

Judicial Mediation Model

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Introduction and background

1. The overarching purpose of the *Civil Procedure Act 2010* and the rules of court in relation to civil proceedings is to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute. Without limiting how the overarching purpose is achieved, it may be achieved by the determination of the proceeding by the court, agreement between the parties or any appropriate dispute resolution process agreed to by the parties or ordered by the court: s 7 of the *Civil Procedure Act 2010*.
2. *Appropriate dispute resolution* is a process attended, or participated in, by a person involved in a civil dispute or a party for the purposes of negotiating a settlement of the civil dispute or the civil proceeding, or resolving or narrowing the issues in dispute. A *judicial resolution conference* is a type of *appropriate dispute resolution*. A mediation conducted by a judicial officer, often referred to as a judicial mediation, is a type of *judicial resolution conference* that is often agreed to by the parties or ordered by the court. Over the last decade, judicial mediations conducted by judicial officers of the court have become an important and vital part of how civil proceedings are managed and resolved.
3. Proceedings filed with the court will be actively case managed and, as part of that case management, available dispute resolution options, including judicial mediation, will be explored with the parties. The purpose of a judicial mediation is not limited to achieving settlement of the proceeding. Whilst that may be the main objective of the mediation, if that is not achieved, a judicial mediation can assist in the parties understanding each other's case, resolving the proceeding in part, limiting the issues for trial, resolving interlocutory disputes and reaching agreement on the conduct of the litigation.
4. This information paper sets out the judicial mediation model that is adopted by judicial officers when conducting judicial mediations ordered by the court. It should be read and considered in conjunction with the overarching obligations provided for in Part 2.3 of the *Civil Procedure Act 2010* and Practice Note SC Gen 6 *Judicial Mediation Guidelines* and any Practice Note that provides for judicial mediation or mediation, such as Practice Note SC CL 7 *Testators Family Maintenance List*, Practice Note SC CC8 *Oppressive conduct of the affairs of a company* and Practice Note SC CC1 *Commercial Court*.
5. The court recognises and supports the autonomy of the parties to engage a private mediator if they wish to do so and the critical role that private mediations play in the resolution of proceedings. However, the judicial mediation model set out in this paper is a service that may be available to the parties, and the court, if they wish to use it, as part of the overall case management of a proceeding filed with the court.

What happens after an order for judicial mediation is made?

6. Once an order for judicial mediation is made, the order will be referred to the court's *Appropriate Dispute Resolution Centre* (ADR Centre). The ADR Centre is staffed by an ADR Judicial Registrar, the ADR Registrar and a number of support staff. The ADR Centre, in consultation with judicial mediators, will allocate a judicial officer to conduct the judicial mediation, taking the following matters into consideration:
 - the type of proceeding that is to be judicially mediated;
 - the complexity and history of the proceeding, including the number and identity of the parties and their legal representatives and whether the proceeding should be co-mediated;

- the particular experience and skills of the judicial mediators available to mediate the proceeding; and
- if the proceeding, or a related proceeding, has been judicially mediated before.

After a judicial mediation is allocated

7. Once a judicial mediation has been allocated to a judicial mediator, a mediation notice from the ADR Centre will be forwarded to the parties, advising them of the name of the judicial mediator and the proposed time and date of the mediation. In proposing a date for the mediation, the ADR Centre will be guided by the mediation order and the availability of judicial mediators but will also consider the most appropriate timing of the mediation, taking into account, amongst other things, other orders made in the proceeding and whether the proceeding should be mediated urgently.
8. As part of the judicial officer's preparation for the mediation, the judicial mediator will consider, soon after the mediation is referred, what information and material the judicial mediator might require before the mediation and canvass this with the parties prior to the mediation. In some matters, the judicial mediator may be assisted by the parties exchanging short issues papers and other documents, such as a confidential report by each party to the judicial mediator. Some practitioners exchange issue papers as a matter of course. Parties will be encouraged, in these documents, to address not only the issues in the proceeding, but how those issues might be resolved by agreement between the parties.
9. The parties should attend the mediation on the basis that, prior to the mediation, the judicial mediator has read the court file and, if provided in a timely manner, a party's issues paper and any other material provided to the judicial mediator.
10. The judicial mediator who conducts the mediation will not discuss what happens at a mediation with the judicial officer who referred the proceeding to mediation, or any other judicial officer.

Arriving at the mediation

11. Upon arriving at the mediation, a member of the ADR Centre will escort each party to their private room (if such rooms are available, depending on the number of parties attending the mediation) which will be able to be used exclusively by them for the duration of the mediation. The officer will also show the parties the location of bathrooms and kitchen facilities. All of these facilities may not be available if the mediation is conducted on circuit.

Conduct of the mediation

12. The judicial mediator may choose to meet each of the parties separately in their private room prior to the commencement of the mediation joint session to obtain further information from the parties and discuss any recent issues that may have arisen since the mediation order was made. Alternatively, the judicial mediator may decide to initially meet with all of the parties together in a joint session to introduce the mediation and thereafter meet with the parties separately in their private rooms.
13. At, or prior to, the commencement of the mediation, the judicial mediator will inform the parties:

- that any matter discussed with the judicial mediator during a private session will not be communicated by the judicial mediator to another party unless authorised to do so;
 - of the confidential nature of the mediation;
 - that the mediation is conducted on a 'without prejudice' basis and refer the parties to s 131 of the *Evidence Act 2008* and s 67 of the *Civil Procedure Act 2010*; and
 - that the judicial mediator will report to the judicial officer who referred the proceeding to judicial mediation only the outcome of the mediation.
14. The role of the judicial mediator is to facilitate discussion between the parties to identify issues, develop options, consider alternatives, and try to reach an agreement about some issues or the whole dispute. The judicial mediator has a duty to act impartially and to provide information that helps parties make good decisions without acting as an advocate for either party. The judicial mediator is responsible for deciding how best to conduct the mediation and, in consultation with the parties, will customise the mediation on a case by case basis with particular reference to the overarching purpose provided for in s 7 of the *Civil Procure Act 2010*. Parties should expect that, during the mediation, the judicial mediator will:
- regularly explain, if necessary, the stages of the mediation process to the parties and make them feel as comfortable and at ease as possible;
 - be patient, not inappropriately rush the mediation and keep the mediation process flowing and on track without being overly rigid and inflexible;
 - talk and listen to the parties, including the litigants themselves, and understand and identify their goals and key issues and adapt the mediation process, as far as possible, accordingly;
 - encourage the parties to discuss their underlying interests and to consider their legal, financial, business and reputational risks inherent in conducting the litigation;
 - take a constructive approach to the mediation and to communication between the parties;
 - suggest possible ways to resolve issues and promote settlement;
 - be persistent when negotiations become difficult and assist the parties to deal sensibly with challenges that arise during the mediation;
 - ask questions of the parties that raise issues and test their case;
 - discuss the likely cost of running the litigation and what costs might be recoverable;
 - be innovative in discussing and promoting settlement with the parties, which may extend beyond resolution of the legal issues in dispute;
 - if a settlement of the proceeding (or part of the proceeding) cannot be achieved, explore whether the issues for trial can be narrowed, any interlocutory disputes can be resolved and if agreement can be reached on the conduct of the litigation; and

- adjourn the mediation if the mediation ends without agreement but there is potential for a settlement to be reached.
15. If a settlement is reached at the mediation, the judicial mediator will encourage the parties to prepare and sign terms of settlement or heads of agreement before the parties leave the mediation. If the parties have a form of terms that they would be proposing for this purpose, they are strongly encouraged to bring these to the mediation, preferably in electronic format, so that any necessary changes can be made and the document signed at the conclusion of the mediation.
 16. If a settlement is reached, the judicial mediator may discuss with the parties the most efficient method of finalising the proceeding. This may be by, for example, the parties filing consent orders providing for the proceeding to be dismissed.
 17. If the judicial mediator is of the opinion that the mediation should be adjourned, the judicial mediator may adjourn to a telephone conference to enquire about on-going negotiations and to see if the judicial mediator is able to assist the parties to reach agreement or, alternatively, adjourn to another mediation date convenient to the parties and the judicial mediator.

Reporting the outcome of the mediation

18. At the conclusion of the mediation, or as soon as is possible thereafter, the judicial mediator (or the ADR Centre) will report to the judicial officer who referred the proceeding to judicial mediation, only the outcome of the mediation, that is, the proceeding, or part of the proceeding, has been settled or not settled.