



ASSOCIATION EUROPÉENNE DES AVOCATS  
EUROPEAN ASSOCIATION OF LAWYERS

# Guidelines for Lawyers in Mediation



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**Mediation Committee of AEA-EAL**

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# INTRODUCTORY NOTE



AEA-EAL's Mediation Committee has developed these guidelines to give assistance to lawyers representing their clients in mediation disputes.

The main purpose of this guide is to raise awareness among lawyers with respect to mediation and its benefits and to give best practice guidance, recommendations, and instructions. This Guideline will help the lawyers to recognize opportunities, benefits, and various professional challenges that stem from the use of mediation.

It is important to mention, that, it is not intended that the guidelines derogate in any way from the usual obligations imposed on lawyers by ethical and professional conduct rules. The objective is to demonstrate why mediation could be an important and useful process for lawyers and their clients, and how mediation could be used to remedy certain problems occurring in lawyers' everyday practice.

This guideline is not unchangeable and It is expected to be reviewed from time to time.



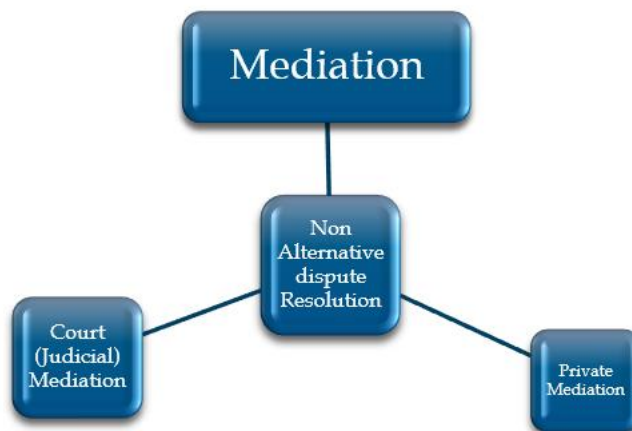
# MEDIATION



Mediation is defined as a process, notwithstanding its name, which two or more parties use to resolve their dispute through a mutual agreement with the support of a mediator in spite of whether the process has commenced at the parties' initiative or on the basis and in accordance with the law. There are two types of mediation: private and court-annexed mediation.

Private Mediation takes place without any lawsuit being filed, on the basis of the parties' initiative, based on a mediation agreement.

Court Mediation is not mandatory if it involves a case that does not fall under the categories when a judge can unilaterally refer the case to court mediation, or if the parties had signed a mediation agreement before the dispute arose and the private mediation procedure was undertaken but parties failed to achieve a mutual agreement. In such cases, court mediation is only upon the parties' consent.



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## WHAT TYPES OF CASES CAN BE MEDIATED?

Any civil and commercial (business) dispute can be resolved through mediation. These include family, inheritance, and neighborhood disputes, disputes regarding obligations and property, and labor disputes.

After a claim has been filed with the court, a case subject to judicial mediation may be transferred to a mediator to conclude the dispute by a settlement between the parties.

## ADVANTAGES THAT MEDIATION HAS AS AN ALTERNATIVE DISPUTE RESOLUTION METHOD

- ✓ **Effectiveness and cost efficiency** – Mediation as an alternative dispute resolution mechanism is faster and cheaper than litigation in courts.
- ✓ **Control over the outcome** – Unlike litigation, in mediation the parties themselves make decisions, and the risk of an unfavorable outcome is mitigated.
- ✓ **Confidentiality** – Since the majority of court hearings are public, the confidential nature of mediation is attractive for many.
- ✓ **The potential to maintain important relationships** – For many parties, it is important to maintain a relationship after the resolution of a dispute. Unlike courts, there is a significant potential to maintain a relationship through and after mediation.

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## ROLE OF LAWYER



Lawyers certainly do and should play an important role in the conflict management processes and thereby may have a major impact on how conflict situations are actually being dealt with for the clients. Therefore, it is of utmost importance that lawyers demonstrate a deep awareness and appropriate technical skills that are necessary in order to effectively support clients in all types of dispute resolution procedures, both adjudicative and amicable, including mediation.

The legal profession should not, by any means and for whatever reasons be perceived as a barrier to mediation, as this might potentially have an adverse effect on lawyers' reputations. These reasons may be the lack of relevant understanding or knowledge, or shortcomings in their practical skills about mediation. For the above reasons, theoretical and practical training in mediation should be included in the syllabuses of law faculties and continuous education courses provided by law societies.

A lawyer who is involved in the mediation process is a guarantee of the success of the process. Good knowledge of each person's roles is necessary. The lawyer advises and defends his client by ensuring that his means of defense and his advice are in the service of mediation. The lawyer participates to help in maintaining the space of mutual understanding and mutual listening. The lawyer helps his client to cooperate with the other party to find a mutually satisfactory solution rather than seeing him as an adversary to be fought. The lawyer helps his client to listen to what the other party has to say about his situation, not to consider that he is right but to understand how it will be possible to come to an agreement. Sometimes in the mediation process, it is better to **Listen to understand rather than listen to respond.**

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The roles of the lawyer are different before mediation, during mediation, and after mediation. The lawyer is a legal professional who advises, defends, assists, and represents his client. This is exactly the role of the lawyer in the mediation process.

**Before mediation Lawyers:**

- Informs his client about the different methods of conflict resolution and works with him on the opportunity to choose mediation, particularly with regard to the advantages of the process, the interest of its client, and expectations.
- Explains the mediation process and role of the mediator to clients. In particular, discuss issues such as confidentiality;
- Listens to any resistance in order to understand them;
- Chooses the mediator(s) to propose to the other party;
- Determines the essential elements to be addressed during mediation;
- Determines with the client the BATNA (Best Alternative to a Negotiated Agreement) in the event of failure of mediation;
- Checks whether it is appropriate to propose the presence of people other than the parties, during mediation;
- Developing strategies to achieve final outcomes;

**At the mediation:**

Mediation is not a process to determine who is right and who is wrong. Mediation should be approached as a problem-solving exercise. The mediator is a facilitator, an expert in communication and mediation, and not an expert in law. It is not there to say who is right or wrong but to create a space for listening and mutual understanding which will allow the parties to find a solution to their conflict. Throughout the mediation process, during individual interviews, A lawyer's role is to help clients to best present their case and assist clients and the mediator by giving practical and legal advice and support.



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## Phases in which the lawyer fully plays his role of advice and defense:

**The first phase**, devoted to evaluating the situation, allows parties to situate the problem and its issues. The lawyer has his role as advisor in reminding the client of factual elements useful for mediation that the latter may have neglected to mention, helping him to explain his position and the reasons for this position.

The purpose of this **second phase** is to identify everyone's priorities. The lawyer plays his advisory role by helping his client express his motivations, concerns, needs, and interests. helps his client to clarify what is essential for him beyond his initial position.

**Analysis of possible options for ending the conflict** and the dispute gives rise to brainstorming where each participant in the mediation, including the lawyers, puts forward ideas for a solution. The lawyer's advice is valuable at this phase. In particular, he will be able to suggest possible solutions and help his client explore all possible avenues.

**Final phase**, the lawyer ensures that his client's interests are well preserved and verifies the legal feasibility of the solution. Once an agreement has been reached, the two lawyers draw up the agreement.

### After the mediation lawyer:

- Helps the client to draft the agreement and any guarantee documents;
- Implements the guarantees;
- Advise the client on the appropriateness of approval;
- Represent the client in the procedure for approval purposes;
- Etc...;



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## SOME RECOMMENDATIONS FOR LAWYERS

- Treat the mediator as a collaborator, not an adversary;
- Be prepared to resolve the dispute on the day of the mediation;
- Share risks and weaknesses, as well as strengths;
- Use the mediator as a sounding board to explore strategies and options;
- Make sure your clients know how much it will cost them to proceed to trial;
- Emphasize the client that the parties are the decision-makers;

### It is recommended for Lawyers to explain to his/her client:

Including a provision in any type of agreement requiring that all disputes go through a mediation process before they proceed to a more formalized conflict resolution mechanism



### When selecting a mediator:

- First look to a mediator's skill and experience as a mediator, and then to any additional qualifications that may be helpful;
- Consider the role of the mediator and whether a particular style of mediation may be better suited to the dispute.

### When to Mediate

Various factors should be considered, including the nature of the dispute and the mindsets of the parties. There is no conclusive rule as to whether, or when, a case is suitable for mediation. Most cases are suitable for mediation. Mediation may be undertaken at any time but it should be better:

- Before proceedings are commenced;
- Before an action is set down for trial and trial costs are incurred;

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## **Good faith**

A lawyer should advise clients about what it means to act in good faith. If a lawyer suspects the other parties to the mediation are acting in bad faith this should be raised privately at first with the mediator. A lawyer should not continue to represent clients who act in bad faith or give instructions that are inconsistent with good faith. Lawyers and clients should act, at all times, in good faith to attempt to achieve a settlement of the dispute.

## **Confidentiality**

A lawyer must not disclose any information disclosed during the mediation unless such disclosure is required by law.

- A lawyer should consider rules about confidentiality which may vary from jurisdiction to jurisdiction) before attending a pre-mediation process.
- Without prior permission of the mediator and the other parties a lawyer must not reveal any information disclosed by the mediator during private sessions to the other parties or their legal representatives.
- All information and documents disclosed during the mediation, including any settlement or draft are confidential.

## **Skills**

The skills required to effectively represent a client at mediation differ from those used in trial advocacy. In mediation, a lawyer's objective is to use advocacy skills, which are best applied to persuading the other parties and their lawyers that settlement options proposed by the lawyer's clients would better meet the legitimate interests of all parties.

Lawyers are encouraged to consider the options and interests of other parties, as well as their clients. Legal arguments or language are not always necessary. Arguments presented in terms and language that are persuasive to the other party are preferred. Listening carefully, even to material that may be irrelevant to litigation may be conducive to setting an atmosphere for settlement.