

IS THIS THE TIME AND PLACE FOR YOU AND I TO NEGOTIATE?

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ABOUT THE AUTHOR

David Hodson is a family law dispute resolution specialist. He is a English accredited solicitor, mediator, family arbitrator, Deputy District Judge at the Principal Registry of the Family Division, London and an Australian (NSW) solicitor and mediator.

He was joint founder in 1995 of probably the world's first metropolitan practice to combine family lawyers, mediators and counsellors and with an emphasis on a conciliatory and holistic approach. It was subsequently copied in many practices across the world. He is past chairman of the Solicitors Family Law Association's Financial Provision Reform Committee, Training Committee and Good Practice Committee and a member of its International Committee. He is a member of the Law Society's Family Law Protocol Committee and a member of the President's International Committee. He is past vice chair of the UK College of Family Mediators, the umbrella organisation for family mediation and a member of the Chartered Institute of Arbitrators. He is co-author of "Divorce Reform: a Guide for Lawyers and Mediators", "The Business of Family Law" "Guide to International Family Law" and consulting editor of "Family Law in Europe". He is a SFLA (resolution) Accredited Specialist (with portfolios in Substantial Assets and International Cases), a Fellow of the International Academy of Matrimonial Lawyers, a past trustee of Marriage Resource and member of the Family Law Section of the Law Council of Australia.

He has written and spoken extensively on family law including many conferences abroad. Some papers and articles can be found at his web site below.

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A INTRODUCTION TO NEGOTIATION SKILLS:
THE CLIENT AND THE PRACTICE MANAGEMENT DEMANDS

Don't worry so much about "no win, no fee" contingency arrangements.

The matrimonial lawyer is in a "no win, no win" situation!

Most clients want to be, or appear to be seen to be, conciliatory and peaceable. They support the SFLA (now resolution) Code of Practice approach.

However clients are increasingly quick to complain if their case develops in a manner adverse to them. Some want their lawyer to engage in aggressive or strongly adversarial tactics as long as they are not seen to be behind it!

Some want to use the resolution process as a means of getting back at their spouse. With no fault effectively with us on divorce and less private law children disputes, the financial issues have become the last arena to play out the marital animosities and under cover of financial provision claims. How much do we spot what is going on?! When are bona fide strategies used for ulterior purposes? Does it matter? Can they run side by side?

Some cases require a softly softly process otherwise the whole case may blow up and the client will not be able to fund it or be able to cope. How does the lawyer distinguish the "softly softly" from the "first to the knock out blow"?

How much does discussing tactics and strategy alter the client's perception of an open and honest approach, a search for fair solutions? How much do we create a morality for them, as they are (mostly) new to this? Where does our own morality come from?

How much are we still litigation lawyers?

Swapping roles in successive client meetings or telephone calls between 'big hug' Tellytubbies, and Rambo/Judge Dredd, and "Alistair Campbell-type" backroom planner/spinner is not easy. Civil litigation lawyers do not have to do it so frequently, yet we are quickly criticised if we get the role and "feel" of the case or client wrong. How do we get the right strategy for the right case and client and then learn to change our spots quickly?

What are the boundaries to tactical manoeuvrings? Are there any?

If part of our job is to ensure that our clients can negotiate from a position of strength, how much do our costs undermine their position? Is funding our concern? How can we get help from the courts or third parties to ensure funding is not a source of weakness in our case? (And why does the govt persistently refuse to introduce interim lump sums for costs??!!)

Once mediation was viewed as just for wimps, for middle class luuvies, and ... those on legal aid?! Section 29 and the legal aid imperative has shown its applicability to a wider audience. But there are still reservations. Is a more directive style of mediation now openly required by clients and lawyers of lawyer-mediators.

Negotiation skills are not litigation skills. Doing an excellent job on the latter is no use if we cannot finish it off by using the former. But most of us have had no training in negotiation. And how can this be a part of a strategy?

Some spouses have their own strategy – stonewall, don't disclose and then mislead. If all else fails,

hide the assets and the paperwork. How can the lawyers' strategies possibly deal with this? How can we carry the applicant client for this uphill, costly and sometimes frustrating process? How much do we preplan or simply rely on the courts' assistance? Do we feel we are getting the latter in the really difficult cases?

How do we use the element of the evidence to help our clients, even in those cases unlikely to go to trial?

Ultimately what strategies are there? How can they be developed and applied? How much will the court support or condemn? Which may backfire and how and at what cost?

Which strategies are first in consideration and which are matters of last resort?

How flexible is the gameplan and strategy, especially when the unexpected occurs?

How can we best develop strategies and tactics to lead to the best settlement for our client? How do we spot the best settlement? Are we too engrossed in the strategy to see the settlement opportunity?

How can we do the best job for our clients?

What are the practice management issues in deciding the particular method to resolve a case? What and how much impact does practice management considerations have? Where are the conflicts between our advice to our client and our role as practice managers?

How can we run the best family law department for our firm?

B THE SETTLEMENT IMPERATIVE

1. Clients want it

- control over outcome
- greater opportunities as to terms than restricted court order
- cannot afford costs of final hearing
- saves costs
- avoids aggressive, alarming, accusatorial frenzy of the way in which final hearings are still often conducted
- often reduces tension and hostility
- quicker
- less (detailed) disclosure
- provides some degree of respect, goodwill and satisfaction
- keeps children out of court.
- more likely to succeed in long term than imposed court order
- helps children by showing parents working together to resolve issues
- allows outcomes which the courts, by their restrictive powers may not be able to make

2. Courts want it

- FDRs
- in-court conciliation appointments
- adjournments for mediation or negotiation
- unnecessary trials
- waiting lists

- judicial encouragement: *“It is incumbent upon both parties to negotiate if possible and at least make attempts to settle ...”*, Gojkovic v Gojkovic (No 2) (1991) 2 FLR 233

3. Lawyers want it

- change of culture; SFLA (now resolution) Code;
- more satisfied clients
- more satisfactory outcomes?
- uncertainty of outcome at court: s25 wide discretion or sheer unpredictability?
- turnaround of work, especially if only to be paid at end
- sometimes selling job to client
- they expect to settle - 90%+ for private finance, slightly lower for legal aid and children

4. But :

- settlements do not always represent merits of case, but depend on other factors/ aspects
- often prompted by first too weary of the battle including of giving/seeking disclosure
- rarely both parties adopt commercial realities
- one lawyer may not be willing to negotiate
- lawyers often do not have sophisticated negotiation skills
- can leave both parties unhappy (now and/or later) and/or wondering what if ...
- too often left to the last in middle of busy demands of other cases, court deadlines, more vocal clients
- too often requires lateral thinking and hard work whereas increasing tendency to mechanistic and legislative approach to procedural elements of the work
- some ADR can create professional conflicts for the lawyer within a practice
- lack of confidence of some lawyers in non lawyer ADR professionals
- lack of confidence of some lawyers in some ADR processes

C WHEN TO NEGOTIATE?

1. Too early?

- Should not negotiate without full disclosure.
- At no risk from Calderbank until full disclosure, and minimal risk from open offers.
- However it is the client’s option to do so earlier.
- Also, how much more will you learn and/or how will it alter your view of overall assets and terms of settlement by waiting for additional disclosure? (But take care of own professional position.)
- Offer based on client’s knowledge of other party’s finances?
- If possible, don’t negotiate until client accepts relationship breakdown and then is emotionally ready - otherwise the outcome will always be unsatisfactory, however excellent.
- Don’t allow your client to pay own “guilt” edged settlement.
- Never negotiate until proceedings have been issued if another European Union or lis pendens jurisdiction is involved
- Make sure there is domestic abuse protection and/or client is not negotiating out of fear, threats, bullying etc
- Make sure financial protections are in place first such as freezing orders, interim support etc

2. Too late?

- Door of court (normally)
- Client has run out of funds
- Out of time on interlocutory orders; don't negotiate looking down the barrel of a gun – or court order!
- Client has been rumbled on misleading or non disclosure

3. When to consider terms and manner of settlement.

- At the first meeting, discuss benefits of a settlement outcome, possible structures of settlement, client's hopes and wishes and likely timetable to settle. Discuss various forms of ADR. (If you cannot offer a particular type of ADR, know to whom you can refer and the implications for your practice.)
- As you finalise your client's disclosure, draft out best possible terms on believed disclosure of other spouse. Weigh up arguments and counter arguments.
- When you receive other side's disclosure (affidavit, statement or Form E), is this sufficient to make an offer or is more needed to be known? Will more knowledge outweigh costs and delay, and satisfy proportionality?
- Go to counsel? Before offering or if first offer rejected?
- Time may be needed for unrealistic expectations of client, other party or other solicitor to "get real". Other solicitor may be unrealistic due to very different instructions, through lack of experience of right range of outcome or through highly competitive experienced solicitor deliberately aiming too high/low.

D. MANNER OF NEGOTIATION

1. Clients direct

Advantages :

- clients in control
- most satisfactory if a settlement is achieved
- less costs
- allows client to be "enabled and empowered" by own solicitor
- overcomes difficult lawyer.

Disadvantages :

- weaker, vulnerable spouse
- continues battles of family breakdown
- uncertainty of terms agreed
- may involve the children
- at home or in public place: both less than satisfactory
- often only able to deal with principles or broad terms

2. In writing by lawyer

Advantages

- terms (should be) clear, complete, comprehensive
- easier to respond in similar manner
- allows time to draft carefully
- risk on costs placed on other side

- permanence
- formality
- often benefits less experienced lawyer negotiator
- ideal for setting off the negotiations
- essential for complex terms
- more easily approved by client and counsel
- can be shown to court
- use of privilege (and Calderbank)
- suits slow thinker/methodical lawyer and one who prefers written work and may feel at a disadvantage at a roundtable meeting or telephone discussion

Disadvantages

- slow, even by e-mail which has its own dangers
- allows drift and/or festering
- no opportunity for body or verbal language
- can be misled, especially if accompanying arguments about strength/merits of case

3 By telephone

Advantages :

- immediacy
- speed
- informality
- earlier response can be gauged with likely counter-offer
- tone of voice and side comments can ease severity of offer
- can deal with one element of ongoing written negotiations

Disadvantages

- unless timed, can catch other solicitor off guard so not prepared to talk or be so open to discussions and may be unnecessarily defensive
- unhelpful as opening approach unless broad terms discussion
- potential for uncertainties and misunderstandings - always confirm in writing
- no body language or other non-verbal signals
- sometimes unclear if privileged in whole or part
- other side can listen and then say "put it in writing" or simply "no".

4. By meeting

Advantages

- suits more experienced, confident negotiator
- suits lawyers who are used to working together on cases
- potential for most progress more quickly
- opportunity for immediate instructions if clients present or available, in any event quicker response and counter response
- allows progress through full range of body language benefits, including (sometimes) gender benefits
- can gather its own momentum for concluding a settlement
- more personal, friendly especially (sometimes!) if clients present
- can explore wider needs, interests, concerns of clients
- play at home, or play away so you can get up and leave!

Disadvantages

- can expose less experienced, less confident negotiator

- client being present may compare own lawyer less favourably
- clients present means that some lawyers feel need to perform; also less easy to make necessary concessions
- higher costs of meeting and preparation
- if goes badly, can ruin any other prospects of negotiation
- exposes lawyer who is not quick thinker or good orally
- agreements prone to uncertainty as oral; often best to commit to writing before meeting breaks
- beware tactics of host; seating, kept waiting, interruptions, lack of food and refreshments; lack of privacy with client.

5. Counsel meeting

Advantages

- by-passes difficult solicitor
- better for less confident lawyer
- suitable if very complex case
- fresh involvement
- no close “emotional” relationship with client

Disadvantages

- higher costs
- client often has even less feel of involvement
- can make client less confident in counsel as advocate if not settled outcome.

6. At FDR or other court “mediation – type” hearing

Advantages

- have to be there anyway by court rules, so no double cost
- can instruct counsel if not experienced or confident
- helpful indications by court
- pressure from court to settle
- if unsuccessful, no time lost in court timetable and can go more quickly towards a final hearing

Disadvantages

- the courtroom experience
- unhelpful indications by court can destroy prospects of settling on certain terms
- “settle on any terms” mentality.

7. Traditional mediation

Advantages

- impartial and independent mediator
- clients control timetable and outcome
- may sometimes include therapeutic and communication skills elements
- should use disclosure documents which are transportable to court process if no settlement
- clients can be more creative compared to restricted powers of court

Disadvantages

- mediators act as neutral facilitators and can only state if certain discussions regarding outcome are within the court acceptable range and cannot, or at least should not, be

proactive in commenting critically on merits, and likely courses of action, unreasonable stances etc with consequence that mediation clients are left uncertain about possible terms of settlement and without a settlement. (But see directive mediation below.)

- lawyers are not usually present which makes some clients feel vulnerable
- duplication of lawyers in the background, with some mediators seemingly ignoring the lawyers' involvement
- can sometimes seem to go on too long, with many sessions
- perception that some non lawyer mediators are not good enough to deal with financial dispute mediations
- quite considerable range of circumstances when mediation is unsuitable including if unredressable imbalances of power or extreme conflict, if major impairment of mental capacity, if one or both parties feel coerced to attend, if child protection issues, if one party has no confidence in the likelihood of other party sticking to an agreement and others
- some lawyers are not sympathetic to mediated settlements and may seek to unravel them
- some issues brought to mediation table are complex and beyond some mediators and require specialist legal input e.g. venture capital funding, corporate issues, some pensions etc

8. Directive, lawyer involved mediation

Advantages

- lawyers often present with the clients in the mediation room so clients feel more comfortable and confident and lawyers can give ongoing advice
- often at one relatively long session and when disclosure is complete
- mediator is able to give indications of the likely outcomes and comment critically on positions and arguments adopted, akin to FDR judge
- final terms of agreement and even draft consent order can be drawn up and signed before the end of the session
- suitable for cases which are hard to settle because of significant level of dispute and contentiousness between the parties, difficult issues of law or evidence or in other ways unsuitable for traditional mediation
- mediator is invariably experienced lawyer, with good mediation, negotiation and adjudication skills
- other advantages of traditional mediation

Disadvantages

- towards the end of the process so costs will already have been incurred
- the cost with lawyers and mediator present is high but can produce relative saving if otherwise case would go into final hearing
- clients have less direct involvement because of lawyers involvement
- some of the other disadvantages of traditional mediation

9. Collaborative law

Advantages

- the client's lawyer is fully involved as lawyer including at meetings
- transparency of process as everything undertaken at meetings with clients present
- risk of unexpected proceedings is greatly reduced
- maintains amicable relationship between the parties
- negotiations at meetings so no contentious correspondence
- outcome will be acceptable to a court

Disadvantages

- higher costs as meeting intensive
- requires “good faith”
- lack of written record of matters agreed and discussed. (Minutes of meeting are kept by each and read through at start of next collaborative session.)
- need for both parties to change lawyers if unexpected development requires protective or other court applications or simply if one party decides tactically to issue an application; directly prejudices the financially weaker party who is less able to afford duplication of costs and rereading by new lawyer so some clients simply accept what is then on offer
- the practice loses the client for the litigation, the costs and the final settlement when non consensual proceedings are commenced
- anxieties that lawyers blur their representative roles
- not always appropriate to have clients at roundtable meetings
- lack of independent, impartial party at settlement roundtable meeting to assist in producing a settlement
- money has to be paid up front before lawyers are engaged in the process
- divisiveness in the family law profession as some collaborative lawyers recommend their clients to suggest their spouse changes lawyer to a collaborative lawyer.

10. Arbitration, presuming it becomes binding in law

Advantages

- The direct, continuous involvement of decision maker
- The selection of decision maker
- Flexibility and individual choice of adjudication process
- Privacy and confidentiality
- Avoidance of court delays and standardisation of forms and procedure
- Use for discrete issues of case
- Speed.
- Saving of court resources

Disadvantages

- costs of instructing the arbitrator, in contrast to the court process where the judge is free!
- significant degree of preparation, although less than final hearing at court

E TWO NEGOTIATING STRATEGIES POSITIONAL AND PRINCIPLED BARGAINING

With acknowledgement to “Getting to Yes” by Fisher, Ury and Patton

1. Positional bargaining

- Positions adopted are based on what offered or demanded, often accompanied by threats, haggling over terms, swapping compromises. Occasionally ends up surprisingly near the middle.
- Prone to deadlock, misrepresentation and degree of manipulation.
- Can often achieve outcomes; rarely produces satisfaction.
- Such bargainers often impose unreasonable deadlines or threats: answer is to go to court.
- Also positional bargaining is prone to take highly contested positions; answer is to

refuse to move, walk out of meeting, call bluff.

- Positional bargainers often refuse to concede any point unless an opposite (and greater) point also conceded. Encourages the stacking up of (frequently minor) points at outset, to be thrown in so that compensatory compromises are made by other side.
- Beware the salami machine.
- Positional bargaining is invariably adversarial and competitive. Often loses or has lost sight of merits - only the terms in dispute. Usually last minute (classic door of court).
- Produces compromise when time, energies and tensions do not allow more careful and considered examination or one party wants to settle just to avoid an event.

2. Principled bargaining

- Negotiation on merits of case rather than on offer itself.
- Aim is to produce sensible and reasonable outcome in efficient and amicable manner.
- Success in principled bargaining is improved by distancing the people from their problems. Focus on interests of parties, not their respective positions.
- Often negotiation needs inventiveness; the key to unlock the door. Negotiation experience, lateral thinking, broad view, underlying objectives of parties. Develop multiple options to choose from.
- Insist on using objective criteria. Try to reach a result based on merits, outcome at court or in law. Yield to principle and good argument, not to pressure and contests of will or tactics
- "If I could wave a magic wand, what would you like?"

3. Improving strategy

Often negotiation involves both positional and principled bargaining, together or at different stages.

Outcome can be improved by

- learning, identifying and being aware of strengths and weaknesses of both positional and principled bargaining strategies; and learning how to switch
- appraising, but not assuming, the other side's strategy
- clarifying and testing assumptions of negotiating techniques
- experimenting with different negotiating techniques; in house role plays and discussions
- reflecting on experience learned and general ethics and approach
- identifying common ground and real differences in any negotiating standpoint and building on common ground
- improving relevant communication skills to demonstrate and assert the merits of a stance

4 Know your BATNA

Best Alternative to a Negotiated Settlement

F. CONCLUSION

Some cases need to go to court :

- point of law
- valuations or other experts' differences
- dispute of fact; evidence needs testing
- unreasonable and/or unrealistic lawyers or litigants in person
- emotional and other reasons for clients or dispute, unrelated to legal merits

- long running dispute, including involving more than just the couple.

However most cases don't need a final hearing. Still too many cases go to court unnecessarily or have unnecessary court litigation. Some settle at the wrong time (often too late!) and on poor terms.

Demand for settlements will only increase. Good case management requires:

- practitioners acquiring, then continuing to enhance, negotiation skills
- knowing when and how to negotiate
- knowing terms on which to start and to conclude
- clients feeling part of the process
- appropriate choice of ADR

Good practice management should consider that a practice's clients' best interests are served by settling a high proportion of cases on terms and in a manner and method satisfactory to the clients yet taking account of internal practice management concerns and issues. Practices must offer their clients a choice of settlement alternatives (some in-house) and have the negotiation skills to settle their clients' cases.

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G TO NEGOTIATE OR OTHER ADR ?

A discussion and workshop
by David Hodson

Your senior partner who undertakes commercial and company work calls you for a meeting. He explains the managing director of one of the firm's most important corporate clients needs family law advice on the breakdown of his domestic relationship. As head of the family law department, you are asked to conduct the case. You are told that both the outcome and the manner in which the case is dealt with will be regarded as of paramount importance to the firm – and to the future of the family law department!

The client sends you an e-mail. The client has done a lot of reading on the relevant law but wants your advice on the relative advantages and disadvantages of

- negotiation through lawyers
- mediation
- directive mediation
- litigation
- arbitration, which for these purposes presume is binding
- collaborative law

The clients asks particularly that you take account of:

- speed to a settlement
- cost
- implementation and likely enforceability/enforcement
- certainty
- comprehensiveness
- conciliatory approach
- issues if any proceedings have to be taken quickly
- finality
- the lack of publicity including confidentiality for the employees and corporate contacts of the client's company
- the psychological benefits to the family of the manner of the reaching of the settlement
- identity of the other solicitor
- local experience and practice
- the possibility that another European jurisdiction may be involved

What do you say?

Irrespective of the advice to the client, what practice management issues will be in your consideration? In what manner might that have any influence on the advice you give?

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