried in the past to protect yourself and your children (e.g., left for a
903 few days, sought help from family, friends, or a shelter, fought back, got an order for
904 protection)? Did any of these strategies help? Will any of them help you now?

⁶Michigan Supreme Court Office of Dispute Resolution. (2005). Domestic Violence and Child Abuse/Neglect Screening for Domestic Relations Mediation [On-line]. Available: <http://courts.michigan.gov/scao/resources/standards/odr/dvprotocol.pdf>

- 905 • Who in your support system will help you? How can they help? Can we involve
906 them?
- 907 8. If the party has separated from the domestic violence perpetrator, evaluate the following
908 options with the party:
- 909 • Changing the locks on doors and windows.
 - 910 • Installing a better security system -- window bars, locks, better lighting, smoke
911 detectors and fire extinguishers.
 - 912 • Teaching the children to call the police or family and friends if violence occurs or
913 they are snatched.
 - 914 • Talking to schools and childcare providers about who has permission to pick up the
915 children and developing other special provisions to protect the children.
 - 916 • Finding a lawyer knowledgeable about family violence to explore custody, visitation,
917 and divorce provisions that protect the children and the adult victim.
 - 918 • In rural areas where only the mailbox may be visible from the road, covering the box
919 with bright colored paper so that police can more easily locate the home.
 - 920 • Obtaining an order of protection.
 - 921 • Telling neighbors that the parties' partner is gone and asking the neighbors to inform
922 the party if the parties' partner returns to the area.
 - 923 • Figuring out what the party can do (or is willing to do) if/when the parties' partner
924 returns.
- 925 9. If the party is leaving the domestic violence perpetrator review the following with the
926 party:
- 927 • How and when can the party most safely leave? Does the party have transportation?
928 Money? A safe place to go?
 - 929 • Is the party comfortable calling the police if the party needs them?
 - 930 • Who will the party tell or not tell about leaving?
 - 931 • Who in the parties' support network does the party trust to protect the party?
 - 932 • What can the party and others do so that the parties' partner will not find the party?
 - 933 • How will the party travel safely to and from work or school or to pick up children?
 - 934 • ~~What community/shelters/legal resources will help the party feel safer? Write down
935 their addresses and phone numbers. Help the party call them. Encourage the party to
936 use them.~~
 - 937 • What ~~custody and visitation~~ parental rights and responsibilities provisions would keep
938 the party and the children safe?
 - 939 • Would an order of protection be a viable option?
- 940 10. If the party is staying with the domestic violence perpetrator, review the following with
941 the party:
- 942 • In an emergency what works best to keep the party and the children safe?
 - 943 • Who can the party call in a crisis?
 - 944 • Would the party call the police if the violence starts again? Is there a phone in the
945 house or can the party work out a signal with the children or the neighbors to call the
946 police or get help?
 - 947 • If the party needs to flee temporarily, where can the party go? Help the party think
948 through several places where the party can go in a crisis. Write down the addresses
949 and phone numbers.

950
951

Suggested Text for Safety Planning Assistance

952 “Based on what I’ve heard from you and observed, I am concerned for your safety. I would
953 like you to consider contacting some professionals to help you come up with a plan to stay
954 safe today. Most communities have organizations that provide services to survivors of
955 domestic violence. These services often include confidential shelter, counseling, advocacy,
956 support groups and counseling for your children. The phone number to our local domestic
957 violence program is 701-746-0405. You can also call the National Domestic Violence
958 Hotline at 1-800-799-SAFE (7233). The National Hotline can provide you with confidential
959 advocacy and support and also refer you to the nearest domestic violence program. Please
960 feel free to use my telephone.”

961
962 For additional information about mediating cases involving domestic violence, please read
963 and become familiar with the Association for Conflict Resolution’s Standards of Practice for
964 Family and Divorce Mediation (i.e., ~~Standard Ten~~), which outlines what to do in mediations
965 that may involve domestic violence.

966 **D. SAFE TERMINATION OF MEDIATION⁷**

967
968
969 There are times when during the course of an orientation no behaviors or comments suggest
970 the presence of domestic violence, but during the course of the mediation something suggests
971 domestic violence. Anytime during the course of mediation, if either party decides to
972 withdraw, or the mediator finds that mediation is not safe because of domestic violence, the
973 mediation should be terminated in the following manner.

- 974
975 • If domestic violence is revealed for the first time during a mediation session, the mediator
976 should interrupt the proceeding and conduct a screening of each party separately to
977 determine whether mediation is appropriate and whether the party who has been subject
978 to the abuse understands the potential impact of abuse on the person’s ability to
979 participate in mediation fully and fairly.
- 980 • The screening sessions can occur right after the interrupted mediation or screening
981 sessions can be scheduled for future dates or the screening session for the abused party
982 can take place immediately with the screening session for the other party scheduled for
983 another day.
- 984 • In any event, talk privately with the abused party to determine whether safety
985 arrangements are necessary. If possible, make arrangements for the parties to leave
986 separately. Consider whether to alert law enforcement or other security of the potential
987 for violence and arrange for escort of the abused party to his/her transportation. Do not
988 reveal the destination or means of transportation of the abused party to the other party.
- 989 • Provide the abused party with information and referrals for assistance, including safety
990 planning.
- 991 • There are two positions to consider with regard to advising the parties about the reasons
992 for termination of mediation.
 - 993 ➤ Some domestic violence victim advocates and professionals who work with batterers
994 in batterer intervention programs believe that, due to safety concerns, the mediator

⁷Michigan Supreme Court Office of Dispute Resolution. (2005). Domestic Violence and Child Abuse/Neglect Screening for Domestic Relations Mediation [On-line]. Available: <http://courts.michigan.gov/scao/resources/standards/odr/dvprotocol.pdf>

995 *should not* advise the parties that the reason for termination is domestic violence,
996 regardless of whether the victim or abuser disclosed the violence. Other valid reasons
997 for termination that could be provided to the parties include: mediation policies and
998 procedures, parties too far apart in positions or interests, inability to fully participate,
999 unwillingness to participate, substance abuse or mental illness (if known by both
1000 parties).

- 1001 ➤ Some mediators believe that if the abuse is *disclosed by the abuser or by both parties*,
1002 it is appropriate to advise the parties that the reason for termination is domestic
1003 violence. If a mediator chooses this approach, the mediator must be careful to provide
1004 each party with the same information regarding the reasons for termination without
1005 violating confidentiality. If the violence is *disclosed only by the victim*, the mediator
1006 should not advise the parties that the reason for termination is domestic violence.
- 1007 ➤ **Violence should never be mediated.** In other words, never mediate when the core
1008 issues is for one party to stop abusing the other party. “I’ll stop hitting you if you stop
1009 seeing your friend, Jane.”
- 1010 ➤ The mediator must promote the safety of all parties in the mediation process, but it is
1011 important to remember not to create an artificial environment during the mediation.
1012 To say to parties “you can say whatever you want in here” may be harmful because a
1013 mediator cannot guarantee a party’s safety outside the mediation sessions.

1014 1015 **Suggested Text to the Abused and Abusive Party: Termination of Mediation after** 1016 **Orientation**

1017
1018 “I have decided not to mediate this case. Many cases are not appropriate for mediation. It is
1019 my experience that with situations like yours, mediation may not be the best process. This
1020 orientation meeting fulfills the requirement for court ordered mediation. It is not a “failure”
1021 to terminate mediation and there are no legal repercussions for doing so. You may want to
1022 talk with an attorney about your situation.”

1023 1024 **Suggested Text: Termination of Mediation after Start of Mediation**

1025
1026 “After observing the issues between you and your interactions with each other, I know from
1027 my experience that mediation may not be best process for you. Many cases are not
1028 appropriate for mediation. So rather than taking up your time and resources, I am
1029 terminating this mediation. It is not a “failure” to terminate mediation and there are no legal
1030 repercussions for doing so. You may want to talk with an attorney about your situation.”

1031
1032 This screening tool was developed by the Michigan Supreme Court Office of Dispute Resolution. (2005).
1033 Domestic Violence and Child Abuse/Neglect Screening for Domestic Relations Mediation [On-line]. Available:
1034 <http://courts.michigan.gov/scao/resources/standards/odr/dvprotocol.pdf> It was adapted for the Family
1035 Mediation Pilot Program with the permission of the Michigan Supreme Court Office of Dispute Resolution.

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Form G

CLOSING FORM

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF _____

_____ JUDICIAL DISTRICT

CIVIL NO. _____

A.B.,)

Plaintiff,))

vs.)

C.D.,)

Defendant.)

**FAMILY MEDIATION PILOT PROGRAM
CLOSING FORM**

The above-named parties have attended pre-mediation orientation sessions individually and ___ sessions and ___ hours of mediation jointly.

_____ ~~The parties have reached agreements on issues important to them in whole or in part, and have been given a summary of their decisions;~~

_____ ~~The parties have not reached agreements on issues important to them.~~

Mediation Outcome - parental rights and responsibilities only

_____ Agreement reached on all issues

_____ Agreement reached on some issues

_____ No agreement reached

Mediation Outcome - other issues in case

_____ Agreement reached on all other issues raised by parties

_____ Agreement reached on some other issues raised by parties

_____ No agreement reached on other issues raised by parties

Mediator's Names & Signature: _____

Date _____

cc: The Judge, Family Mediation Program Administrator, ~~Judge~~ _____, Parties/Attorneys

1077 **Form H**

1078

1079 **ABA MODEL STANDARDS OF PRACTICE FOR FAMILY AND**

1080 **DIVORCE MEDIATION¹**

1081

1082 **Overview and Definitions**

1083

1084 Family and divorce mediation ("family mediation" or "mediation") is a process in which a mediator, an
1085 impartial third party, facilitates communication between people in family disputes and facilitates their voluntary
1086 and informed decision-making. The family mediator assists communication, encourages understanding and
1087 helps the participants to understand each other. The family mediator works with the participants to explore
1088 options, make decisions and reach their own decisions.

1089

1090 Family mediation is not a substitute for the need for family members to obtain independent legal advice or
1091 counseling or therapy. Nor is it appropriate for all families. However, experience has established that family
1092 mediation is a valuable option for many families because it can:

- 1093 • increase the self-determination of participants and their ability to communicate;
 - 1094 • support decision making that is in the best interests of children; and
 - 1095 • reduce the economic and emotional costs associated with the litigation of family disputes.
- 1096

1097 Effective mediation requires that the family mediator be qualified by training, experience and temperament; that
1098 the mediator be impartial; that the participants reach their decisions voluntarily; that their decisions be based on
1099 sufficient factual data; that the mediator be aware of the impact of culture and diversity; and that the best
1100 interests of children be taken into account. Further, the mediator should also be prepared to identify families
1101 whose history includes domestic abuse or child abuse.

1102

1103 **These Model Standards of Practice for Family and Divorce Mediation ("Model Standards") aim to**

1104 **perform three major functions:**

- 1105 1. to serve as a guide for the conduct of family mediators;
 - 1106 2. to inform the mediating participants of what they can expect; and
 - 1107 3. to promote public confidence in mediation as a process for resolving family disputes.
- 1108

1109 The Model Standards are aspirational in character. They describe good practices for family mediators. They
1110 are not intended to create legal rules or standards of liability.

1111

1112 The Model Standards include different levels of guidance:

1113

1114 Use of the term "may" in a Standard is the lowest strength of guidance and indicates a practice that the family
1115 mediator should consider adopting but which can be deviated from in the exercise of good professional
1116 judgment. Most of the Standards employ the term "should" which indicates that the practice described in the
1117 Standard is highly desirable and should be departed from only with very strong reason. The rarer use of the
1118 term "shall" in a Standard is a higher level of guidance to the family mediator, indicating that the mediator
1119 should not have discretion to depart from the practice described.

1120

1121 **Standard I**

1122

1123 **A family mediator shall recognize that mediation is based on the principle of self-determination by the**

1124 **participants.**

- 1125
- 1126 A. Self-determination is the fundamental principle of family mediation. The mediation process relies
1127 upon the ability of participants to make their own voluntary and informed decisions.

¹ This ethical guide is provided due to the current absence of any codes of mediation ethics adopted in the state of North Dakota and is meant only to provide guidance as of the date of this protocol.

- 1128 B. The primary role of a family mediator is to assist the participants to gain a better understanding of their
1129 own needs and interests and the needs and interests of others and to facilitate discussion and decision-
1130 making among the participants.
1131
- 1132 C. A family mediator should inform the participants that they may seek information and advice from a
1133 variety of sources during the mediation process.
1134
- 1135 D. A family mediator shall inform the participants that they may withdraw from family mediation at any
1136 time and are not required to reach an agreement in mediation.
1137
- 1138 E. The family mediator's commitment shall be to the participants and the process. Pressure from outside
1139 of the mediation process shall never influence the mediator to coerce participants to settle.
1140

1141 **Standard II**

1142 **A family mediator shall be qualified by education and training to undertake the mediation.**
1143

1144 **Standard III**

1145 **A family mediator shall facilitate the participants' understanding of what mediation is and assess their**
1146 **capacity to mediate before the participants reach an agreement to mediate.**
1147

- 1148 A. Before family mediation begins a mediator should provide the participants with an overview of the
1149 process and its purposes, including:
1150
- 1151 1. informing the participants that reaching an agreement in family mediation is consensual in
1152 nature, that a mediator is an impartial facilitator, and that a mediator may not give legal
1153 advice, evaluate the case, or impose or force any settlement on the parties;
 - 1154 2. distinguishing family mediation from other processes designed to address family issues and
1155 disputes;
 - 1156 3. informing the participants that any agreements reached will be reviewed by the court when
1157 court approval is required;
 - 1158 4. informing the participants that they may obtain independent advice from attorneys, counsel,
1159 advocates, accountants, therapists or other professionals during the mediation process;
 - 1160 5. advising the participants, in appropriate cases, that they can seek the advice of religious
1161 figures, elders or other significant persons in their community whose opinions they value;
 - 1162 6. discussing, if applicable, the issue of separate sessions with the participants, a description of
1163 the circumstances in which the mediator may meet alone with any of the participants, or with
1164 any third party and the conditions of confidentiality concerning these separate sessions;
 - 1165 7. informing the participants that the presence or absence of other persons at a mediation,
1166 including attorneys, counselors or advocates, depends on the agreement of the participants and
1167 the mediator, unless a statute or regulation otherwise requires or the mediator believes that the
1168 presence of another person is required or may be beneficial because of a history or threat of
1169 violence or other serious coercive activity by a participant;
 - 1170 8. describing the obligations of the mediator to maintain the confidentiality of the mediation
1171 process and its results as well as any exceptions to confidentiality;
 - 1172 9. advising the participants of the circumstances under which the mediator may suspend or
1173 terminate the mediation process and that a participant has a right to suspend or terminate
1174 mediation at any time.
1175
- 1176 B. The participants should sign a written agreement to mediate their dispute and the terms and conditions
1177 thereof within a reasonable time after first consulting the family mediator.
1178
- 1179 C. The family mediator should be alert to the capacity and willingness of the participants to mediate
1180 before proceeding with the mediation and throughout the process. A mediator should not agree to
1181 conduct the mediation if the mediator reasonably believes one or more of the participants is unable or
1182 unwilling to participate.
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1184

1185 D. Family mediators should not accept a dispute for mediation if they cannot satisfy the expectations of
1186 the participants concerning the timing of the process.
1187

1188 **Standard IV**
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1190 **A family mediator shall conduct the mediation process in an impartial manner. A family mediator shall**
1191 **disclose all actual and potential grounds of bias and conflicts of interest reasonably known to the**
1192 **mediator. The participants shall be free to retain the mediator by an informed, written waiver of the**
1193 **conflict of interest. However, if a bias or conflict of interest clearly impairs a mediator's impartiality, the**
1194 **mediator shall withdraw regardless of the express agreement of the participants.**
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1196 A. Impartiality means freedom from favoritism or bias in word, action or appearance, and includes a
1197 commitment to assist all participants as opposed to any one individual.
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1199 B. Conflict of interest means any relationship between the mediator, any participant or the subject matter
1200 of the dispute that compromises or appears to compromise the mediator's impartiality.
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1202 C. A family mediator should not accept a dispute for mediation if the family mediator cannot be impartial.
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1204 D. A family mediator should identify and disclose potential grounds of bias or conflict of interest upon
1205 which a mediator's impartiality might reasonably be questioned. Such disclosure should be made prior
1206 to the start of a mediation and in time to allow the participants to select an alternate mediator.
1207

1208 E. A family mediator should resolve all doubts in favor of disclosure. All disclosures should be made as
1209 soon as practical after the mediator becomes aware of the bias or potential conflict of interest. The
1210 duty to disclose is a continuing duty.
1211

1212 F. A family mediator should guard against bias or partiality based on the participants' personal
1213 characteristics, background or performance at the mediation.
1214

1215 G. A family mediator should avoid conflicts of interest in recommending the services of other
1216 professionals.
1217

1218 H. A family mediator shall not use information about participants obtained in a mediation for personal
1219 gain or advantage.
1220

1221 I. A family mediator should withdraw pursuant to Standard IX if the mediator believes the mediator's
1222 impartiality has been compromised or a conflict of interest has been identified and has not been waived
1223 by the participants.
1224

1225 **Standard V**
1226

1227 **A family mediator shall fully disclose and explain the basis of any compensation, fees and charges to the**
1228 **participants.**
1229

1230 A. The participants should be provided with sufficient information about fees at the outset of mediation to
1231 determine if they wish to retain the services of the mediator.
1232

1233 B. The participants' written agreement to mediate their dispute should include a description of their fee
1234 arrangement with the mediator.
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1236 C. A mediator should not enter into a fee agreement that is contingent upon the results of the mediation or
1237 the amount of the settlement.
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1239 D. A mediator should not accept a fee for referral of a matter to another mediator or to any other person.
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1241 E. Upon termination of mediation a mediator should return any unearned fee to the participants.

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Standard VI

A family mediator shall structure the mediation process so that the participants make decisions based on sufficient information and knowledge.

- A. The mediator should facilitate full and accurate disclosure and the acquisition and development of information during mediation so that the participants can make informed decisions. This may be accomplished by encouraging participants to consult appropriate experts.
- B. Consistent with standards of impartiality and preserving participant self-determination, a mediator may provide the participants with basic information that the mediator is qualified by training or experience to provide. The mediator shall not provide therapy or legal advice.
- C. The mediator should recommend that the participants obtain independent legal representation before concluding an agreement.
- D. If the participants so desire, the mediator should allow attorneys, counsel or advocates for the participants to be present at the mediation sessions.
- E. With the agreement of the participants, the mediator may document the participants' decisions in the form of a decision summary (vs. a legal agreement). The mediator should inform the participants that any decision summary or agreement should be reviewed by an independent attorney before it is signed.

Standard VII

A family mediator shall maintain the confidentiality of all information acquired in the mediation process, unless the mediator is permitted or required to reveal the information by law or agreement of the participants.

- A. The mediator should discuss the participants' expectations of confidentiality with them prior to undertaking the mediation. The written agreement to mediate should include provisions concerning confidentiality.
- B. Prior to undertaking the mediation the mediator should inform the participants of the limitations of confidentiality such as statutory, judicially or ethically mandated reporting.
- C. As permitted by law, the mediator shall disclose a participant's threat of suicide or violence against any person to the threatened person and the appropriate authorities if the mediator believes such threat is likely to be acted upon, and use standard exit planning strategies with the parties.
- D. If the mediator holds private sessions with a participant, the obligations of confidentiality concerning those sessions should be discussed and agreed upon prior to the sessions.
- E. If subpoenaed or otherwise noticed to testify or to produce documents the mediator should inform the participants immediately. The mediator should not testify or provide documents in response to a subpoena without an order of the court if the mediator reasonably believes doing so would violate an obligation of confidentiality to the participants.

Standard VIII

A family mediator shall assist participants in determining how to promote the best interests of children.

- A. The mediator should support the participants' exploration of the range of options available for separation or post divorce parenting arrangements and their respective costs and benefits. Referral to a specialist in child development or an attorney may be appropriate for these purposes. The parties may be given the following list of topics for discussion (this is not an exhaustive list and there may be other topics):

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1. information about community resources and programs that can help the participants and their children cope with the consequences of family reorganization and family violence;
 2. problems that continuing conflict creates for children's development and what steps might be taken to ameliorate the effects of conflict on the children;
 3. development of a parenting plan that covers the children's physical residence and decision-making responsibilities for the children, with appropriate levels of detail as agreed to by the participants;
 4. the possible need to revise parenting plans as the developmental needs of the children evolve over time; and
 5. encouragement to the participants to develop appropriate dispute resolution mechanisms to facilitate future revisions of the parenting plan.
- 1311 B. The mediator should be sensitive to the impact of culture and religion on parenting philosophy and other decisions.
- 1312
- 1313
- 1314 C. The local mediation administrator and/or the mediator shall inform any court-appointed representative for the children of the mediation. If a representative for the children participates, the mediator should, at the outset, discuss the effect of that participation on the mediation process and the confidentiality of the mediation with the participants. Whether the representative of the children participates or not, the mediator shall provide the representative with the resulting agreements insofar as they relate to the children.
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- 1321 D. Except in extraordinary circumstances, the children should not participate in the mediation process without the consent of both parents and the children's court-appointed representative if one exists.
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- 1324 E. Prior to including the children in the mediation process, the mediator should consult with the parents and the children's court-appointed representative about whether the children should participate in the mediation process and the form of that participation.
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- 1328 F. The mediator should inform all concerned about the available options for the children's participation (which may include personal participation, an interview with a mental health professional, the mediator interviewing the child and reporting to the parents, or a videotaped statement by the child) and discuss the costs and benefits of each with the participants.
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Standard IX

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1335 **A family mediator shall recognize a family situation involving child abuse or neglect and take appropriate steps to shape the mediation process accordingly.**

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- 1338 A. As used in these Standards, child abuse or neglect is defined by applicable state law.
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- 1340 B. A mediator shall not undertake a mediation in which the family situation has been assessed to involve child abuse or neglect without appropriate and adequate training.
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- 1343 C. If the mediator has reasonable grounds to believe that a child of the participants is abused or neglected within the meaning of the jurisdiction's child abuse and neglect laws, the mediator shall comply with applicable child protection laws.
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- 1345
1. The mediator should encourage the participants to explore appropriate services for the family.
 2. The mediator should consider the appropriateness of suspending or terminating the mediation process in light of the allegations.
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Standard X

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1352 **A family mediator shall recognize a family situation involving domestic abuse and take appropriate steps to shape the mediation process accordingly.**

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- 1355 A. As used in these Standards, domestic abuse includes domestic violence as defined by applicable state

1356 law and issues of control and intimidation.

- 1357
1358 B. A mediator shall not undertake a mediation in which the family situation has been assessed to involve
1359 domestic abuse without appropriate and adequate training.
1360
1361 C. Some cases are not suitable for mediation because of safety, control or intimidation issues. A mediator
1362 should make a reasonable effort to screen for the existence of domestic abuse prior to entering into an
1363 agreement to mediate. The mediator should continue to assess for domestic abuse throughout the
1364 mediation process.
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1366 D. If domestic abuse appears to be present the mediator shall consider taking measures to insure the safety
1367 of participants and the mediator including, among others:
1368 1. establishing appropriate security arrangements;
1369 2. holding separate sessions with the participants even without the agreement of all participants;
1370 3. allowing a friend, representative, advocate, counsel or attorney to attend the mediation
1371 sessions;
1372 4. encouraging the participants to be represented by an attorney, counsel or an advocate
1373 throughout the mediation process;
1374 5. referring the participants to appropriate community resources;
1375 6. suspending or terminating the mediation sessions, with appropriate steps to protect the safety
1376 of the participants.
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1378 **Standard XI**

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1380 **A family mediator shall suspend or terminate the mediation process when the mediator reasonably**
1381 **believes that a participant is unable to effectively participate or for other compelling reason.**
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- 1383 A. Circumstances under which a mediator should consider suspending or terminating the mediation, may
1384 include, among others:
1385 1. the safety of a participant or well-being of a child is threatened;
1386 2. a participant has or is threatening to abduct a child;
1387 3. a participant is unable to participate due to the influence of drugs, alcohol, or physical or
1388 mental condition;
1389 4. the participants are about to enter into an agreement that the mediator reasonably believes to
1390 be unconscionable or violates public policy or law;
1391 5. a participant is using the mediation to further illegal conduct;
1392 6. a participant is using the mediation process to gain an unfair advantage;
1393 7. if the mediator believes the mediator's impartiality has been compromised in accordance with
1394 Standard IV.
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1396 B. If the mediator does suspend or terminate the mediation, the mediator should take all reasonable steps
1397 to minimize prejudice or inconvenience to the participants which may result.
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1399 **Standard XII**

1400
1401 **A family mediator shall be truthful in the advertisement and solicitation for mediation.**
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- 1403 A. Mediators should refrain from promises and guarantees of results. A mediator should not advertise
1404 statistical settlement data or settlement rates.
1405
1406 B. Mediators should accurately represent their qualifications. In an advertisement or other
1407 communication, a mediator may make reference to meeting state, national or private organizational
1408 qualifications only if the entity referred to has a procedure for qualifying mediators and the mediator
1409 has been duly granted the requisite status.
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1411 **Standard XIII**

1413 **A family mediator shall acquire and maintain professional competence in mediation.**

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- A. Mediators should continuously improve their professional skills and abilities by, among other activities, participating in relevant continuing education programs and should regularly engage in self-assessment.
- B. Mediators should participate in programs of peer consultation and should help train and mentor the work of less experienced mediators.
- C. Mediators should continuously strive to understand the impact of culture and diversity on the mediator's practice.

1425 **Special Policy Considerations for State Regulation of Family Mediators**
1426 **and Court Affiliated Programs**
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1428 The Model Standards recognize the National Standards for Court Connected Dispute Resolution Programs
1429 (1992). There are also state and local regulations governing such programs and family mediators. The
1430 following principles of organization and practice, however, are especially important for regulation of mediators
1431 and court-connected family mediation programs. They are worthy of separate mention.
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- 1433 A. Individual states or local courts should set standards and qualifications for family mediators including
1434 procedures for evaluations and handling grievances against mediators. In developing these standards
1435 and qualifications, regulators should consult with appropriate professional groups, including
1436 professional associations of family mediators.
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- 1438 B. When family mediators are appointed by a court or other institution, the appointing agency should
1439 make reasonable efforts to insure that each mediator is qualified for the appointment. If a list of family
1440 mediators qualified for court appointment exists, the requirements for being included on the list should
1441 be made public and available to all interested persons.
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- 1443 C. Confidentiality should not be construed to limit or prohibit the effective monitoring, research or
1444 evaluation of mediation programs by responsible individuals or academic institutions provided that no
1445 identifying information about any person involved in the mediation is disclosed without their prior
1446 written consent. Under appropriate circumstances, researchers may be permitted to obtain access to
1447 statistical data and, with the permission of the participants, to individual case files, observations of live
1448 mediations, and interviews with participants.
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1450 **These Model Standards were developed by the Association for Conflict Resolution and were approved by**
1451 **the American Bar Association in February 2001.**