

Mediation of Complaints



Can my complaint be mediated?

This fact sheet provides information for Complainants and Practitioners about the mediation of complaints.

Introduction

Section 436 of the *Legal Profession Act 2007* (‘the Act’) provides the Board with an opportunity to invite the parties to mediate a complaint if it considers that the complaint is capable of resolution and is appropriate in the circumstances.

Your complaint will be assessed once received by the Board. The Board will then consider the complaint and the Practitioner’s reasons and may determine that the complaint is suitable for mediation.

Complaints may not be mediated if the Board considers the practitioner would be likely to be found guilty of a serious breach of professional standards (professional misconduct).

What complaints are suitable for mediation?

Mediation is not compulsory. A mediation will not go ahead unless both parties agree to it.

Mediation may be suggested by anyone involved: the Practitioner, the Complainant or, the Board. Generally speaking, mediation suits circumstances such as where there is:

- A dispute about fees;
- A dispute about value for service; or,

- A misunderstanding, or breakdown of communication between client and Practitioner.

Sometimes, especially where there has been a communication breakdown Board staff can assist a client and Practitioner by:

- Giving information to the client about legal processes and thereby help to set a client’s mind to rest about something they have not understood or become suspicious about; and
- Clarifying a client’s concerns for a Practitioner where one or both client and Practitioner have become upset or angry.

Examples of some matters that have been mediated can be found at the bottom of this fact sheet.

What are the potential benefits of mediation?

Often mediation of a complaint is less arduous for both parties and produces a quicker result than undergoing the full complaint, investigation and hearing process.

From a Complainant’s perspective, mediation is more immediate, it can result in an acknowledgment and recognition of their concerns about the conduct from the Practitioner or the law firm.

For Practitioners, mediation can resolve a complaint in the early stages without the stress associated with an ongoing investigation. It can cause the Practitioner to reflect on and adjust their processes to prevent further complaints.

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The primary purpose of the complaint process is not to compensate clients. While compensation orders can be made in some types of disciplinary proceedings, this will only be done in limited circumstances, and only after a finding of 'unsatisfactory professional conduct' or 'professional misconduct' on the part of the practitioner has been made.

What are the possible outcomes of mediation?

The outcomes of a mediation vary.

Some of the outcomes can include:

- Explanations and/or apologies
- Waiver of fees
- Refund or repayment of legal fees already paid
- Withdrawal of the complaint by the Complainant

What happens if the complaint is withdrawn?

A common outcome of mediation is the withdrawal of the complaint by the Complainant. The Board prefers that withdrawals are made in writing and usually withdrawal of a complaint will bring the complaint to an end.

Section 434(5) of the Act prevents a further complaint about the same conduct as the original complaint from being made unless the Board is satisfied that it is appropriate to do so in the circumstances.

Section 434(6) of the Act provides that if a complaint is withdrawn then no further action can be taken with regard to the complaint unless the Board is satisfied that investigation or further investigation is justified in the circumstances.

How is a mediation conducted?

The Board facilitates mediation by way of an in-person mediation by an independent mediator with the Complainant and Practitioner both in attendance. The Board covers the cost of the mediator and an interpreter if such assistance is required. Generally the Board does not cover the cost of any legal representation either party wishes to have for the mediation.

Alternatively, a mediation might occur in a less formal manner. The Board staff may act as a go between, often by telephone, to relay information between the parties to come to an agreed resolution which is also considered a mediated outcome. In these circumstances the investigator of the complaint or a senior staff member of the Board may chair the mediation as appropriate.

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Early mediation

A client made a complaint to the Board expressing dissatisfaction with the amount of the bill, which was unpaid. The client had not contacted the Practitioner about the concerns prior to making the complaint. The Practitioner, in the letter to the Board responding to the complaint, indicated that he would like to have had an opportunity to respond to the concerns before a complaint was made, but since a complaint had been made, would now like an opportunity to discuss and potentially mediate the client's concerns about the bill. Board staff asked the client if he would like to mediate the matters of complaint via Board staff. The client agreed and detailed the concerns to Board staff. Board staff relayed the concerns to the Practitioner. The Practitioner, while denying any inappropriate charging or overcharging, agreed to not charge for some of the disputed items. The client agreed to withdraw the complaint.

Mediation during investigation

A client made a complaint to the Board alleging over-charging, dissatisfaction with the time the Practitioner had taken to do the work and quality of the work and alleged that no information about costs or charging methods had been given to her during the representation period. The bill was part-paid. The Practitioner responded to the complaint and admitted that the provision of a retainer agreement had been overlooked but otherwise denied the allegations made in the complaint. The matter was referred to investigation. An amount was identified on the bill which could not be accounted for. The investigator queried the basis of the amount. It became apparent that the amount had been charged by mistake and the firm concerned indicated that it would remove the amount from the bill and waive a further outstanding amount as a gesture of good-will. The investigation indicated that the other matters complained about were a consequence of the client not fully understanding the work the Practitioner had been doing and the relevant processes involved. The client was satisfied with the outcome, and agreed to withdraw the complaint.

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Unsuccessful mediation

A client made a complaint to the Board expressing dissatisfaction with the quality of the advice the Practitioner had given. The client felt she had a good claim in negligence and felt the Practitioner’s advice was not clearly supportive of her claim. Following the referral of the complaint to investigation an in-person mediation was arranged with an external mediator. Attempts were made to reach some mutual understanding, however, this was not successful. Ultimately the complaint was fully investigated and the matters of complaint were dismissed. The complaint did not prevent the client pursuing her negligence claim.

Relationship breakdown

A client made a complaint that settlement monies had not been transferred to her from trust when this was requested. The client would not agree to the amount of the Practitioner’s legal fees, which were in accordance with the costs agreement and about which estimates had been given. Communication between the Practitioner and client had broken down and part of the client’s legal matter could not be finalized in consequence. The Board suggested mediation of the issues to the parties and the parties agreed to this course. The issues were researched and discussed with the parties by Board staff. It was agreed that settlement funds would be transferred to the client, legal fees would be transferred to the Practitioner and the client’s matter finalised. The complaint was withdrawn on these bases.

The information contained in this fact sheet does not constitute legal advice.

Further information

If you have any questions or require further information, please contact the Legal Profession Board of Tasmania.

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