

A NEW DIRECTION FOR MEDIATION

David Hodson

Summary

A more directive model of mediation in which the mediator is able to give greater encouragements to settle by expressing views on outcome if the case went to final hearing and on the merits of the separate claims and offers; often after disclosure; often in parallel with court; often with lawyers present; often in one session; often in cases unsuitable for orthodox mediation; with mediators who are also lawyers experienced in resolutions of difficult cases; with the sole aim of getting a settlement.

Introduction

Mediation has a problem.

Family Mediation in England and Wales has not prospered as its architects and founders anticipated in the 1980s and the 1990s and despite huge resources and commitments made by government, mediators and others in the mid and late 1990s. There are many reasons. One reason is that mediation suffers from a major difficulty, a serious handicap.

Mediators help couples explore options, assist communication and produce disclosure. Mediators have a high satisfaction rating when a case settles. It is an excellent process.

Until an impasse in settlement in mediation is reached!

Mediators can then go no further in indicating what is likely to happen if the matter went ahead at court. They can certainly say if any proposals being discussed are outside the very wide range of what a court may order, but that is all. They cannot comment on the respective merits of the claims and arguments. They cannot overtly suggest one party moves their position to produce an outcome. They cannot predict an outcome, as with an FDR judge, with all the benefits that FDRs bring. They cannot suggest what a sensible and fair settlement could be. Mediators are unable to give any strong steer or direct encouragement of any terms on which to settle.

When all the best efforts of the couple in mediation have failed, the parties look in vain for more help from the mediator. As a consequence, the parties leave the mediation room without a settlement, often for want of a more directive approach by the mediator. For many lawyer-mediators, this is an immensely frustrating experience.

The next Australian model

One of the Australian mediation models, known confusingly to English ears as conciliation, overcomes this in a manner which finds considerable support with many Australian lawyers and clients. Given increasing pressures in England to resolve matters short of a final hearing, including legal aid changes which “penalise” lawyers who do not settle, there is a real and urgent need to find a way for mediators to take a more pro-active role to bring about a settlement.

Based on orthodox mediation, it is mediation with a strong input from an experienced family lawyer acting as a neutral mediator to help the couple and their lawyers reach a settlement. The normal rules of mediation apply save if the couple struggle to settle, the mediator is able to indicate and predict what he considers might or would happen if the matter were to be litigated at court and/or to propose positive solutions and forms of settlement and/or to comment critically on proposals by either party because

they are either unlikely to succeed if litigated at court or they are not likely to produce a settlement in the case in hand.

The mediator has training as a mediator but, in practice, is selected as much for skills, judgement, knowledge and abilities as a lawyer in negotiating and achieving a settlement.

This model of mediation invariably takes place after disclosure is concluded and the primary facts known. The mediation is directed to negotiating and reaching a settlement. This needs prior disclosure.

Lawyers are often present throughout and take a full part. They address the mediator about the issues and the positions of the parties. They engage in the ongoing negotiations as well as giving advice throughout to clients. Lawyers therefore feel much more comfortable with this mediation model as they are present and know that at all times they can safeguard their client's interests and advise their client as the mediation discussions continue. Clients say as much (or as little) as they want in the mediation round table discussions. It is good practice to make sure that they get a chance to say whatever they want, especially at the outset of the mediation. This will be the equivalent of their day in court to have their say, with the personal importance that lawyers appreciate clients feel to have such an opportunity to be heard. But everything then said is in the "safety" of the mediation room where the mediator can ensure what is said does not derail the settlement process.

Often the mediation starts with both parties, their lawyers and the mediator in the same room. After the mediator has explained what mediation is, and what it is not, especially that it is a voluntary process and nothing can be imposed on the parties at the mediation or referred to openly, the lawyers often address the mediator on the issues, the offers already made and other proposals for settlement, with clients contributing as they wish. The mediator often wants to hear directly from the parties including what they want from the settlement in the wider sense rather than specific financial terms. The mediator will have been sent the relevant documents in advance and be aware of the issues between the parties, perhaps even the offers. He is likely to have his own questions to clarify the facts or positions.

Some mediations in this model takes place only with everyone together in one room throughout, with short break out sessions for clients to discuss with their lawyer. For other mediations, after this initial session together, the parties and their lawyers adjourn to separate rooms for discussions about further proposals to be made or received, with then either everyone returning to the primary mediation room for further combined discussions, or just the lawyers returning, or for the mediator to visit each of the separate rooms to talk to the parties and their lawyers to see how discussions are progressing and to make suitable interventions and proposals to take the discussions forward towards a settlement. How it operates depends on each individual case, the preference of the parties and their lawyers and of the mediator, and may vary during the session.

This model of mediation is invariably conducted at one session, not limited in duration to the orthodox 90 minutes although with a fixed conclusion time. It is quite usual for roundtable meetings and for the FDR process at court to last much longer than 90 minutes. As the parties with their lawyers may be in separate rooms for some periods, and as the clients will be primarily giving instructions rather than engaging in the intensity of the negotiations themselves as in orthodox mediation, there is no difficulty in this model of mediation having sessions lasting longer than 90 minutes. About 30 – 60 minutes before fixed conclusion, the mediator decides if the matter is likely to settle and indicates this to the parties and if necessary invites it to end if there is little prospect. This can produce renewed offers! Time is set aside for drawing up and signing final documentation although often the mediator draws up, and modifies, documentation about terms as the mediation progresses throughout the session. With lawyers present and able to deal with any issues of pressures on clients to conclude a deal and advice on the merits of terms as the negotiations proceed, the mediation documentation can be signed off at the session. The parties leave with, hopefully, signed heads of agreement, perhaps even a draft consent order.

There is specifically no therapeutic element as the mediator does not hold out as having specialist therapy skills, although naturally the mediator is very experienced in family dynamics and negotiation dynamics for the purposes of reaching a settlement. If couples seek therapeutic elements of mediation, then the mediator or the lawyers recommend a more appropriate mediator or a therapist, or a life coach as recommended in collaborative law. This model is purely a dispute resolution process. No more. No less.

Sometimes other experts are needed to help with the process. The mediator may recommend this on reading the papers in advance of the mediation or even suggest the mediation is delayed until extra information or joint reports are obtained. This is no different from a court not being able to deal with a final hearing due to inadequate evidence or disclosure. It may be agreed at the mediation session that it should be adjourned to obtain expert help or more information.

This model is suitable for final and interim and interlocutory issues. It is suitable before proceedings are commenced or in parallel including an attempt to resolve before any final hearing. It is best when the disclosure process is complete and facts known so the concentration can be on the resolution itself.

A place on the ADR catwalk

Like collaborative law, the parties have the benefit of having their lawyers with them. One of the chief selling points of collaborative law is that clients like to have their lawyers with them to help them settle and which has historically been denied them in conventional mediation. Indeed some mediators have positively discouraged any notion of having lawyers in the mediation room, with lawyers often feeling very removed and distant from the mediation. It can be really scary having lawyers present in the mediation room and there is a very different dynamic and process, with at times lawyers arguing direct and the parties arguing direct! It is harder to maintain control than a conventional mediation. But good mediators, perhaps experienced in running heated committee meetings, partnership/chambers management meetings or court rooms, cope and learn skills to deal with it.

The parties are not required to commit to the non commencement of any proceedings, in contrast to collaborative law. To the contrary, this model of mediation works when there are proceedings.

The collaborative law process ultimately has a meeting to settle at which the lawyers have a professional duty to represent their clients. This model of mediation does not diminish lawyers' assertive, representative roles or their professional responsibilities but instead helps the lawyers to get to a settlement by the intervention of a neutral but experienced third party.

Unlike normal arbitration or private judging, this mediation process cannot produce a binding outcome. However because disclosure has been wholly or mostly completed, because of the time and therefore costs committed to the mediation session and because of the experience and expertise of the mediator and the input of the lawyers, there is a reasonable hope and expectation that there will be an outcome.

Many couples, and many more than are at present in mediation, would benefit from settling their cases in the conventional mediation model including where there is some therapeutic benefit to help the parties with communication skills and resolution skills for the future. This new, more directive model of mediation does not seek to take away those cases which are more appropriate for the conventional model. Instead it seeks to extend the benefits and advantages of family mediation into more, and perhaps more difficult to settle, cases.

The next English model?

It is said that ADR shuffles around only those cases which are capable of settling relatively easily anyway.

So cases resolved with lawyers' correspondence or round table meetings were then settled in mediation. Then cases which would have gone into mediation are, it is said, now being settled in collaborative law. So the ADR shuffle continues.

I want to see mediation getting to the "hard to settle" cases; the ones inappropriate for collaborative law because of the high risk of the issue of proceedings or one party taking action which causes the other to issue; the ones where serious costs have been incurred and there have been several court applications; the ones heading for a final hearing; the ones where the parties can hardly be in the same room and only then when firmly separated by their lawyers; the ones where the lawyers know it should settle but are struggling with their clients to get it settled; the ones not presently settled by mediation or other ADR.

Having seen Australian family mediation and examined English commercial mediation, I am certain English family mediation is strong enough for these hard cases, but probably not on the present models of mediation.

As I have discussed this model with other lawyer mediators since returning from Australia in the Spring, I have received much support and encouragement. Then something strange happens. The voice lowers. The body language attains a conspiratorial tone. Then they invariably say they sometimes do this more directive style of mediation any way, although they know it is not exactly in accordance with the existing guidelines. They express concern and sorrow for the couple who have done their best in mediation to settle but just cannot get there without some more help. They talk about clients with poor advisers who are not being given help to know what would happen at court. They talk about the concern for costs if the case goes beyond mediation. They speak of their giving stronger nudges towards settlement terms as the mediation progresses. So can it possibly be that we have fictions in mediation already? It must be a sign of mediation coming of age! Then it is only a short step to move openly to this more directive mediation model.

No change of law or court rules is required for this form of mediation. The wider powers, duties and obligations of the mediator would be set out in the Mediation Terms of Business. I hope mediators adopt this model in appropriate cases. I hope lawyers consider this model of mediation in appropriate cases, perhaps for their difficult to settle cases. I believe it could become a very successful model of English family mediation.

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