

Civil & Commercial Mediation Accreditation Scheme

Law Society code of practice

Members of the Law Society's Civil and Commercial Mediation Scheme must agree to be bound by this code.

Introduction

This code is designed to deal with the fundamentals of civil and commercial mediation. It is not intended that it should cover every situation that may arise. The concept of not giving advice to the parties either individually or collectively when acting as mediator permeates this entire code.

Section 1 – Objectives of civil and commercial mediation

Civil and commercial mediation is a process in which:

- 1.1 two or more parties in dispute
- 1.2 whether or not they are legally represented
- 1.3 and at any time, whether or not there are or have been legal proceedings
- 1.4 agree to the appointment of a neutral third party (the mediator)
- 1.5 who is impartial
- 1.6 who has no authority to make any decisions with regard to their issues
- 1.7 which may relate to all or any part of a dispute of a civil or commercial nature
- 1.8 but who helps them reach their own decisions
- 1.9 by negotiation
- 1.10 without adjudication

Commentary

The code is aimed at those undertaking civil and commercial mediations on a commercial basis, although it may be observed equally by those undertaking civil and commercial mediations on a pro bono basis.

Whilst the mediation may deal, typically, with the whole of any dispute, the parties may, should they so choose, deal with only one aspect of a dispute, for example, liability or quantum.

While most mediations are undertaken by a sole mediator, there may be occasions where two or more mediators co-mediate the dispute. In those circumstances, the solicitor mediator should be aware that the co-mediator may need to comply with his or her own ethical rules and will need to obtain his or her own insurance cover.

The mediator must not give legal advice to the parties individually or collectively. The mediator may, however, provide legal information to the parties to assist them in understanding the principles of law applicable to their circumstances and the way in which those principles are generally applied.

In the context of the code, adjudication means the formal determination by a third party. It does not preclude the mediator, at his or her discretion and with the consent of the parties, from expressing an opinion or from providing some elements of non-binding evaluation in those models of mediation that are not purely facilitative but also evaluative. The mediator should not, however, advise parties in the sense of asserting what their rights are and recommending how those rights should be translated into settlement terms.

Section 2 – Qualification and appointment of mediator

2.1 Every mediator must comply with the criteria and requirements for mediators consultancy, accreditation and regulation.

2.2 Save where appointed by or through the court, a mediator may only accept appointment if both or all parties to the mediation so request, or agree.

2.3 Whether a mediator is appointed by the parties or through the court or any other agency, he or she may only continue to act as such so long as both or all parties to the mediation wish him or her to do so. If any party does not wish to continue with the mediation, the mediator must discontinue the process as regards that party and may discontinue the process as regards all parties. Also, if the mediator considers that it would be inappropriate to continue the mediation, the mediator shall bring it to an end, and may, subject to the terms of the mediation agreement, decline to give reasons.

Commentary

This section should be read in conjunction with paragraph 4.1.

Section 3 – Conflicts of interest, confidential information and the impartiality of the mediator

3.1 The impartiality of the mediator is a fundamental principle of mediation.

3.2 Impartiality means that

3.2.1 the mediator does not have any significant personal interest in the outcome of the mediation

3.2.2 the mediator will conduct the process fairly and even-handedly, and will not favour any party over another

3.3 Save as set out in 3.2 above, a mediator with an insignificant personal interest in the outcome of the mediation may act if, and only if, full disclosure is made to all of the parties as soon as it is known, and they consent.

3.4 The mediator must not act, or, having started to do so, continue to act:

3.4.1 in relation to issues on which he or she or a member of his or her firm has at any time acted for any party

3.4.2 if any circumstances exist which may constitute an actual or potential conflict of interest

3.4.3 if the mediator or a member of his or her firm has acted for any of the parties in issues not relating to the mediation, unless that has been disclosed to the parties as soon as it is known, and they consent

3.5 Where a mediator has acted as such in relation to a dispute, neither he or she nor any member of his or her firm may act subsequently for any party in relation to the subject matter of the mediation.

Commentary

While impartiality is fundamental to the role of the mediator, this does not mean that a mediator may never express a comment or view that one party may find more acceptable than another. However, the mediator must not allow his or her personal view of the fairness or otherwise of the substance of the negotiations between the parties to damage or impair his or her impartiality.

The mediator must appreciate that his or her involvement in the process is inevitably likely to affect the course of the negotiations between the parties. (His or her involvement is, of course, intended to assist that process so far as possible.) This would be the case whether the mediator intervenes directly or whether he or she deals with issues indirectly, for example, through questions. Consequently, all mediator intervention needs to be conducted with sensitivity and care in order to maintain impartiality.

There may be circumstances where the mediator may have some personal interest in the outcome of the mediation (for example, he or she has a very small shareholding in a company which is a party to the mediation). In those circumstances, and where the mediator feels able to act impartially, he or she must disclose full details of his or her interest to the parties immediately, inviting them to decide whether or not the mediator should continue to act.

The mediator should decline to act if he or she feels he or she will be prejudiced (for example, he or she knows one of the parties socially), or in circumstances where either party may perceive there to be a prejudice.

It is important not only that the mediator should be neutral, but also that he or she should be perceived by the parties to be so. The mediator must therefore take particular care to avoid conflicts of interest, whether actual or potential, real or perceived.

While a mediator may not undertake cases in respect of which his or her firm has already provided legal advice to one of the parties, the mediator would not be precluded from acting as such in respect of unrelated issues involving a party for whom his or her firm has

previously acted, provided that, before undertaking the mediation, the mediator discloses this fact to the parties and the parties consent to the mediation.

It is usual in mediation for the parties to agree that the mediator should treat as confidential information which he or she acquires during the course of private meetings; almost invariably such information will be relevant to the dispute and it is unlikely that it will give rise to a conflict situation as described in Rule 3.06 of the Solicitors Code of Conduct). However, if either the mediator acquires confidential information relevant to the dispute or to any of the parties involved in the mediation from another source (for example, from another client, partner, colleague or firm), whether before or during the mediation, or the mediator acquires confidential information relevant to another client of his or her firm, during the mediation a conflict of interest as defined in Rule 3 of the Solicitors Code of Conduct would exist, necessitating the mediator's withdrawal from the mediation.

If the mediator is in any doubt on any possible conflict of interest or confidentiality point, the mediator should contact Professional Ethics for further advice.

Section 4 – Mediation procedures

4.1 The mediator must ensure that the parties agree the terms and conditions regulating the mediation before dealing with the substantive issues. This should be in a written agreement which should reflect the main principles of this code. Such agreement should also contain the terms of remuneration of the mediator.

4.2 The procedure for the conduct of the mediation is a matter for the decision of the mediator. Insofar as the mediator establishes an agenda of matters to be covered in the mediation, the mediator should be guided by the needs, wishes and priorities of the parties in doing so.

4.3 In establishing any procedures for the conduct of the mediation, the mediator must be guided by a commitment to procedural fairness and a high quality of process.

Commentary

This section should be read with section 5 and its commentary. The mediator is the manager of the process and should manage the mediation, at his or her discretion, with the object of meeting as best as possible the wishes of the parties.

The mediator and the parties should agree, as far as practicable, at the outset whether the mediator's role will be purely facilitative, or whether the mediator may at his or her discretion, provide an evaluative element based on his or her knowledge of the subject matter or legal issues involved.

The role of the mediator, whether facilitative or evaluative, may change during the course of the mediation by agreement of the parties.

Section 5 – The decision-making process

5.1 The primary aim of mediation is to help the parties to arrive at their own decisions regarding the disputed issues.

5.2 The parties should be helped to reach such resolution of such issues which they feel are appropriate to their particular circumstances.

Such resolution may not necessarily be the same as that which may be arrived at in the event of adjudication by the court. That allows the parties to explore and agree upon a wider range of options for settlement than might otherwise be the case.

5.3 The mediator may meet the parties individually and/or together. Solicitors, barristers or other professional advisers acting for the individual parties may, but need not necessarily, participate in the mediation process if the parties so wish. Such solicitors and/or advisers may take part in discussions and meetings, with or without the parties, and in any other communication and representation, in such manner as the mediator may consider useful and appropriate.

5.4 Parties are free to consult with their individual professional advisers as the mediation progresses. The mediator may make suggestions to the parties as to the appropriateness of seeking further assistance from professional advisers such as lawyers, accountants, expert valuers or others.

5.5 The mediator must not seek to impose his or her preferred outcome on the parties.

5.6 The mediator shall be free to make management decisions with regard to the conduct of the mediation process.

5.7 The mediator may suggest possible solutions and help the parties to explore these, where he or she thinks that this would be helpful to them.

5.8 The mediator must recognise that the parties can reach decisions on any issue at any stage of a mediation.

5.9 Agreements reached in mediation fall into three categories:

5.9.1 Non-binding agreements

5.9.2 Binding agreements (which would be enforceable by a court)

5.9.3 Binding agreements enshrined in a court or arbitration order

The mediator should ascertain how the parties wish their agreement to be treated. Where the parties do not wish to have a legally binding solution (for example, where they have resolved personal rather than legal issues), their wishes should be respected.

5.10 At the end of the mediation or at any interim stage, the mediator and/or the parties or their representatives may prepare a written memorandum or summary of any agreements reached by the parties, which may, where considered by the mediator to be appropriate, comprise draft heads of such agreements for formalisation by the legal advisers acting for the parties.

5.11 If the parties wish to consult their respective individual legal advisers before entering into any binding agreement, then any terms which they may provisionally propose as the basis for resolution will not be binding on them until they have each had an opportunity of taking advice from such advisers and have thereafter agreed, in writing, to be bound.

5.12 Mediation does not provide for the disclosure and inspection of documents in the same way or to the same extent as required by court rules. The parties may

voluntarily agree to provide such documentation, or any lesser form of disclosure considered by them to be sufficient. This should be considered in advance of the mediation. The mediator may indicate any particular documents that he or she considers should be brought to the mediation.

5.13 The mediator may assist the parties, so far as appropriate and practicable, to identify what information and documents will help the resolution of any issue(s), and how best such information and documents may be obtained.

However, the mediator has no obligation to make independent enquiries or undertake verification in relation to any information or documents sought or provided in the mediation.

5.14 If, in cases where one or more parties is unrepresented at the mediation and the parties are proposing a resolution which appears to the mediator to be unconscionable, having regard to the circumstances, then the mediator must inform the parties accordingly and may terminate the mediation and/or refer the parties to their legal advisers.

Commentary

The mediator is the manager of the process. It is important that, where possible, a flexible approach is adopted by the mediator. He or she may suggest the introduction into the process of professional, technical, and/or business advisers to the parties to assist in such a manner as agreed between the parties. It is for the parties to decide whether they wish to be represented in mediation, but for the mediator to decide how the process is managed.

Some mediation organisations suggest that, at the request of the parties and with his or her consent, the mediator may provide a non-binding written recommendation on terms of settlement. This is rarely used and then, usually, as a last resort at the end of the mediation. This would not be precluded by paragraph 5.5.

Whenever possible, the mediator should consider with the parties, in advance of the mediation, what documents should be made available and, where appropriate, how verification in relation to documents or information sought, should be obtained. It must be recognised, however, that there will be circumstances where this is not possible in advance of the meeting, in which circumstances, in the interests of fairness, consideration should be given to adjourning the mediation for further enquiries or for such verification to be obtained.

It is quite common and proper in the context of mediation for the parties to disclose information and documents on a confidential basis to the mediator only. This section should be read in conjunction with section 7 which deals with the confidentiality and privilege surrounding mediation.

While the mediator must permit the parties, if they so wish, to adjourn a mediation to seek advice from their professional advisers once a resolution has been proposed and agreed in principle, caution should be exercised in recommending this, since this may have the effect of losing the momentum of the mediation and, in some cases, the resolution proposed.

The mediator is concerned with fairness of process. The mediator cannot be responsible for issues of justice and fairness of outcome; the parties must define their own „fairness“ of the substantive terms and criteria for agreeing terms. However, the mediator must be able to dissociate him or herself from the proposed resolutions in certain extreme circumstances, as indicated in paragraph 5.14.

When deciding whether to terminate the mediation pursuant to paragraph 5.14, the mediator must consider all of the circumstances of the dispute and the mediation process itself. It is important to distinguish those who are represented at the mediation from those who are not; in the former situation, the mediator is entitled to rely on the fact that the party has reached a decision based on legal advice given to him or her by his or her legal representative and should not seek to look behind that decision; in the latter case, in extreme circumstances, the mediator must be able to distance him or herself from the resolution proposed. In those circumstances, the mediator may wish to suggest that the parties seek legal advice before proceeding further in the mediation.

Section 6 – Dealing with power imbalances

6.1 The mediator should be alive to power imbalances existing between the parties. If such imbalances seem likely to cause the mediation process to become unfair or ineffective, the mediator must take reasonable steps to try to prevent this.

6.2 The mediator must seek, in particular, to prevent abusive or intimidating behaviour by any of the parties.

6.3 If the mediator believes that, because of power imbalances, the mediation would not be able to be fairly and effectively conducted, he or she may discuss this with the parties, recognising that the mediation may have to be brought to an end and/or the parties referred to their lawyers.

Commentary

Power imbalances will almost inevitably exist and will shift during the course of a mediation. The mediator cannot be responsible for redressing those imbalances. He or she must, however, seek to ensure that these do not cause the process to become ineffective as a result of the abuse of one party's stronger position. The likelihood of abuse occurring will diminish where the parties are legally represented in the mediation.

Section 7 – Confidentiality and privilege

7.1 Before the mediation commences, the parties should agree in writing as to the provisions concerning confidentiality and privilege that will apply to the mediation process itself and any resultant mediation agreement, save as otherwise agreed in the mediation settlement agreement.

7.2 The mediator must maintain confidentiality in relation to all matters dealt with in the mediation. The mediator may disclose:

7.2.1 matters which the parties and the mediator agree may be disclosed

7.2.2 matters which are already public

7.2.3 matters which the mediator considers appropriate where he or she believes that the life or safety of any person is or may be at serious risk

7.2.4 matters where the law imposes an overriding obligation of disclosure on the mediator

In any such event the mediator should, where appropriate, try to agree with the party furnishing such information as to how disclosure shall be made.

7.3 Subject to paragraph 7.2 above, where the mediator meets the parties separately and obtains information from any party which is confidential to that party, the mediator must maintain the confidentiality of that information from all other parties, except to the extent that the mediator has been authorised to disclose any such information.

7.4 Mediators should note that the mediation privilege will not ordinarily apply in relation to communications indicating that any person is suffering or likely to suffer serious bodily harm, or where other public policy considerations prevail, or where for any other reason, the rules of evidence render privilege inapplicable.

7.5 The mediator should remind the parties that (unless the mediation agreement provides otherwise) the confidentiality and privilege attaching to the mediation process may not extend to the provisions of any settlement agreement which results. The mediator should suggest to the parties that they consider the extent to which they wish the terms of the resulting settlement to be disclosable – and to provide accordingly in the agreement itself.

Commentary

Prior to commencement of mediation, the mediator should obtain agreement from the parties that no party should be permitted to refer, in any proceedings that may subsequently take place, to any such privileged discussions and negotiations, or require the mediator to do so; nor should any party have access to any of the mediator's notes, or call any mediator as a witness in any proceedings, save where the parties agree that this is not appropriate.

The mediator should remind the parties that (unless the mediation agreement provides otherwise) the confidentiality and privilege attaching to the mediation process may not extend to the provisions of any settlement agreement which results. The mediator should suggest to the parties that they consider the extent to which they wish the terms of the resulting settlement to be disclosable, bearing in mind that they may have some overriding obligation of disclosure to a third party – and to provide accordingly in the agreement itself.

There are circumstances in which, even though the parties do not cooperate, there is an overriding duty of disclosure. In these circumstances general public policy prevails and the duty of disclosure would apply to all mediators, not merely solicitors. Mediators must have regard to the circumstances when confidentiality may be overridden, as set out in the Solicitors Code of Conduct. If in doubt, mediators should contact Professional Ethics

Ordinarily, the mediator should suggest to the parties that they expressly agree that all discussions and negotiations during the mediation will be regarded as evidentially privileged and conducted on a "without prejudice" basis.

Section 8 – Professional indemnity cover

8.1 All solicitor mediators must carry professional indemnity cover in respect of their acting as mediators.

8.1.1 Solicitors who practise as mediators will be covered by the Solicitors' Indemnity Fund in respect of their acting as a mediator, provided they are doing so in their capacity as a member of their firm.

8.1.2 If a solicitor is acting as a mediator as a separate activity outside his or her legal practice, separate indemnity insurance must be obtained.

Commentary

Solicitors who mediate outside their practices as members of mediation organisations may be covered by block insurance provided by those organisations. If not, they must make their own arrangements for appropriate cover.

A solicitor practising as a mediator outside his or her legal practice must have regard to the Solicitors Regulation Authority's Handbook 2011.

Section 9 – Promotion of mediation

9.1 Solicitor mediators may promote their practice as such, but must always do so in a professional, truthful and dignified way. They may reflect their qualification as a mediator and their membership of any other relevant mediation organisation.

9.2 Solicitor mediators must comply with the Solicitors Code of Conduct.