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BEATING THE BOUNDS: LAW AND MEDIATION

David Hodson

1. What does a lawyer do?
2. Information, advice and representation
3. Working with mediation
4. Working with mediators
5. Conflicts
6. Where are we going?

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The views expressed are personal and do not necessarily represent the views of any organisation or practice with which I am connected. Some are put forward for discussion purposes and to further debate.

ABOUT THE SPEAKER

David Hodson is a specialist family law solicitor, and partner in The Family Law Consortium, Covent Garden, London, WC2. He is a sole and joint family mediator, assessed by the Legal Services Commission as s29 competent, and a full member of the UK College of Family Mediators. He is an elected governor and vice chair of the UK College of Family Mediators. He is chairman of the Solicitors Family Law Association's Ancillary Relief Reform Committee as well as a member of its International Committee. He is co-author of "Divorce Reform: a Guide for Lawyers and Mediators" (Sweet and Maxwell), "The Business of Family Law" (Jordans) and consulting editor of "Family Law in Europe" (Butterworths). He is a member of the Family Proceedings Rule Committee. He is a SFLA Accredited Specialist (with portfolios in Substantial Assets and International Cases), a Fellow of the International Academy of Matrimonial Lawyers, a trustee of Marriage Resource counselling organisation and sits as a Deputy District Judge at the Principal Registry, London.

The Family Law Consortium was (probably) England's first practice to combine solicitors, mediators and counsellors, providing a range of services for family law clients. It is a s29 mediation provider and franchised by the Legal Services Commission for family law and family mediation. It offers a preliminary interview to clients or couples to help decide which of the services are most appropriate. It also provides a practice management consultancy for family law and family mediation practices.

1 What does a lawyer do?

Role in an adversarial system of justice;

- the champion
- the prize fighter
- the fearless crusader
- the representative
- the defender
- articulator of the inarticulate
- independent
- “anti-state”, not agent of state
- sole manager of client’s case including timetable, costs, settlement decisions
- instructor of others, not receiver of instructions save from client
- ethics based on relatively bare minimum
- provides information, advice and representation

New and not yet properly adjusted role in increasingly inquisitorial system in family law?

- “search for fair solutions”
- (over riding?) concern for interests of children including duties if suspect abuse etc
- settlement orientated
- ascertaining the facts
- work managed by court and court rules and court timetables
- receives clients with good information already (esp. if Pt III)
- receives clients with settlements endorsed by others already
- provides representation to allow court to recommend settlement
- provides representation and negotiates to allow court to make final order (Xydhias)
- provides advice but often still largely mixed with information

(But whither role post human Rights Act?)

What can we learn from the notaire and the advocate of France? Former acts primarily in uncontentious issues including conveyancing but also dividing up the community of property on death or divorce. Acts for both as uncontentious agent. Latter acts in litigation and perhaps (!) sometimes more akin to counsel.

Many specialists and some judges have had mediation training. Has this been akin to SFLA Code of the 1980s, i.e. it has caused lawyers to recreate themselves and we are now regularly using mediation techniques in law work, to benefit of cases, clients and families.

Is mediation skills and experience, not mediation itself, the new culture, just as the SFLA code was in 80s and 90s?

Might this in fact be the longest term and widest spread impact of mediation?

2 Information, advice and representation

Defintions

Information – factual matters which have no distinction of biases or direction to the party to whom it is given. Could be given passively or actively. Mediators can give information. Great number of communications between lawyer and client are information, admittedly based on lawyers

professional experience rather than specific advices. But still at heart information. Recommendations by mediators are viewed as information although care is needed as to when and (effectively) to whom such recommendations are directed. I return to this.

Advice – the adaptation of that information to suit the circumstances of the client, including crucially how information, applied in a particular fashion, could benefit the client to their advantage and (almost inevitably) to the disadvantage of another party.

Representation – often understood to be the active involvement on behalf of one party and against another. Whereas advice may be individual and preliminary to any lis (dispute), representation is clearly when a lis, dispute arrives. For these purposes, the terms advice and representation are the same side of the neutrality equation so “advice” is adopted.

The mediator does not, or at least should not, give advice.

Drafting

However the mediator produces documents which are totally familiar to the advice giving lawyer. Are they advice or is the lawyer doing information work? If the latter, mediator can do it too?

First the mediation financial summary is identical to the court based Form E document.

Secondly and more crucially still, the mediator prepares a memorandum of understanding.

Of course the MOU and consent orders or separation agreements are different in status.

But save for this short term half way privileged status of the MOU to which I return, what is the difference in drafting and the process of getting to the consent order?

So why not draft pre marriage agreements or cohabitation agreements?

So why not draft separation agreements and parenting plans on separation?

So why not draft consent orders? There is no distinction from separation agreements save two.

First the draft consent order is more immediately binding than a separation agreement.

Secondly, we have no tradition under English law of a legal adviser to both parties to the litigation in family law.

Accordingly it is submitted that there is no reason why the mediator cannot undertake the work of lawyers in drafting:

- pre marriage agreements
- cohabitation agreements, but probably not the deed of trust element unless mediator is skilled trust lawyer
- separation agreement
- parenting plan
- draft financial consent order
- divorce petition including agreed particulars

Is the mediator undertaking a lawyer’s work?

Is the mediator undertaking lawyer's advice?

Is the mediator representing either or both parties?

Is the mediator doing work for which lawyer is better qualified?

Is mediator confusing public as to mediator's role?

Is mediator taking work from a lawyer?

Instructing experts

On behalf of a client, a lawyer instructs a third party expert to analysis, investigate, value, report etc.

Past decade has seen very dramatic move away from the unfettered use of individual experts. See Evans guidance. See new ancillary relief rules and accompanying Law Society protocol endorsed by President's Practice Direction of 25 May 2000. The reckless, non court approved use of single experts risks severe costs orders. Requirement, especially strong in children cases, to disclose experts reports obtained.

Meeting at Clarke Whitehall, Spring 2000, chaired by Thorpe LJ about use of single, jointly instructed (even court answerable, independent) expert.

So lawyers are learning how uncontentiously and non adversarially (and non partisan) to instruct experts for common purpose.

Mediation needs unbiased information.

Why cannot mediator, with common agreement of clients (and suitably in funds!) instruct?

Is the mediator giving advice?

Is the mediator representing the couple?

Should mediators do this?

Conclusion

It has been a complaint of mediators in recent years that that lawyers have trained en masse as they saw their own work disappearing! (Most lawyers also incidentally found their legal practice and skills hugely enhanced, changed and improved by their mediation practice in ways which would have been impossible with any other training available on the market.)

What mediators have failed to appreciate is that much of what good SFLA family lawyers do, especially (perversely) in this conciliatory era, is very consensual, mutualising and towards agreement and harmony.

But still many lawyers say, wrongly, that they have been mediating for decades in the way they do their settlement discussions.

What they fail to realise is that other elements of their lawyer work have been in fact what

mediators, especially with legal training and skills, are able, perhaps better able, to accomplish.

Why have mediators been slow to invade the boundaries? They can do so without crossing their professional boundaries. They would thereby help many clients in additional aspects of the resolution process. The failure to do so has perhaps cost the reputation of mediation profession and specifically cost clients.

3 Working with mediation

Referring into mediation

Section 29 FLA 1996, as it then was, requires all potentially publicly funded parties to see a s29 assessed mediator first to ascertain if mediation is more suitable.

Fails to capture private parties. Requires s12 FLA to be implemented, which places a duty on a lawyer acting for petitioner or applicant to certify that he has discussed mediation. Similar (high) hopes held for Law Society protocol.

Fails to capture private and publicly funded parties later in the court process.

New ancillary relief rules from 5 June provide mediation as a management of the court's overriding objectives:

Overriding Objective (Rule 2.51): *The ancillary relief rules are a new procedural code with the overriding objective of enabling the Court to deal with cases justly*

- 1.1 Dealing with a case justly includes, so far as is practicable –
- a) ensuring that the parties are on an equal footing
 - b) saving expense
 - c) dealing with the case in ways which are proportionate
 - *to the amount of money involved*
 - *to the importance of the case*
 - *to the complexity of the issues*
 - *to the financial position of the parties*
 - d) ensuring that it is dealt with expeditiously and fairly
 - e) allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases

The Court must further the overriding objective by actively managing cases

Active Case Management includes

- b) encouraging the parties to settle their disputes through mediation, where appropriate

Moreover at a FDR, the court has power to refer to out of court mediation. The District Judge must, unless he decides that a referral is not appropriate, direct that the case be referred to an FDR. If he decides FDR not appropriate, he must

- fix further appointment for directions; or
- fix the case for final hearing; or
- *adjourn for out of court mediation or private negotiation or, in exceptional circumstances, generally;*
- fix an appointment for the making of an interim order (part of which order must be one of the three options above, or fix another appointment for the making of another interim order

Debate is needed between mediators and mediation-friendly lawyers as to how best to identify (by stage reached as well as by case), and then encourage, those cases likely to be suitable for mediation.

The geographical divides

London lawyers in particular are a distrustful breed on behalf of their clients.

The north/south divide.

Portability

Mediation is just one part of the Dispute Resolution System. It does not exist on its own nor does its outcome have an independence existence in most cases – they anticipate a court order or at least an arrangement which a court will identify and endorse if required to do so. It must therefore use forms and terminology which enables portability in the ADR system i.e. between courts, lawyers and mediators.

See below about the need for consensus on mediation terminology amongst mediators, so helping lawyers to be more at ease with mediation itself.

Equally, a desperate need for portability of disclosure. A chief benefit of mediation is that disclosure in mediation is open - contrast the FDR. Although a couple may not ultimately resolve in mediation, according to the mediation marketing blurb they will still have made good progress in disclosure and so saved time, costs and potential contentiousness in giving and obtaining disclosure.

But not in the mediation disclosure documents some mediators were using. Bland, unspecific, unfocused on s25 facts and unrecognisable as any form of disclosure document a specialist lawyer would ever use.

Moreover some documents e.g. income requirements, being used by some mediation organisations are inherently unfair on some category of applicant spouses.

Accordingly the initiatives by SFLA Mediation and the UK College in Spring 2000 to produce a Mediation Financial Statement simultaneously with the new ancillary relief procedure introduced in all divorce courts on 5 June may yet prove to be the most exciting development in mediation entering mainstream Dispute Resolution. Now mediators and lawyers and their clients are working on what is, effectively, the same disclosure document. See at www.ukcfm.co.uk.

It can come from a preliminary court hearing and straight into an out of court mediation and be recognisable by all mediators familiar with finance work. It can come out of mediation and, with some additional elements, go straight into court. It is open throughout. Paragraph numbers, wording of requests for information, additional documentation to corroborate are all the same. A real (but rare) example of lawyers working with mediation.

Where and in which documents can this initiatives be extended?

Unnecessary confusions?

For long, mediators have managed to confuse lawyers by using between themselves different names for the same document. Whilst some lawyers believe it is too much to expect mediators to agree between themselves, this confusion has only served to diminish respect for mediation.

Accordingly, can a day be reached when the outcome of the mediation is accepted as a Memorandum of Understanding?

Uncertain status

Reference was made above to the temporary privileged status of MOUs. Can it really be the case that no one has prepared a flow chart and careful analysis of its status in law? I believe it is the most likely first area of full litigation concerning mediation. For example:

1. both agree MOU and endorsed by lawyers; then open
2. neither take legal advice, partially implement then issue on the terms; open?
3. one takes legal advice and endorses, other does not neither makes any statement of disagreement with contents of MOU, time passes, former applies to show cause why an order should not be made in terms of MOU; open as Xydhias Pt I?
4. mediator drafts and signs MOU, one party confirms and endorses, other party agrees with all save as to implementation of one aspect on which says there was a contrary understanding/agreement; how will court deal?

No doubt other predictable scenario. Should not the mediation profession be working through this? Too often by mediators there is a presumption that all is safe behind privilege. This may be too presumptuous.

4 Working with mediators

Specialisations

The last 15 years have seen a progressive specialisation in the legal profession.

However the last 5-10 years or so has seen yet greater specialisation. The finance lawyer and the child lawyer. The public often expects specialisation. The rise of the niche practice.

In recognition, the legal profession has provided panels. At the basic is the Law Society Family Law Panel. Well above in level of competence is the SFLA Accredited Specialists. For a list see www.sfla.co.uk. Specialists exist elsewhere. The International Academy of Matrimonial Lawyers is a 300 strong, peer elected group of family lawyers around the world who do international elements. See www.iaml.com. The Law Society Children Panel has lawyers who alone can act for children. There are others.

And mediators have precisely nothing.

If this was bad enough, gets worse!

In the headlong dash at the opportunities presented by s29, mediators with professional background or understanding in certain specifics of some areas of family law have entered all arenas.

Mediators who could not spot the difference between a CTV and a CGT suddenly mediated couples with both and were surprised when family professionals (mainly lawyers) expressed doubts about the wisdom of mediation with them.

Mediators (mainly lawyer mediators) who could not spot the difference between evidence of child abuse and robust playtime activities suddenly mediated couples where one parent kept giving subtle (but totally ignored) hints and were surprised when family professionals (mainly non lawyers) expressed doubts about the wisdom of mediation with them.

Is there any reason why the complexities of family law work mean that whilst some specialist

family lawyers will not deal with e.g. children or finance work, mediators are proficient to deal with the lot?

Has the time come for specialists to be listed? No doubt there are many who can cover both children and finance and are excellent generalists. However some cases need specialists in specific areas. Why can they not be available to the public and the referring professions?

Has also the time now come for those mediators who are uncomfortable with, or could not pass e.g. the basic Law Society Family Lawyer panel tests, in either mildly complex children or finance cases, to make themselves known and debar themselves voluntarily?

By admitting the need for specialisation by mediators and then identifying by creating panels, whilst at the same time applauding the need for a body of generalists, will not mediation as a profession gain greater respect of fellow professionals? If it doesn't take specialisation on board, and instead asserts being a good mediator is good enough, will mediation continue to expand or will it then contract? At the very least, it may be at risk of not attracting the specialist professionals in related family work whose own specialisations will be lost or disregarded on their becoming mediators.

Who is the client?

The mediator's client is the couple. But they may have lawyers. So why has it been a dogma that the lawyers should be kept out of the picture?

The result is that lawyers feel distanced from, alien to and unwanted in the process. They are less interested in the outcome and somehow less committed. Their learning curve when needed to be involved is great.

Has there been an anti lawyer element in some mediators not copying in the lawyers? We are interested in our clients!

Mediators should review their approach in this regard.

The lawyer is not the client. But he or she is more likely to refer the next client! And he or she is also a likely source of keeping clients content with the on-going mediation.

In ignorance lies suspicion!

Lawyers in the mediation room

The traditional English model of mediation has seen the lawyer excluded altogether from the mediation arena. In many instances, this is for the best of the parties, the dynamic, the mediator and the resolution process. The lawyer operates not only in the shadow of the law but in the distant glow of mediation.

However there will be times and cases when mediation will not start unless the client has the confidence of their "champion" nearby. Perhaps a "Linus blanket". Reality as a defender and on hand help and supporter.

This will be scary for some mediators.

It cannot happen if the other party is thereby threatened. Alternatively both attend.

However there must be more occasions than present where a flexible and mature approach to

mediation by experienced mediator allows the closer involvement of a lawyer with a client in the physical mediation process. Consider remarks and proposals of John Wade at SFLA/FMA seminar, which has caught imagination of, at least, many lawyer mediators.

A different model with lesser safeguards yet with greater potentials for speed of advice and decision making and perhaps finality of outcome. Training in this model is needed and will find favour with some clients, mediators and lawyers.

Co-working

Experience of The Family Law Consortium.

If office space permits, difficult to see any justification for lawyers and lawyer mediators to delay by a nanosecond working very closely with therapists, counsellors and with mediators from those backgrounds.

Impact for personal understanding, their breath of experience and knowledge, their insights, and much more.

Shared training, seminars etc

Important to have professional boundaries of shared case work.

If a client has seen a lawyer (and it is inevitable that a lawyer will have quickly given advice), a mediator in the practice cannot act.

If a client has seen a mediator, a lawyer in the practice cannot act.

However some practices have tried to gain the cache of a multi disciplinary FLC-type practice yet have deliberately been at arms length in order to pass on the work. Is mediation being brought into dispute? Do the public and other professionals view it as a combined, linked practice? If so, should not pass work across.

Are referrals exclusive? Are there back handers, or open handers?

Clients welcome seeing professions together even if do not consult them all.

The only complete family law practice.

5 Conflicts

See UK College's "Conflicts of Interest – Policy and Good Practice Guidelines", available from the UKC. The main parts are set out in the Appendix.

6 Where are we going?

Neither legal work nor mediation is improved by either profession losing their professional distinctiveness or abandoning their heritage. Both are working to the same ends – dispute resolution.

Sometimes they will working together to resolve a case through mediation. Where is their boundary?

Sometimes one will take over from the other to finalise a settlement. Where are their boundaries.

Sometimes the resolution will be wholly through one of the two professions. Can one still learn from the other?

Where are their separate boundaries from those of the court?

Can the boundaries genuinely overlap?

Family mediation is still a young profession. It is exploring its own boundaries, and creating a few more beneficial ones as it learns the lessons of life. Like most youngsters, it is bold and brave yet at heart insecure and uncertain. It can and should confidently press against and move pass the boundaries it rightly needed in its younger days. It should recapture the wider depth of vision of what it can achieve and use mediation skills and opportunities in areas which may be regarded by first generation mediators as taboo.

Law is an old profession with very many boundaries; some are still vitally needed for the protection and benefit of the public and to serve the ends of justice, some are relics of an earlier era of legal work and practice and which no longer serve the public, justice, dispute resolution or other professional workers. It should stop shoring up walls which are not needed as the battle has passed on and legal strongholds are elsewhere.

The task, for which very great sensitivity and wisdom is needed by both professions, is first to seek out those boundaries which today are fundamental for the integrity and effectiveness of each profession and secondly to locate and quietly walk pass those boundaries of the past which no longer serve the needs of the family dispute resolution system and the separate professions working within it.

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APPENDIX

UK College's "Conflicts of Interest – Policy and Good Practice Guidelines", available from the UKC. The following sets out principles for discussion purposes where it relates to work with lawyers.

"Impartiality, even-handedness and the mediator's neutrality to the outcome of the mediation are essential components of mediation. It is vital to the integrity of the process that mediators should neither have any conflict of interest, nor should they be perceived as having any interest or potential bias, even if no actual conflict of interest exists.

Three different aspects need to concern mediators in this regard:

- Actual conflicts of interest, where the mediator has or has previously had another role or

relationship that is inconsistent with his or her impartial, even-handed role as mediator

- Potential conflicts of interest, where a conflict does not yet exist but there is a significant risk of a conflict arising in the future
- Situations or relationships that do not constitute actual or potential conflicts of interest as such, but which may cause confusion about the mediator's role and thereby may give the perception of affecting the mediator's ability to act impartially. For ease of reference, these will be referred to as "perceived role conflicts".

1. **Defining and regulating conflicts of interest and perceived role conflicts**

Mediators must not mediate where a conflict of interest exists, and must carefully observe the restrictions and qualifications on mediating in situations where perceived conflict exists. The UK College has rules that regulate conflicts and perceived conflicts.

In addition, different professional bodies such as the Law Society, Bar Council, British Association of Counselling and UK Council for Psychotherapy may have their own stipulations regulating conflicts of interest that their members may face. Members of the UK College who are subject to regulation by such bodies will need to ensure that they comply with any such stipulations in addition to the College's rules. The Legal Services Commission also has rules that need to be observed where appropriate.

2. **Absolute and relative bars to mediating by reason of conflicts and perceived conflicts**

In some situations, mediators will be absolutely barred from mediating even if the couple wish to release the mediator from that bar. In other situations, it may be possible for the parties to decide that they do want the mediator to mediate for them notwithstanding the existence of a perceived conflict. In the latter case, however, consent to mediate can only be effectively given by parties who are fully aware of the circumstances of the perceived conflict. Consent can only be effective if it is informed consent.

The following are the rules that apply to each of these kinds of situations:

2.1 Absolute bar to mediating:

A mediator may not mediate for a couple in any of the following circumstances even if the couple specifically request him or her to do so and purport to give consent:

2.1.1 Where the mediator or member of his or her partnership or family has a personal or financial interest in the outcome of the mediation.

2.1.2 Where the mediator or a member of his or her partnership has at any time provided legal, counselling or any other professional advice, support or representation for any one party individually before the mediation in relation to any issue that may arise in the mediation

2.1.3 Where the mediator has or at any time has had a therapist/client or counsellor/client relationship with one only of the parties

2.1.4 Where the mediator or a member of his or her firm, partnership or service advises, acts for or counsels or has previously advised or acted for any third party whose interests may conflict with those of either or both parties to mediation (such as the trustees of a family trust of which either party is a beneficiary, discretionary or otherwise)

2.1.5 Where the mediator or a member of his or her firm/partnership or service advises, acts for or

counsels or has previously advised, acted for or counselled any third party on a matter related to the likely issues in the mediation and the parties are aware of this.

2.1.6 Where the mediator is aware that for personal or other reasons he or she will not be able to mediate in an impartial way, or notwithstanding informed consent is likely to be perceived as being unable to do so.

2.2 Qualified bar to mediating:

In any of the following circumstances, a mediator may not mediate for a couple unless the couple specifically request him or her to do so and give informed consent:

2.2.1 Where the mediator or a member of his or her firm, service or consortium has previously advised, acted for or counselled both parties to the mediation, but not either of them as individuals.

2.2.2 Where the mediator or a member of his or her firm or service has acquired information relevant to any issue likely to arise in the mediation, then the mediator may not act unless the nature and source of such information is known to both parties and they consent to the mediator acting. (However, if such information was acquired while providing legal, counselling or any other professional advice, support or representation for any party individually in relation to issues that may arise in the mediation, the mediator is absolutely barred, as set out above)

2.2.3 Where the mediator or a member of his or her firm, service or consortium advises, acts for or counsels or has previously advised, acted for or counselled any third party on a matter related to the likely issues in the mediation and the parties are aware of this. (However, where the third party's interests may conflict with those of either party to the mediation, there is an absolute bar on mediating.)

2.2.4 Where the mediator has a social or other personal relationship with either party to the mediation, or with any third party materially affected by the mediation, the mediator may not act unless full disclosure is made to the parties and they consent to the mediator acting.

2.2.5 Where circumstances exist and are known to the mediator in which a party aware of such circumstances might reasonably be concerned about the mediator's ability to act impartially as a mediator, but which do not constitute an actual or potential conflict of interest (In such event, if full disclosure of the circumstances is made to both parties and they give informed consent, the mediator may act as such).

3. **Conflicts or perceived conflicts arising or identified after mediation has started**

3.1 If a mediator starts the mediation in the good faith belief that no conflict or perceived conflict exists, and either of these subsequently arises or is identified, the mediator must be guided by the rules set out above as to whether he or she can continue to act

3.2 Where there is an absolute bar to mediating, the mediator must withdraw from the mediation. Where there is a qualified bar, the mediator must either withdraw or inform the parties of all relevant facts and circumstances relating to the conflict or perceived conflict, and should establish whether the parties wish him or her to continue mediating. If they do, then the mediator can continue to act as such. In some circumstances, the mediator may consider that even where a qualified bar exists, he or she should not continue to act as mediator. In such event, the mediator should withdraw from the mediation.

Conclusion

These rules identify when mediators cannot mediate because of conflicts or perceived conflicts, and when they can do so only with informed consent. There are, however, always likely to be some grey areas. They must be dealt with in accordance with the rules outlined above.

On the one hand, mediators may wish to adopt a cautious approach, and in cases of doubt might decline to mediate. On the other hand, there is also an issue of party choice. Parties may well take a view that circumstances that do not constitute an absolute bar can be overlooked, where they particularly wish to appoint a specific mediator who has told them about a perceived conflict that he or she does not consider would damage impartiality. A balance must be struck between protecting parties against certain kinds of conflict or perceived conflicts, and not imposing unnecessary and inappropriate restrictions on their freedom of choice.

The simple rule for grey areas is that if you are in doubt, don't."