

## Model Mediation Rules

### Introduction

From time to time, the Law Society receives requests for the President to nominate persons to act as arbitrators, mediators, expert determiners or some other form of third party neutral in disputes.

The Alternative Dispute Resolution (ADR) Committee is responsible for the maintenance of a list of mediators and arbitrators whom should be considered for nomination when a request is made to the President to nominate a mediator or arbitrator.

The ADR Committee has drafted a set of Model Mediation Rules which can be used by the parties to a mediation. The Committee believes that these Model Mediation Rules will be a useful tool for explaining the process to the parties and for regulating the process.

The parties to a mediation where the mediator is nominated by the President of the Law Society are not required to use these Model Mediation Rules but may wish to do so.

### **Functions of the mediator**

- 1 The mediator will assist the parties to resolve their dispute (“the Dispute”) by agreement between them.
- 2 “The mediation” includes all steps taken to attempt to resolve the Dispute by mediation after the appointment of the mediator.
- 3 The mediator will not advise a party, make decisions for a party or impose a solution on the parties.

### **Conflicts of Interest**

- 4 The mediator must, to the best of the mediator’s knowledge, disclose to the parties any prior dealings the mediator has had with either of them and any interest the mediator has in the Dispute or the parties.
- 5 If, during the course of the mediation, the mediator becomes aware of circumstances that might reasonably be considered to affect the mediator’s capacity to act impartially, the mediator must, to the extent that the mediator may properly do so, immediately inform the parties of those circumstances. The parties will then confer and, if agreed, may continue with the mediation before the mediator.

### **Co-operation in the Mediation**

- 6 The parties must participate in good faith in the mediation. The parties must co-operate with the mediator and each other during the mediation to achieve a mutually acceptable resolution of the Dispute.
- 7 Each party must use its best endeavours to comply with reasonable requests made by the mediator to promote the efficient and expeditious resolution of the Dispute.

### **Authority and Representation**

- 8 If a party is a natural person, the party must attend the mediation conference. If a party is not a natural person it must be represented at the mediation conference by a person with full authority to make agreements binding on it settling the Dispute.
- 9 Each party may be accompanied by one or more other persons, including legally qualified persons, to assist and advise the party in the mediation and to perform such roles in the mediation as the party requires. The mediator

may require any person who attends the mediation to assist a party to sign an acknowledgement and undertaking as to confidentiality.

### **Conduct of the Mediation**

10 The mediation, including all preliminary steps, will be conducted in such manner as the mediator considers appropriate. Without limiting the mediator's powers, the mediator may give directions as to:

- (a) preliminary conferences prior to the mediation conference;
- (b) exchange of experts' reports, the meeting of experts and the subsequent preparation of a joint experts' report;
- (c) exchange of brief written outlines of the issues; and
- (d) provision to the mediator of any such reports and outlines.

11 The mediation conference shall be held as soon as practicable.

### **Communication between the Mediator and a Party**

12 The mediator may meet with the parties together or separately as frequently as the mediator considers appropriate.

13 Information, whether oral or written, disclosed to the mediator by a party in the absence of the other party may not be disclosed by the mediator to the other party unless the disclosing party permits the mediator to do so.

### **Confidentiality**

14 All confidential information disclosed during the mediation:

- (a) may not be disclosed except to a party or a representative of that party participating in the mediation or if compelled by law to do so or to obtain professional advice; and
- (b) may not be used for a purpose other than the mediation.

15 The mediator will:

- (a) keep confidential all information furnished by a Party to the Mediator on a confidential basis;
- (b) except with the consent of the Party who furnished such information, not disclose the information to any other Party.

## **Privilege**

- 16 Subject to Rule 21, the following will be privileged and will not be disclosed in or relied upon or be the subject of a subpoena to give evidence or to produce documents in any arbitral or judicial proceedings in respect of the Dispute:
- (a) any settlement proposal, whether made by a party or the mediator;
  - (b) the willingness of a party to consider any such proposal;
  - (c) any admission or concession or other statement or document made by a party; and
  - (d) any statement or document made by the mediator.

## **Subsequent Proceedings**

- 17 The mediator will not accept appointment as an arbitrator in or act as an advocate in or provide advice to a party to any arbitral or judicial proceeding relating to the Dispute. Neither party will take action to cause the mediator to breach this Rule.

## **Termination**

- 18 A party may terminate the mediation immediately by giving written notice to each other party and to the mediator at any time during or after the mediation conference.
- 19 The mediator may immediately terminate the engagement as mediator by giving written notice to the parties of that termination, if, after consultation with the parties, the mediator forms the view that the mediator will be unable to assist the parties to achieve resolution of the Dispute. The mediation will not be terminated in that event unless a party gives notice to that effect to each other party. The parties must appoint another mediator, where the mediation is not terminated.

## **Settlement**

- 20 If settlement is reached during the mediation, the terms of the settlement must be written down and signed by the parties and the mediator at the earliest possible time after the terms of settlement have been agreed on.

## **Enforcement**

- 21 If part or all of the Dispute is settled either party will be at liberty:
- (a) to enforce the terms of the settlement by judicial proceedings; and

- (b) to adduce in those proceedings evidence of and incidental to the settlement agreement including evidence from the mediator and any other person engaged in the mediation.

### **Exclusion of Liability and Indemnity**

- 22 To the maximum extent permitted by law, the mediator will not be liable to a party for any act or omission by the mediator in the performance or purported performance of the mediator's obligations in the mediation, except in the case of fraud. Where exclusion of liability is not permitted by law, the liability of the mediator will be limited to the costs of providing the mediation services.
- 23 The parties shall jointly and severally indemnify the mediator against all claims, except in the case of fraud by the mediator, arising out of or in any way referable to any act or omission by the mediator in the performance or purported performance of the mediator's obligations in the mediation.
- 24 No statements or comments, whether written or oral, made or used by the parties or their representatives or the mediator within the mediation shall be relied upon to found or maintain any action for defamation, libel, slander or any related complaint. These Rules may be pleaded in bar to any such action.

### **Costs**

- 25 The parties will share equally and will be jointly and severally liable to the mediator for the mediator's fees for the mediation, unless otherwise agreed. The mediator's fees will be as agreed with the mediator or, failing agreement, as determined by the President of the Law Society.
- 26 The mediator may, at any time and from time to time, require each party to deposit with the mediator such sum as the mediator considers appropriate to meet the mediator's anticipated fees and disbursements. The mediator may decline to embark upon or continue the mediation until all such deposits are made.