



**Joining Instructions for the  
Accredited Civil and Commercial  
Mediation Training Course**

**LSM Admin Office Tel 0207 583 0444**

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Role play common scenarios (to follow as an additional PDF)

***Please print these joining instructions and bring them with you to the course.***

## **INTRODUCTION FROM THE LSM COURSE DIRECTOR, JUDITH KELBIE**

Dear Colleagues,

Welcome to our fully accredited mediation training course. Mediation is our passion and our pleasure to teach. We look forward to providing you with all the knowledge and skills to be safe and competent to begin practice on successful completion of the course.

The course features a mix of teaching and role plays that have made it popular for over a decade. All of the role plays are based on real mediations, anonymised of course, which the faculty have conducted. We will enjoy working through them and as we develop the mediation process with you.

Please note that all the sessions (and about 90 minutes of homework each evening) are compulsory and that if hours are missed we will need to work to ensure that the Civil Mediation Council requirement is met. We will support you throughout the week. There is a written exam to complete on Wednesday evening.

If you have queries in the run-up to the course, please contact Michelle on 0207 583 0444. They will be able to give you all the information you need. A full briefing on Covid-19 procedures at the venue will be provided. We ask you all to please follow the rules specified.

I will be leading the course for the first three days with Tessa Herman. We will also coach you in the role plays. There will be an assessment team, led by an independent assessor, who will conduct the last two days. We have a diverse group of leaders and assessors, who bring an unrivalled range of experience to the course.

Please note that due to Covid-19 we will not be able to provide lunch so please either bring your own or visit one of the local sandwich shops close by during the lunch break. Please wear what you like – there is no dress code, so wear whatever you feel most comfortable to learn and to enjoy the training.

**You will require evening access to a laptop/PC/tablet with access to the internet to download your exam materials (a Word document and PDF slides).**

We look forward to seeing you at 0930 for a prompt start. On other mornings, we will start at 0900.

With very best wishes

Judith and Tessa

1 April 2021

**LOCATION MAP**

**NEAREST TUBE**

**NEAREST OVERGROUND**



## **OUTLINE COURSE PROGRAMME**

### **Monday Introduction to mediation**

- 0915 Registration
- 0930 Course Commences – Introductions and Circle
- 0945 What is mediation?
- 1000 Mediation 101
- 1030 Language and active listening
- 1045 Questioning techniques
- 1115 Negotiation exercise
- 1130 Break
- 1145 Debrief
- 1155 More techniques
- 1215 How to begin a mediation
- 1225 Demonstration opening - Van Winkle v Van Winkle
- 1240 Confidentiality
- 1300 Lunch
- 1345 Mediation 102
- 1415 Offers and agreements
- 1440 Role Play briefing
- 1445 **Role Play 1 – Monalito**
- 1615 Break
- 1630 **Role Play 2 – A Pinch of Salt**
- 1800 Consolidation, issue homework and close

### **Tuesday Core Skills**

- 0900 Non-verbal communication
- 0920 The agreement to mediate
- 0935 Threats to process
- 1000 **Role Play 3 – Never mind the Pollocks**
- 1130 Break
- 1145 **Role Play 4 – Pig in a Poke**
- 1315 Lunch
- 1400 Unrepresented people
- 1415 **Role Play 5 - Edge of Reason**
- 1545 Break
- 1600 **Role Play 6 – Where there’s a Glebe**
- 1730 Consolidation
- 1815 Issue homework and close

### **Wednesday Higher Level Skills**

0900 Lies, Threats, Ethics and POCA  
1000 **Role Play 7 - Kelly v O'Hara**  
1130 Break  
1145 **Role Play 8 – The Rosetta Stone**  
1315 Lunch  
1400 **Role Play 9 – Megalit**  
1530 Break  
1545 **Role Play 10 –The Eager Beaver**  
1715 Consolidation  
1730 Examination issue and full briefing  
1800 Issue homework and close

#### **Thursday Consolidation and Assessment**

0900 Examination hand in  
0900 **Role Play 1 - Low Life Music (non-assessed)**  
1100 Break  
1115 **Role Play 2 – Fast Bikes (non-assessed)**  
1315 Lunch  
1400 Assessment briefing  
1415 **Role Play 3 - Murphy v DAFT**  
1615 Break  
1630 **Role Play 4 - Old Spice**  
1830 Issue homework and close

#### **Friday Assessment and Debriefing**

0900 **Role Play 5 - Final Furlong**  
1100 Break  
1115 **Role Play 6 – Great Fire of Stoke**  
1315 Lunch  
1400 **Role Play 7 - The Golf Match**  
1600 Break  
1615 **Role Play 8 –What a Picture**  
1815 Individual debriefs  
1845 Finish

#### **Notes:**

- (1) Times are approximate and may vary with the needs of the course.
- (2) Role plays may be changed with the needs of the course.
- (3) In addition to lunchtime, each day will contain two breaks for coffee and tea.
- (4) All 40 working hours of the course are compulsory.
- (5) Debriefs on Friday PM will be organised to fit around individual needs.
- (6) Certificates will be issued to all of those who pass the assessment and the examination.







**SCHEDULE 1**

**PARTIES AND REPRESENTATIVES**

**Party 1**

Name \_\_\_\_\_

Address \_\_\_\_\_

\_\_\_\_\_

Representative \_\_\_\_\_

Firm \_\_\_\_\_

Telephone \_\_\_\_\_

Email \_\_\_\_\_

**Party 2**

Name \_\_\_\_\_

Address \_\_\_\_\_

\_\_\_\_\_

Representative \_\_\_\_\_

Firm \_\_\_\_\_

Telephone \_\_\_\_\_

Email \_\_\_\_\_

## LSM's MEDIATION RULES - 2021 EDITION

### **1. INTERPRETATION**

1(1) In these Rules, the following terms shall have the following meanings:

- (a) "Mediator" means a member of LSM Limited's panel of mediators appointed by the Parties as a neutral to conduct the mediation. The Mediator is an independent contractor chosen by or agreed to by the Parties with whom they contract for services rendered. The Mediator is not an employee of LSM Limited. The Mediator is not a person who will provide legal or professional advice to the Parties or their Representatives or who will give a judgment or an award.
- (b) "Agreement to Mediate" means a legally-binding contract to mediate, prepared by LSM Limited for the Parties, their Representatives, the Mediator and any Non-Parties attending the Mediation, to be executed prior to the commencement of the Mediation, containing various provisions relating to the process of Mediation, confidentiality, privilege, liability, and the duties and obligations of the Parties to each other, to the Mediator and LSM Limited. The Agreement to Mediate requires agreement to and compliance with these Rules.
- (c) "Party" means a Party to a dispute, controversy, or legal action who is a participant in the mediation or who is represented by a participant in the mediation.
- (d) "Representative" means the lawyer, counsel, attorney, or other authorised representative of the Party.
- (e) "Evaluative Mediation" shall mean a process of mediation in which the Parties jointly invite the Mediator to comment on the merits or substance of the case, and/or to provide a non-binding evaluation.
- (f) "Facilitative Mediation" shall mean a process of mediation in which the Mediator offers no comment on the merits or substance of the case, nor provides any evaluation but instead assists the Parties to an agreement using principled negotiation. The Mediator may in his or her absolute discretion comment on the use of the process of the Mediation if such comment is likely to assist the Parties.
- (e) "Settlement Agreement" means a document signed by the Parties or their Representatives before the conclusion of the Mediation, setting forth agreed terms of settlement between the Parties which are intended by them to be legally binding

1(2) These Rules shall be interpreted in such a way as to provide the Parties with an efficient and effective Mediation.

### **2. AGREEMENT OF PARTIES**

2(1) These Rules, and all amendments to them, shall be deemed to be part of the Agreement to Mediate which provides for Mediation with the Mediator.

2(2) Subject to the agreement of the Mediator, these Rules may be varied at any time by written amendment signed by the Parties or their Representatives.

### **3. PRIVACY AND CONFIDENTIALITY OF MEDIATION**

- 3(1) The Mediation is private and confidential.
- 3(2) A person who is not a Party or a Legal Representative may only attend the Mediation with the consent of all of the Parties and of the Mediator: every such person shall sign Schedule 2 before the start of the Mediation.
- 3(3) Every Party and Legal Representative agrees that all offers, promises and proposals, whether oral or written, actions, determinations, representations and statements (including but not limited to admissions) made in the course of the Mediation by any of the Parties, their agents, employees, experts, Legal Representatives and all statements, comments, or observations made or relayed, by the Mediator, and all notes, documents and reports prepared or exchanged during the Mediation are "without prejudice" and for the purpose of negotiation only.
- 3(4) The Parties agree that any such offers, promises, proposals, conduct, statements, notes, documents, and reports shall not be disclosed to any third party and they shall not be offered as evidence in any arbitration, judicial or other proceeding, at any time.
- 3(5) Notwithstanding Rule 3(4), the parties acknowledge that evidence that is otherwise admissible shall not be rendered inadmissible because it has been used in a Mediation.
- 3(6) Neither the Mediator, nor any person present observing the Mediation nor any of LSM Limited's staff shall be invited or compelled by the Parties, jointly or severally, to appear as a witness in any pending or future adversarial or judicial proceeding involving any one or more of the Parties or relating in any way to the subject matter of the Mediation.
- 3(7) The Parties agree that they shall not jointly or severally seek to summons the Mediator or any person observing the mediation or any of LSM Limited's staff.
- 3(8) Any notes made by the Mediator are confidential to the Mediator and shall not be available to the Parties at any time, nor subject to subpoena for production as evidence in any arbitration, judicial or other proceeding. The Mediator undertakes that he or she shall in any event destroy any notes taken on completion of the mediation.

### **4. BASIC PRINCIPLES**

- 4(1) The Parties and their Representatives agree that each Party shall attend the Mediation with full authority to settle.
- 4(2) At the Mediation, the Parties agree that they will be prepared to make a brief oral statement explaining what they wish to achieve from the process and acknowledge that they are expected to participate in good faith in the process conducted with the assistance of the Mediator.
- 4(3) The Parties agree where reasonably practicable to make available to the Mediator such copies of documents or materials as are likely to be needed in order effectively to negotiate.
- 4(4) The Parties agree that the Mediator may meet privately (caucus) with each Party and its Legal Representative during the Mediation if the mediator considers that it will assist the

process. Any Party and Legal Representative may request a private caucus with the Mediator at any time.

- 4(5) The Parties agree that there shall be no electronic recording by any means of the mediation, nor any verbatim stenographic record taken of the Mediation. Parties may make notes but these must not be shown to any person not a signatory to the Mediation Agreement, without the consent of the other Party and expressly are not admissible in any court, arbitration or other proceedings.

## **5. MEDIATION PROCEDURE**

- 5(1) The Mediator will conduct the Mediation using Facilitative Mediation as defined in Rule 1(1)(f). The Mediator will conduct process non-judgmentally by exploring the interests, needs and concerns of the Parties allowing them to generate options for a mutually agreed resolution.

- 5(2) The Mediator will not advise any person, nor comment or offer legal or professional opinions. The Parties will rely on their own counsel or Legal Representatives for legal or professional advice.

- 5(3) The Mediator will not propose a settlement nor draft any offers of settlement.

- 5(4) The Mediator will continue to use Facilitative Mediation techniques until a settlement is reached, or the Mediation is adjourned or terminated as set out below.

### **Evaluative Mediation**

- 5(5) Evaluative Mediation is not offered by LSM Limited. The Mediator will not evaluate or advise.

### **Termination of the Mediation**

- 5(6) Whatever the process used in Mediation, the Mediation shall be terminated:

- (a) by agreement between the Parties; or
- (b) if a settlement is reached by the Parties; or
- (c) at any time during the Mediation, if the Mediator in his/her absolute discretion decides it should be terminated in which case the Parties agree they shall not challenge that decision nor shall the Mediator give or be asked for a reason for the termination; or
- (d) no agreement has been reached in the time available and it is either impracticable to take further time, unless the Parties and the Mediator agree to adjourn the mediation; or
- (e) a Party does not wish to continue in Mediation.

- 5(7) On termination, the Mediator will as soon as reasonably practicable destroy all notes and documents save for the Agreement to Mediate and any Schedules to that Agreement and/or the Rules.

## **6. SETTLEMENT AGREEMENT AND FORMALITIES**

- 6(1) Any settlement agreed at Mediation will not be deemed to be concluded or to be legally binding until the Parties or their Legal Representatives sign a Settlement Agreement at the mediation setting forth the terms thereof.
- 6(2) The Settlement Agreement shall not be drafted or signed by the Mediator.

## **7. EXCLUSION OF LIABILITY**

- 7(1) Neither the Mediator nor LSM Limited or its staff, employees or agents, shall be liable to any Party or Legal Representative for any act or omission howsoever arising in connection with any Mediation conducted by the Mediator.
- 7(2) Without prejudice to the Agreement to Mediate and to the exclusions or limitations set out in these Rules, should contrary to the foregoing provisions any liability be found to attach to the Mediator then the Parties agree that it shall be limited to the maximum sum of £1,000,000.

## **8. FEES AND COSTS OF THE MEDIATION**

- 8(1) The Parties will be responsible for the fees and expenses of the Mediator (“the Mediation Fees”) in accordance with LSM Limited’s Terms and Conditions of Business current at the date of this Agreement (including any provision for additional hours if the mediation process extends beyond the allocated hours).
- 8(2) By way of a summary of the terms and conditions and not by way of a complete recital, the Parties agree jointly and severally to pay to LSM Limited:
- (a) £500+VAT on reserving the mediation by way of a non-refundable deposit; and
  - (b) the balance of the mediation fee (normally a further £1,500+VAT) in cleared funds before the date of the mediation – the complete fee covers preparation of half a day (up to four hours), the Mediation of up to six working hours, and reasonable local travel to the Mediation; and
  - (c) the actual cost of any non-local travel and subsistence where the same is not booked and paid for by the parties themselves: reimbursement shall be by immediate transfer of cleared funds on presentation of receipt support fee notes; and
  - (d) travel time at the daily rate where a flight is scheduled to exceed one hour: payment shall be in advance before the mediation; and
  - (e) overtime at the hourly rate of £250+VAT for any additional hours on one day, or at the standard daily rate for an additional mediation day: the same to be paid by immediate transfer of cleared funds on receipt of a fee note; and

- 8(3) The Parties shall be jointly and severally liable for the costs of any venue, interpreter, or other additional costs, together with the Mediator's airfares if appropriate to be paid at business class rates and to include appropriate accommodation where reasonably necessary.
- 8(4) If contrary to Rule 3(6) or otherwise, any Party does seek to call the Mediator or any other person as a witness or make such an application, that Party will fully indemnify the Mediator or the LSM Limited's employee or staff in respect of any costs any of them incur in resisting and/or responding to such an application, including reimbursement at the Mediator's standard hourly rate (£250+VAT) for the Mediator's time spent in resisting and/or responding to such application including but not limited to waiting, travelling, preparing, attending or being at Court or any other tribunal.
- 8(5) Unless otherwise agreed by the Parties and LSM Limited in writing, each Party agrees to share liability for the Mediation Fees equally and also to bear its own legal and other costs and expenses of preparing for and attending the Mediation ("each Party's Legal Costs") prior to the Mediation. However, each Party further agrees that any court or tribunal may treat both the Mediation Fees and each Party's Legal Costs as costs in the case in relation to any litigation or arbitration where that court or tribunal has power to assess or make orders as to costs, whether or not the Mediation results in settlement of their dispute.

#### **LEGAL EFFECT AND STATUS OF THE MEDIATION**

- 9(1) The Agreement to mediate and these Rules are governed by the laws of England and Wales and the courts of England and Wales shall have exclusive jurisdiction to decide any matters arising out of or in connection with this Agreement and the Mediation.

#### **SIGNATURE**

I have read, understand and agree the provisions of this Agreement and the attached Rules.

Signed: \_\_\_\_\_ for and on behalf of Party 1 and its Representatives

Signed: \_\_\_\_\_ for and on behalf of Party 2 and its Representatives

Signed: \_\_\_\_\_ Mediator (who also signs for LSM Limited)

Dated this                      day of                      2021

**SCHEDULE 2 TO LSM's MEDIATION RULES**

**CONFIDENTIALITY AGREEMENT**

**FOR OBSERVERS/NON-LAWYERS/NON-PARTIES**

**MEDIATION between**

**Party 1**

**and**

**Party 2**

**Held on**

**2021; at**

I the undersigned, in consideration of the Mediator and the Parties in the above mediation agreeing to me attending and observing the above mediation, hereby irrevocably agree to keep confidential all matters that I hear, read, or see at the above mediation and shall never disclose what I learn, hear, read, or see at the above mediation unless required by a Court in due process of law.

<b>Name</b>	<b>Address</b>	<b>Email</b>	<b>Telephone</b>	<b>Signature</b>

Signed in the presence of the Mediator:

Mediator's name:

Signed:

Dated:

**1. COMPETENCE AND APPOINTMENT OF MEDIATORS**

**1.1 Competence**

Mediators shall be competent and knowledgeable in the process of mediation. Relevant factors shall include proper training and continuous updating of their education and practice in mediation skills, having regard to any relevant standards or accreditation schemes.

**1.2 Appointment**

The mediator will confer with the parties regarding suitable dates on which the mediation may take place. The mediator shall satisfy him/herself as to his/her background and competence to conduct the mediation before accepting the appointment and, upon request, disclose information concerning his/her background and experience to the parties.

**1.3 Advertising/promotion of the mediator's services**

Mediators may promote their practice, in a professional, truthful, and dignified way.

**2. INDEPENDENCE AND IMPARTIALITY**

**2.1 Independence and neutrality**

The mediator must not act, or, having started to do so, continue to act, before having disclosed any circumstances that may, or may be seen to, affect his or her independence or conflict of interests. The duty to disclose is a continuing obligation throughout the process. Such circumstances shall include

- any personal or business relationship with one of the parties,
- any financial or other interest, direct or indirect, in the outcome of the mediation, or
- the mediator, or a member of his or her firm, having acted in any capacity other than mediator for one of the parties.

In such cases the mediator may only accept or continue the mediation provided that he/she is certain of being able to carry out the mediation with full independence and neutrality in order to guarantee full impartiality and that the parties explicitly consent.

**2.2 Impartiality**

The mediator shall at all times act, and endeavour to be seen to act, with impartiality towards the parties and be committed to serve all parties equally with respect to the process of mediation.



### **3. THE MEDIATION AGREEMENT, PROCESS, SETTLEMENT AND FEES**

#### **3.1 Procedure**

The mediator shall satisfy himself/herself that the parties to the mediation understand the characteristics of the mediation process and the role of the mediator and the parties in it.

The mediator shall in particular ensure that prior to commencement of the mediation the parties have understood and expressly agreed the terms and conditions of the mediation agreement including in particular any applicable provisions relating to obligations of confidentiality on the mediator and on the parties.

The mediation agreement shall, upon request of the parties, be drawn up in writing. The mediator shall conduct the proceedings in an appropriate manner, taking into account the circumstances of the case, including possible power imbalances and the rule of law, any wishes the parties may express and the need for a prompt settlement of the dispute. The parties shall be free to agree with the mediator, by reference to a set of rules or otherwise, on the manner in which the mediation is to be conducted.

The mediator, if he/she deems it useful, may hear the parties separately.

#### **3.2 Fairness of the process**

The mediator shall ensure that all parties have adequate opportunities to be involved in the process. The mediator if appropriate shall inform the parties, and may terminate the mediation, if:

- a settlement is being reached that for the mediator appears unenforceable or illegal, having regard to the circumstances of the case and the competence of the mediator for making such an assessment, or
- the mediator considers that continuing the mediation is unlikely to result in a settlement.

#### **3.3 The end of the process**

The mediator shall take all appropriate measures to ensure that any understanding is reached by all parties through knowing and informed consent, and that all parties understand the terms of the agreement.

The parties may withdraw from the mediation at any time without giving any justification. The mediator may, upon request of the parties and within the limits of his or her competence, inform the parties as to how they may formalise the agreement and as to the possibilities for making the agreement enforceable.

### **3.4 Fees**

Where not already provided, the mediator must always supply the parties with complete information on the mode of remuneration which he intends to apply. He/she shall not accept a mediation before the principles of his/her remuneration have been accepted by all parties concerned.

## **4. CONFIDENTIALITY**

The mediator shall keep confidential all information, arising out of or in connection with the mediation, including the fact that the mediation is to take place or has taken place, unless compelled by law or public policy grounds. Any information disclosed in confidence to mediators by one of the parties shall not be disclosed to the other parties without permission or unless compelled by law.

**For more information** see the Civil Mediation Council site [www.civilmediation.org](http://www.civilmediation.org)

## LSM OPENING CHECKLIST 2021

*Please remember that this is a general guide and not intended to be a script*

### *Welcome*

Introductions - first names?

Table map

Health and safety, facilities, comfort breaks, time available

**{If anyone needs legal or other advice they are free to break at any time – just ask}**

**{Only need to advise of breaks for legal advice if no lawyers present}**

### *Preliminaries*

Authority to settle

Signed mediation agreement

Are others attending agreed and if so have they signed the confidentiality agreement?

### *Process*

Confidential and without prejudice

Any notes I take will be shredded immediately after the mediation

I cannot be called as a witness, save in improbable circumstances if ordered by a Judge

This is a voluntary process - you can leave at any time

Will you agree to give me 5 minutes before you leave?

Thank you for papers– I have read them and therefore you need not go over them

Today is about looking forward rather than back

I am confident that the process will be of benefit to you all

### *Role*

I am neutral and impartial

I am not here to judge, assess, give an opinion or legal advice

I am not here to recommend any particular solution or to decide who is right or wrong

I am here to encourage and facilitate an agreement that satisfies your respective interests

### *How it will work*

I may work in open session or in private

What is said in private session will remain absolutely confidential

unless I am asked to transmit it to the other participants.

I will try to spend even amounts of time with each of you

It sometimes helps if in private sessions I can have permission to play devil's advocate

Would you give me permission to ask questions that may probe or challenge?

It is often useful to have some rules.

May I suggest only one person speaks at once; and we are polite to each other?

Are there any other rules that you would like to propose?

In a moment, I will ask you to say in general terms what you hope to achieve today.

Who would like to begin?

## **USEFUL QUESTIONS TO USE IN PRIVATE SESSIONS 2021**

*(Remember the follow-up/ supplementary: "Why?")*

1. What is important to you that was not addressed in the opening session?
2. How do you feel about this dispute?
3. How do you feel about (the other participants – use their names)?
4. What do you really want out of the resolution of this dispute?
5. If you could only achieve one thing from this mediation what would it be?
6. If this matter went to trial, what are your expectations?
7. What have you based those on?
8. What is the strongest part of (the other participant's) case?
9. What don't you like about your case?
10. If the judge is going to pick on something in your case, what might it be?
11. What law or fact in your case would you like to change?
12. What do you think that (the other participant) sees as your weak point?
13. What is the range of possible outcomes at trial?
14. What has hindered settlement to date?
15. What are the costs going forward if you do not settle today?
16. How are you funding these?
17. What is going on with (the other participants)?
18. What do you think they will take to settle this case?
19. Is there anything else that it would be helpful for me to know?
20. What else can I do to help move this case toward settlement?

## **COMMON MEDIATOR MISTAKES 2021**

1. Not setting the ground rules and checking that a mediation agreement is signed
2. Talking too much
3. Not asking: “how will what I am about to say help in this mediation?”
4. Forgetting the participants’ names or getting them wrong
5. Referring to participants by titles or roles
6. Not staying (or appearing not to stay) neutral
7. Avoiding open/joint sessions
8. Going into private sessions too quickly
9. Offering advice or opinions (or appearing to do so)
10. Not following up on information by asking “why?” or a similar question
11. Failing to be Yorkshire-nosey
12. Going to money issues too soon
13. Looking for offers in the first private session
14. Not using the first private session for information gathering and re-assurance
15. Giving up
16. Failing to use reflective listening / summarising
17. Being the obstacle or distracting
18. Taking notes rather than listening
19. Only talking to legal representatives
20. Failing to keep track of time

## **LSM's 39 STEPS FOR A MEDIATOR - 2021**

### **Before the mediation**

1. Why have they asked for a mediator?
2. Why have they engaged me for the role?
3. What must I put out of my mind?
4. What am I not there to do?
5. What are the admin arrangements?
6. What do I need from my Administrator?
7. Is there a signed mediation agreement?
8. Who is coming?
9. Are there any papers?
10. Why have they sent me the papers they have?
11. Do they know my role – initially and potentially?
12. Should I send an email?
13. Do I need a pre-meeting?
14. Have I got time to prepare?
15. Is there any possible conflict of interest?
16. If so, do I need to declare it?
17. What else might the participants need from me?
18. Are my travel and accommodation arrangements sorted?

### At the mediation

1. Can I focus exclusively on the mediation?
2. Who is here? Who is not here?
3. Is there authority in the room?
4. What do the participants want to be called?
5. Do I recognise anyone and if so, do I need to declare it?
6. Why are they really stuck?
7. What is going on?
8. What do they need help with – beyond the obvious, settling?
9. Who is talking?
10. How, and why?
11. Who is not talking? Why?
12. What seems to be important to the participants?
13. But what are they really saying?
14. Is their body language consistent?
15. Is my verbal and non-verbal language neutral?
16. Have I given everyone a chance to have their say?
17. Can anything I might say or ask help?
18. Have I balanced the time I spend with everyone in private?
19. What can I do to help?
20. Are there any ethical or POCA issues for me?
21. Am I the problem today?

### **MISTAKES PEOPLE MAKE IN MEDIATION**

1. Assuming that money is what it is all about (missing the REAL needs and best interests of the Participants).
2. Entering into a mediation without full trial evidence and expecting to "win" the mediation when important facts remain unsupported by tangible evidence.
3. Avoiding (or declining) a joint session for all the wrong reasons.
4. Preventing discovery by retaining information that could be pivotal in the decision-making process.
5. Failing to prepare a structured concession plan or failing to use that plan.
6. Guessing the cost of litigating a case to trial/appeal which makes valid settlement terms difficult to estimate.
7. Failing to prepare decision makers for their role in the mediation.
8. Believing that the informality of a mediation does not require thorough preparation
9. Selecting a mediator on the basis that "they are all the same".
10. Second-guessing the 'best' outcome in a given scenario (failing to appreciate the wide range of outcomes that are actually possible).





## LEGAL DEFINITIONS

### **Applicant**

The person/company making an application to either a Court or to a Tribunal

### **CBT (Cognitive Behavioural Therapy)**

A specific type of psychological treatment, usually only available privately, and used frequently to treat Post Traumatic Stress Disorder.

### **Claimant**

A person bringing the claim by way of lodging a claim form to the court.

### **Contributory Negligence**

A defence in an action that the Claimant's own negligence caused or contributed to his own injuries. The Law Reform (Contributory Negligence) Act 1945 provides that where a person suffers damage as a result partly of his own fault, the claim is not defeated, but the damages are reduced having regard to the Claimant's share of blame.

### **Costs**

Legal fees, VAT and disbursements (expenses).

### **CPR (Civil Procedure Rules)**

The rules of court that relate to civil claims.

### **Damages**

Broadly, monetary compensation that is awarded by a court in a civil action to an individual who has been injured through the wrongful conduct of another party.

In personal injury claims, these are normally divided into-

*General damages*-compensation sought/awarded for personal injuries (pain suffering and loss of amenity)

*Special damages*- compensation sought/awarded for any other losses which may include damage to vehicle, medical expenses, loss of earnings/future loss of earnings

### **Defendant**

A person defending a claim.

### **Disbursements**

Expenses incurred by Solicitors in running a claim. These include court fees, expert fees, travelling expenses, records fees, barrister's fees, etc.

### **Frustration**

In commercial contracts, when unexpected events arise which make a contract impossible to be performed, entitling the frustrated party to cancel the contract without paying damages

### **Injunction**

A court order restraining a person from beginning or continuing an act or threat and/or compelling a person to carry out a certain act

### **JC (Judicial College) guidelines**

Official guidelines that contain a tariff for every type of injury from quadriplegia to minor strains. Solicitors, Barristers and ultimately, Judges, use this guide to value personal injury claims.

### **Liability**

Legal responsibility for one's acts or omissions.

### **Part 36**

A formal offer to settle a claim, which can be made by either party. If it is not accepted, and if subsequently a more advantageous outcome is achieved through negotiations or at trial, the party who did not beat the offer will have adverse cost consequences. The party who did beat the offer, will have advantageous cost consequences in its favour.

### **PCC (Parochial Church Council)**

A legal entity comprising elected members of a church congregation. It is responsible for the church budget and deals with a range of matters, including repairs to the church.

### **Pro bono**

Free legal work done by members of the legal profession normally for those who cannot afford legal representation

### **PSLA (Pain, Suffering and Loss of Amenity)**

A claimant is entitled to recover damages for any pain, suffering and loss of amenity caused by an accident he/she is involved in. The pain and suffering element of the award compensates the claimant for all past, present and future physical and psychiatric symptoms and is dependent on factors such as the duration/severity of the accident. Guidelines on the monetary element are contained in JC Guidelines.

### **Respondent**

The person/company responding/objecting to an application against it either at Court or before a Tribunal

### **Taut contract**

A tightly drafted contract

### **Tort**

A wrongful act done by one person to another (other than a breach of contract) where a duty of care exists between the parties; that duty having been breached and losses that flow from that breach. Relief may be obtained in the form of monetary damages or an injunction.

### **Quantum**

The specified amount of money being claimed in a claim. This monetary element can be left for the court to assess after the trial, for example in personal injury claims where the PSLA is to be calculated using the JC Guidelines.

### **Without Prejudice**

When letters containing negotiations or offers are marked 'without prejudice', it means that the communication is confidential between parties and cannot be shown to the Court until such times when parties agree and/or when dealing with costs at conclusion of the hearing.





### **A Basic Introduction to Litigation Costs**

Costs are the fees that a lawyer will charge for the work they undertake under their retainer or contract with a client. The type of retainer can vary and so may the recoverability of these fees at the conclusion of the case.

Disbursements are expenses which a lawyer may incur such as expert fees, barrister's fees, court fees, travelling expenses etc.

This means that the loser will usually have to reimburse some of the winner's layers' fees & disbursements. However, costs are always at the discretion of the court. Even a successful party may not be awarded costs if for example they have failed to beat an offer or failed to comply with pre-action protocols or have acted badly e.g. refused an invitation to mediate with no good reason.

The amount of fees the loser will have to pay can be as difficult to sort out as the actual case itself. The parties can agree the figure between themselves through negotiation. If not agreed, then the court can step in to make a decision through detailed assessment. It is unlikely a court will order anything other than a proportion of the costs claimed. The percentage recovered will depend on any budgets set by the court during the costs management process and whether the court thinks the costs are reasonable and proportionate. Many disputed costs cases will be mediated as there are risks of going through detailed assessment.

If the case is a claim for personal injury compensation the situation is slightly different. Qualified one-way costs shifting or 'QOCS' means that should the Claimant lose their case, they will not have to pay the Defendant's costs. Should the Claimant win, the Defendant will pay the Claimant's reasonable costs. There are situations when a successful Claimant may be ordered to pay some of the Defendant's costs – usually where the Claimant has failed to beat an offer made by the Defendant. In those situations, the Claimant cannot be ordered to pay more in costs than the Defendant has been ordered to pay the Claimant in compensation.

There are different ways to fund litigation:

#### **1. Legal Aid**

Only available now in very limited circumstances and will depend on the type of dispute and the Claimant's financial situation.

#### **2. Before the Event Insurance**

Some household or car insurance policies will also cover legal fees for certain types of dispute. Such cover will also cover legal fees for certain types of dispute. Such cover will usually require an individual to instruct a solicitor on the insurance company's approved panel.

#### **3. Conditional Fee Agreement (CFA) – No win no fee**

Legal fees only become payable should the Claimant win their case. In that situation the Claimant would have to pay the fees plus an uplift known as a success fee. This can be as much as 100% for the cases other than personal injury cases. In personal injury cases whilst

the success fee can be as much as 100%, it is always subject to a cap of 25% of the amount of compensation the Claimant has been awarded for the injuries (general damages) and any past expenditure. The success fee percentage will be determined based on the risks involved with the case, the more complex, riskier cases will carry a higher success fee.

Due to costs shifting, the fees would be met in part by the losing party but the success fee would still be paid out by the Claimant out of their damages/other monies recovered.

Should the Claimant lose, then they would not have to pay their lawyer's fees or the success fee. They would have to pay their opponent's costs unless they have taken out an insurance policy (after the event insurance policy) which would protect them against the risk of paying opponent's costs.

There are variations on the above no win no fee agreement such as a discounted CFA or a no win no low fee agreement. In those circumstances, should the Claimant lose then they would be paying discounted fees plus the opponent's costs. If the case is successful then the rates are no longer discounted.

#### **4. Contingency Fee Agreement**

This agreement provides that the fees will be charged as a percentage of the sum recovered. It is only available for money claims.

If court proceedings are anticipated, court rules do permit a damages based contingency fee but the rules are complex and this type of agreement is not suitable in most cases.

#### **5. Private Retainers**

This is where the individual enters into a retainer with the lawyer where they agree to pay fees and expenses directly throughout the case on an hourly basis.

***These topics are covered in greater depth on our Law for non-Lawyers course, should you wish to book it.***



## **CRITERIA FOR ASSESSMENT**

### **Core Skills**

The **Core Skills** to be assessed are the:

#### **A. Administration**

1. Ability to meet and greet a range of participants appropriately.
2. Ability to deal with introductions and address participants appropriately.
3. Ability to manage health and safety issues.
4. Ability to describe how the mediation will work.
5. Ability to identify the status of those attending and deal with any issues arising.
6. Ability to identify those with authority.
7. Ability to keep participants informed.
8. Ability to read papers and prepare thoroughly for mediation.
9. Ability to recognise when a mediator can be a witness.

#### **B. Process**

1. Ability to demonstrate an appropriate opening to a mediation.
2. Ability to explain the importance of the mediation agreement.
3. Ability to create an opportunity for everyone to give opening statements.
4. Ability to identify the issues to be resolved and to get the facts and perceptions out on the table.
5. Ability to create and maintain a safe and effective environment.
6. Ability to manage the phases of mediation.
7. Ability to summarise.
8. Ability to manage any venting.
9. Ability to ensure that any agreed rules are maintained.
10. Ability to manage time and maintain momentum.
11. Ability to use private sessions effectively.
12. Ability to transmit offers effectively.
13. Ability to apply a flexible approach to process.
14. Ability to ensure that if settlement is reached the agreement is written and signed.
15. Appropriate allowance for diversity and linguistic issues.

#### **C. Ethics**

1. Ability to describe to the disputants the importance of confidentiality in the mediation process and how will that be maintained.
2. Ability to explain without prejudice nature of mediation.
3. Sensitivity to strong felt values of the disputants, including gender, ethnic, and culture differences.

4. Ability to treat the participants equally and fairly.
5. Ability to identify when and how to neutrally terminate a mediation.
6. Ability to understand and deal with power imbalances.
7. Ability to identify and separate the mediator's personal values from issues under consideration.
8. Ability to deal appropriately with unethical behaviour.
9. Ability to preserve participants' autonomy.
10. Commitment to honesty, dignified behaviour, respect for the participants.
11. Adherence to ethical and code of conduct values.

D. *Soft skills*

1. Ability to listen actively.
2. Ability to know when to use silence.
3. Ability to use clear, neutral language.
4. Ability to earn trust and develop rapport.
5. Ability to be interactive.
6. Ability to manage relationships.
7. Ability to interact with diverse range of disputants using appropriate language.
8. Ability to use open questions.
9. Ability to appropriately use closed questions.
10. Ability to use probing questions.
11. Ability to demonstrate enthusiasm.

Higher Skills

The **Higher Skills** the student should aspire to are the:

A. *Administration*

1. Ability to consider appropriate room layout and seating.
2. Ability to conduct pre-meetings where relevant.
3. Ability to undertake a mediation without note taking.

B. *Process*

1. Ability to help participants invent creative options through brainstorming.
2. Ability to reframe.
3. Ability to reflect.
4. Ability to seek clarification of information.
5. Ability to analyse problems, identify and separate the issues and interests involved through questioning.
6. Ability to engage in principled negotiation.

7. Ability to help the participants identify principles and objective criteria that will guide their decision-making.
8. Ability to engage in reality testing.
9. Ability to deploy strategies to resolve impasses.
10. Ability to help the participants assess their non-settlement alternatives.
11. Ability to encourage participants to look at the dispute from different angles.
12. Ability to help the participants make their own informed choices.
13. Ability to help the participants assess whether their agreement can be implemented.
14. Ability to use a flipchart or one text approach.

C. *Ethics*

1. Ability to recognise a disputant lacking in capacity.
2. Ability to identify money laundering issues.
3. Ability to identify relevant profession ethics. Ability to identify risks posed to others.

D. *Soft skills*

1. Ability to demonstrate authenticity.
2. Ability to empathise with participants.
3. Ability to demonstrate curiosity.
4. Ability to demonstrate an inquiring mind.
5. Ability to demonstrate neutral body language.
6. Ability to observe and respond to participants' body language.

JUDITH KELBIE


Director of Standards



## **LSM ASSESSMENT SKILLS SHEET MATRIX 2021**

On the assessment days, students will be expected, where the role plays allow, to demonstrate to the independent assessors all of the Core Skills. They may also demonstrate Higher Level skills. All of the core skills will be introduced and taught during the training days. Care will be taken to ensure that every student has grasped the skills and the examination will also reflect that awareness. Overall, the assessors will be looking to see whether the student is safe and has adequate competencies measured against these objective criteria. Students should ask the Faculty if in any doubt at all. A full briefing will be given by the assessors before the assessment commences to amplify the process.

	<b>1 ADMINISTRATION</b>	<b>2 PROCESS</b>	<b>3 ETHICS</b>	<b>4 SOFT SKILLS</b>
<b>A CORE SKILLS</b>	1 Meeting 2 Names 3 Health & safety 4 How it will work 5 Who attends? 6 Authority 7 Keeping informed 8 Preparation (notes) 9 Witness	1 Opening 2 Mediation agreement 3 Opening Statements 4 Issues/facts/perceptions 5 Safe environment 6 Management 7 Summarising 8 Venting (if it arises) 9 Rules/Role 10 Time/Momentum 11 Private sessions 12 Transmission of offers 13 Flexibility 14 Settlement agreement	1 Confidentiality 2 Without prejudice 3 Sensitivity 4 Equality 5 Termination (if it arises) 6 Power Imbalance (if it arises) 7 Personal values 8 Unethical behaviour (if it arises) 9 Preserve autonomy 10 Honesty 11 Code of conduct	1 Active listening 2 Silence 3 Neutral language 4 Trust/rapport 5 Interaction 6 Manage relationships 7 Appropriate language 8 Open questions 9 Closed questions 10 Probing questions 11 Enthusiasm
<b>B HIGHER LEVEL SKILLS</b>	1 Room layout 2 Pre-meetings 3 No notes	1 Brainstorming 2 Reframing 3 Reflecting 4 Clarifying 5 Problems/Interests 6 Principled negotiation 7 Objective criteria 8 Reality testing 9 Impasse strategies 10 Different angles 11 Alternatives 12 Informed choices 13 Implement 14 Flip chart/one txt	1 Capacity 2 Money laundering 3 Relevant professional skills 4 Risks to others	1 Authenticity 2 Empathy 3 Curiosity 4 Inquiring 5 Open body language 6 Sensitivity to body language
Notes:				



## Basic ethical questions ...to answer on this course

- Can the mediator withhold some information that may be crucial to a participant?
- What if the mediator believes a participant is making a decision based on incorrect information?
- What if it is unfair?
- What if the mediator suspects a lie?

## The Proceeds of Crime Act 2002 – Considerations for Mediators

1. The Proceeds of Crime Act 2002 (“POCA”) creates a series of criminal offences relating to money laundering.
2. Section 328 of POCA makes it an offence to enter into or become concerned in an arrangement which he knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person.
3. The introduction of the legislation led to well-founded fears from dispute resolvers – mediators and arbitrators – as to what their obligations were under the Act. In response, the Civil Mediation Council convened a forum in December 2004 to ventilate mediators’ worries about the effect of the Act. See **Civil Mediation Council Guidance Note No 2**.
4. A year later, in March 2005, the Court of Appeal in the case of *Bowman v Fels*<sup>1</sup> gave authoritative guidance on this part of the Act, although its judgment was not expressly concerned with the position of the mediator. See **Case Summary on Bowman v Fels**. Subsequently, the Chartered Institute of Arbitrators published authoritative guidance on the effect of the Act for mediators, arbitrators and adjudicators: See **CIARB Guidance 12: The Proceeds of Crime Act 2002, Guidance for Arbitrators and Mediators**.
5. So what is the current guidance for mediators in relation to POCA?
6. The case of *Bowman v Fels* offers assistance. The central issue in this case was whether s.328 covered or affected the ordinary conduct of litigation by legal professionals – e.g. lawyers acting for their clients in litigation. It was held that it did not do so. Although the Court did not specifically mention the position of mediators, or other dispute resolvers, it did hold, albeit obiter that s.328 was not intended to apply to legal professionals *negotiating or implementing a consensual resolution of issues in a litigious context*.
7. It follows from the decision of *Bowman v Fels*, as summarized in the CIARB Guidance Note that:
  - (i) a mediator, whether he is a lawyer or not, will generally not be at risk of being concerned in an arrangement, if he merely facilitates a consensual resolution of a dispute in the context of litigation;
  - (ii) it is not necessary for litigation to have actually been commenced. It can be either “existing or contemplated; and
  - (iii) similarly, a mediator will not generally be at risk if he merely facilitates a consensual resolution of a dispute in the context of an existing or contemplated arbitration.

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<sup>1</sup> [2005] 1 WLR 3083.

8. There are however limits to the protection afforded by *Bowman v Fels* and problems for mediators may still arise in these situations, where care should be taken:
- (i) where there are no existing or contemplated legal or arbitration proceedings or where the link between the mediation and such proceedings is tenuous; and
  - (ii) where (even if there are existing or contemplated proceedings) the settlement did not reflect the legal and practical merits of the parties' respective positions in the proceedings and was known or suspected to be no more than a pretext for agreeing on the acquisition, retention, use or control of criminal property.
9. The CIARB Guidance states that in these situations, a mediator should be particularly careful to ensure, before any settlement takes place, that he does not *know or suspect* that it will facilitate the acquisition, retention, use or control of criminal property and, if he does know or suspect this, he should consider carefully whether to withdraw from the mediation before a settlement is made and whether to make a disclosure to the National Crime Agency (previously SOCA, which the National Crime Agency replaced in 2013).<sup>2</sup> In terms of making a disclosure, the scheme adopted by s.328 is that a person who might otherwise commit an offence can avoid doing so if before he continues with the mediation, he makes a disclosure to the NCA and receives the consent of the NCA to continue with the mediation.<sup>3</sup>
10. It should be noted that the protection afforded by *Bowman v Fels* is not lost merely because a settlement may not, or does not reflect the legal merits of the case where other legitimate interests are taken into account. As the CIARB Guidance note states, "the important point being made by the Court of Appeal would seem to be that, if the parties are known or suspected to be using the ADR process as "no more than a pretext for agreeing on the retention, use or control of criminal property", then the ADR process may be no more than a sham or a device to launder illicit money, or other criminal property. If there is *knowledge or suspicion* on the part of a mediator or other dispute resolver that this is the case, he will be at risk of committing an offence under s.328 unless, before any settlement is reached, he makes an authorised disclosure to the National Crime Agency, which replaced the Serious Organised Crime Agency in 2013.
11. Should a mediator know or suspect that the parties are using the mediation as "no more than a pretext for agreeing on the acquisition, retention, use or control of criminal property, the CIARB Guidance note states that "it will almost certainly be ethical for him to withdraw from the mediation once suspicions of this kind are aroused. The CIARB Guidance suggests that before withdrawing, the mediator should consider giving the participants an opportunity to rebut any

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<sup>2</sup> The NCA took over from SOCA in 2013.

<sup>3</sup> It would ordinarily be a breach of confidence for any disclosure to be made to the NCA unless the terms on which the mediator had agreed to conduct the mediation permitted this. However, section 338(4) provides: "An authorised disclosure is not to be taken to breach any restriction on the disclosure of information (however imposed).

suspicious he may hold that the mediation is being used for a pretext for agreeing on the acquisition, retention, use or control of criminal property. There is however no general rule and in some cases it may be wiser to withdraw without providing such an opportunity.

12. If a mediator informs the parties that he is considering withdrawing from the case because of his knowledge or suspicions concerning possible money laundering, there is no risk of his being held to be guilty of the offence of **“tipping off”** under section 333A, as that offence only applies to the regulated sector and does not therefore apply to mediators.
13. Finally, where a person, whether he works in a business in the regulated sector or the non-regulated sector, knows or suspects that an investigation in connection with alleged money laundering has or is about to be commenced in respect of another person but nonetheless makes a disclosure to any other person which is likely to prejudice any such investigation, or interferes with material which is likely to be relevant to such investigation, this is known as the offence of **“prejudicing an investigation.”**
14. The offence is committed if the person (a) makes a disclosure which is likely to prejudice the investigation or (b) falsifies, conceals, destroys, or otherwise disposes of, or causes or permits the falsification, concealment, destruction or disposal of, documents which are relevant to the investigation.
15. However under subsection (3) a person does not commit an offence under (a) if he does not know or suspect that the disclosure is likely to prejudice the investigation or if the disclosure falls within the legal professional exception. That exception, defined in subsections (4) and (5) covers disclosures to a client or his or her representative by a professional legal adviser in connection with the adviser giving legal advice to the client or to any person in connection with actual or contemplated legal proceedings so long as it is not made with the intention of furthering a criminal purpose.
16. The more serious offence in section 342(2)(b) cannot be committed if the individual concerned **“does not know or suspect that the documents are relevant to the investigation, or does not intend or conceal any facts disclosed by the documents from any appropriate officer or (in Scotland) proper person carrying out the investigation.”**
17. It follows that a dispute resolution professional acting in good faith has nothing to fear from the offence of prejudicing an investigation.

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