



Independent Mediation – Information for Judges, Magistrates and Legal Advisors

I am pleased to endorse this guidance which has been produced by the Family Mediation Council with contributions from the Appropriate Dispute Resolution sub-committee of the Family Justice Council.

The guidance sets out, for judges, magistrates and legal advisers, the fundamental principles of independent family mediation which are central to its effective delivery and by which all recognised family mediators must abide. I believe it will be extremely useful for all involved in family justice and I fully commend it to you.

Sir Nicholas Wall
President of the Family Division

This paper has been prepared to assist Judges in understanding the fundamental and inviolable principles of mediation

Independent mediation is governed by four principles:

- **It is a voluntary process**
- **It is a confidential process**
- **The mediator acts in an impartial way**
- **Decision making rests with the participants to the mediation**

These principles are central to the delivery of an independent family mediation process and govern the way in which all recognised family mediators work. Mediators cannot dilute these principles which are embedded in Code/s of Practice applied by all mediation representative and regulatory bodies and in documentation provided by mediators to clients.

Family mediators are also required to ensure that they work within their relevant Code of Practice (abiding by these core principles) for insurance purposes.

It is the preservation of these principles which has enabled mediation to provide a highly effective Out of Court Resolution process. The advantage to this is that, where mediation succeeds, there is far less likelihood of a return to the court process.

Voluntary Process

Mediators working with or at court are able to provide an opportunity, in the form of an assessment meeting, for clients to understand more about the mediation process and to assess whether it would be appropriate

and helpful for them. At this meeting clients are fully informed of the principles, process, benefits and any cost of mediation. They can then decide whether or not they wish to engage in mediation in order to resolve disputed issues.

Independent mediators are not able to provide mediation without the voluntary agreement of both clients to participate in the process (unlike some existing conciliation schemes available at court).

Within the civil jurisdiction, this has been expressed in the following way: *“The hallmark of ADR procedures, and perhaps the key to their effectiveness in individual cases, is that they are processes voluntarily entered into by the parties in dispute with outcomes, if the parties so wish, which are non-binding. Consequently the court can not direct that such methods be used but may merely encourage and facilitate”* (*Halsey v Milton Keynes General NHS Trust* [2004] EWCA (Civ) 576). Attendance at a mediation assessment meeting can however be ordered as a contact activity under s.11A and 11C Children Act 1989.

Confidentiality

The confidentiality of any process of family mediation is covered by an existing precedent: *Re D (Minors) (Conciliation: Privilege) Disclosure of Information* [1993] 1 FLR 932, which states that “parents would not achieve a compromise unless they approached conciliation openly and were prepared to give and take. They would not make admissions or conciliatory gestures unless they were confident that these could not be used against them. Any attempt at conciliation must be off the record but there were exceptions . . .” and further “the only exception would be in rare cases where a statement made during conciliation indicates that the maker has caused or is likely to cause serious harm to a child”.

Any client entering a mediation process is asked to sign an ‘Agreement to Mediate’ – which sets out both the scope of and limitations to confidentiality in line with *Re D* (and in regard to legislation relating to abuse and harm and money laundering) - and further, participants to a mediation are asked not to call the mediator to provide evidence (either as notes or in person).

Independent mediators are therefore not able to provide information to the court as to the content of any discussions held in mediation or the reasons why proposals were not reached and/or any view as to who may have not co-operated or declined to enter or continue with a mediated process.

If participants do reach a consensus, they may request the mediator to draft a mediation summary to provide details of this. Such a summary is a “without prejudice” document which cannot be legally binding until the participants have had the opportunity to take legal advice upon it. Having had that opportunity they can then decide if they wish to enter into a binding agreement. (In “All-Issues” cases, where issues relating to finance, property as well as children have been considered, financial information is provided on an open basis and an open financial summary is prepared as a separate document.)

Mediators can only provide further information to the court if both clients agree to waive their privilege. This is likely to be only in those cases where it would assist the participants to resolve their dispute for the court to be made aware of some information as to the progress or conclusion of the mediation. It would be appropriate and reasonable that clients should take legal advice before agreeing to waive their privilege.

Impartiality

Mediators act as an impartial third person to assist people to reach their own, informed decisions. It is therefore important that mediators are understood by all concerned to be independent of the court. They do of course have a special concern for the welfare and protection of children and young people.

Decision making

Mediators will work with clients to help them achieve an outcome that is appropriate to their situation. It is often the case that reaching an enduring outcome, likely to stand the test of time and deal with underlying issues of conflict, will require more than one meeting and wherever possible, arrangements should take into account that a mediation process may require the court to adjourn matters whilst the mediation continues.

Mediation appointments take place within a time frame that is realistically practicable for clients. The time taken to reach decisions for settlements is usually considerably shorter than the time needed for full engagement in the court process. Mediators will always try to ensure that the process of mediation is not being used as a delaying tactic.

The Opportunity for Out of Court Resolution

1. In its 2007 review the National Audit Office noted the inadequate take-up of the opportunity to mediate due to lack of awareness. "There is scope to improve the value for money achieved from the legal aid budget through increasing the take-up of mediation. In addition to financial savings, this would bring potential benefits for those involved in family breakdown in terms of outcomes that are less acrimonious, quicker, and longer lasting than might otherwise have been achieved" (National Audit Office: Legal Aid for People Involved in Family Breakdown: 02.03.07). Parties referred by the court for mediation assessment are given this opportunity, which needs to be offered again and again; mediation is never "all or nothing". It can be particularly effective to engage in a process away from the court once proceedings have commenced.
2. It is helpful if the court can help parties (especially litigants in person) to understand the choices between continuing court/ Cafcass involvement and mediation or other ADR intervention. The Midland Judges' Statement of Expectations or the FJC ADR's Family Court Guide are excellent starting points.
3. Considerations in the choice between mediation referral, litigation and welfare investigation and/or Dispute Resolution by Cafcass are likely to include:
 - Any history of domestic abuse or violence outside the home or special vulnerability of either party or relevant children
 - Any consequent need for investigation of welfare issues by Cafcass
 - The principles and advantages of voluntary and privileged mediation
 - A place outside the adversarial arena – that is, "Out of Court Resolution"
 - Outstanding financial issues impeding resolution, which might be susceptible to "all-issues" mediation
 - Any relative delay
 - Continuity
 - The location of mediation services
 - The relative cost
 - Utilising a mediation process to discuss with parents the wishes and feelings of a child/ren and/or young person and the possible use of direct consultation with the child, if appropriate and with the agreement of all concerned
 - Whether there are disputed facts requiring a judicial finding.

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