

Law Council of Australia

Guidelines for Parties in Mediations

Updated Version: May 2019



Law Council
OF AUSTRALIA

Introductory Note

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 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 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:

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

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

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

1. Process

Mediation is a process in which an impartial person – a mediator – facilitates the resolution of a dispute by promoting agreement by the parties to the dispute.

A mediator:

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

Comment

- (a) *A mediator will aim to be impartial at all times and treat parties in an even-handed manner.*
- (b) *A mediator must disclose whether he or she has acted in a professional capacity for one of the parties (other than as a mediator in a dispute involving a party). in which case the mediator may terminate the mediation if any objection is raised to the mediator continuing to act*
- (c) *As part of facilitating discussions, a mediator may ask direct questions of the parties to clarify issues in dispute, and to understand the respective priorities and interests of each party.*
- (d) *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.*
- (e) *A mediator may separately have confidential private discussions with each of the parties and/or their legal representatives.*
- (f) *A mediator may not disclose any private discussions during a mediation without permission, unless required to by law.*

2. Confidentiality

Subject to the requirements of the law (including 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) *A mediator should clarify and address any questions or concerns of the parties regarding the conduct of the mediation, including confidentiality, before the mediation commences.*
- (d) *At the end of a mediation the mediator should also confirm the parties' respective confidentiality obligations.*
- (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 by the mediator during private sessions without prior permission.*

3. When to Mediate

Mediation is suitable for most disputes.

Mediation can offer advantages to disputants when compared with litigation.

There is no conclusive rule as to 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. Mediation can be used prior to litigation or tribunal proceedings being commenced.

4. 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. With authority to settle the dispute at a mediation conference.

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

An individual may attend on his or her own and/or with a support person as an observer. In some circumstances, a mediator may need to approve the attendance of a support person, if objected to by the other party.

A person with the ultimate authority to settle the dispute and bind the party who is represented should be present at the mediation. The mediator will confirm either during private conferences or (more likely) at the commencement of the mediation that the parties each have the authority to settle the dispute.

Comment

If a party is:

- (a) 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;*
- (b) 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;*
- (c) a person with authority to make recommendations to the ultimate decision maker - the ultimate decision maker must be contactable throughout the mediation.*

5. Role of the Parties

All persons attending a mediation should participate in good faith with the intention of seeking settlement.

6. 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, provide practical and legal advice regarding the process, on issues arising during the mediation, on offers made, 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:*
 - (i) the mediator may encourage parties to play an active role in discussions and negotiations; and*
 - (ii) the mediator may provide opportunities for the 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 advice.*
- (c) *All participants are responsible for their own legal fees incurred as a result of engaging a legal representative.*

7. 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 what are the likely and realistic outcomes.

Comment

- (a) *Ask yourself:*

What outcome is important to me?

What outcome is likely to be important to the other parties?

What are the possible options for resolving the dispute taking into account the needs of each of the parties?

What is my best alternative if I do not settle at mediation?

What is my worst alternative if I do not settle at mediation?

What risks do I face if I do not settle?

What risks do the other parties face if they do not settle?

What could I do or say that might be of value to the other party?

What do I want the other party to do or say that is of value to me?

What outcome can I live with?

- (b) *Gather relevant documents that relate to the dispute. Some information may be exchanged by parties before the mediation.*
- (c) *Consider responses to possible alternatives or 'what if' scenarios.*
- (d) *Conflict resolution involves emotions. Consider the issues, words, and actions that might cause emotional reactions. Have a plan to manage difficult issues or behaviours (your own behaviours or others').*

8. Preliminary Conference

Sometimes, a mediator will hold a preliminary conference with the parties and/or their legal representatives, either separately or together, before the date scheduled for the mediation. It may be in person or by telephone.

Pre-mediation conferences are used by the mediator to establish a relationship and to outline the stages of the mediation process, how the parties and the mediator should prepare for a mediation, who will attend the mediation, what material the mediator should read, what information the parties should exchange before the mediation, details of the mediator's remuneration and how the mediation will be conducted.

Comment

- (a) *A preliminary conference may be held between the lawyers and the mediator to cover details of the mediation such as the date, time, place, fees, persons attending, the mediation agreement and documents to be exchanged or brought to the mediation.*
- (b) *A private conference may also take place immediately before the mediation at which the mediator meets individually with the parties and their lawyers.*

9. At the Mediation

Mediation is an opportunity to discuss problems that need attention and to narrow or resolve issues in dispute. Parties should approach the mediation in good faith and with the genuine intention of achieving settlement. Mediation is not an adversarial process, nor will it determine who is right and who is wrong.

Comment

- (a) *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.*
- (b) *A mediator will facilitate dialogue amongst the parties, encouraging each party to communicate openly and directly. Parties will 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.*
- (c) *A mediator may hold private and confidential sessions with each of the parties.*

10. Termination of Mediation

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

- (a) *the mediator can no longer be impartial or has a conflict of interest;*
- (b) *any party is abusing the process;*
- (c) *there is no reasonable prospect of settlement;*
- (d) *a settlement is being proposed that the mediator considers may be unenforceable or illegal; or*

- (e) *the mediator considers that continuing the mediation is unlikely to result in a settlement.*

11. 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. Be prepared to discuss and explore alternatives and to make counter-offers.

Avoid making an ultimatum which can limit future options and damage credibility.

It is good practice to put the agreement in writing and have it signed. The legal representatives will assist the parties to record the agreement. The agreement needs to be sufficiently detailed to be able to be properly enforced.

If possible, each party should be provided with a copy of the final signed agreement for their own records before leaving the mediation.

12. Post Mediation

- (a) If a settlement is agreed and recorded in a written settlement agreement:
 - (i) parties should consult their respective legal representatives regarding implementation of the agreement soon after the end of the mediation;
 - (ii) parties should 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
 - (iii) parties should take any steps that may be required to conclude any legal proceedings in accordance with the terms of settlement.
- (b) If a settlement is not agreed at the mediation:
 - (i) parties should review with their legal representatives what was learned from the mediation and seek advice on how this may influence ultimate resolution of the dispute;
 - (ii) parties should consult their respective legal representatives regarding their next steps; and
 - (iii) another mediation can be subsequently convened with the same or a different mediator at another time if obtaining settlement continues to be an issue for the parties.
- (c) 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.