

GUIDELINES FOR MEDIATORS

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1. INTRODUCTION

- 1.1 The New Zealand Law Society (Society) has developed these guidelines to serve as a general framework for the practice of mediation. The guidelines are intended to apply to all types of mediation.
- 1.2 The guidelines are intended to perform three major functions:
 - (a) to serve as a guide for the conduct of mediators;
 - (b) to inform the mediating parties of what they should expect; and
 - (c) to promote public confidence in mediation as a process for resolving disputes.
- 1.3 These guidelines draw on existing codes of conduct for mediators and are based on the Guidelines for Mediators developed by the Law Council of Australia and the Australian National Mediator Standards.
- 1.4 There are a range of different mediation models in use across New Zealand. These guidelines set out minimum requirements and recognise that some mediators may choose to develop or comply with additional standards or requirements.
- 1.5 Where mediators practice under existing legislative frameworks and there is a conflict between the requirements of these guidelines and any legislation, the legislative requirements will override those of the guidelines to the extent of any inconsistency.

2. PROCESS

- 2.1 Mediation is a process in which the parties, with the support of an impartial mediator, identify issues, develop options, consider alternatives and make decisions about future actions and outcomes. The mediator facilitates the resolution of a dispute by using problem solving techniques to enable the parties to reach their own agreement.
- 2.2 Mediation is not a substitute for legal and/or other expert advice, or individual counseling or therapy. Mediation may not be appropriate for all parties or all types of disputes.

- 2.3 Mediators do not advise upon, evaluate or determine disputes. The primary role of the mediator is to facilitate the voluntary resolution of a dispute by the parties themselves.
- 2.4 A mediator should explore with the parties prior to the mediation commencing that each party will have the necessary authority to conclude any settlement.
- 2.5 A mediator should describe and explain the mediation process that is to be used and explain to the parties of the mediator's role in relation to the provision of advice. For example, if the mediator is also a lawyer, he or she should inform the parties that he or she cannot provide legal advice.
- 2.6 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 when reaching an agreement to resolve a dispute.

3. *POWER AND SAFETY ISSUES*

- 3.1 Some disputes may not be appropriate for mediation because of power imbalance, safety, control and/or intimidation issues.
- 3.2 If at any time abuse is present, implied or threatened, the mediator shall take appropriate measures to ensure the safety of the parties. Options include:
 - (a) requiring separate sessions with the parties;
 - (b) enabling a friend, representative, advocate or legal representative to attend the mediation; and
 - (c) suspending or terminating the mediation with appropriate steps to protect the safety of the parties.

4. *IMPARTIALITY*

- 4.1 A mediator must 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.
- 4.2 A mediator must avoid conduct that gives the appearance of partiality or prejudice such as spending more time with one party than another without good reason and adopting different modes of address.
- 4.3 Even if the parties 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.

5. *CONFLICTS OF INTEREST*

- 5.1 Before the mediation begins, the mediator must disclose all actual and potential conflicts of interest known to the mediator. The mediator should:
- (i) discuss any circumstances that may, or may be seen to, affect the mediator's independence or impartiality; and
 - (ii) be transparent at all times about the mediator's relations with the parties in the mediation process.
- 5.2 Disclosure must also be made if conflicts arise during the mediation.
- 5.3 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.
- 5.4 The mediator must be certain of the parties' agreement and the mediator's ability to undertake the mediation with independence and neutrality to ensure impartiality.
- 5.5 After the mediation, the mediator must not act in such a manner as to raise legitimate questions about the integrity of the mediation process.
- 5.6 Conflicts of interest may arise in recommending the services of others.
- 5.7 Interests which should be disclosed include any association with a party, advisor or representative of a party, which could reasonably be seen to affect the impartiality of the mediator.
- 5.8 The mediator should disclose to the parties 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 a mediator without the fully informed consent of both parties.
- 5.9 The mediator should not establish a professional relationship with one of the parties in relation to the same dispute.

6. *COMPETENCE*

- 6.1 A mediator must not mediate unless the mediator has the relevant skills, knowledge and necessary competence to do so and to satisfy the reasonable expectations of the parties.
- 6.2 A person who agrees to act as a mediator holds out to the parties and the public that he or she has the skills, knowledge and competence to mediate effectively.
- 6.3 A mediator should undertake regular professional supervision to address matters relating to skills development, conceptual and professional issues, ethical dilemmas, and to ensure ongoing emotional health.
- 6.4 Mediators should participate in continuing professional development training.

7. CONFIDENTIALTY

- 7.1 Subject to the requirements of the law, a mediator must maintain confidentiality required by the parties.
- 7.2 As the parties' expectations regarding confidentiality are important, the mediator should discuss those expectations with the parties before undertaking the mediation process.
- 7.3 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:
- (a) the mediator is given permission to do so by all persons attending at the mediation with an interest in the preservation of the confidence; or
 - (b) the mediator is required by law to do so.
- 7.4 If the mediator intends to hold private sessions with a party, the mediator should before such sessions discuss with the parties the confidentiality attaching to them.
- 7.5 The mediator should render anonymous all indentifying information when materials emanating from a mediation are used for supervision, mentoring or training purposes.

8. PROCEDURAL FAIRNESS

- 8.1 The mediator will support the parties to reach any agreement freely, voluntarily, without undue influence, and on the basis of informed consent.
- 8.2 The mediator will provide each party with an opportunity to speak and to be heard in the mediation, and to articulate his or her own needs, interests and concerns.
- 8.3 If the mediator, after consultation with a party, believes that a party is unable or unwilling to participate in the process, the mediator may suspend or terminate the mediation.
- 8.4 The mediator should encourage and support balanced negotiations and should understand how manipulative or intimidating negotiating tactics can be employed by parties.
- 8.5 If parties require additional information or assistance, the mediator must ensure that parties have sufficient time and opportunity to access sources of advice or information.
- 8.6 Parties should be encouraged, where appropriate, to obtain independent professional advice or information.

- 8.7 The mediator has a duty to support the parties in assessing the feasibility and practicality of any proposed agreement in both the long and short term.
- 8.8 The mediator will not pressure parties into an agreement or make a substantive decision on behalf of any party.

9. *TERMINATION OF MEDIATION*

- 9.1 A mediator may terminate the mediation if the mediator considers that:
- (a) any party is abusing the process; or
 - (b) there is no reasonable prospect of settlement.
- 9.2 The mediator, if appropriate, should inform the parties and may terminate the mediation if:
- (a) 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
 - (b) the mediator considers that continuing the mediation is unlikely to result in a settlement.

10. *RECORDING SETTLEMENT*

- 10.1 If the mediation results in a settlement between the parties, the mediator should encourage the parties to continue the mediation until the parties have:
- (a) recorded the terms of settlement in writing; and
 - (b) addressed any enforceability issues.
- 10.2 Agreement to record the terms of any settlement in writing should be made prior to the commencement of the mediation.
- 10.3 The mediator should be cautious about direct involvement in drafting the terms of agreement, as their involvement may be construed as providing legal advice.
- 10.4 The mediator should assist the parties to take whatever steps may be necessary to formalise any settlement agreement, and satisfy themselves regarding its enforceability.

11. *PUBLICITY AND ADVERTISING*

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

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

12. CHARGES FOR SERVICES

- 12.1 As early as practicable, and before the mediation begins, a mediator will explain to the parties any fees to be charged for the mediation and any related costs. The mediator must also obtain the agreement from the parties as to how any fees and related costs will be shared and the method of payment.
- 12.2 The better practice is to record in writing the arrangements in respect of fees and costs.
- 12.3 A mediator should not agree to a fee which is contingent upon the result of the mediation or amount of settlement.