

For information

**Legislative Council
Panel on Administration of Justice Legal Services**

Mediation Information Office of the Judiciary

Purpose

The purpose of this paper is to inform Members of the establishment of the Mediation Information Office (“MIO”) within the Judiciary with effect from 4 January 2010.

Background

2. One of the initiatives under the Civil Justice Reform (“CJR”) is to promote the wider use of mediation to facilitate early and satisfactory settlement of disputes. A new Practice Direction on Mediation (“PD 31”) applicable to all relevant civil cases in the Court of First Instance and the District Court, will come into effect on 1 January 2010. A copy of the PD 31 is attached.

3. Upon the implementation of the PD 31, the Court has the duty, as an integral part of active case management, to encourage the parties to use an alternative dispute resolution procedure (“ADR”) if the Court considers that appropriate and to facilitate its use. Mediation is one of the common modes of ADR and a cost-effective means of resolving the parties’ disputes. All legal representatives have the duty to advise their clients of the need to explore mediation as well as the possibility of the Court applying costs sanctions against a party who is found to have unreasonably rejected the use of mediation. For cases with one or more parties who are not legally represented, the Court may, at a suitable stage when mediation is considered appropriate, give direction to the parties to consider mediation.

Objective and Operation of the Mediation Information Office

4. In support of the implementation of the PD 31, the MIO will be set up to provide litigants with relevant information on mediation, so as to assist them in considering whether they should attempt mediation in resolving their disputes; and if so, how.

5. The target users of the MIO are the parties who have commenced or are about to commence civil proceedings in the High Court or the District Court. The primary function of the MIO is to provide relevant information by conducting information sessions on mediation for the parties. It will also provide relevant materials to court users as well as members of the public.

6. Since the Judiciary has to maintain its independent and impartial position, mediation will not be provided by any staff of the Judiciary. The actual mediation will be provided by accredited mediators outside the Judiciary to be appointed by the parties themselves.

7. The MIO is located on the Lower Ground First Floor of the High Court Building, adjacent to the Resource Centre for Unrepresented Litigants (“Resource Centre”). The two offices, though separately manned and operated, will work in close liaison with each other. It is expected that the MIO will handle enquiries relating to mediation from unrepresented litigants.

Facilities and Services

8. The MIO will provide the following facilities and services :

(a) Reception and General Enquiries Counter

The MIO serves as a focal point of enquiry for all court-related mediation. As the first point of contact with users, the counter will be manned by properly trained staff.

(b) Videos

Three thematic videos on mediation have been produced and will be shown to court users for their reference.

(c) Leaflets

A series of leaflets, including the leaflet on the MIO, the General Guide to Practice Direction 31 - Mediation and the leaflet on “What is Mediation” will be made available for collection.

(d) Information Sessions

The MIO will conduct information sessions on mediation for parties before or after they commence proceedings in court.

(e) Dedicated Webpage

A newly developed mediation webpage will be launched in January 2010 on the Judiciary’s website. The contents of the videos and leaflets, related judgments and publications will be uploaded onto the dedicated mediation webpage. The links to other related professional bodies are also placed in this mediation webpage.

(f) Frequently Asked Questions (“FAQs”)

A database on FAQs concerning court-related mediation will be also uploaded on the dedicated webpage.

(g) Computer Facilities

Computer terminals with access to the Judiciary website, interlinked with the websites of professional bodies of mediation, are installed in MIO.

PUBLICITY

9. The two legal professional bodies and related mediation organizations have been kept informed of the establishment of the MIO and the services and facilities to be provided by such office.

10. A press briefing will be held and a press release will be issued in the normal way to inform the public of the establishment of the MIO.

CONCLUSION

11. Members are invited to note the contents of this paper.

Judiciary Administration
December 2009

PRACTICE DIRECTION – 31

MEDIATION

Part A

1. An underlying objective of the Rules of the High Court and the District Court is to facilitate the settlement of disputes. The Court has the duty as part of active case management to further that objective by encouraging the parties to use an alternative dispute resolution procedure (“ADR”) if the Court considers that appropriate and facilitating its use (“the duty in question”). The Court also has the duty of helping the parties to settle their case. The parties and their legal representatives have the duty of assisting the Court to discharge the duty in question¹.

2. The aim of this Practice Direction (“PD”) is to assist the Court to discharge the duty in question. It applies to all civil proceedings in the Court of First Instance and the District Court which have been begun by writ² except the proceedings set out in **Appendix A**.

3. ADR means a process whereby the parties agree to appoint a third party to assist them to settle or resolve their dispute. Settlement negotiations between the parties do not amount to ADR. A common mode of ADR is mediation. This PD applies to mediation. Where the parties are engaged in arbitration proceedings, the court proceedings would be stayed and this PD would not apply to such proceedings.

4. In exercising its discretion on costs, the Court takes into account all relevant circumstances. These would include any unreasonable failure of a party to engage in mediation where this can be established by admissible materials. Legal representatives should advise their clients of the possibility of the Court making an adverse costs order where a party unreasonably fails to engage in mediation.

¹ See Order 1A, rule 1(e), rule 3 and rule 4(2)(e) and (f).

² The proceedings include those which were begun by originating summons but were ordered to be continued as if the cause or matter had been begun by writ. See Order 28, rule 8.

5. The Court will not make any adverse costs order against a party on the ground of unreasonable failure to engage in mediation where:

- (1) The party has engaged in mediation to the minimum level of participation agreed to by the parties or as directed by the Court prior to the mediation in accordance with paragraph 13 of this PD.
- (2) A party has a reasonable explanation for not engaging in mediation. The fact that active without prejudice settlement negotiations between the parties are progressing is likely to provide such a reasonable explanation. However, where such negotiations have broken down, the basis for such explanation will have gone and the parties should then consider the appropriateness of mediation. The fact that the parties are actively engaged in some other form of ADR to settle the dispute may also provide a reasonable explanation for not engaging in mediation in the meantime.

6. In all contexts, including dealing with matters arising under this PD and in exercising its discretion on costs, the Court cannot compel the disclosure of or admit materials so long as they are protected by privilege in accordance with legal principles, including legal professional privilege and the privilege protecting without prejudice communications. What happens during the mediation process, being without prejudice communications, is protected by privilege. It must be emphasized that there is no question of the Court undermining the protection afforded by privilege.

7. Part B applies to proceedings in which all parties are legally represented. Part C applies to proceedings in which one or more of the parties is not legally represented.

Part B

8. This Part applies to proceedings in which all parties are legally represented.

(1) Mediation Certificate

9. In proceedings where all the parties are legally represented, solicitors acting respectively for the parties shall file in Court a Mediation Certificate at the same time as the time tabling questionnaire filed under Order 25, rule 1. The Mediation Certificate shall contain the information required and be in the form as per **Appendix B**, with modifications if necessary, and signed by the solicitors and the party they represent.

(2) Mediation Notice and Response

10. If a party (“the Applicant”) wishes to attempt mediation, he should as soon as practicable after filing the Mediation Certificate serve a Mediation Notice on the other party or parties (“the Respondent”) in the dispute in the form and containing the information as per **Appendix C**, with modifications if necessary, and signed by the Applicant or his solicitor.

11. Upon receiving the Mediation Notice, the Respondent should respond to the Applicant by way of a Mediation Response within 14 days (or such other time as the parties may agree or as the Court may direct) in the form and containing the information as per **Appendix D**, with modifications if necessary, and signed by the Respondent or his solicitor.

12. Where the parties put forward differing proposals in the Mediation Notice and Mediation Response, the parties should attempt to reach agreement on the proposals on which they differ as soon as practicable. Any agreement consequent upon such discussion should be reduced into writing in a minute called the Mediation Minute signed by the Applicant and the Respondent or their solicitors.

13. Where the parties are unable to reach agreement on certain proposals in the Mediation Notice and Mediation Response in relation to the mediation:

- (1) If the parties are willing to have their differences resolved by direction of the Court, they may make a joint application to the Court for directions resolving the points of difference between them; and
- (2) in the absence of such willingness, any party may apply to the Court for directions and the Court may give such directions as are appropriate to resolve differences between

the parties regarding the proposals that they have each made in the Mediation Notice and the Mediation Response respectively, but only in respect of the matter of time referred to in paragraph 11 above and the matters referred to in paragraphs 4, 5, 6 and 7 of the said Notice and Response³.

14. Where the parties reach agreement on mediation in accordance with the Mediation Notice, Mediation Response and any Mediation Minute, the parties should proceed in accordance with the stipulated rules and timetable and, if appropriate, may apply to the Court for an interim stay of the proceedings.

15. The Mediation Notice and Mediation Response shall be filed in Court at the time of the service of the same on the other party. The Mediation Minute shall also be filed in Court within 3 days after it has been signed by or on behalf of both parties. These documents may be taken into account by the Court on questions of costs.

(3) Application for Stay for Mediation Purposes

16. The Court may, on the application of one or more of the parties or of its own motion, stay the proceedings or any part thereof for the purpose of mediation for such period and on such terms as it thinks fit, bearing in mind the importance of avoiding so far as possible, disruption to the milestone dates and of avoiding, save in exceptional circumstances, any postponement of the trial dates.

17. Where the Court stays the proceedings, the plaintiff must promptly inform the Court if a settlement is reached and the parties should take the necessary steps to conclude the legal proceedings formally.

³ Paragraph 13(2) is directed at facilitating the mediation by having the Court resolve differences concerning the details or mechanics of the mediation process where the parties have agreed to attempt mediation. The Court may not, for instance, be asked to direct a party to engage in mediation or to appoint a particular mediator over the opposition of the other party, unless both parties are willing to have their differences resolved by the Court. See paragraph 13(1).

Part C

18. This Part applies to proceedings in which one or more parties are not legally represented.

19. On the application of a party or on its own motion, the Court may consider at a suitable stage whether mediation is appropriate, taking into account all the circumstances. The Court may seek information from the parties for this purpose, always respecting privilege.

20. Where the Court considers that mediation is appropriate, the Court may give directions that the parties should follow the procedure set out in Part B with any necessary modifications.

Part D

21. This PD shall come into effect on 1 January 2010.

Dated this 12th of February 2009.

(Andrew Li)
Chief Justice

Proceedings to which this PD does not apply

- (1) Court of First Instance:
 - (a) Proceedings in the Construction and Arbitration List (See PD 6.1 Part F¹)
 - (b) Proceedings in the Personal Injuries List (See PD 18.1 paragraphs 14 and 25 to 49²)

- (2) District Court:
 - (a) Proceedings in the Personal Injuries List (See PD 18.1 paragraphs 14 and 25 to 49³)
 - (b) Proceedings in the Equal Opportunities List under the Sex Discrimination Ordinance (Cap. 480), Disability Discrimination Ordinance (Cap. 487) and Family Status Discrimination Ordinance (Cap. 527)
 - (c) Proceedings to recover tax under the Inland Revenue Ordinance (Cap. 112)

¹ The relevant part of the PD in question contains relevant provisions dealing with the encouragement and facilitation of mediation.

² As above.

³ As above.

Specimen Mediation Certificate

[Title as per proceedings]

Part I

1. Is the Plaintiff / Defendant willing to attempt mediation with a view to settling these proceedings?¹
2. If the Plaintiff / Defendant is not willing to attempt mediation, please state the reasons in this Certificate or, if thought desirable, such reasons or additional reasons should be set out in a statement signed by the party concerned or his solicitor and attached to this Certificate in a sealed envelope².

¹ If a party is willing to attempt mediation, he should issue a Mediation Notice in accordance with this Practice Direction.

² Such a sealed statement should be marked and takes effect as a statement without prejudice save as to costs and will be inspected by the Court only if an issue arises in relation to costs. The use of such a sealed statement may be thought desirable if privileged information may be involved. The statement (so marked) should however be sent to the other parties.

Part II

I, [name], solicitor of [firm name] having conduct of the proceedings on behalf of [plaintiff / defendant] confirm as follows:

- (a) I have explained to our client the availability of mediation with a view to settling the dispute or part(s) of the dispute, and the respective costs positions of mediation as compared with the costs of the litigation.
- (b) I have explained to our client the Mediation Practice Direction.
- (c) The information set out under Part I is to the best of my knowledge and belief true and correct.

[signed by the solicitor]

Part III

I, [name], the plaintiff / defendant [if the party is a corporation or an association, describe the position of the person signing this certificate, and state the authority of the person to represent the party] in these proceedings, acknowledge that I understand the Practice Direction on Mediation and the availability of mediation to resolve the dispute instead of litigation. I further confirm the information set out under Part I is true and correct.

[signed by the party]³

³ Where the party does not understand English, the party should sign a Chinese version or there should be a signed interpretation clause.

Specimen Mediation Notice

[Title as per proceedings]

Applicant:
Solicitors for the
Applicant:

Respondent:
Solicitors for the
Respondent:

1. The Applicant wishes to attempt mediation to resolve all [or a specified part] of its disputes with the Respondent and makes the following proposals¹.
2. If the Applicant wishes to propose the adoption of the rules of a particular body² for the proposed mediation, specify them³.
3. The Applicant proposes to appoint [name of mediator] as the mediator. The CV of [name of mediator] is attached. The estimated costs for engaging [name of mediator] are [costs in figures].
4. The Applicant proposes [name of venue] as the venue for the mediation. The estimated costs of renting the venue for the mediation are [costs in figures].
5. [The Applicant makes the following proposals as to payment of fees and costs for the mediation and whether the same could be recoverable as costs of the proceedings if the mediation fails.]
6. The Applicant proposes that [a specified minimum level of participation⁴] should qualify as a sufficient attempt at the mediation.

¹ An Applicant wishing to attempt mediation should make as many of the proposals referred to in paragraphs 2 to 7 as possible. If he is not in a position to make some of those proposals, he should nevertheless file the notice and then make proposals to the other party.

² For example the Mediation Rules published by the Hong Kong International Arbitration Centre in consultation with the Hong Kong Mediation Council or the Mediator's Rules and Code of Ethics of the Hong Kong Mediation Centre.

³ A mediation may be undertaken without the adoption of the rules of a particular body. If the Applicant does not wish to propose the adoption of such rules, this paragraph will not be applicable.

⁴ An example of a specified minimum level of participation may be as follows: "Agreement between the parties as to the identity of the mediator and the terms of his or her appointment, agreement as to the rules applicable to the mediation (if any) and participation by the parties in the mediation up to and including at least one substantive mediation session (of a duration determined by the mediator) with the mediator".

7. The Applicant proposes that the mediation should commence within [state period of time].
8. The Applicant requests / opposes an interim stay of the legal proceedings for [] days pending the mediation process.
9. The Applicant's willingness to pursue mediation is / is not conditional upon an interim stay of the legal proceedings being granted.

Dated this of 2009.

[signed by the Applicant
or his solicitor]⁵

⁵ Where the Notice is signed by a party who does not understand English, the party should sign a Chinese version or there should be a signed interpretation clause.

Specimen Mediation Response

[Title as per proceedings]

Applicant:
Solicitors for the
Applicant:

Respondent:
Solicitors for the
Respondent:

1. The Respondent agrees / does not agree to use mediation to attempt to resolve all [or specified part] of the relevant disputes¹. [If disagrees or agrees only as to specified part of the disputes, please state the reasons in this Response or, if thought desirable, such reasons or additional reasons should be set out in a statement signed by the party concerned or his solicitor and attached to this Response in a sealed envelope².]
2. The Respondent agrees to attempt mediation in accordance with [the rules identified by the Applicant]. If the Respondent proposes the adoption of the rules of some other body, specify them³.
3. The Respondent agrees / does not agree to appoint [name of mediator] to conduct the mediation. [If he disagrees, the Respondent should identify the mediator he proposes and supply his or her CV together with an estimate of the costs of engaging [name of mediator].]
4. The Respondent agrees / does not agree that the mediation should be conducted at the venue proposed by the Applicant. [If he disagrees, the Respondent should identify the alternative venue he proposes, together with an estimate of the costs of renting such venue.]
5. The Respondent agrees / does not agree on the arrangement for payment of fees and costs of the mediation as proposed by the

¹ A Respondent agreeing to use mediation should respond to the various proposals made by the Applicant. Further, where the Applicant who wishes to attempt mediation has not made proposals in respect of any of the matters in paragraphs 2 to 7 in the Mediation Notice, the Respondent should make as many proposals as possible in relation to these matters.

² Such a sealed statement should be marked and takes effect as a statement without prejudice save as to costs and will be inspected by the Court only if an issue arises in relation to costs. The use of such a sealed statement may be thought desirable if privileged information may be involved. The statement (so marked) should however be sent to the other parties.

³ See footnotes 2 and 3 to the Specimen Mediation Notice.

Applicant. [If he disagrees, the Respondent should specify his position on fees and costs.]

6. The Respondent agrees / does not agree to the minimum level of participation which would qualify as a sufficient attempt at this mediation specified by the Applicant⁴. [If he disagrees, the Respondent should specify his position on minimum level of participation.]
7. The Respondent agrees / does not agree on the time for commencing the mediation proposed by the Applicant. [If he disagrees, the Respondent should state his position as to the time within which the mediation should commence.]
8. The Respondent agrees / requests / does not agree to an interim stay of the legal proceedings for [] days pending the mediation process. [Specify the Respondent's position on interim stay.]
9. The Respondent's willingness to pursue mediation is / is not conditional upon the grant of an interim stay.

Dated this day of

[signed by the Respondent
or his solicitor]⁵

⁴ See footnote 4 to the Specimen Mediation Notice.

⁵ See footnote 5 to the Specimen Mediation Notice.