

## PART 7

# Alternative dispute resolution

*Solicitors should keep under review at all times the availability of public funding and the need to provide clients with costs information at the outset and on a regular basis.*

### 7.1 WHAT IS ALTERNATIVE DISPUTE RESOLUTION?

#### **Support to manage relationship breakdown**

- 7.1.1 Many people find that they have a bewildering set of emotions to deal with during relationship breakdown. Evidence suggests that these emotions will make any other resolution difficult and that working through the emotions in order that they can be ‘managed’, or at best resolved, is the most important first step for many couples. This work can be done as a couple or separately. Trained couple or family counsellors can undertake this work.

#### **Mediation**

- 7.1.2 Mediation is the most established alternative dispute resolution (ADR) technique. Mediators work as neutral third parties, with no stake in the outcome of the mediation process. They act as facilitators to the negotiations between the parties, providing information to assist when and if appropriate. Mediators do not give advice and can be publicly funded.

#### **Conciliation or Private Law Programme Dispute Resolution**

- 7.1.3 Conciliation or Private Law Programme Dispute Resolution schemes are made available in many courts. Often conducted

by a CAFCASS officer, and often a substantive part of the first directions hearing in any s.8 Children Act 1989 application, this is a more directed dispute resolution technique, which may include the CAFCASS officer or dispute resolver assisting by putting forward options or potential outcomes. There is still confusion between the terms ‘conciliation’ and ‘mediation’ and solicitors may find that in some courts these appointments are referred to as ‘in court mediation’. Solicitors should advise clients considering or undergoing a Private Law Programme Dispute Resolution of the limits to the privilege and confidentiality attaching to such a process, which are likely to be different from those attaching to conventional out of court mediation processes, but solicitors should be aware that some courts do have in court mediation schemes run by independent mediators.

### **Collaborative law**

- 7.1.4** This is a process in which the solicitors and their clients agree in writing to reach a settlement without court involvement. They agree to work together to resolve children and financial issues arising out of the separation. In addition, they may enlist other experts, such as children specialists, as part of the ‘team’. Using their skills in client representation, negotiation and problem solving, collaborative family lawyers help their clients in a series of ‘four-way’ meetings to shape a fair agreement. If they cannot reach an agreement the clients will need to instruct new solicitors to proceed to court. This process is developing rapidly in the US and Canada and a UK Collaborative Law group has recently been established ([www.collabfamilylaw.org.uk](http://www.collabfamilylaw.org.uk)), now under the auspices of Resolution (formerly SFLA). Whilst collaborative law has many benefits as regards the management and in particular the emotional management of the parties to the dispute, there are unlikely to be significant costs savings as between the collaborative law process and the conventional process of settlement by inter-solicitor negotiation. This is one of a developing range of services to assist clients to resolve issues without the need for court proceedings. As with mediation, it will not be suitable for everyone, but is a useful process for some couples and may help them to manage relationship breakdown more easily.

## 7.2 FAMILY MEDIATION

### 7.2.1 Family mediation is a process in which:

- ‘1.1 a couple or any other family members
- 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 separation, divorce, children’s issues, property and financial questions or any other issues they may raise
- 1.8 but who helps them reach their own informed decisions
- 1.9 by negotiation
- 1.10 without adjudication’

A mediator should not give advice. This definition is taken from the Law Society’s Code of Practice for solicitors practising as family mediators. This Code of Practice and the Family Mediation Panel Criteria and Guidance Notes are available on the Law Society website at [www.lawsociety.org.uk/professional/accreditationpanels/familymediation/codeofpractice.law](http://www.lawsociety.org.uk/professional/accreditationpanels/familymediation/codeofpractice.law). The UK College of Family Mediators has also produced a Code of Practice and Standards available on written request from the UK College of Family Mediators and on their website (see **Appendix 17** for contact details). Mediators providing publicly funded mediation must work to the LSC’s quality assurance standard for mediation, available on their website.

**7.2.2** From time to time the dispute between a couple may involve a wider group of family members than just the couple. Family members may include new partners, step-parents, grandparents, aunts, uncles, children (and young people) and even potential family members. Any of these may participate in the mediation with the agreement of the couple and the mediator.

**7.2.3** Mediators do not routinely see children in mediation, and where they do, usually see them as an adjunct to the process by way of separate consultation, rather than as children participating directly in the mediation. Where mediators do see children, they must only do so when the mediator is specifically

trained in the involvement of children and young people in the mediation process. Mediators, like any other professionals who see children *must* meet requirements in respect of police checks, etc.

### **7.3 SCREENING FOR MEDIATION**

**7.3.1** It is important that only those cases that are suitable are referred to mediation.

**7.3.2** At an early stage solicitors must, unless it is clearly inappropriate to do so, explain the mediation process and advise clients on the benefits and/or limitations of mediation in their particular case, as well as the role of solicitors in supporting the mediation process.

**7.3.3** However, solicitors must consider carefully whether family support networks are beneficial where members of minority communities are concerned. Many clients from minority backgrounds face acute pressures from members of their extended families to save their marriages. Wider family networks, and even the community to which they belong, may add to the pressures on the clients. It is therefore important to bear in mind such difficulties when advising.

**7.3.4** Family mediation usually involves both parties meeting with the mediator at the same time, although other models are also used from time to time (including ‘shuttle mediation’ where the mediator shuttles between the parties who are each in separate rooms, with a view in due course to working together with the couple in the same room). Mediation can resolve issues in dispute or narrow those issues, but it may not be appropriate in some circumstances, at least until other steps (for example applying for interim maintenance, a freezing order or obtaining domestic protection) have been put in hand. Mediation is likely to be inappropriate at a time:

- (a) where there are unresolved child protection issues or a risk of child abduction;
- (b) where clients do not have the capacity to mediate or their mental competence is in question;

- (c) before emergency procedures which need to be taken have been concluded;
- (d) where a particular issue can only be adjudicated upon by the court, for example, in paternity cases;
- (e) in financial proceedings where either party is bankrupt;
- (f) where bail conditions are in place restricting one party having contact with the other party.

**7.3.5** Mediation may also not be appropriate in the following circumstances:

- (a) where domestic abuse has occurred or is still occurring. If clients still want to mediate in such cases, the risks should be discussed and whether any action can be taken to make them feel safe in the mediation. (Mediators will often categorise a matter as unsuitable for mediation by reason of domestic abuse even though both parties may wish to mediate, or in circumstances where the domestic abuse has been discontinued for some time.) The term domestic abuse is defined in **Part 6** and guidance is given on screening, safety planning, etc.;
- (b) where the imbalance between parties is likely to be beyond the capacities of mediators to address, although solicitors should be aware of the need to consider mediation in certain publicly funded cases, where the issue of imbalance will be addressed by the mediators when screening the case for mediation suitability;
- (c) where relationship counselling or marital therapy may be more appropriate at this stage.

This is not an all-inclusive list but covers most situations which may be unsuitable for mediation.

## **7.4 WHICH MEDIATOR?**

**7.4.1** Solicitors who refer clients to mediation should provide details of mediators who have undertaken appropriate training and have obtained accreditation with an established organisation. These details should be kept up to date. Details of the Law Society Family Mediation Panel and how to access its members may be found on the Law Society's website. Other organisa-

tions which offer family mediation training and accreditation include Family Mediators Association (FMA), National Family Mediation (NFM), the UK College of Family Mediation (UKCFM) and Resolution (formerly SFLA), for which contact details are set out in **Appendix 17**.

- 7.4.2** Mediators come into mediation from a range of professional backgrounds and may specialise in different types of family mediation, in exactly the same way as different solicitors may specialise in different types of family law.
- 7.4.3** Solicitors should advise and assist clients in selecting the most suitable family mediator for the dispute in question, by reference to training and areas of expertise together with appreciation of cultural issues, as well as by reference to charging rates, geographical suitability and other relevant characteristics.
- 7.4.4** Some mediators may consider a case is appropriate for co-mediation by two mediators. While co-mediation may attract a higher rate of fees, working in co-mediation can be quicker and more effective than working with a sole mediator (even a sole solicitor mediator). An ‘anchor mediation’ model is also available from many mediation services where the mediation commences with one mediator but with the explicit proviso from the start that a second mediator may be brought into the mediation as and when required, and charged for accordingly. A non-exhaustive list of reasons for considering the need for anchor mediation or for co-mediation includes:
- (a) couple in high conflict;
  - (b) background of domestic abuse;
  - (c) legal or financial complexity;
  - (d) foreign element;
  - (e) emotional neediness;
  - (f) cultural complexity;
  - (g) clients with complex disabilities.
- 7.4.5** Solicitors must advise publicly funded clients on the availability of publicly funded mediation, that the statutory charge does not apply to work done in respect of mediation, and that there are no contributions payable. They must advise clients

that they are entitled to legal advice in connection with the mediation under 'Help with Mediation' and this is also exempt from the statutory charge and contributions.

## **7.5 THE BENEFITS OF MEDIATION**

**7.5.1** Solicitors must explain to their clients the potential benefits of mediation. These include:

- (1) When parties divorce or separate, it is generally better if both parties can sort out together their own practical arrangements for the future.
- (2) The aim of mediation is to help parties find a solution that meets the needs of all involved, especially the children, and that both parties feel is fair. At the end of mediation, those involved should feel that there has been no 'winner or loser', but that together they have arrived at sensible, workable arrangements.
- (3) Mediation can help to reduce tension, hostility and misunderstandings and so improve communication between parties. This is especially important if children are involved as parties may need to cooperate over their care and upbringing for some years to come.
- (4) Mediation can offer general costs savings as parties have only one professional assisting them. It should be noted, however, that clients who are able to agree will incur lower fee levels.
- (5) Mediation has particular economic benefits where one or both parties are eligible for publicly funded family mediation since they will not be required to make any contribution towards the cost of the mediation, nor for the legal advice provided under public funding in connection with that mediation, nor for the work involved in translating the outcome of mediation into a court order by consent, nor for any linked conveyancing required. If a party is eligible for public funding for mediation then they will also be eligible for 'Help with Mediation' to pay for legal advice during the mediation, and for legal advice and legal implementation work at the end of the mediation.

## **7.6 THE TIMING OF THE REFERRAL TO MEDIATION**

- 7.6.1** It is important that solicitors should carefully consider and advise as to the timing of any referral to mediation.
- 7.6.2** In publicly funded cases there is a requirement to consider mediation before a General Family Help or Legal Representation certificate can be obtained. However, even if the case is unsuitable for mediation at the outset, the possibility of a later referral should be kept under review as funding is available for such a later referral.
- 7.6.3** In private matters, the timing of the referral should be given careful consideration, depending on the facts of the case. For example, it may be appropriate to refer contact disputes to mediation early on. On financial matters it may sometimes be appropriate to deal with disclosure prior to such referral.

## **7.7 SUPPORTING CLIENTS IN MEDIATION**

- 7.7.1** It is accepted that mediation works best when supported by independent legal advice. When referring clients to mediation, solicitors should explain that:
- (a) the mediation process should be supported by independent legal advice;
  - (b) public funding is available for this by way of ‘Help with Mediation’;
  - (c) no financial agreement or other mediated outcome is directly binding between the parties until it has been approved by the court as a consent order or made legally binding in some other manner. Solicitors should advise on the need for such an order;
  - (d) parties may consult their solicitors at any stage in mediation but this is particularly important when disclosure and settlement proposals are being considered; and
  - (e) seeking advice from solicitors between mediation sessions can be positively helpful in seeing whether proposals are appropriate.

## **7.8 THE ROLE OF SOLICITORS DURING MEDIATION**

**7.8.1** The role of solicitors during the mediation process is very important. When clients are going through mediation solicitors should:

- (a) assist clients to provide disclosure where necessary and assess the disclosure which takes place in mediation (use of a Form E or Form E equivalent as a standard for disclosure in mediation is recommended and is standard practice for most family mediators in England and Wales);
- (b) give advice about settlement proposals as and when required, bearing in mind the long-term interests of clients and/or any children;
- (c) give advice about other options;
- (d) facilitate the obtaining of additional third-party input or information, for example welfare benefits advice (where not available directly from the solicitor's own firm) or expert valuation or accountancy advice;
- (e) bear in mind the cost of mediation as opposed to negotiation through solicitors or court proceedings;
- (f) give advice about any untenable position either clients or their partners may be adopting;
- (g) assist clients to reach a decision and encourage clients to raise issues in mediation as appropriate.

## **7.9 THE ROLE OF SOLICITORS FOLLOWING MEDIATION**

**7.9.1** Proposals made in mediation are not binding between the parties. It is very important that the parties have access to independent legal advice when proposals are made.

**7.9.2** Following mediation, where the client has reached no firm proposals the solicitor should:

- (a) discuss the reasons for the discontinuation of the mediation;
- (b) note what has been achieved; and
- (c) discuss the options.

- 7.9.3** Where the parties have produced interim proposals, discuss the position and any potential difficulties, including the need to apply for any interim orders.
- 7.9.4** Where proposals have been made, solicitors should follow the guidance in the Main Protocol (see **paras. 1.5.1–1.5.4**) and where it is appropriate to draft a consent order dealing with finances, the guidance on consent orders should be followed (see **paras. 4.19.1–4.19.5**).