Guidelines for Lawyers in Mediations

Updated: June 2025

Law Council
OF AUSTRALIA

Contents

Introductory note

The Law Council of Australia has developed these guidelines to give assistance to lawyers representing clients in the mediation of civil and commercial disputes. It is not intended that the guidelines derogate in any way from the usual obligations imposed on lawyers by law or any ethical rules, professional conduct rules or standards. It is expected that the 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 on Alternative Dispute Resolution:

Mary Walker	Alan Limbury	Michael Hollingdale
Michael Klug	Nadja Alexander	Henry Jolson QC
Laurence Boulle	Philip Theobald	Joanne Staugas
Ian Hanger AM QC	Geoff Gronow	

These guidelines were reviewed and updated by the Committee in August 2011:

Mary Walker	Ian Bloemendal	Catherine Gale
Scott Ellis	Geri Ettinger	Michael Kent SC
David Gaszner	George Golvan QC	Joanne Staugas
Kathy Mack	Tim McFarlane	
Philip Theobald	Laurence Boulle	

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:

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

1. Process

Mediation means a process, in which parties to a dispute engage with the assistance of a neutral and independent third party or parties (the mediator), 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.

2. Role

Reference in these guidelines to mediation is intended to cover the varying forms of mediation process, irrespective of the expression used or the basis upon which the process is carried out.

A lawyer's role in mediation is to assist clients, provide practical and legal advice on the process and on issues raised and offers made, and to assist in drafting terms and conditions of settlement as agreed.

A lawyer's role will vary greatly depending on the nature of the dispute and the mediation process.

It may range from advising a client before a mediation, to representing a client during a mediation and undertaking all communications on behalf of a client.

At all times, a lawyer must pay due regard to the duties owed as an officer of the court and in the administration of justice.

Ethical issues

3. Confidentiality

As with all dealings with clients, anything that is said or done in a mediation is strictly confidential. In addition, subject to the requirements of the law (including any applicable Rules of Court), a lawyer must maintain the confidentiality required by the parties and by any mediation agreement.

3.1. Comment

A lawyer must not disclose any information disclosed during the mediation unless such disclosure is required by law.

Without prior permission of the mediator and the other parties a lawyer must not reveal any information disclosed by the mediator during private sessions to the other parties or their legal representatives.

All information and documents disclosed during the mediation, including any settlement or draft offers/counter-offers, are confidential and privileged between parties to the mediation and their legal representatives.

A lawyer should consider rules about confidentiality (which may vary from jurisdiction to jurisdiction) before attending a pre-mediation conference so that

they may be established by the parties and the mediator at the pre-mediation conference.

A lawyer should also consider 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. 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.

In some mediations there may be two mediators working together, usually referred to as a co-mediation model. The second mediator may be chosen to provide specialist subject matter expertise.

When the mediation is held online, all participants need to be aware of the risks of other persons being present or overhearing the mediation proceedings and take steps to ensure that confidentiality is maintained.

4. Good faith

Lawyers and clients should act, at all times, in good faith to attempt to achieve settlement of the dispute or at least a narrowing of the issues in dispute.

4.1. Comment

A lawyer should advise clients about what it means to act in good faith. A lawyer should not continue to represent clients who act in bad faith or give instructions which are inconsistent with good faith.

Likewise, if a lawyer suspects the other parties to the mediation are acting in bad faith this should be raised privately at first with the mediator.

'Genuine participation' is sometimes used by lawyers as a plain language alternative to 'participation 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.

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, 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. When to mediate

The assessment of whether mediation is suitable for a particular matter should be 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 by

lawyers when first instructed and then reconsidered from time to time, as appropriate. In assessing whether, or when, a case is suitable for mediation various factors should be considered, including the nature of the dispute and the mindsets of the parties.

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.

5.1. Comment

Most civil cases are suitable for mediation at some point in time. Anticipated costs and duration of litigation, arbitration or tribunal proceedings are a persuasive factor in favour of mediation.

Parties may have included a term in their contract requiring participation in mediation before proceedings are commenced.

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.

Mediation may be undertaken at any time and should be considered:

- *before proceedings are commenced;*
- *after pleadings have closed, but before the costs of discovery are incurred;*
- *before an action is set down for trial and trial costs are incurred; and*
- *after a trial and before judgment.*

Another factor to consider is whether the parties have sufficient information available to them to make an informed decision about settlement.

6. Selecting the mediator

Selecting and engaging the most suitable mediator enhances the prospect of a successful settlement in the mediation process.

6.1. Comment

When selecting a mediator, the following matters should be considered:

a) *a mediator's skill and experience as a mediator. In addition, any additional expertise that may be helpful, such as expertise in the subject matter of the dispute or the relevant law;*

b) *the role of the mediator and whether a particular style of mediation may be better suited to the dispute. A mediator's mediation style (whether it is directive, facilitative, or transformative) and their reputation should be taken into account and align with the parties' needs and expectations;*

c) *potential or perceived conflicts of interest;*

d) a mediator's understanding of any cultural, social, or contextual factors relevant to the parties or the subject matter;

e) a mediator's availability to commit the necessary time and resources, along with logistical considerations such as location, costs, and scheduling;

f) affiliations with or accreditation by recognised professional bodies.

7. Preparing for the mediation

Preparation for a mediation is as important as preparing for trial. A lawyer should look beyond the legal issues or quantum and consider the dispute in a broader, practical and commercial context.

7.1. Comment

Before a mediation, a lawyer should, as well as assessing the legal merits of the case, consider the dispute in commercial terms and in light of the client's business, personal and commercial needs, generate possible practical options for resolution and engender a problem-solving approach.

8. Preparing your client

A lawyer's primary task is to help prepare clients for a mediation by:

a) undertaking a risk analysis and linking risks to the client's interests;

b) explaining the nature of mediation;

c) identifying interests; and

d) developing strategies to achieve final outcomes.

8.1. Comment

a) Discussing and explaining to clients the nature of the mediation process and the mediator's role. In particular, issues such as confidentiality and the nature of 'without prejudice' negotiations should be discussed.

b) Helping clients to identify their needs and interests and the best ways to achieve desired outcomes. Lawyers should also help their client to consider the needs and interests of other parties and ways to overcome any tactics or objections likely to arise. For example, clients should consider the following matters before they attend the mediation:

(i) What specific outcomes or resolutions are important to them?

(ii) What outcome might be important to the other parties?

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

(iv) What is the best likely alternative outcome if the mediation does not result in a resolution?

(v) What is the worst likely alternative outcome if no resolution is reached during the mediation?

(vi) What potential risks or downsides do they face if the dispute is not resolved?

(vii) What risks or challenges do the other parties face if the dispute is not resolved?

(viii) What personal and financial costs might they or the other parties incur if the dispute is not resolved?

(ix) What could they do or communicate that might be valuable or advantageous to resolving the matter?

(x) What issues, words, and actions might cause adverse reactions by the other party? The client should also be supported to develop a plan as to how they will manage difficult issues or behaviours (whether their own behaviours or those of others).

(xi) What do they want the other party to do or acknowledge that is of value to them?

(xii) What outcome can they reasonably accept and live with?

c) Deciding who will speak during the mediation. Often, with appropriate preparation, clients will be better placed to convey facts and other non-legal issues. If so, a lawyer may need to assist clients with preparation for their involvement.

d) Ensuring the parties have available relevant documents that relate to the dispute. The mediator may be approached to encourage information to be exchanged by the parties before the mediation.

e) Assist clients to complete a risk analysis. A draft risk analysis should be discussed with clients before being finalised by the legal team. This analysis will help determine a range of settlement options.

Consider and discuss the potential costs, both personal and financial, that the parties may incur if the dispute is not resolved?

Discuss and explain to clients the mediation process and the mediator's role. In particular, discuss issues such as confidentiality and the nature of 'without prejudice' negotiations.

Help clients identify their needs and interests and the best ways to achieve desired outcomes. Consider the interests of other parties and ways to overcome any tactics or objections likely to arise. Refer to the Comments in section 7 of the Guidelines for Parties Engaged in Mediation.

Decide who will speak during the mediation. Often, with appropriate preparation, clients will be better placed to convey facts and other non-legal issues. If so, a lawyer may need to assist clients with preparation for their involvement.

9. Preliminary conferences with the mediator

Preliminary conferences convened by the mediator ahead of the mediation are a good opportunity to establish a relationship with the mediator and arrange any practical matters relevant to convening the mediation. Preliminary conferences may be conducted in person, by telephone or online, depending on the preference of the mediator and the parties or their representatives.

9.1. Comment

a) *A first mediation conference or preliminary conference in a mediation enables the mediator to establish a relationship with clients and their lawyers, explain the process, format and structure of the mediation, and answer any questions before the joint meeting commences.*

b) *The preliminary conference in a mediation covers procedural details concerning the mediation such as the date, time, place, persons attending, and documents to be exchanged or brought to the mediation and to finalise and agree upon the mediation agreement, including fees. It is often only attended by the lawyers and the mediator. Lawyers should consider whether their clients would benefit from attending. Parties are often encouraged by their lawyer to attend the preliminary conference. Rules about confidentiality must be established and documented. The usual practice is to agree that confidentiality commences at the time of the preliminary conference and relates to the entirety of the mediation process from that time, including correspondence and post-mediation reporting requirements.*

c) *Further preliminary conferences can take place in a private meeting with each party and their lawyers immediately before the commencement of the joint meeting. This may be the first occasion that a party meets the mediator, if they did not attend an earlier preliminary conference.*

   This private conference enables the mediator to establish a relationship with clients, explain the process, format and structure of the mediation, and answer any questions before the joint meeting commences.

10. At the mediation

Mediation is intended to be 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. It is important to reflect upon the likely outcome if the matter is not resolved and the matter goes to a trial or a determinative process such as arbitration or expert determination. Mediation should be approached as a problem-solving exercise. A lawyer's role is to help clients to best present their case and assist clients and the mediator by giving practical and legal advice and support.

A lawyer should be alert to how the mediator is conducting the process and gauge the client's reactions. If there are revelations which give rise to an apprehension that the mediator may have a conflict of interest, discuss this with the client. If the client has any concerns, ensure they are addressed promptly and appropriately.

11. Skills

The skills required to effectively represent a client at mediation differ from those used in trial advocacy. In litigation, arbitration or tribunal proceedings, a lawyer's objective is to persuade the decision-maker to accept the arguments advanced by the lawyer and to find in favour of the lawyer's client. In mediation, a lawyer's objective is to use advocacy skills, which are best applied to persuading the other parties and their lawyers that settlement options proposed by the lawyer's clients would better meet the legitimate interests of all parties. To that end, lawyers are encouraged to consider the options and interests of other parties, as well as their clients', and assist the parties in dispute to appreciate that a mutual resolution, not an imposed judgment or determination, would best satisfy their interests.

11.1. Comment

a) *Arguments presented in terms and language that will be understood and therefore is persuasive to the other party are preferred. Legal arguments or language are not always necessary.*

b) *Listening carefully and respectfully, even to material which may be irrelevant to the legal issues in the litigation, arbitration or tribunal proceedings may be conducive to setting an atmosphere for settlement. It can be helpful to acknowledge arguments made against clients to show that the other party's position has been heard and understood.*

12. Offers and settlement

A primary aspect of a lawyer's role is to help formulate offers, assess the practicality/reasonableness of offers made by other parties and assist in drafting settlement terms and conditions.

12.1. Comment

a) *Never mislead or knowingly make a false statement to an opponent and be careful of puffery.*

b) *Be cautious about making a 'final offer' or delivering ultimatums which can limit future options and damage credibility for future negotiations.*

c) *It may be helpful to have available a draft settlement agreement at the mediation.*

d) *If it appears that the mediation will not produce a final settlement, try to obtain a written agreement on as many outstanding issues as possible and on the most efficient way to conduct the remaining litigation, arbitration or tribunal proceedings. This may advance future negotiations or shorten a trial. It may be helpful for future purposes to draft a list of issues on which agreement has not been reached.*

13. Professional conduct

Legal representatives have professional ethical obligations to deal with their opponents with respect, fairness and courtesy.

Lawyers must act in a professional manner and respect and obey the law including their professional rules of conduct.

Lawyers must not engage in or assist conduct that is illegal or dishonest or otherwise discredit a practitioner or is prejudicial to the administration of justice or which might otherwise bring the profession into disrepute.

Lawyers must not engage in misleading conduct. Lawyers should ensure that they do not take unfair advantage of an obvious error of another lawyer or person.

14. Post mediation

Generally, lawyers should report on mediation in writing to clients. Lawyers should also inform their clients (before the mediation) of any reporting obligations the mediator may have to courts, government departments or other organisations.

14.1. Comment

> *A lawyer should be aware of any post-mediation reporting obligations (which may vary from jurisdiction to jurisdiction) before attending a pre-mediation conference.*