Guidelines for Parties Engaged in Mediation

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Law Council
OF AUSTRALIA

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Introductory note for guidelines for parties engaged in mediation

The Law Council of Australia has developed these guidelines to provide practical and ethical guidance to parties engaged in mediation. The guidelines are intended to apply to all types of mediation. Professional and other bodies may have different requirements.

Some types of disputes may be subject to specific legal requirements. These guidelines draw on existing guidelines and literature aimed at facilitating a productive mediation process and maximising the potential for a satisfactory outcome.

The purpose of the guidelines is:

- To inform discussion between legal practitioners, parties and other participants throughout the mediation process;
- To serve as a guide for the conduct of participants;
- To inform parties of what to expect at a mediation and to inform parties of the role of mediators and legal representatives; and
- To explain the rights and responsibilities of all participants.

It is expected that these guidelines will be reviewed from time to time. These guidelines are based on the work of the members of the Law Council of Australia Expert Standing Committee in August 2011:

Henry Jolson QC	Philip Theobald	Ian Bloemendal
Mary Walker	Nadja Alexander	Geri Ettinger
Laurence Boulle	Scott Ellis	Joanne Staugas
Catherine Gale	David Gaszner	
Michael Kent SC	Kathy Mack	

These guidelines were further updated by the Committee in April 2018:

Mary Walker	Ian Bloemendal	Anthony Nolan QC
Scott Ellis	Geri Ettinger	Michael Hollingdale
George Golvan QC	Tim McFarlane	
Joanne Staugas	Philip Theobald	

These guidelines were further updated by the Federal Dispute Resolution Section ADR Committee in June 2025 with minor edits in April 2026. They adopt some aspects of the United Nations Convention on International Settlement Agreements Resulting from Mediation ('Singapore Convention on Mediation') (New York 20 December 2018), particularly the definition of mediation:

Mary Walker OAM	Toby Boys	Glen Pauline
Philip Theobald	Geri Ettinger	Jon Clarke
Michael Hollingdale	Rachael Field	Alistair Wyvill SC

1. Process

Mediation means a process, in which parties to a dispute engage, with the assistance of an independent third party or parties (the mediator or co-mediators), to reach a mutually acceptable resolution. This process emphasizes self-determination, good faith negotiations, and collaborative problem-solving, without conferring upon the mediator any authority to impose a binding solution.

A mediator:

- facilitates communication;
- promotes understanding;
- assists the parties to identify their needs and interests; and
- uses creative problem solving techniques to enable the parties to reach their own agreement.

Comment

a) The above definition is intended to describe the mediation process broadly, irrespective of the expression used or the basis upon which the process is carried out.

b) A mediator will aim to be impartial at all times and treat parties in an even-handed manner to facilitate a fair and balanced dialogue.

c) A mediator must disclose any actual, potential or perceived conflicts of interests, including previous professional interactions with any of the parties, aside from acting as a mediator in past disputes.

d) If any party raises an objection to the mediator's involvement due to a conflict of interest, the mediator should address the concerns raised. If the conflict cannot be resolved to the satisfaction of the parties, and the mediator determines that they cannot proceed without compromising their impartiality, the mediator may choose to withdraw and terminate the mediation process.

e) As part of facilitating discussions, a mediator may ask direct questions of the parties to clarify issues in dispute, to understand the respective priorities and interests of each party and to help the parties to communicate so that they can understand their respective priorities and interests.

f) Unless the parties and the mediator expressly agree, a mediator does not:

i) decide the facts of a case;

ii) determine which party to the dispute is right or wrong; or

iii) make decisions for the parties or advise a party to accept or reject a particular solution.

g) A mediator may separately have confidential private discussions with each of the parties and/or their legal representatives.

h) A mediator may not disclose any private discussions during a mediation without permission, unless required to do so by law.

i) In some mediations there may be two or more mediators working together, usually referred to as a co-mediation model. Co-mediators may be chosen to provide specialist subject matter expertise.

Confidentiality

Subject to the requirements of the law (including any applicable Rules of Court) and the mediation agreement, all participants including the mediator must maintain confidentiality of the mediation as to what was said and done, and of any documents created for the purpose of mediation.

Comment

a) *Lawyers assisting parties will advise the parties before the mediation on their confidentiality obligations before, during and after the mediation and those obligations will be incorporated into the mediation agreement.*

b) *The parties' obligations of confidentiality will depend upon:*

   i) *the circumstances of each mediation;*

   ii) *the requirements of the mediation agreement; and*

   iii) *any regulatory or institutional requirements.*

c) *Lawyers assisting parties should also advise about the confidentiality obligations of third parties who are attending or involved in the mediation, including for example their involvement in online/videoconference mediations. Lawyers should assist parties and those third parties to take steps to comply with their confidentiality obligations.*

d) *A mediator may be asked to clarify or address any questions or concerns of the parties regarding the conduct of the mediation, including confidentiality, before and during the mediation.*

e) *A mediator should not disclose any matter that a party requires to be kept confidential (including information about how the parties acted in the mediation process, the merits of the parties' respective positions, any settlement offers or agreed outcomes) unless:*

   i) *the mediator has the permission of all parties attending the mediation with an interest in preserving confidentiality; or*

   ii) *the mediator is required by law to do so.*

f) *Neither the mediator nor the parties or their lawyer may reveal to the other parties (and their legal representatives) any information disclosed between a party and the mediator during private sessions without prior permission.*

2. When to mediate

Mediation is suitable for most disputes.

Mediation can offer advantages to parties when compared with litigation, arbitration or tribunal proceedings. Advantages of the mediation process include confidentiality, reduced cost and delay, and the preservation of relationships. There are no conclusive rules or guidelines about whether, or when, a case is suitable for mediation. Various factors should be considered, including the nature of the dispute and the mindset and desired outcomes of each party.

Not only can mediation be used prior to litigation, arbitration or tribunal proceedings being commenced, it is often desirable and sometimes a requirement to do so.

Comment

a) Parties may have included a term in their contract that requires that mediation be attempted before litigation, arbitration or tribunal proceedings are commenced.

b) Courts and tribunals may stipulate that, except in limited circumstances, a party must make reasonable or genuine endeavours to resolve a dispute before commencing proceedings. Many also stipulate that before parties may proceed to a trial, they must have engaged in mediation.

c) The assessment of whether mediation is suitable for a particular matter is made on a case by case basis. Timing is an important factor when considering suitability. Generally speaking, most cases are suitable for mediation at some point in time. Further, the anticipated costs and duration of litigation, arbitration or tribunal proceedings are persuasive factors in favour of mediation reasonably early in the course of a dispute. Hence, as a general rule, the appropriateness of mediation should be considered when a dispute first arises and then reconsidered from time to time, as appropriate.

3. Who should attend a mediation

All persons who have a legitimate interest in the resolution of the dispute and who can assist the parties to reach a resolution should attend the mediation where practicable.

Parties may choose to be represented by a lawyer; however, there is no obligation to do so.

Individuals may choose to attend the mediation alone or with a support person who acts as an observer. In certain situations, if the other party objects to the presence of a support person, the mediator may need to seek consent for their attendance. If consent is not granted, the mediation can proceed without the support person, provided the party agrees to continue without them.

A person with the ultimate authority to settle the dispute and bind the party who is represented should be present at the mediation. A mediator will explore with the parties prior to a mediation commencing, the authority each party will have to conclude a settlement.

Comment

a) If a party is:

i) a company or an association – someone appointed with the necessary level of authority and able to speak on behalf of the company or association and reach a binding agreement should attend;

ii) a government department or agency – the person who attends should clarify (both before the mediation and at the mediation) their role and the approval procedures required as they are usually not in a position to bind the ultimate decision maker on whose behalf they appear; and

iii) represented by a person with authority to make recommendations to the ultimate decision maker (for example an insurer) – the ultimate decision maker should be contactable throughout the mediation;

b) The parties and their representatives should discuss the above with the mediator prior to the mediation.

c) *In addition, the parties and their representatives should discuss prior to or during the mediation any concerns about safety in attending the mediation. Concerns may best be raised in a private discussion with the mediator. The mediator should ensure any safety concerns are addressed prior to continuing.*

4. Role of the parties

All persons attending a mediation should genuinely participate with the intention of seeking settlement or at least narrowing the issues in dispute.

Comment

a) *'Genuine participation' is sometimes described by lawyers as participating in 'good faith'. Certain legislation requires participation to be genuine or in good faith. If a party fails to do so, and the dispute is unresolved, in some instances courts may impose costs or other sanctions against that party.*

b) *While the meaning of 'good faith' will usually be derived from the common law, interpretation in the context of a mediation can vary. The term usually conveys having a genuine intention to engage in open, honest, and respectful communication, and being prepared to consider the perspectives and interests of all parties, and to actively participate in seeking a mutually acceptable resolution, without deceit or intent to undermine the process.*

5. Role of the legal representatives

A lawyer's role will vary depending on the nature of the dispute and the mediation process. A lawyer will assist clients to select a mediator and provide practical and legal advice regarding the process and issues arising during the mediation. They will advise about offers made, assist with generating and evaluating options for resolution, and assist with documenting and implementing any agreement.

Lawyers may advise the party before the mediation, represent the party during the mediation and undertake some or all communications on behalf of the party.

At a mediation the lawyer should be there to assist the party represented to make reasonable and genuine attempts to resolve the dispute.

Comment

a) *If a party's lawyer is present the mediator may:*

   i) *encourage parties to play an active role in discussions and negotiations;*

   ii) *encourage lawyers present to speak directly to each other with the mediator present and without the client present; and*

   iii) *provide opportunities for each party to consult privately with their lawyer.*

b) *If the lawyer is not present at the mediation, the mediator may provide the parties with opportunities to seek professional advice.*

c) *Parties are responsible for their own legal fees incurred as a result of engaging a legal representative, unless otherwise agreed between them.*

6. Preparing for a mediation

Before attending a mediation, each party should identify what the dispute is about, what their interests and concerns are, which should not be limited to their legal rights, and consider what are the likely and realistic outcomes.

Comment

a) Parties should consider the following matters before they attend the mediation:

- *i) What specific outcomes or resolutions are important to me?*
- *ii) What outcome might be important to the other party or parties?*
- *iii) What are the possible options for resolving the dispute taking into account the needs of each of the parties?*
- *iv) What is my best alternative if the mediation does not result in a resolution?*
- *v) What is my worst alternative if no resolution is reached during the mediation?*
- *vi) What potential risks or downsides do I face if the dispute remains unresolved?*
- *vii) What risks or challenges do the other party or parties face if the dispute is not resolved?*
- *viii) What personal and financial costs might be incurred by me and the other party or parties if the dispute is not resolved?*
- *ix) What could I do or communicate that might be valuable or advantageous to the other party?*
- *x) What do I want the other party or parties to do or acknowledge that is of value to me?*
- *xi) What outcome can I reasonably accept and live with?*

b) The parties should have available relevant documents that relate to the dispute. The mediator can encourage some information to be exchanged by the parties before the mediation.

c) The parties should consider responses to possible alternatives or 'what if' scenarios.

d) Conflict resolution involves emotions. The parties should consider the issues, words, and actions that might cause adverse reactions. The parties should also have a plan as to how they will manage difficult issues or behaviours (whether their own behaviours or those of others).

7. Preliminary conference

Sometimes a mediator will hold a preliminary conference with the parties or their legal representatives, or both, either separately or together, before the date scheduled for the mediation. A preliminary conference may be conducted in person or by telephone or online. A preliminary conference is part of the mediation process and is confidential.

Pre-mediation conferences may be used by the mediator to outline the mediation process, cover any preparatory steps and deal with the necessary arrangements for the conduct of the mediation. The terms of the mediator's appointment can be discussed, if required, and confirmed at the preliminary conference.

Comment

a) A mediator may use a preliminary conference to address matters such as:

i) establishing rapport with the parties;

ii) explaining the mediation process and preparation expectations;

iii) identifying who will attend the mediation;

iv) addressing logistical and administrative arrangements, including the date, time and place;

v) confirming the terms of the mediator's appointment including payment of fees; and

vi) determining what materials the mediator should receive and what information the parties should exchange before the mediation.

b) A preliminary conference may enable a mediator to assess the parties' readiness to proceed with the mediation or whether it may be premature to proceed without certain steps being taken.

8. At the mediation

Mediation provides a constructive environment to discuss and address problems, and to explore solutions that may narrow or resolve the issues in dispute.

Parties should genuinely participate in the mediation and with the sincere intention to work towards a settlement. Mediation is a non-adversarial process focused on collaboration rather than judgment. Its purpose is not to determine who may be right and who may be wrong.

The mediator assists in facilitating discussions but does not impose solutions or make decisions for the parties.

Comment

a) Consistent with clause 2 above, discussions in mediation are intended to be confidential, creating a secure environment for honest and sometimes robust communication.

b) At the outset of the mediation, the mediator may meet each party and their lawyers (if present) in private immediately before the initial joint session commences.

c) A mediator will usually ask the parties to give a short opening statement outlining their issues and concerns. If parties are accompanied by a legal representative, the lawyer may make this statement on a party's behalf.

d) A mediator will facilitate dialogue amongst the parties, encouraging each party to communicate openly and directly. Parties may also be encouraged to ask questions of each other to further explore issues of concern. Parties may find it empowering to speak during the mediation.

e) To be productive, discussions also need to be respectful. Giving a party the opportunity to be heard is helpful to gaining respect and mutual understanding. Interrupting when another person is speaking can be disruptive to the process.

f) Mediation provides a space for creative problem-solving beyond the immediate issues, potentially addressing underlying concerns, needs and interests. It can enable the root cause of an impasse or conflict to be identified and addressed.

g) A mediator may hold private and confidential sessions with each of the parties.

9. Termination of mediation

A mediator should inform the parties, as may be appropriate, and may terminate the mediation if the mediator forms the view that:

a) the mediator can no longer be impartial or has a conflict of interest;

b) any party is frustrating the process;

c) there is no reasonable prospect of settlement;

d) a settlement that is being proposed may be unenforceable or illegal; or

e) continuing the mediation is unlikely to result in a settlement or a narrowing of the issues in dispute.

The mediation agreement will usually provide that the parties may also terminate the mediation, subject to any court rules or court orders that might apply.

10. Resolution

A range of settlement proposals is likely to be made during the course of the mediation. Early offers may not represent the final outcomes. The parties should be prepared to discuss and explore alternatives and to make counter-offers.

The parties should avoid making any ultimatums which might limit future options and damage credibility.

In most contexts, it is considered good practice to put an agreement in writing and have it signed. If possible, each party should be provided with a copy of the final signed agreement for their own records before leaving the mediation. The parties should also consider the practical requirements for preparing and executing agreements electronically if parties are participating remotely.

Comment

a) It is prudent in all cases to record any binding agreement in writing.

b) The legal representatives will assist the parties to record the agreement.

c) The agreement needs to be sufficiently detailed to enable it to be enforced.

d) If parties are not legally represented, often the mediator will assist with drafting of a heads of agreement recording the proposed settlement. The mediator may act as a scribe to record the terms of the settlement. In some contexts that may involve preparing a simple agreement to record the settlement reached. It is prudent to seek legal advice or engage lawyers to draft and arrange the execution of a binding agreement.

11. Post mediation

If a settlement is agreed and recorded in a written settlement agreement the parties should:

a) consult their respective legal representatives regarding implementation of the agreement soon after the end of the mediation;

b) attend to all matters addressed in the agreement to perform the terms of the settlement, and if legally represented confirm with their respective legal representatives all matters required to perform the settlement; and

c) take any steps that may be required to conclude any legal proceedings in accordance with the terms of settlement.

If a settlement is not agreed at the mediation the parties should:

a) consider whether to adjourn the mediation to another time;

b) consider whether to convene another mediation with a different mediator at another time;

c) review with their legal representatives what was learned from the mediation and seek advice on how this may influence the ultimate resolution of the dispute; and

d) otherwise consult their respective legal representatives regarding their next steps.

It is important for parties to be aware of any reporting obligations the mediator may have to courts, government departments or other organisations.

Comment

A party should be aware of any post-mediation reporting obligations (which may vary from jurisdiction to jurisdiction) before attending a pre-mediation conference or at the earliest opportunity. A mediator can provide this information.