



# Supreme Court of Victoria

## Practice Note SC Gen 6

### Judicial Mediation Guidelines

#### 1. INTRODUCTION

- 1.1 The Chief Justice has authorised the issue of the following Practice Note.
- 1.2 The purpose of this Practice Note is to set out the guidelines for the referral of civil proceedings to judicial mediation and the procedures for the conduct of judicial mediations.

#### 2. COMMENCEMENT

- 2.1 This Practice Note was issued on 30 January 2017 and commences on 30 January 2017 and will apply to all referrals to judicial mediation made on or after that date.

#### 3. DEFINITIONS

- 3.1 In this Practice Note:  
*Judicial officer* includes a Judge of the Court, Associate Judge, or Judicial Registrar

#### 4. REFERRAL TO JUDICIAL MEDIATION

- 4.1 The Supreme Court of Victoria is committed to resolving disputes in the most efficient manner possible, including the use of non-adjudicative processes. The use of private mediation practitioners has been and remains critical to the administration of justice in Victoria. The Court will continue to encourage, and where appropriate direct, parties to engage in private mediation in the majority of civil proceedings coming before the Supreme Court.
- 4.2 Under s 66 of the *Civil Procedure Act 2010* the Court is authorised to order a judicial resolution conference which includes judicial mediation.
- 4.3 Judicial mediation is not a substitute for mediation by appropriately qualified private mediators, rather it is another option that may be employed in appropriate cases.

- 4.4 A matter may be referred by the Court to judicial mediation at any stage in the proceeding under Order 50 of the *Supreme Court (General Civil Procedure) Rules 2015*.
- 4.5 Under s 68(1) of the *Civil Procedure Act 2010*, a judicial officer acting as a judicial mediator has the same immunity as a judge acting judicially.
- 4.6 A matter referred to judicial mediation will usually have one or more of the following features:
- an earlier unsuccessful private mediation;
  - one or more parties with limited resources;
  - a substantial risk that the costs and time of a trial would be disproportionately high compared to the amount in dispute or the subject matter of the dispute;
  - an estimated trial length that would occupy substantial judicial and other court resources; or
  - aspects that otherwise make it in the interests of justice that the matter be referred to judicial mediation.
- 4.7 There are proceedings which, as a matter of policy, may not be appropriate for judicial mediation. The following disputes will not ordinarily be referred for judicial mediation:
- cases involving the resolution of a matter of public importance which, in the public interest, ought to be heard in open court;
  - cases in which the Court is to review the exercise of a statutory power or discretion;
  - cases in which the commission of a crime or serious misconduct is alleged in the context of a civil proceeding; and
  - cases in which there is a litigant in person (unless that litigant has representation for the purposes of the mediation).

## **5. PREPARATION**

- 5.1 Directions regarding preparation for a judicial mediation will be made at a preliminary conference or conveyed to the parties by a court officer.
- 5.2 The parties will be told when and where the mediation will take place and who is to attend. Parties will usually be provided with a statement of the proposed course of the mediation.
- 5.3 Parties will be informed prior to the commencement of a mediation of any pre-conditions, expectations or particular requirements. These may include a requirement to provide specified documents and other information, position papers or confidential offers.

## **6. CONFIDENTIALITY**

- 6.1 Parties and other participants are to protect the confidentiality of all that is said and done by any person in the course of the conduct of a mediation. Parties and practitioners are also referred to s 131 of the *Evidence Act 2008* and s 67 of the *Civil Procedure Act 2010*.

- 6.2 It will be the usual practice of the mediator to destroy all materials provided to or prepared by the mediator and any other court officer participating in the mediation, following completion of the mediation, whether successful or not.

## **7. ATTENDANCE AT MEDIATIONS**

- 7.1 A mediator may authorise the attendance at a mediation of persons other than the parties and their legal representatives. Participation of all persons in the mediation will be under the direction and control of the mediator.
- 7.2 In the absence of the mediator's express authorisation to the contrary, it is expected that the mediation will be attended by parties or representatives of the parties who have full authority to settle the proceeding. Participation by telephone or video-link will be allowed only in exceptional circumstances.
- 7.3 The mediator will inform the parties of the identity of all attendees prior to the commencement of the mediation.

## **8. LEGAL ADVICE OR ASSISTANCE**

- 8.1 A mediator will not evaluate issues in dispute or provide legal advice to parties, and will not assist with the preparation of any terms of settlement.

## **9. MEETING SEPARATELY WITH THE PARTIES- CAUCUSING**

- 9.1 Mediation styles and practices will differ between judicial mediators. Some mediators may be prepared to caucus, depending on the nature and circumstances of the case. Other mediators may not be prepared to do so.
- 9.2 A mediator will not meet separately with a party and their legal representatives, or with the legal representatives of a party, in the absence of some or all of the other parties, without the express approval of all parties to the mediation.
- 9.3 Information provided by a party to a mediator in a separate session will not be disclosed to any other party unless the mediator has been expressly authorised to do so. This will not restrict the mediator from terminating the mediation upon receiving information which by its nature is open to an interpretation of illegal, improper or unethical conduct.

## **10. ADJOURNMENT**

- 10.1 A mediator may adjourn the mediation to continue at a later date, either under the conduct of the same or a different mediator.
- 10.2 If the proceeding fails to settle at mediation, the mediator may give directions for the further conduct of the proceeding in their capacity as a Judge, Associate Judge or Judicial Registrar.

## **11. SUBSEQUENT TRIAL**

- 11.1 No member of the Court will hear and determine an issue in a proceeding in which that person acted as a mediator, or where he or she has become acquainted with any confidential information relating to the mediation of the dispute (e.g. where confidential information was provided in preparation for a mediation that was subsequently conducted by another judicial officer).

## **AMENDMENT HISTORY**

30 January 2017: This Practice Note was issued on 30 January 2017 and replaced Practice Note No 2 of 2012.

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30 January 2017