

Law Council of Australia

Ethical Guidelines for Mediators

Updated Version: April 2018



Law Council
OF AUSTRALIA

Introductory Note

The Law Council of Australia has developed these guidelines to serve as a general ethical and practical framework for the practice of mediation. The guidelines are intended to apply to all types of mediation. Particular professional and other bodies may have different requirements. It is expected that the guidelines will be reviewed from time to time.

The guidelines of conduct for mediators are intended to perform three major functions:

- (i) to serve as a guide for the conduct of mediators;
- (ii) to inform the mediating parties of what they should expect; and
- (iii) to promote public confidence in mediation as a process for resolving disputes.

These ethical guidelines draw on existing codes of conduct for mediators and take into account issues and problems that have surfaced in mediation practice. They are offered in the hope that they will serve an educational function and provide assistance to individuals, organisations and institutions involved in mediation in all practice contexts.

These guidelines are based on the work of four professional groups in the United States: the American Arbitration Association, the American Bar Association, the Society of Professionals in Dispute Resolution, and the Association for Conflict Resolution. They were reworked for Australia in 1996 by members of the Law Council of Australia Expert Standing Committee on Alternative Dispute Resolution:

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| Alan Limbury | Laurence Boulle | Charles Brabazon QC |
| Carol Dance | Michael Klug | Henry Jolson QC |
| Ruth McColl S.C. | Julian Riekert | Philip Theobald |
| Mary Walker | | |

They were further reviewed and updated by the Committee in February 2000 and in February 2006:

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

In its February 2006 review, the Committee adopted some aspects of the Draft European Code of Conduct for Mediators, April 2004 on Independence and Neutrality.

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

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

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

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

1. Process

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

A mediator should explore with the parties prior to a mediation commencing that each party will have the necessary authority to conclude any settlement.

Comment

- (a) *A mediator should provide information about the process, and help the parties identify their real concerns and all their options. The primary role of a mediator is to facilitate voluntary resolution of disputes by the parties themselves.*
- (b) *A mediator cannot personally ensure that each party has made a fully informed decision when reaching an agreement to resolve a dispute, but it is good practice for the mediator to make the parties aware of the importance of consulting other professionals, where appropriate, to help them make informed decisions.*
- (c) *A mediator must address with the parties any instances of deceit, fraud and misleading statements before any settlement is reached.*

2. Impartiality

A mediator may mediate only those matters in which the mediator can remain impartial and even handed. If at any time the mediator is unable to conduct the process in an impartial manner the mediator should withdraw.

Accordingly, a mediator must avoid:

- (i) partiality or prejudice; and
- (ii) conduct that gives any appearance of partiality or prejudice.

Comment

- (a) *Whatever their own views and standards mediators should not only not be partial or prejudiced but should avoid the appearance of partiality or prejudice by reason of such matters as the parties' personal characteristics, background, values and beliefs or conduct at a mediation.*
- (b) *Mediators should be conscious of behaviour which, however innocent, may be interpreted as indicating partiality or prejudice, such as spending more time with one party than another without good reason, socialising with a party and adopting different modes of address.*
- (c) *Even if all the disputants agree that they would like the mediator to express an opinion on the merits, there is a substantial risk in giving such an*

opinion that the mediator may no longer appear to be impartial. As a result the mediator may be obliged to withdraw.

- (d) *Should the disputants agree to terminate a mediation and enter an alternative process, using the mediator, the mediator must consider the suitability of continuing as the appointed resolver and may need to withdraw altogether notwithstanding the parties' wishes.*

3. Conflicts of Interest

Before a mediation begins, a mediator must disclose all actual and potential conflicts of interest known to the mediator. The mediator should:

- (iv) discuss any circumstances that may, or may be seen to, affect the mediator's independence or impartiality; and
- (v) at all times be transparent about the mediator's relations with the parties in the mediation process.

Disclosure must also be made if conflicts arise during a mediation.

After making disclosure the mediator may proceed with the mediation if all parties agree and the mediator is satisfied that the conflict or perception of conflict will not preclude the proper discharge of the mediator's duties. The mediator must be certain of:

- (i) the parties' agreement; and
- (ii) the mediator's ability to undertake the mediation with independence and neutrality so as to ensure impartiality.

After a mediation a mediator must not act in such a manner as to raise legitimate questions about the integrity of the mediation process.

Comment

- (a) *Conflicts of interest may arise when recommending the services of others. It may be preferable to recommend referral services or associations which maintain rosters of qualified persons.*
- (b) *External pressures should never influence a mediator. A mediator's commitment should be to the parties and the process.*
- (c) *Interests which should be disclosed include any association with a party or adviser or representative of a party, which could reasonably be seen to affect the impartiality of a mediator.*
- (d) *A mediator should disclose to the participants any circumstances which may cause, or have tendency to cause, a conflict of interest. In particular a mediator who is a partner or an associate of any representative retained by either of the parties should not act as mediator without the fully informed consent of all the parties.*

- (e) *A mediator should not establish a professional relationship with one of the parties in relation to the same dispute.*

4. Competence

A mediator must not mediate unless the mediator has the necessary competence to do so and to satisfy the reasonable expectations of the parties.

A person who agrees to act as a mediator holds out to the parties an appropriate level of expertise and competence to effectively mediate.

Comment

- (a) *Competence comprises appropriate knowledge and skills which would normally be acquired through training, education, and experience.*
- (b) *Mediators should have available for the parties information regarding their training, education and experience.*
- (c) *When a person is appointed or nominated to a panel or list of mediators, the appointing court, tribunal, institution, or agency should ensure that the mediator has through training, education and experience acquired the necessary knowledge and skill for inclusion on the particular panel or list.*
- (d) *The qualifications for inclusion on a list of mediators should be made public and available to interested persons.*

5. Confidentiality

Subject to the requirements of the law a mediator must maintain the confidentiality required by the parties.

Comment

- (a) *As the parties' expectations regarding confidentiality are important, the mediator should discuss those expectations with the parties and endeavour to meet them. The mediator should clarify when a mediation begins and when it ends, and whether conversations on the telephone, in meetings and communications by email and other means are also confidential.*
- (b) *The parties' expectations of confidentiality depend on the circumstances of a mediation and any agreements they, and any other persons present at the mediation, and the mediator may make.*
- (c) *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 case, any settlement offers or agreed outcomes) unless:*
 - (i) *the mediator is given permission to do so by all persons attending at a mediation with an interest in the preservation of the confidence; or*
 - (ii) *the mediator is required by law to do so.*

- (d) *The parties and the mediator may make their own rules with respect to confidentiality, or the accepted practice of the mediator or an institution may mandate a particular set of expectations.*
- (e) *If a mediator intends to hold private sessions with a party, the mediator should before such sessions discuss with the parties the confidentiality attaching to them.*
- (f) *Any reporting which requires a subjective judgment by a mediator of the conduct of the parties is likely to destroy the integrity of the mediation process.*
- (g) *Under appropriate circumstances, researchers may be permitted to obtain access to statistical data.*
- (h) *With the permission of all of the parties, researchers may be permitted access to individual case files, to observe mediations, and to interview participants.*
- (i) *A mediator should render anonymous all identifying information. When materials emanating from a mediation are used for research, supervision, or training purposes, the mediator should remove all identifying information from them.*

6. Termination of Mediation

A mediator may terminate a mediation if the mediator considers that:

- (i) any party is abusing the process; or
- (ii) there is no reasonable prospect of settlement.

The mediator if appropriate should inform the parties, and may terminate a mediation if:

- (i) a settlement is being reached that to the mediator appears unenforceable or illegal having regard to the circumstances of the dispute and the competence of the mediator for making such an assessment; or
- (ii) the mediator considers that continuing a mediation is unlikely to result in a settlement.

7. Recording Settlement

If a mediation results in a settlement between the parties, the mediator should encourage the parties to continue the mediation until the parties have:

- (i) recorded terms of settlement in writing; and
- (ii) addressed any enforceability issues.

Comment

- (a) *Normally agreement to record the terms of any settlement in writing should be made prior to the commencement of a mediation.*
- (b) *A mediator ought to be cautious about direct involvement in drafting the terms of agreement, as the mediator's involvement in drafting may be construed as providing legal advice.*
- (c) *A mediator should however assist the parties to take whatever steps may be necessary to formalise any settlement agreement, and to satisfy the mediator regarding its enforceability. The mediator may consider seeking to reconvene the mediation at a later time to allow the parties to finalise a settlement deed or any necessary court orders.*

8. Publicity and Advertising

A mediator must not engage in misleading or deceptive publicity or advertising.

A mediator must not make any false or misleading statement including statements or claims as to the mediation process, its costs and benefits, or the mediator's role, skills, or competence.

9. Fees

A mediator must fully disclose the mediator's engagement terms and fees to the parties.

Comment

- (a) *As early as practicable, and before a mediation session begins, a mediator should obtain the agreement of the parties regarding all engagement terms, fees and other expenses to be charged for the mediation, and by whom and when the fees and expenses are to be paid.*
- (b) *The better practice is to record in writing the arrangements in respect of fees and costs.*
- (c) *A mediator should not agree to a fee which is contingent upon the result of a mediation or amount of settlement.*