



The Law Society



Helping participants realise an enduring outcome to family mediation

1. This guidance has been jointly agreed between Resolution and The Law Society. Particular thanks and acknowledgements are recorded here to The Law Society and Resolution Joint Working Group and especially to Caroline Bowden and David Hodson
2. This guidance relates to the preparation by mediators of draft proposals and terms in respect of financial matters or marital agreements following resolution reached in mediation. It is relevant to all mediators regardless of profession of origin.¹
3. The principles which underpin the preparation of terms following a successful outcome are the same as for any other aspect of mediation:
 - that the mediator remains impartial;
 - does not give advice; and
 - informs participants of the importance of taking independent legal advice.
4. The FMC Code of Practice [appended] requires that you should do this, together with providing information about the risks and disadvantages of not doing so (FMC CoP 8.14).
5. It is also essential that you consider whether, in drafting in more technical or formal detail than a summary of proposals, you do so within the limits of your competence. The FMC Code also requires you to have appropriate and adequate professional indemnity insurance.
6. For mediators who are lawyers, it is especially important that in drawing up terms following a successful mediation, the participants are clear that you are still acting as a mediator and not a lawyer. The FMC Code of Practice makes clear that you must ensure that mediation is conducted as an 'independent professional activity and must be distinguished from any other professional role in which you may practice' [FMC Code of Practice 5.1.7].

¹ (For simplicity of expression throughout this guidance, reference to drafting financial terms includes drafting marital agreements on the basis that the latter would be quite probably of persuasively binding effect under Radmacher case law).

7. Generally, mediators either encompass any proposals in regard to children's arrangements in a Memorandum of Understanding (MOU) or prepare more detailed Parenting Plans in respect of any children's arrangements which can be appended to C100 application to the Court for formal recognition should parents wish to do so.
8. For some participants in mediation, having only draft proposals set out in the Memorandum of Understanding (MOU) causes them to view mediation as deficient to their need to establish a binding outcome. It is also the case that an increasing number of people do not instruct or seek advice from solicitors prior to, during, or following mediation. With increasing levels of self-representation and the availability of standard orders, many mediators are offering to assist participants who want a form of outcome summary that could readily be used to achieve a binding outcome. This might be because they intend to represent themselves or because they wish to limit the costs of seeking legal advice on their proposed outcome.
9. As a mediator, it is essential that you work within your professional boundaries and expertise and that you have made an appropriate assessment of what will help individuals most (including in protecting each of them and any children).
10. There are a number of considerations you must weigh if you wish to assist participants in having a draft document that sets out their proposals at a level sufficient to aid them in securing a binding order. As, when and if appropriate, it may be helpful for you to discuss with your PPC the appropriateness of providing a detailed draft and/or what needs to go into the draft to ensure that you have considered matters of enforcement. Any draft should also achieve what the participants intended (potentially without any re-drafting after they have taken advice – or indeed, if they choose not to take advice). You should also ensure that you are aware of guidance issued by your own Membership Organisation (MO), within your own practice or service or by the FMC to assist you. Courses relating to the drafting of documents are also available from MOs.

Family Mediator acting as a drafts person

11. As a mediator, you already draft a Memorandum of Understanding (MOU) and Open Financial Statement or Summary (OFS). The MOU generally sets out what has been discussed and the proposals that have been reached as a result of those discussions. The proposals are and should be usually set out in a 'Summary of Proposals' or similar, which forms an integral part of the MOU and assists both participants and solicitor/s to prepare a draft consent order.
12. It is therefore possible to consider whether greater detail could be added to the Summary of Proposals such that it would, in effect, provide both participants with a draft for any order they might seek. With the introduction of the President's Standard

Orders (and in particular the Financial Remedy Omnibus), Standard Orders may be useful as the base for a Summary of Proposals.

13. If you decide to act in this way, it is essential that you ensure that it is clear that the Summary remains within the MOU as a whole document and is protected by mandatory precedent paragraph/s provided in the template documents provided by MOs and that makes clear the status of the document (i.e. the confidential nature of it) and that until the individuals have sought and received legal advice on the proposals, they are not binding upon them.

14. You should add:

- that the proposals are that of the participants' alone and the mediator is not endorsing the merit of them or facilitating a binding settlement and
- that the mediator has explained the importance of appropriate financial disclosure and
- that the mediator has not and will not be providing any legal advice
- the importance of their individual right and opportunity to seek legal advice, which the mediator recommends and encourages them to do before entering into any binding agreement
- they understand that if the court makes an order in the proposed terms, they are very likely to be prevented from making an application for alternative financial provision or resiling from it

15. (You should be aware and make use of any precedent template/s or other information and guidance provided by your own MO)

Robustness of mediation process

16. In providing more detailed settlement or proposed terms, it follows that you must have ensured that clients have provided the appropriate disclosure of their finances. Participants should be aware of their individual obligations in providing disclosure of their finances and the consequences of not doing so. This is of considerable importance if you are to set out detailed proposals and it will also be important for you to make clear and to remind individuals of the importance of having appropriate verification of their financial disclosure which falls outside of your role as a mediator

Keeping a professional distance – considerations

- 17.** You need to consider carefully how you ensure that you have maintained your role as a mediator (especially in the understanding of the clients). Clearly, providing clients with a more detailed set of proposals, even if following one of the available standard orders, is not all that they will require. You need to consider whether to e.g. prepare or assist participants to prepare the D81 financial summary and in doing so whether you could or might start to 'blur the lines' as to your role. Bear in mind that lodging papers at the Court is ancillary to the conduct of litigation, which is a reserved activity, and must not be undertaken by a family mediator.

Confidentiality and without prejudice communications – considerations

- 18.** It is essential that mediators keep in mind the need for confidentiality that applies to the mediation process.
- 19.** Should mediators decide with participants to provide a detailed draft as part of an MOU there are considerations in terms of confidentiality. It is important to be aware that confidentiality is conditional and is subject to caveats ranging from issues of safeguarding, any over-arching or over-riding obligation in law, over-riding public policy considerations, ECHR imperative and/or where there is or has been concerns in regard to unlawful activity (fraud, criminal act, money laundering). Over the years of mediation practice, notably in civil/commercial matters, the canon of precedent judgements relating to the confidential nature of mediation has grown and it is clear that there will be more occasions when challenges to the confidentiality of mediation process will be made.
- 20.** Established precedents such as [Brown v Rice & Patel \[2007\] EWHC 625 \(ChD\)](#), or [Unilever v Proctor and Gamble \[2000\] 1 WLR 2436](#) and [Farm Assist v DEFRA \[2009\] EWHC 1102](#) may all have resonance in relation to potential challenges to detailed drafts prepared as part of family mediations. (See also FMC Code of Practice in relation to confidentiality, 5.2, 6.4 and privilege and legal proceedings 6.5). A more recent case, [BL v TC & OD \[2017\] EWHC 3363](#) has added to the available precedents in relation to confidentiality of mediation process.
- 21.** For all of the reasons cited, it is essential that mediators consider very carefully how they provide explanations to participants (and as necessary, their respective legal advisers) and ensure that matters are clearly set out in any Agreement to Mediate and in client outcome documents.

Suitability for drafting detailed proposals

22. You must carefully consider the 'appropriateness' of drafting detailed proposals. You should be clear that the proposals are those of the participants alone and that you as the mediator are not endorsing the merit of them or facilitating a binding settlement.
23. Beyond that, you must ensure that you adhere to the requirements of the FMC Code of Practice in terms of e.g. possible imbalance of power, that individuals are reaching decisions about which they are fully informed, that the proposals do not fall outside of that which a court would order or approve etc.

'Cooling off' period

24. It is good practice that if you are drafting detailed formal terms that you repeatedly emphasise the importance of legal advice on any proposals. This is clearly set out in the FMC CoP (8.14)

Mandatory preamble

25. It is essential that you explain to participants that the draft provided to them as part of their Memorandum of Understanding is provided on an evidentially and without prejudice draft basis and should not be signed by them until they have each received independent legal advice on the terms as drafted in order to protect their individual rights.

Summary

26. It is essential that any family mediator who intends to draft the terms of a mediation outcome, beyond the traditional MOU document, must consider carefully:
 - Whether you have an appropriate level of professional knowledge and skill
 - That you do not blur the boundaries of your role as mediator and ensure that you are acting within the principles of mediation and the Code of Practice of the FMC
 - As in all mediation practice, you should ensure that clear caveats are in place warning participants that they should take legal advice on the proposals contained within the MOU **before** drafting the terms or that it is clear that the MOU and detailed draft is provided on an evidentially privileged and without prejudice basis and does not record or create a binding agreement between participants and is

intended to provide a draft on which independent legal advice may be sought and which they have been recommended to do.

- That you ensure that you have made clear in writing or have the written agreement of the clients confirming that you have explained, and they have understood the terms by which you will draft any terms and the status of the draft terms.
- Confirming appropriate professional indemnity cover

27. In some jurisdictions it is usual practice for mediators to draft orders as part of their role. If there is an international element, you may therefore be asked or expected to do so. Remember also that in some jurisdictions the proposals or settlement terms coming out of mediation are open, and not confidential as in the law of England and Wales. Much greater care must always be taken when mediating a case with an international element

28. Mediators who are qualified to act as civil/commercial mediators are able to draft suitable 'Tomlin Orders' from a civil mediation procedure. If and when they do, it is within the applicable rules and Code/s of their governing or training organisation. If you are so qualified, it may be more appropriate to conduct certain mediations within the auspices of civil/commercial practice, e.g.:

- Where a family business is involved
- TOLATA matters
- Complex family trusts and inheritance issues

29. However, if such matters are dealt with in family mediation and parties wish the mediator to provide detailed draft terms as a free-standing document, conducting the mediation under civil/commercial rules may be appropriate.

Working with representing solicitors

30. Clearly, where individuals are individually represented, you should always ensure that the solicitors are aware that you will prepare a detailed draft if so agreed with the participants to the mediation. You should inform the solicitors that any draft will make it clear that individual legal advice will be required before any binding agreement can be made and that solicitors usually undertake the final drafting of any order. It is essential for you to explain to participants the need for contact with their respective solicitors and that you have their permission to do so. Wherever possible and practicable, participants should be clear about who they can choose to provide draft detailed terms.

- 31.** Where individuals are unrepresented, you should still ensure that they have been properly informed and that you encourage participants to seek individual legal advice, as is set out in the FMC Code of Practice.
- 32.** In August 2015 the SRA issued [guidance](#) on the preparation of consent orders by solicitors who are mediators by way of a separate retainer.
- 33.** Mediators must note the cautions surrounding this practice as are pointed out by the SRA in its own guidance, including that it will not be suitable for everyone. These cautions must also be considered together with the FMC Code of Practice and in particular ensuring that you have carefully and clearly separated out what are two very different roles and associated responsibilities and are confident that those involved are clear about the terms and have provided their written consent.