

# Guidelines for Mediation in Discipline

## Association of Ontario Land Surveyors

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### Introduction

In 2009 the Surveyors Act was changed to bring Council into the discipline process. Complaints Committee can forward decisions to Council with a recommendation that Council refer the matter to the Discipline Committee. Additionally, in the event of a Registrar’s investigation being held, the Registrar shall report to Council and that report may direct the matter to the Discipline Committee. Section 25.1 was added to allow mediation to be an option of Council.

**“25.1 (1)** If a matter comes to the attention of the Council for referral to the Discipline Committee, whether from the Registrar or the Complaints Committee or otherwise, the Council may appoint a mediator to look into the matter and make a report to the Council as to whether the matter should be referred to the Discipline Committee. 2009, c. 33, Sched. 22, s. 11 (25).”

This guide provides an overview of roles and procedures to be consider in fulfilling the mediation role as contemplated in Section 25.1.

This guide should be reviewed regularly by Council particularly following mediation procedures but in any event should be reviewed every three-years.

## Definitions

“Association” means the Association of Ontario Land Surveyors; (“Ordre”)

“Association Representative” is the individual appointed by the Executive Director or Council to represent the Association during the mediation. Normally this will be an Assistant Registrar.

“Council” means the Council of the Association; (“Conseil”)

“Complaints Committee” is the Complaints Committee established and appointed by Council

“Discipline Committee” is the Discipline Committee established and appointed by Council

“Executive Director” is the Executive Director of the Association

“LGA” refers to the Lieutenant Governor’s Appointee (lay member of Council)

“Mediator” – as appointed by Council or the Executive Director and can include a Council member, a member of the AOLS or an independent mediator or lawyer

“Parties” - refers to the parties in the mediation and include the surveyor as the subject of the complaint (and their representative), the Association representatives and the complainant

“Registrar” means the Registrar of the Association;

## Terms of Reference

### Aims

The aim of mediation is to facilitate a resolution to the discipline matter before Council while ensuring that the objectives listed below are met, that interested parties to the process are consulted and that the parties involved have a fair opportunity to come to a resolution and agreement. Mediation is voluntary and any mediation agreement is subject to Council approval.

### Objectives

The objectives of the Association in this context are:

- to regulate the practice of professional surveying and to govern its members and holders of certificates of authorization in accordance with this Act, the regulations and the by-laws in order that the public interest may be served and protected;
- to establish, maintain and develop standards of knowledge and skill among its members;

- to establish, maintain and develop standards of qualification and practice for the practice of professional surveying;
- to establish, maintain and develop standards of professional ethics among its members.

## Roles and Responsibilities

Council may appoint a mediator. The mediator will be appointed based on the selection criteria noted below. This appointment will happen as soon as reasonably possible. Out of an abundance of caution, Council members who may sit on any discipline panel should not participate in Council actions under this policy so as to preserve their neutrality.

The Executive Director will appoint a representative to represent the Association and consider the public protection objectives as noted above. The Association Representative will represent one party to the mediation. If there is a real or perceived conflict with the Association Representative, the Executive Director will appoint someone else to fulfill the role.

If the discipline process has resulted from a complaint from a member of the public, that member of the public should also be involved as described in the procedures below or as appropriate.

The mediator will be responsible for conducting the mediation in accordance with the procedures normally accepted in a mediation process and as noted below. They will be responsible for generating and providing a report and any signed undertaking or mediation agreement to Council.

A LGA, if available, will be appointed as a Lay Public Representative to ensure an additional impartial view in the mediation process that further protects the public interest. The LGA will provide an independent view of the mediation process and report. LGAs on Council will select one of their number who has no conflict of interest. The assigned LGA should not have been involved in a complaint against the involved member and cannot be a member of the discipline panel should the matter be referred to the Discipline Committee in the future. While they can provide value and an impartial view, it is recognized they may not have complete content knowledge and will have to restrict their comments in this regard.

Council will be responsible for reviewing the mediators report and taking appropriate action. Please see Council considerations below.

## Mediators

### Selection

Mediators will ideally have experience and knowledge of mediation, surveying, and some administrative law. Mediators can be appointed from within Council, the AOLS membership or from a list of independent mediators. They are not required to be lawyers. The Executive Director will maintain a roster of mediators that will be refreshed annually. If the mediator is a surveyor, care must be taken to ensure that there is no real or perceived conflict of interest. Mediators will be chosen based on their ability and availability. Prior to proceeding with the mediation process, the mediator will sign a conflict of interest and confidentiality agreement (Appendix A). The parties will be notified of the identity of the mediator and will have ten days from that notification to raise any concerns before the appointment becomes final.

## Conduct

Mediators will be expected to operate in an honest, professional and non-biased fashion. Information will only be shared as necessary for them to perform their mediation duties and report to Council. Should any conflict of interest of the mediator arise during the mediation they are to advise the Executive Director who will notify Council and Council will determine how to proceed.

The Association Representative will be expected to operate in a non-biased fashion ensuring that the objectives of the Association are being upheld. They will sign the Conflict of Interest form in Schedule B.

## Compensation of Mediators

Any surveyor appointed as a mediator will be reimbursed at a rate negotiated with the Executive Director and will be provided expenses in accordance with the Association's travel expenses policy. Mediators appointed outside the AOLS will be paid the rates and expenses normally set by independent mediators or as negotiated by the Executive Director.

## Mediation Procedures

### Process Considerations

1. The Executive Director or Registrar will turn over to the Mediator and the Association Representative all relevant material in the possession of Association dealing with the matter. The mediators may ask for additional material from the Executive Director or Registrar during their preliminary inquiries should it serve useful in the mediation process.
2. The mediator will be expected to communicate with the complainant(s), the surveyor and AOLS representative to fully understand the complaint, the interests of the parties, and determine what each party sees as an appropriate resolution. Wherever possible, face to face mediations with all parties are preferable, however where such a meeting is not feasible, the mediation can be held by phone or an on-line meeting.
3. Given the Association's policy on transparency, publication with name will be required in most agreements. There may be some room for negotiation in publication for a first minor offence and related to the length of publication and the detail of the content being published.
4. Mediation will be successful if all parties can agree on a way forward, focuses on the best possible outcome that protects the public interest while ensuring any appropriate remedial action is being taken with the surveyor. It may not always be possible to achieve all of the goals of the complainant, particularly if they are seeking financial redress or resolution to a boundary issue. The mediation process is being put in place to satisfy the Association's requirements to meet its objectives as noted above and is not intended to replace other legal action that the complainant may choose to take (unless the complainant and surveyor sign a 'mediation agreement' that releases the other parties from legal action).
5. If a mediation agreement is not possible, the mediator reports to Council on the impasse and makes recommendations describing the issues and next steps (e.g. Discipline Committee)
6. If a verbal agreement is reached during mediation, a draft written undertaking or mediation agreement shall be developed by the mediator. The Association representative will compare the draft agreement against previous undertakings or agreements before any undertaking or agreement is signed by the parties. The Association representatives may consult with the

Executive Director, who may also seek legal assistance where necessary. Once approved by all parties, the undertaking or mediation agreement may be signed.

7. Legal counsel may be used by either party during the mediation but is not necessary.

### Timing

In accordance with sub-section 25.1 (3) the mediator shall report to Council within 90 days of being appointed.

### Reporting by the Mediator

The report should include a summary of steps taken and issues agreed to. It should also include at least a paragraph from the LGA that addresses process impartiality and the public interests.

Communications between the parties are confidential and privileged.

If mediation was not successful, the mediator shall report back on outstanding issues that could not be resolved and provide recommendations (e.g. referral to the Discipline Committee, some resolution other than a referral to discipline or take no further action) to the Council. If agreement was reached, the signed undertaking or mediation agreement shall be included with the report.

## Council Consideration for Mediation as a Tool

Mediation will not be appropriate in all discipline circumstances. It should not be used as a tool in serious discipline cases. Examples of where it will be useful include remedial action or potential solutions that require the use of a monitor to oversee and improve practices, allow for periodic audits, where further training or education is required, etc.

Upon receipt of a report of a successful mediation with a signed undertaking or mediation agreement, Council will normally accept the agreement unless it would bring the administration of justice before the Association into disrepute, and have it published unless the agreement has been deemed confidential to the parties and Council.

Where mediation has not been successful Council will consider the report of the mediator and their recommendations including whether to forward the case on to the Discipline Committee or take other appropriate action that would best serve the public interest.

## Appendices

### Appendix A – Conflict of Interest

I, (*mediator's name*), appointed under Section 25.1 of the Surveyors Act, declare that I have no conflict of interest with, (*name of member involved*) or to the complainant and that should I discover any real or potential conflict of interest throughout the mediation, I will report such matter promptly to the Executive Director.

### Appendix B – Conflict of Interest

I, (*Association Representative's name*), declare that I have no conflict of interest with, (*name of member involved*) or to the complainant and that should I discover any real or potential conflict of interest throughout the mediation, I will report such matter promptly to the Executive Director.

## Appendix C – Sample Report Outline

### Mediation involving Member ABC

- Parties Involved
- Date complaint received
- Complaint and associated issue(s)
- Resolution or agreement sought by each party (e.g. surveyor, Association, complainant)
- Issue(s) arising during the mediation (without disclosing the communications of the parties)
- Steps taken (including meeting dates)
- Issues agreed to, common resolution
- Unresolved issues (if any)
- LGA statement
- Undertaking or Mediation Agreement (Signed undertakings should include tangible actions with time frames and consequences for failure to meet the actions)

## Appendix D – Sample Mediation Agreement

### AGREEMENT TO MEDIATE

AND

### TERMS OF MEDIATION

The parties agree to mediate with \_\_\_\_\_, an AOLS mediator, to attempt to settle their dispute in relation to the above-noted matter.

The provisions of the Agreement are as follows:

1. The Mediator is a neutral facilitator who will assist the parties in reaching their own settlement. The Mediator will not make decisions for the parties on how the matter must or should be resolved.
2. All written and oral communications made in the course of the mediation will be treated as confidential and without prejudice. Therefore:
  - a) The parties to this agreement agree that communications and documents shared in this mediation will not be disclosed to anyone who is not a party to this mediation unless:
    - i) the person has signed this Agreement to Mediate;
    - ii) the information is otherwise public; or
    - iii) the person to whom the information is disclosed is a legal or financial advisor to a party to this agreement
  - b) The parties to this agreement agree that all communications made and documents shared in this mediation, which are not otherwise discoverable, will be shared on a without prejudice basis and, and will not be used in discovery, cross examination, at trial or in any other way, in this or any other proceeding

c) Everyone signing this document, whether or not a party to the action, agrees to be bound by the confidentiality provision of this agreement.

3. The Mediator will not reveal the names of parties or anything discussed in Mediation except that the Mediator may disclose such information:

a) to the lawyers or other professionals retained on behalf of the parties as deemed appropriate or necessary by the mediator;

b) to non-parties consented to in writing by the parties, as deemed appropriate or necessary by the mediator;

c) for research or education purposes, on an anonymous basis;

d) where ordered to do so by a judicial authority or where required to do so by law;

e) where the information suggests that there will be actual or potential threat to human life or safety, or the commission of a crime in the future.

4. a) The parties agree that they will not at any time, before, during, or after mediation call the Mediator or the AOLS Representative as a witness in any legal or administrative proceedings concerning this dispute. To the extent that they may have a right to call the Mediator or the AOLS as a witness Representative, that right is hereby waived.

b) The parties agree not to subpoena or seek any Court Order or use any other legal process in an attempt to demand the production of any records, notes, work product or the like, of the Mediator in any legal or administrative proceedings concerning this dispute. To the extent that they may have the right to demand these documents, that right is hereby waived.

c) If, at any later time, either party decides to subpoena the Mediator, the Mediator may move to quash the subpoena. That party agrees to reimburse the Mediator for whatever expenses he or she incurs in such an action, including lawyer fees, plus the hourly rate of the Mediator for time that is taken by this matter.

d) Any party calling the Mediator as a witness, issuing a subpoena against the Mediator or seeking production from the Mediator waives his/her/its right to rely upon and enforce the confidentiality provisions of this agreement as against the Mediator.

e) If any of the foregoing provisions is found to be unenforceable, the parties seeking to call the Mediator or the AOLS Representative as a witness agree to pay the then applicable hourly rate of the mediator for the time that the Mediator spends dealing with such issues.

f) Notwithstanding the above, this Agreement to Mediate and any written agreement made and signed by the parties as a result of mediation, may be used in any relevant proceeding, unless the parties make a written agreement not to do so.

5. The Mediator shall not be liable for anything done or omitted with respect to the Mediation and has the immunity granted to a Judge under the legislation in place in the Province.

6. While all parties intend to continue with mediation until a settlement agreement is reached, it is understood that any party may withdraw from mediation at any time.

7. If the Mediator determines that it is not practical or appropriate to continue the mediation, the mediator may terminate the process after conveying his or her unilateral decision to the parties to do so.

8. The parties or those representing them at the mediation have authority to settle the dispute.

9. The parties may have lawyers present at the mediation. The Mediator will not provide legal representation or legal advice to any party at any time, and has no duty to assert or protect the legal rights and responsibilities of any party, to raise any issue not raised by the parties themselves, or to determine who should participate in the mediation.

10. Where an agreement is reached, the parties or their counsel will draft any Settlement Documentation or Minutes of Settlement and any releases. In drafting the agreement, the parties or their counsel will consider what will be published by the AOLS.

11. This agreement may be executed in counterparts.

I have read, understand and agree to the provisions of this Agreement signed this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

To be signed by all participants in the mediation.