

The Law Society of New South Wales Rules for Mediation and Model Clause

	Page
1 Mediation Guidelines	2
2 Model Clause - Mediation	8

This publication provides general information and should not be relied upon as a substitute for legal or other professional advice. While every care has been taken in the production of this publication, no legal responsibility or liability is accepted or implied by the authors or The Law Society of New South Wales, and any liability is expressly disclaimed.

© 2023 The Law Society of New South Wales ACN 000 000 699. All rights reserved.

THE LAW SOCIETY OF NEW SOUTH WALES MEDIATION GUIDELINES

Authority for Guidelines

Where an Agreement, submission or reference provides for mediation under the Mediation Guidelines of The Law Society of New South Wales (the **Guidelines**), the parties are taken to have agreed that the mediation is to be conducted in accordance with the:

- a. Mediation Guidelines of The Law Society of New South Wales; and
- b. National Mediator Standards.

Please note that definitions are set out in Rule 20.

PART I	PRELIMINARY
---------------	--------------------

RULE 1 Appointment of Mediator

- 1.1 The parties appoint the Mediator to mediate the dispute in accordance with these Guidelines.
- 1.2 If the parties in dispute do not agree on a Mediator, either party may request the President of the Law Society to appoint a Mediator. The parties must in good faith join in the Mediation which must be conducted in accordance with these Guidelines.

RULE 2 Call for Appointment

- 2.1 If a notice of dispute has been given under an Agreement, and the dispute has not settled, any party can in writing request the Law Society President, to appoint a Mediator. The request is to be made with:
 - a. A copy of the Notice of Dispute; or in the event that the parties have waived service of the Notice of Dispute, a copy of the waiver.
 - b. A copy of the Agreement containing the submission to Mediation.
 - c. The names and addresses of the parties to the dispute; and
 - d. A brief description of the nature of the dispute with enough particulars of the dispute to allow the Law Society President to appoint an appropriate Mediator.
- 2.2 The Law Society President is to appoint a Mediator within ten (10) days of the receipt of the request and its associated material. This time limit may be extended if supplied material does not, in the opinion of the Law Society President give enough information of the dispute.

RULE 3 Appointment Fee

- 3.1 The parties shall deposit with the Law Society the prescribed Appointment Fee.

- 3.2 The Appointment Fee shall be such sum as is prescribed by the Law Society at the relevant time.
- 3.3 There can be no appointment of a Mediator until the Appointment Fee has been paid to the Law Society.

RULE 4 Timeframe

- 4.1 The mediation will be held within fourteen (14) days of the selection of the Mediator, or within such other period as the parties may agree.
- 4.2 The Mediator must, within seven (7) days of receiving written advice of his or her appointment, give the parties written notice of his or her appointment, and if the Mediator deems appropriate, schedule a preliminary conference with each party.
- 4.3 The Mediator must advise parties of the Mediation Agreement (including the costs of the Mediation) prior to the Mediation. The Mediation Agreement is to be signed by all parties to the mediation and the Mediator.

RULE 5 Appointed Mediator Failing to Act/ Loss of Mediator

- 5.1 The Law Society President must appoint a replacement Mediator, within a reasonable time of:
- a. Receiving written notice from the Mediator that he or she does not accept the appointment.
 - b. Being called on by a party if the Mediator has not commenced the mediation within fourteen (14) days of his or her appointment; or
 - c. Being advised of the death of a Mediator, or a Mediator having become incapable of proceeding with the mediation because of legal incapacity, ill-health, or other actual incapacity.

RULE 6 Release of the Law Society

- 6.1 Except in respect of any fraud, the parties release the Law Society, its officers, employees, and agents from any liability of any kind whatsoever arising out of, or in connection with the Mediator's appointment, the mediation, or any agreement reached at mediation.

PART II	THE MEDIATION
----------------	----------------------

RULE 7 Role of the Mediator

- 7.1 The Mediator will be impartial and objective. The Mediator will assist the parties to attempt to resolve the matter by helping them to systematically isolate the relevant issues, develop options for resolution of these issues, explore the usefulness of these options, and meet their interests and needs.
- 7.2 The Mediator may meet with the parties together or separately during the mediation.

7.3 The Mediator will not impose a result on any party or make decisions for any party.

7.4 The Mediator will not, unless the parties agree in writing to the contrary, obtain from any independent person advice or an opinion as to any aspect of the dispute and then only from such person or persons and upon such terms as are agreed between the parties.

RULE 8 Conflict of Interest

8.1 The Mediator must, prior to the commencement of the Mediation, disclose to the parties or his, her or their legal representatives any prior dealings with any of the parties and any interest the Mediator has in the dispute.

8.2 If in the course of the Mediation the Mediator becomes aware of any circumstances that might reasonably be considered to affect the Mediator's capacity to act impartially, the Mediator must immediately inform the parties of these circumstances. The parties will then decide whether the Mediation will continue with that Mediator or with a new Mediator to be appointed by the parties or by the President of the Law Society.

RULE 9 Cooperation by the Parties

9.1 The parties must cooperate with the Mediator and each other during the mediation and will comply with the reasonable requests and directions of the Mediator to promote the efficient and expeditious resolution of the dispute.

RULE 10 Conduct of the Preliminary Conference

10.1 As part of the mediation, the Mediator may schedule a preliminary conference for the purpose of clarifying the issues in dispute, making arrangements for the mediation, establishing a timetable for exchange of information including the exchange of experts' reports, the meeting of experts and the subsequent preparation of joint experts' report and arranging service on the Mediator prior to the mediation of any such outlines and reports.

10.2 The parties and their duly represented authorised representatives must attend the preliminary conference if one is convened by the Mediator.

10.3 The mediation including all preliminary steps, will be conducted in such manner as the Mediator considers appropriate having due regard to the nature and circumstance of the dispute and the agreed goal of an efficient and expeditious resolution of the dispute.

RULE 11 Authority and Representation

11.1 The parties are expected to attend the preliminary conference and mediation in person. If a party is not a natural person, it must be represented at the preliminary conference and the mediation by a person with full authority to make agreements binding on it for the purpose of settling the dispute.

11.2 At the mediation each party may have one or more legally qualified persons to assist and advise them.

11.3 The attendance of any support person with a party is to be by agreement between the

parties prior to the mediation.

RULE 12 Communication between the Mediator and the Parties

- 12.1 Any information disclosed to a Mediator in private is to be treated as confidential by the Mediator unless the party making the disclosure states otherwise.
- 12.2 The Mediator may meet as frequently as the Mediator deems appropriate with the parties together or with a party alone, and in the latter case the Mediator need not disclose the meeting to the other party.
- 12.3 The Mediator may communicate with any party orally and/or in writing.

RULE 13 Confidentiality in Mediation

- 13.1 The parties and all participants in the Mediation will not disclose to anyone not involved in the mediation any information or document given to them during the mediation unless required by law to make such disclosure. This does not prevent the reporting to the Office of the Legal Services Commissioner of any alleged breach of the Solicitors' Guidelines or of other unprofessional conduct by a lawyer, Mediator, or legal representative.
- 13.2 The participants agree that the following will be privileged and will not be disclosed in, or be the subject of a subpoena to give evidence or to produce documents, in any proceedings in respect of the matter:
 - Any settlement proposal whether made by a party or the Mediator.
 - The willingness of a party to consider any such proposal.
 - Any statement made by a party or the Mediator during the mediation.
 - Any information prepared for the mediation.

RULE 14 Subsequent Proceedings

- 14.1 The Mediator will not accept an appointment or act for any party in relation to any proceedings concerning the dispute.

RULE 15 Suspension or Termination of the Mediation

- 15.1 A party may withdraw from the mediation at any time after consultation with the Mediator.
- 15.2 The Mediator has the discretion to terminate or suspend the process at any time and is not obliged to give reasons for doing so to the parties or either of them.
- 15.3 Separate to the Mediator's discretion under Clause 15.2 above, the Mediator may terminate the Mediator's involvement in the mediation if, after consultation with the parties, the Mediator feels unable to assist the parties to achieve resolution of the dispute.

RULE 16 Settlement

16.1 If agreement is reached at the mediation, the terms of the agreement may be written down and signed by the parties (or their legal representatives or other authorised agents) before they leave the mediation.

RULE 17 Enforcement

17.1 In the event that part or all of the dispute is settled either party will be at liberty to enforce the terms of the settlement by judicial proceedings.

RULE 18 Exclusion of Liability and Indemnity

18.1 The Mediator will not be liable to a party for any act or omission in the performance of the Mediator's obligations under this agreement unless the act or omission is fraudulent.

18.2 The parties jointly and severally indemnify the Mediator against any claim for any act or omission in the performance of the Mediator's obligations under this agreement unless the act or omission is fraudulent.

RULE 19 The Cost of the Mediation

19.1 The parties will share equally and will be jointly and severally liable to the Mediator for the Mediator's fee for the mediation subject to the terms of any order to the contrary.

19.2 The Mediator's fee shall be such sum as the Mediator prescribes.

19.3 The Mediator may, at any time and from time to time, require each party to deposit with the Mediator such sums as the Mediator considers appropriate to meet the Mediator's fees and disbursements.

19.4 The Mediator may decline to embark upon or continue the mediation until all such deposits are made.

PART III

GENERAL

RULE 20 Definitions

In these Guidelines:

'Agreement' means any agreement between the parties including a submission of present or future disputes to Mediation.

'Appointment Fee' has the meaning specified in Rule 3.2.

The **'costs of the mediation'** includes the fees and expenses of the Mediator, any Appointment Fee or other fee payable to the Law Society, the room hire and the costs and disbursements of the parties.

'days' means normal working days and excludes Saturdays, Sundays, and public holidays in NSW.

'dispute' means the disputed issues which are referred to mediation.

'Law Society' means The Law Society of New South Wales.

‘Mediation Agreement’ means the written terms of engagement proposed by the Mediator to bind the parties to these Guidelines and acknowledge the Mediator’s jurisdiction to mediate the dispute.

‘Mediator’ means a neutral third party who assists parties to a dispute identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. A mediator has no advisory or other determinative role in regard to the content of the dispute or the outcome of its resolution but may advise on or determine the process of mediation whereby resolution is attempted.

‘written’ or **‘writing’** includes anything sent by facsimile transmission or by electronic mail irrespective of whether or not such thing is in fact received or, if received, printed at or by the address to which that thing is sent, provided that the sender has both printed out a copy of the thing sent and can verify that the address used was an address specified for the electronic reception of information.

RULE 21 Counting of Days

- 21.1 For the purpose of counting days under these Guidelines, the first day is the day following the day when notice is first actually received or deemed to be received under paragraph 21.2 whichever is earlier. If the last day is a non- business day at the residence or place of business of the addressee, then the period is extended until the first business day which follows.
- 21.2 Any notice, which is posted, is deemed to have been received on the second day following the day of posting. Any notice, which is sent by electronic transmission is deemed to have been received on the day of transmission.

The Law Society of New South Wales
Model Clause – Mediation

1. If a dispute arises in relation to or is in any way connected with this contract (“**the Dispute**”), apart from an application for urgent interlocutory relief, no party must commence court or arbitration proceedings relating to the Dispute unless that party has participated in a mediation in accordance with paragraphs 2 and 3 of this clause.
2. A party to this contract claiming that a Dispute has arisen must give written notice specifying the nature of the Dispute (“**the Notice**”) to each other party to the contract. The parties must then participate in mediation in accordance with this clause.
3. If the parties do not agree within seven days of receipt of the Notice (or within a longer period to which they have agreed in writing) on:
 - 3.1 the procedures to be adopted in a mediation of the Dispute; and
 - 3.2 the timetable for all the steps in those procedures; and
 - 3.3 the identity and fees of the mediator; then:
 - 3.4 any party may request the President of The Law Society of New South Wales to:
 - 3.4.1 appoint the Mediator; and
 - 3.4.2 determine the mediator's fees; and
 - 3.4.3 determine the proportion of those fees to be paid by each party (to be in equal shares unless otherwise agreed by the parties);
 - 3.5 the parties must mediate the Dispute:
 - 3.5.1 with the mediator appointed under paragraph 3.4;
 - 3.5.2 with a genuine commitment to participate; and
 - 3.5.3 in accordance with the Mediation Guidelines of The Law Society of New South Wales.
4. If a party commences proceedings relating to the Dispute other than for urgent interlocutory relief (“**the Proceedings**”), that party consents to an order under section 26 of the *Civil Procedure Act 2005* (NSW) that the Proceedings be referred to mediation by a mediator appointed under paragraph 3.4 of this clause.
5. If a party:
 - 5.1 refuses to participate in a mediation of the Dispute to which it earlier agreed; or
 - 5.2 refuses to comply with paragraph 3.5 of this clause, a Notice having been served; then
 - 5.3 that party is not entitled to recover its costs in any court proceedings or arbitration relating to the Dispute, even if that party is successful; and
 - 5.4 that party consents to an order of the Supreme Court of New South Wales in accordance with paragraph 3.5 of this clause.