



CODE OF PRACTICE FOR MEMBERS OF C.A.L.M.

Comprehensive family mediation by lawyers is a process whereby couples in whatever stage of separation or divorce, including post-divorce, can meet with a mediator or co-mediators to seek ways of resolving issues and problems arising from their separation with a view to identifying the issues, problems, areas of agreement and disagreement and options, all in an informed voluntary process.

Comprehensive family mediation is a specialised process. As it deals with financial and property issues as well as child-related matters the mediator requires a knowledge not only of the law but also of family behaviour, and a sensitivity and alertness to power imbalances within a couple's relationship or manipulative behaviour which could affect the openness and fairness of the process for both parties.

This code of practice sets out ground rules for lawyers who have been accredited by the Law Society of Scotland as family mediators and who have been accepted into membership of CALM. Solicitors should be aware of the Law Society of Scotland's illustrative guidelines for accredited mediators and the Law Society of Scotland's Code of Conduct for Scottish Solicitors.

1. INDEPENDENCE

The mediator must be independent and must not have acted previously for either or both of the parties. The mediator must have no business, financial or close social connections with either or both of the parties. If the mediator belongs to or was previously with a law firm which acted for either or both of the parties, the mediator should consider whether it is appropriate for him or her to act notwithstanding that he or she had no direct dealings with the parties and if deciding that the acting were distant should disclose to the parties the connection with the law firm and allow the parties to decide if they wish an alternative mediator.

2. INTERESTS OF THE PARTIES

The mediator must act in the interests of the parties subject to any over-riding interest of the law of the land and the Court and should not accept instructions to mediate if not able to offer convenient appointments and expeditious service to the parties. The mediator should be non-judgmental in approach and careful not to impose his or her values on the parties or mediation process save that no mediator shall be bound to act for parties in a way which the mediator perceives as likely to cause harm to any child. It is not for the mediator to arbitrate between the parties nor to impose decisions on them. If the mediator considers that the parties are coming to an arrangement which is out of the ordinary or apparently unfair to one of the parties or contrary to justice then the mediator will alert the parties to this and will consider whether it is appropriate to continue the mediation.

3. CONFLICT OF INTEREST

There must be no conflict of interest between the mediator and the parties. If the mediator becomes aware of a conflict of interest then he or she shall terminate the mediation or shall disclose the conflict of interest and discuss with the parties the appropriateness of continuing to mediate for them.

4. CONFIDENTIALITY

The usual duties of confidentiality between Solicitors and their clients shall apply to lawyer mediators with the following exceptions which must be advised to and accepted by the parties in writing before the mediation begins:-

- 4.1 intimation to the parties' Solicitors that the parties are engaged in mediation;
- 4.2 disclosure to the parties' Solicitors of the financial information revealed during mediation which information may then be used by the parties and their Solicitors as they see fit including using the information in a Court action;
- 4.3 disclosure to the Police, a Doctor or Social Worker of any physical harm or suspicion or threat of harm to either or both of the parties or their children but only in exceptional circumstances and only if either or both of the parties decline or delay taking action to prevent or seek discontinuation of the harm.

5. RELATIONSHIP WITH THE PARTIES

The mediator must be even-handed with the parties and must not communicate with one party without communicating in similar terms with the other save for purely formal discussions in general terms to set up the mediation or arrange mediation appointments. Any document or disclosure by one party to the mediator must be disclosed to the other party. The mediator must refuse to receive any information which is not to be disclosed to either or both of the parties save that if one of the parties out of apprehension for their safety does not wish to disclose his or her address and phone number to the other the mediator may receive that information confidentially. The mediator must not have any secret or "off the record" discussions with a party or his or her Solicitor. There may be some cases in which the parties would find it difficult to meet together without first having had a separate session or sessions with the mediator and if both parties consent the mediator may have separate sessions with each of the parties.

6. OPEN DISCUSSION: "WITHOUT PREJUDICE"

In that mediation is a process of openness and informality designed to give parties an opportunity to discuss their problems and differences and to identify and consider options open to them, the mediation process is conducted on a "without prejudice" basis and any statements and negotiations made during mediation cannot be founded on in any Court action save with both parties' consent. The parties should be asked at the commencement of mediation to undertake not to call the mediator as a witness at Court or to seek an order for the production of the mediator's records. In that the mediation process may result in the disclosure of financial information as fact then that information will not be privileged but may be used by the parties in any Court action.

7. LEGAL ADVICE

It is not the function of the mediator to provide legal advice to the parties or either of them but the mediator will be able to give information to the parties about the law and the Courts. The mediator will advise parties to take their own legal advice and may also suggest that other specialist advice be sought (e.g. from an Accountant, Child Psychologist, Actuary etc). If a party declines to instruct a Solicitor then the mediator should advise that party that it would be in his or her interests to do so to maximise the benefits of using mediation and to ensure that mediation leads to a fair and acceptable outcome for the parties. The mediator should not act as legal adviser to that party or recommend any settlement or course of action. It is not the function of the mediator to obtain information from third parties. Information gathering for the mediation should be undertaken by the parties, though the mediator can make suggestions as to relevant sources and documentation. The mediator has no power of independent enquiry.

8. GOOD COMMUNICATION

It is essential to the process of mediation that clear information is given to parties and as appropriate, their Solicitors and that without delay. In particular before mediation begins the parties should be given:-

- 8.1 a leaflet explaining the principles of mediation;
- 8.2 Terms and Conditions of Engagement for mediation, a copy of which should be signed by the mediator and the parties and which must highlight the intention that the process be "without prejudice" but for the openness of the financial information gathering;

At certain stages of the mediation process and at its termination the mediator may prepare for the parties a summary of the mediation to date, any interim agreement reached, any final agreement reached, and a financial summary. The mediator shall endeavour to produce such summaries expeditiously.

9. TERMINATION OF MEDIATION

In that mediation is a voluntary process, either party or the mediator may terminate it summarily, though the mediator should not terminate the process except for good cause (which need not necessarily be disclosed to the parties). The mediator must terminate the mediation if after discussion with the parties the mediator is not satisfied that full disclosure of financial matters has been made by one or both of the parties or it if appears that one or both of the parties are being untruthful, manipulative, threatening or abusing the mediation process for their own ends (e.g. by protracting the mediation to maintain a status quo).

10. COMPETENCE AND SKILLS

The mediator must continue his or her training by attending Continuing Professional Development training courses each year sufficient to meet the requirements for accreditation as may be determined by the Law Society of Scotland. The mediator must be able to satisfy C.A.L.M. or the Law Society of Scotland as to their continuing professional development as a mediator. C.A.L.M. will monitor compliances with this paragraph. Before embarking on mediating on his or her own, the mediator must carry out a minimum of three co-mediations with another C.A.L.M. member and involving three different parties. At least once per annum, the mediator will act as co-mediator or be observed by another mediator (but always subject to the consent of the parties) or if this is not practicable will be observed in supervised role-play. The mediator must keep himself or herself up to date with knowledge of family law.

11. SAFETY

The mediator must be alert to the possibility of violence between the parties.

12. FAIR AND REASONABLE FEES

The mediator must disclose his or her level of fee charging in advance. It is appropriate for the mediator to request payment in full or part in advance as non-payment or late payment of fees may lead to a conflict of interest between the mediator and one or both of the parties. It is possible for one party to be solely responsible for all the mediator's fees provided that this does not detract from the impartiality of the process. The mediator's fees must be fair and reasonable.