

Working with solicitors in mediation – a mediator’s perspective

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One of the trickiest conundrums facing family law mediators is trying to balance the desirability of clients obtaining independent legal advice alongside the mediation process, with tackling some of the challenges that mediators and solicitors working alongside each other can present. In this month’s DR column we look at some of the difficulties that mediators and solicitors encounter when co-working in a mediated process and how those challenges can be turned into opportunities to achieve positive outcomes for clients.

A challenge or an opportunity?

Mediators certainly appreciate and extol the virtues of mediation clients seeking independent legal advice from a family law specialist. Mediation operates in the shadow of the law. Most of us, especially post-LASPO, have experience of cases where one or both clients in mediation have not taken legal advice and as a consequence have adopted a wholly unrealistic, unsustainable position. There can be many reasons why mediation clients do not take legal advice. Sometimes they simply cannot afford to. In other cases, perhaps they have not appreciated beforehand that the role of a mediator is a facilitative one, without the giving of legal advice. Many of our mediation clients increasingly fall into the category of those who can well afford to take legal advice but want to contain costs (and the risk of acrimony) by having a mediator sense- and reality-check an agreement they have reached before the mediation starts, something akin to the ‘one lawyer, two client’ model that the Government has been keen to promote. And in far too many cases we are sorry to say that clients have come into the mediation

process adamant that solicitors should have no involvement, either because they have been bruised by earlier attempts at settlement through solicitors (in one case, with six figures having already been spent on legal costs) or because they fear that going to solicitors will mean that they are encouraged into a litigated battle. Clearly there is work to be done to promote the benefits that solicitors can and do bring to the mediation process.

According to Resolution, 768 (or c.14%) of its c. 5,500 solicitor members are trained mediators; c. 25% of Resolution’s overall membership has had some formal DR training. When mediation clients’ solicitors are not DR-trained, there can often be suspicion (on both sides, mediator and solicitor) of the other professional involved. On the solicitor’s side there may be misunderstanding of process, concern that the mediator will discourage clients from seeking legal advice at all and anxiety that the level of disclosure/any mediated settlement will fall short of what they consider could have been achieved through solicitors. Conversely, from the mediator’s stand-point, there may be apprehensions about clients speaking to what they may perceive as litigation-focused solicitors between sessions, due to fear of the solicitors unravelling proposals or even encouraging clients to abandon mediation altogether.

Yet if mediators are able to involve solicitors in the mediation process positively and actively encourage clients to seek legal advice at appropriate points throughout, they may be able to prevent misunderstandings from arising and ensure

that solicitors are supportive of the process and more likely to respect any outcome that the clients reach.

First impressions count

If clients are represented, an effective way of setting matters off on the right foot is for the mediator to write to their solicitors at the outset (with the permission of the clients) to introduce yourself and explain how you will be assisting the clients and how you approach matters. Given that a significant proportion of privately-funded mediation is still solicitor-referred, that is also common courtesy. Writing to the solicitors at the outset is, of course, particularly helpful when the clients' legal advisers are not trained mediators, and may have limited knowledge of how the process works. In this introductory email you could set out: (a) the usual steps involved in the mediation process, from the individual intake meetings through to drawing up any final mediation summaries; and (b) the key principles of mediation. In addition, it can be helpful to explain that you will be encouraging clients to seek legal advice throughout; in other words, you can reassure solicitors that you are in no way usurping their role.

In many mediations, we find ourselves being asked by clients to recommend solicitors to them. We will always give a range of names and think about questions of geography and affordability; but one of the other drivers is whether we know the solicitors we are suggesting to be supportive of mediation. This shows that although there may be fear on solicitors' part of losing a potentially juicy litigation to mediation, there is plenty of scope for mediators to refer unrepresented clients to solicitors. With the advent of statutory MIAMs and the Government's mediation task force in 2014, increasingly clients are well-educated about mediation and finding their way to mediators' doors without solicitors.

Keeping solicitors engaged

How often a mediator is in touch with clients' solicitors again during the mediation process will vary from case to case. Whilst it

can be helpful to update solicitors on the progress of the mediation (again with the clients' permission), the danger is that by doing so the mediator disempowers the clients. Often a better way of keeping solicitors in the loop is to encourage clients to forward any session summaries and action points arising to their respective solicitors. In this way the clients' solicitors are kept engaged with the process, but the clients remain very much in the driving seat.

It will always be useful for the mediator to be in direct contact with the solicitors where, eg there are court documents (such as a petition) to be filed, so that there is clarity about who has agreed to do what. Often there is discussion about whether financial disclosure will be done within or outside the mediation process. If it is being done within mediation, we will always signpost clients to their solicitors with any questions about completion of Forms E and budgets, and with their spouse's Form E so that they may be analysed and views formed about questions and appropriate parameters/structure of settlement. Here, a mediation-savvy solicitor will discuss a range of possible outcomes with their client. As mediators we find it quite challenging to have a client in mediation who says 'my solicitor has told me to expect "X" if I went to court and so to accept nothing less in mediation'.

Lawyer-assisted mediation

The direct participation of solicitors within family mediation is still fairly infrequent but can bring real benefit to the process, especially where one or both clients feel that they would find it helpful (eg, where the finances are especially complex, or there is time pressure to try to resolve matters, or perhaps where impasse has arisen). Inevitably, there can be anxieties on the part of a mediator that the dynamic of the mediation will change when solicitors are present and that it will turn into a quasi round-table meeting. It is always worth sounding out clients as to why they would like their solicitors to be present; if it is a case of one of them feeling that their voice is not being heard, there may well be ways

to address this without involving their solicitor. However if, say, the case is very complex and both clients would like the opportunity to obtain advice during the session, the presence of solicitors (or indeed other professional advisers such as accountants) may be very useful. Moreover, a huge potential benefit of lawyer-assisted mediation is that if an outcome is reached during the session, the solicitors can draft the consent order immediately, thereby significantly expediting the process.

In practical terms, if solicitors are to attend mediation, it is advisable for the mediator to speak to both of them on the telephone beforehand to check their/their client's expectations about the session ahead, and to remind them that this is their clients' process (sometimes already with a few sessions behind them). It is also important symbolically to ask the solicitors to sign the Agreement to mediate, so that all parties feel that they have bought into the process. From the solicitors' perspective, it is prudent not to go into positional negotiation mode on the day of the mediation, but to let their clients do most of the talking, facilitated by the mediator, and chip in only with, eg requests for clarification. The mediator should allow for break-out time so that legal advice can be given.

We have found this a really helpful process as it gives the solicitors a unique insight, in a without prejudice setting, into what is important to the other spouse and why. They can then help their client come up with ideas for brainstorming, whilst reassuring them that what they are proposing, whilst it may not sit exactly with what a court may do, is within broad parameters of what a judge would find fair.

Managing the process

From the outset it is critical that the mediator manages the process and clarifies everyone's roles and expectations. This can be done positively; emphasising to solicitors what they can do, eg support their client, give them advice and assist with expediting the process, rather than what they cannot, eg negotiate on their client's behalf. If the

mediator wants to go one stage further than having solicitors sign the Agreement to Mediate only if and when they become directly involved in the process, in advance of the first session solicitors may be asked to sign an addendum to the mediation agreement, confirming that they understand the confidential and privileged nature of process. This may also serve to allay understandable concerns mediators have at present about the reach of privilege in mediation and whether they may be called to give evidence in any litigation notwithstanding the clear terms of the Agreement to Mediate.

It may also be helpful to ask solicitors to produce a joint 'mission statement', thereby narrowing the issues and encouraging the solicitors to work together, mirroring what the clients have been doing during the mediation process. Alternatively, each client and solicitor could produce a collaborative style anchor statement to read out at the start of the first session at which they are all present.

The way forward

We cannot deny that there are challenges for mediators when working with solicitors, particularly when those solicitors are not DR-trained. Equally, we recognise that there are challenges for solicitors when working with mediators who are not legally trained. The key is trying to ensure that, like the crew of a rowing boat, we work together effectively, knowing each other's strengths and weaknesses, skills and limitations. Most mediators appreciate that it is crucial for clients to receive independent legal advice alongside the mediation process in all but the most straightforward of cases. If mediators can work collaboratively with solicitors, we will likely not only achieve better (and invariably quicker) outcomes for clients, but also help to foster a greater understanding of the mediation process and principles amongst the wider family law community. That can only be of benefit in these times of significant change in the family justice system.

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