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# Guidelines for lawyers in mediations

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## New guidance for legal practitioners

# Guidelines for lawyers in mediations

Mary Walker

The Law Council of Australia launched its *Guidelines for Lawyers in Mediations* at the Australian Legal Convention on 23 March 2007. The *Guidelines for Lawyers in Mediation* (Guidelines) are based on the work of the members of the Law Council Alternative Dispute Resolution Committee and were developed to provide assistance to lawyers representing clients in the mediation of civil disputes. It is not intended that the Guidelines derogate from the usual obligations imposed on lawyers by law or any ethical rules, professional conduct rules or standards.

The Guidelines were crafted to complement the Law Council *Ethical Guidelines for Mediators*.<sup>1</sup> Both guidelines were developed to provide a general ethical and practical framework for mediation and both are intended to apply to all models and styles of mediation.

The Guidelines, in conjunction with the *Ethical Guidelines for Mediators*, are intended to perform three major functions:

- to serve as a guide for the conduct of mediations,
- to inform the mediating parties of what they should expect from the mediator and their legal representatives, and
- to promote public confidence in mediation as a process for resolving disputes

As the institutionalisation of dispute resolution processes, in addition to litigation, gains momentum in Australia there has been some confusion in the definitions of ADR processes and the adaptation of the role of lawyers representing parties in these processes.

The publication of *Alternative Dispute Resolution Definitions* by the National Dispute Resolution Advisory Council (NADRAC)<sup>2</sup> has provided some uniformity of approach to the

definition of ADR processes including mediation. The context of the development of the *Ethical Guidelines for Mediators* was to provide a common expectation of the essence of mediation highlighting common ethical dilemmas. The *Guidelines for Lawyers in Mediation* has been developed in the context of providing lawyers with an understanding of the contribution lawyers can make to the success of the mediation process in practice.

Cases such as *Studer v Boettcher* [2000] NSWCA 263 have commenced the process of outlining the obligations, responsibilities and duties of lawyers representing parties in mediation and particularly in the negotiation process undertaken in the settlement of civil proceedings. Additional features such as the 'confidentiality'<sup>3</sup> of the mediation process and the requirement of the parties to 'negotiate in good faith'<sup>4</sup> have been the subject of judicial consideration.

The clarification of the expectations of the role of legal practitioners representing parties in mediation in a practical context was the impetus to develop the Guidelines. The purpose of this recent development is to assist lawyers, unfamiliar with the mediation forum, to participate adequately in the process and to provide guidance to practitioners when inevitable dilemmas arise.

It has been argued that, due to the confidentiality of the mediation process (as with many ADR processes), there is inadequate scrutiny of the process and outcomes achieved by the parties in mediation. Criticisms include inadequate practitioner accountability for the manner in which mediators conduct the process and the manner in which legal representatives perform their functions in appearing on behalf of their clients. Both guidelines have been formulated to provide general

guidance to mediators, the legal profession and the public to enhance the general understanding of the process and to promote public confidence in mediation as a process for resolving disputes.

Seven guidelines are presented in the *Guidelines for Lawyers in Mediation*, each with practical emphasis. Comments are included as an explanatory adjunct.

The areas of coverage encompass:

- (1) the role of lawyers in mediation;
- (2) ethical issues, particularly confidentiality and good faith;
- (3) the time of referral to mediation;
- (4) the selection of mediators;
- (5) preparation for mediation;
- (6) presentation at mediation emphasising the skills required by lawyers in negotiation; and
- (7) post-mediation requirements.

The *Guidelines for Lawyers in Mediation* may be accessed via the Law Council website at

<[www.lawcouncil.asn.au](http://www.lawcouncil.asn.au)> and are

reproduced below. It is envisaged that the both sets of mediation guidelines will be reviewed periodically. ●

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## Endnotes

1. The *Ethical Guidelines for Lawyers* was developed by the Law Council ADR Committee in 1996 and revised in 2000 and 2006.

2. NADRAC, *Alternative Dispute Resolution Definitions*, March 1997, p 4.

3. For example: *AWA Limited v George Richard Daniels t/a Deloitte Haskins & Sells* (unreported, no 50271 of 1991, 18 March 1992 SC Comm D, Rolfe J); *State Bank of New South Wales v John Freeman* (unreported SC NSW 31 January 1996, Badgery-Parker J); *Gain v Commonwealth Bank of Australia* (1997) 42 NSWLR 2252; *Capolingua v Phylum Pty Ltd (as Trustee for the Gennoe Family Trust)* (1991) 5 WAR 137.

4. For example: *Western Australia v Taylor* (1996) 134 FLR 211; *Aiton v Transfield* [1999] NSWSC 996 per Einstein J.

## Guidelines for lawyers in mediations

### 1. Role

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 merely advising the client before the mediation, to representing the client during the mediation and undertaking all communications on behalf of the client.

### 2. Ethical issues

#### 2.1 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 and any relevant Rules of Court, a lawyer must maintain the confidentiality required by the parties and by any mediation agreement.

#### Comment

- (a) A lawyer must not disclose any information disclosed during the mediation unless all parties to the mediation agree, or if required to by law.
- (b) 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.
- (c) 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.
- (d) 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.

#### 2.2 Good faith

Lawyers and clients should act, at all

times, in good faith to attempt to achieve settlement of the dispute.

#### Comment

- (a) 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.
- (b) 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.

### 3. When to mediate

Timing is an important factor in establishing a framework conducive to settlement. 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 mindsets of the parties.

#### Comment

- (a) Most cases are suitable for mediation at some point in time. Costs of litigation are a persuasive factor in favour of mediation.
- (b) Mediation may be undertaken at any time and should be considered:
  - (i) before proceedings are commenced;
  - (ii) after pleadings have closed, but before the costs of discovery are incurred;
  - (iii) before an action is set down for trial and trial costs are incurred; and
  - (iv) after a trial and before judgment.

### 4. Selecting the mediator

Choosing the right mediator will enhance clients' settlement prospects in the mediation.

#### Comment

When selecting a mediator:

- (a) first look to a mediator's skill and experience as a mediator, and then to any additional qualifications that may be helpful, such as expertise in the subject matter of the dispute or law;
- (b) consider the role of the mediator and whether a particular style of mediation may be better suited to the dispute.

### 5. Preparing for the mediation

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

#### Comment

- (a) Litigation defines the issues by pleadings. Before a mediation, a lawyer should, as well as assessing the legal merits of the case, consider the dispute in commercial terms and in the light of the client's business, personal and commercial needs, generate possible practical options for resolution.

#### 5.1 Preparing your client

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

- (i) undertaking a risk analysis and linking risks to the client's interests;
- (ii) explaining the nature of mediation;
- (iii) identifying interests; and
- (iv) developing strategies to achieve final outcomes.

#### Comment

- (a) Assist clients to complete a risk analysis. A draft risk analysis may be discussed with clients and then reviewed with the legal team. A risk analysis will assist in determining a range of options for settlement.
- (b) Discuss and explain the mediation process and role of the mediator to clients. In particular, discuss issues such as confidentiality and the nature of 'without prejudice' negotiations.
- (c) Help clients identify positions and interests and the best ways to achieve outcomes. It is useful to consider the interests of other parties and ways to overcome any tactics or objections likely to arise.
- (d) Decide who will do the talking in the mediation. Often, with appropriate preparation, clients will be in the best position to convey facts and other non-legal issues. If so, a lawyer may need to assist clients with preparation for their involvement.

#### 5.2 Conference with the mediator

Pre-mediation conferences convened by the mediator are a good opportunity to establish a relationship with the mediator and arrange any practical matters relevant to convening the mediation.

**Comment**

(a) *The first mediation conference is usually between the lawyers and the mediator and covers 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.*

*Rules about confidentiality must be established and documented. One option 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.*

(b) *A second preliminary conference can take place immediately before the mediation at which the mediator can meet individually with the parties and their lawyers.*

*This 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 mediation commences.*

**6. At the mediation**

Mediation is not an adversarial process to determine who is right and who is wrong. 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.

**6.1 Skills**

The skills required for a successful mediation are different to those desirable in advocacy. It is not the other lawyer or mediator that needs to be convinced; it is the client on the other side of the table. A lawyer who adopts a persuasive rather than adversarial or aggressive approach, and acknowledges the concerns of the other side, is more likely to contribute to a better result.

**Comment**

(a) *Arguments should be presented in appropriate terms and language that is appealing to the other party.*

*Legal arguments or language are not always necessary.*

(b) *Listening carefully, even to material*

*which may be irrelevant to litigation, is conducive to setting an atmosphere for settlement. It is helpful to summarise arguments made against clients to show that the other party's position has been heard and understood.*

**6.2 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.

**Comment**

(a) *Never mislead and be careful of puffing.*

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

(c) *If possible, bring a draft settlement agreement to the mediation, or at least have a draft available on-line.*

(d) *If it appears that the mediation will not produce a full settlement, try to obtain a written agreement on as many issues as possible. This may advance future negotiations or shorten a trial and leaves parties feeling like they have at least achieved something useful. It is also useful for future purposes to draft a list of issues on which agreement has not been reached.*

**7. Post-mediation**

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

**Comment**

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

(b) *A lawyer should address, with the mediator and with the other parties, any objections clients may have to the scope of what is reported by the mediator*