

How Might the Adversarial Imperative be Effectively Tempered in Mediation?

The objective of this paper is to discuss the tradition of adversarialism as it relates to mediation and to suggest ways in which good practice can be encouraged amongst mediation advocates. Mediation is a key mechanism for dispute resolution in the English and Welsh jurisdiction. The practice of the lawyers involved in the mediation process is shaped by various factors including training, codes of practice, behavioural norms and court guidance. The default skill set the legal professionals bring to the process is founded on the principle of adversarialism which is not suited to the core values of mediation. The developing professional group of mediation advocates, many of whom are from the legal professions, may benefit from a voluntarily assumed code of practice. The alternatives are to include provisions covering behaviour in mediation into existing codes of conduct for legal professionals and the adoption of more collaborative pre-mediation agreements which include lawyers. A combination of these measures is recommended as a way to assist the process of realignment of the advocate role from that of legal adversary to collaborator.

Key words: Mediation, mediation advocacy, codes of practice, good faith, legal professionals, adversarialism

1. The Context of Mediation Advocacy

Traditionally arbitration has provided the alternative to the courts as a method of dispute resolution. However, the use of methods known as Alternative Dispute Resolution (ADR) also has a long and distinguished history¹. The promotion and development of mediation in the United Kingdom in the last twenty years has centred on the efforts of organisations such as CEDR (Centre for Dispute Resolution) and the ADR Group. Around the same time the commercial law courts saw the potential contribution that ADR had for the ‘more efficient use of judicial resources’² and consequently began to encourage the parties to use ADR mechanisms through court practice statements and pre-action protocols. The major impetus

¹ H. Brown and A. Marriott, “ADR Principles and Practice”, (1993) Sweet and Maxwell

² Commercial Court Guide Paragraph G.1. Available at: www.justice.gov.uk

for mediation development was a result of the reform to civil litigation following Lord Woolf's reviews on civil justice³.

The Civil Procedure Rules (CPR) came into force on 26 April 1999. Judges were given the power to manage cases which included 'encouraging the parties to co-operate with each other in the conduct of the proceedings'⁴ and encouraging and facilitating alternative dispute resolution (ADR) when 'appropriate'.⁵ The encouragement to parties to consider ADR is backed by the costs sanctions a Judge can award for 'unreasonable conduct' in refusing to mediate not only 'during' but also before 'proceedings' have started.⁶ An otherwise successful party may be penalised for the 'failure to follow the Practice Directions (Pre-Action Protocol)⁷ which require the parties to 'make appropriate attempts to resolve the matter without starting proceedings, and in particular consider the use of an appropriate form of ADR in order to do so'.⁸

In the leading case of *Dunnett v Railtrack*⁹ the Court of Appeal refused to award costs to Railtrack who had succeeded in their claim but had turned down the Court's suggestion that mediation be attempted to resolve the case. Court encouragement of the parties towards mediation has gone further since, culminating in the current consultation on whether to make mandatory references to mediation in all small claims.¹⁰

The effect of these developments has been to make the legal profession take serious notice of mediation. Failing to suggest mediation could have serious repercussions for the lawyers. The issue of how lawyers should behave in mediations has not been addressed in the same stark terms. The extent to which the judiciary investigate the behaviour of the parties in mediation is limited and the CA in the *Halsey* case makes it clear that the parties are 'entitled to adopt any position they wish' in mediation.¹¹ However, the issue of lawyer behaviour in mediation remains an important aspect in the development of mediation and is the subject of this paper.

Some lawyers were quick to recognise the potential for work in the area of mediation. Mediation not only offers new areas of work for the legal professions acting as mediators¹² but also a role representing clients in the process. Prior to the developments outlined above, lawyers' held mainly negative perceptions of mediation and qualms about losing revenue

³ Lord Woolf, *Access to Justice: The Final Report* (1995) London: HMSO

⁴ CPR 1.4(a)

⁵ CPR 1.4(e)

⁶ CPR 44.4(a)

⁷ CPR 44.5)(a)

⁸ Pre-action Protocol 6.1(2)

⁹ *Dunnett v. Railtrack PLC* [2002] EWCA Civ 302; [2002]1 W.L.R. 2434

¹⁰ Consultation document available at: <http://www.justice.gov.uk/consultations/docs/ia-alternative-dispute-resolution.pdf>

¹¹ *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 para 14; [2004] All ER (D) 125 (May

¹² S. Roberts, *Mediation in the Lawyers' Embrace*, (1992) *Modern Law Review*, Vol. 55, No. 2, 258-264

were blamed for constraining its use.¹³ Mediation has now become better integrated into litigation requirements and legal professionals, who must now advise their clients on ADR, have gained a better ‘understanding’ of the process and assimilate it into their traditional practices. Studies now show that the majority of mediators working in England and Wales (also Scotland) are from the legal professions and there is evidence to suggest there is a growing market for legal representation within mediation, particularly for commercial and construction disputes which are financially large or complex.¹⁴

There has been much less research undertaken into the issue of how lawyers conduct themselves in their representative capacity in mediation. The term “mediation advocate” has arisen to embody good practice in this area. The role for advocates in mediation has been described as “to provide practical and legal advice on the process and on issues raised and offers made.”¹⁵ There has been a sharp incline in the number of organisations offering mediation advocacy training in England and Wales¹⁶ and there is now a professional ‘trade association’, Standing Conference of Mediation Advocates (SCMA), whose objective is to ‘promote and deliver best practice and professional excellence in mediation advocacy’.¹⁷ Courses and membership of the SCMA are not exclusive to the legal professions but appear to be dominated by them.

The central message emerging from the training available is that “mediation is not an adversarial process to determine who is right and who is wrong. Mediation should be approached as a problem-solving exercise”.¹⁸ The issue is whether this message is being sufficiently well communicated to lawyers, and whether they take sufficient notice of it steeped as they are in the “adversarial imperative”.¹⁹

2. Adversarialism

Criticism of litigation is nothing new. The oft quoted advice of Abraham Lincoln is “Discourage litigation. Persuade your neighbours to compromise whenever you can.”²⁰ The advice continues “As a peacemaker the lawyer has superior opportunity of being a good man. There will still be business enough.” Litigation is discouraged because of the lengthy delays,

¹³ H. Genn, *Mediation in Action: resolving court disputes without trial*, (1999). Calouste Gulbenkian Foundation

¹⁴ CEDR; *The Fourth Mediation Audit*, (2010) available at:
http://www.cedr.com/index.php?location=/news/archive/20100513_347.htm

¹⁵ ADR Committee Law Council of Australia Guidelines for Lawyers in Mediations available at:
www.nswbar.asn.au

¹⁶ See for example www.adrgroup.co.uk, www.cedrsolve.com

¹⁷ SMCA website <http://www.mediationadvocates.org.uk/>

¹⁸ <http://www.mediationadvocates.org.uk/73/>.

¹⁹ G.L. Davies, “Fairness in a Predominantly Adversarial System” in Helen Stacey and Michael Lavarch (eds), *Beyond the Adversarial System*, Federation Press, Sydney, 1999, 102,111

²⁰ R. Basler (ed) “The Collected Works of Abraham Lincoln” (1953) Abraham Lincoln Association

costs and party alienation caused, in part, by the adversarial system.²¹ Adversarialism forms the basis of court proceedings in common law countries where each litigant brings evidence to support their case which can then be cross-examined by opposing parties.²² The litigation advocate is therefore required to deploy his skills not only to support his client's case but to 'discredit' that of the opponent. The codes of professional practice governing lawyers are reported to do little to rein in over-zealous advocacy.²³ Further, the Anglo-American tradition of litigation is reported to impose only 'minimal duties of truth telling on the advocate'.²⁴

This is not to suggest that lawyers regularly fail to operate in a professional manner. Neither is it the case that an ethical vacuum exists where behaviour goes unregulated. For instance, safeguards contained in the Barristers' Code of Conduct prohibit counsel from devising facts which assist in advancing the client's case and encouraging a witness in relation to his evidence.²⁵ Similarly, a barrister must not make statements which are merely scandalous or intended to vilify.

However, adversarialism can lead to various misleading and deceptive tactics such as failing to admit facts known to be true (putting the other side to the expense and trouble of proving them) arguing partial truths, choosing expert witnesses such as doctors and engineers on the basis of the evidence they are likely to give, and burying relevant and damaging documents in an avalanche of documents to be produced on discovery. It can also engender aggressive and bullying behaviour that is not only unpleasant but might be unfair to just claims.²⁶

When approaches akin to the worst excesses of litigation are brought to mediation this does obvious damage to the process. The informal setting of the proceedings and the confidentiality of the private sessions with the mediator provide scope for ethical weakness.

²¹ J Jacobs J. "Justice Between Man and Man. Towards a Code of Civil Procedure" (1985) Current Legal Problems. Oxford University Press

²² J A Jolowicz, "The Woolf Report and the Adversary System" Civil Justice Quarterly, Vol. 15, July, (1996). 198-210.

²³ D Webb, "Civil Advocacy and the Dogma of Adversarialism" (2004)7 *Legal Ethics* 2, 210-230. It should be noted however that Webb's comments do not have the same force in all jurisdictions: as I note in the main text below, the Codes of different professions do approach this differently and there are provisions in the UK Codes which, for instance, limit discrediting to allegations of which there is evidence

²⁴ Ibid page 215

²⁵ Code of Conduct of the Bar of England & Wales 8th edition (2004) rule 704,705 and 708 g

²⁶ C Parker and A Evans, *Inside Lawyers' Ethics* (2007) Cambridge University Press, 66

While few lawyers would plan their strategy around deliberate deception, it is, says one mediator, “part of the game to lie.”²⁷

This is deplorable and begs the question – how did the legal community get here? Conventional advice on negotiation tactics for lawyers suggests that they should see their role as to represent their client’s position as aggressively as possible, using posturing (emotional displays and manipulation) and other misleading or bullying tactics as required and making concessions only to the extent necessary to get greater concessions from the other side.²⁸ It has therefore been suggested that “The negotiator’s role is at least passively to mislead his opponent about his settling point while at the same time appearing to engage in ethical behaviour.”²⁹

Unsurprisingly therefore, there is a common perception amongst mediators and academics that lawyers can frustrate rather than facilitate progress in mediations.³⁰ The negative view of lawyer participation is counteracted by those that are of the view that lawyers improve the effectiveness of mediation by preparing the client and advising on negotiation skills. Other arguments are that they equalize power imbalances and counteract settlement pressures.³¹

Much of the literature in this area fails to acknowledge that lawyers are present at mediations because the clients want them there. This is a legitimate reason and one that the design of mediation embraces. Mediation can be a stressful and intense experience where representation by a trusted advisor can help the party feel more at ease. It is incumbent on the client to satisfy themselves that they have chosen the right representative with the right skill set for the task in hand.

Similarly, it is also questionable whether it is right to view mediation as a non-combative engagement. After all, it takes place as a result of a dispute and frequently during or just prior to litigation. In the Australian jurisdiction mandatory mediation through the courts is a formal step in the court management of litigation. A similar arrangement is currently being mooted for the England and Wales jurisdiction. This can result in numerous referrals to mediation during the litigation. Such a process has been termed “litigotiation”.³²

Clearly the worst excesses of the adversarial approach are not suited to mediation whatever the context. As one commentator put it “mediation is more akin to wrestling: opponents

²⁷ M Rushton, "Effective Mediation Advocacy" *The Mediator Magazine* (2007) available at <http://www.themediatormagazine.co.uk/>

²⁸ J Parke, “Lawyers as Negotiators: Time for a Code of Ethics?” (1993) In C Parker and A Evans “Inside Lawyers’ Ethics” (2007) Cambridge University Press

²⁹ James White quoted in Richard O’Dair, (2001) *Legal Ethics: Text and Materials* Butterworths, London

³⁰ Ibid note 27

³¹ R Wissler “Representation in Mediation: What we Know From Empirical Research, (2010) *Fordham Urban Law Journal* vol 37 419

³² M Galanter, *Worlds of Deals: Using Negotiation to Teach about Legal Process* (1984) 34 *Journal of Legal Education* 268

embrace each other at close quarters in a less formal, more improvised and more intense form of combat. Rather than all out assault, judicious probing of the opponent's strengths and weaknesses, working them out to your advantage where possible, is where good wrestlers and mediation advocates score."³³ The same authors go on to describe the process as the "Jujitsu of negotiation." How can lawyers be encouraged to curb the adversarial imperative and demonstrate the "greater subtlety"³⁴ required for successful mediation advocacy?

A starting point is to understand the extent and context of lawyer's ethical training in England and Wales. The Legal Practice Course (the last stage of institutionalised training for solicitors) makes ethics a pervasive subject whereby students should familiarise themselves with the principles rather than understand the fundamental issues of ethical responsibility. The result of this process is "to stack the odds against respect and compliance for codes from a lawyer's point of view."³⁵ The odds for ethical compliance are further diminished by the lawyer's trained capacity to find ways around detailed rules. The same writer observes that "written codes can become increasingly complex and unwieldy if they attempt to cover the different circumstances of mega firms, high-street practices, sole practitioners and employed lawyers."

The wider ethical training of lawyers has similarly been criticised on the basis that "as a result of the pervasive influence of legal positivism, generations of law students have been taught to see the law in purely technical terms, while its moral content is regarded as irrelevant. The socialisation process of being taught to think like a lawyer involves learning how to separate legal issues from other types of issue (moral, political, social) a process which has been described as one which steals one's soul. Law students begin to learn to ignore the moral content of the law."³⁶

Neither should the significance of the entrenchment of adversarialism within professional culture be underestimated nor the efforts that will be required to dislodge it. As Webb argues: "Perhaps the first step in eroding the adversarial ethic is to recognise it. It needs to be accepted that it exists in the face of the numerous rules of ethics and practice which purport to impose duties of a cooperative nature. Any shift of the magnitude needed to effect meaningful change can occur only over a very long period of time and in tandem with the kind of procedural changes that have begun."³⁷

These observations help to set the context for the discussion as to whether an additional mediation advocate's code is worthwhile in the quest to curb the adversarial imperative and what it might realistically achieve. Advocating the adoption of a code to add further to what

³³ R Fischer, W Ury, B Patton "Getting to Yes: Negotiating Agreement Without Giving In" (1991) Houghton Mifflin Harcourt, 108

³⁴ C Parker and A Evans, *Inside Lawyers' Ethics* (2007) Cambridge University Press, 66

³⁵ J Griffiths-Baker, "Reviewing Legal Ethics and Legal Education in England and Wales - an Unenviable Task?" (2007) 10 *Legal Ethics* 2 121-123

³⁶ F Cownie, "Alternative Values in Legal Education" (2003) 6 *Legal Ethics* 2 159-174

³⁷ See reference 23 above

Griffiths-Baker has described as a “complex and unwieldy collection” would need to have a strong basis of support. There is little point in having an additional code if it will be without practical use and the potential users will not respect its terms. On the other hand managing tensions between constructive client-focused negotiation techniques and the adversarial approach is evidently an area where mediation advocates could use some help.

3. Existing Codes

Both legal professions in England and Wales have codes of conduct to define and regulate how lawyers represent their clients. Solicitors and barristers are required to ‘act’³⁸ or ‘promote and protect’ ‘the best interests’ of their client.³⁹ For many this is the single most important provision in lawyer’s codes. However, the requirement to act in clients’ best interests allows the lawyer considerable discretion when interpreting those interests. Crucially, this requirement gives the lawyer no indication of where adversarialism should be restricted nor of how and in what ways the parties’ right to self-determination should be promoted within a mediation situation.

Further, the Solicitor’s Conduct Rules make no mention of how to act during mediation. There is a reference to not deceiving or misleading the court which states: “You must never deceive or knowingly or recklessly mislead the court or knowingly allow the court to be misled.”⁴⁰ Is it fair game to mislead the mediator? Another general obligation is that solicitors must act with integrity towards clients, the courts, the lawyers and others and must not behave in a way that is likely to diminish the trust the public places in the legal profession.⁴¹ These general duties seem a long way removed from mediation practice, applying as they do to court proceedings.

The Barrister’s Code of Conduct has the advantage of at least referring specifically to mediation following a 2005 amendment. This states “A barrister instructed in mediation must not knowingly or recklessly mislead the mediator or any party or their representative.”⁴² The initiative shown by the Bar Council in amending the barristers’ code of practice is laudable. It would appear logical for the solicitor’s code to at least match this commitment.

Both codes could though go further in supporting the view that when representing clients in mediation (and negotiation) the client’s best interests may not be protected by the adversarial approach. The Civil Procedure Rules require that lawyers and their clients ‘cooperate’ with each other and an amended code could reflect this commitment. Similarly, defining a client’s best interests to include a potential reference to mediation may assist further. This could be achieved by adding a definition in both codes to “client’s best interests” which refers

³⁸ Solicitors Regulation Authority - Solicitors’ Code of Conduct 2007 Rule 1.04 available from: www.sra.org.uk/rules/

³⁹ Code of Conduct of the Bar of England & Wales 8th edition (2004) rule 303 (a) and (b)

⁴⁰ Solicitors’ Code of Conduct 2007 Rule 11.01

⁴¹ Solicitors’ Code of Conduct 2007 Rule 1.02 and 1.06

⁴² Rule 708.1

explicitly to mediation and/or ADR and to more collaborative approaches than the adversarial tradition in litigation allows.

The Australian and American mediation communities have gone much further than their counterpart in England and Wales and have introduced separate codes for mediation advocates.⁴³ The advantage here is that the code writers started with a blank piece of paper rather than the constraints of existing codes. The Law Council of Australia's Model Rules cover advocates' practice during arbitration and mediation. This combination of a single code for mediation and arbitration avoids duplication of effort and content. Ethical issues represent the focus of the Australian code and in particular the duties of confidentiality and good faith. The guideline states "a lawyer should not continue to represent clients who act in bad faith or give instructions which are inconsistent with good faith."⁴⁴ Further guidelines stipulate that "lawyers should never mislead and be careful of puffing."⁴⁵ The Australian code therefore appears exhortatory, issuing cautions and guarding against certain types of behaviour.

The format of the American code appears more precise than its Australian counterpart. This is observable in the manner it seeks to curb the adversarial imperative by introducing rules concerning misleading statements, client perjury and the need to have evidence before making serious allegations. Good faith is also a key theme in the American code.⁴⁶ Under the Guidelines "an attorney may not employ the settlement process in bad faith." The guidelines seek to distinguish between refusing to pursue settlement and deceiving the other side into settlement negotiations. However, this distinction has been interpreted to mean that bluffing about settlement authority, omitting and distorting information, and even making some threats, would not necessarily cause issues for lawyers in the United States who are engaged in ADR processes.⁴⁷

Thus both the Australian and American jurisdictions have an established legal principle of good faith which is under-developed in England and Wales. However, good faith provisions frequently flounder domestically on the grounds that "no-one is quite sure what they mean."⁴⁸ The construction industry contract draftsmen have taken steps towards encouraging the formulation of a general duty of good faith in English law. Bold wording such as imploring the parties to "act in the spirit of mutual trust and co-operation" has been a feature of standard form contracts such as the New Engineering Contract.⁴⁹ The long association between the

⁴³ See note 16 above and Ethical Guidelines for Settlement Negotiations (ABA 2002)

⁴⁴ Rule 4.1.1 Ethical Guidelines for Settlement Negotiations (ABA 2002)

⁴⁵ Rule 1.3.1 Ethical Guidelines for Settlement Negotiations (ABA 2002)

⁴⁶ Section 4.3.1, Ethical Guidelines for Settlement Negotiations (ABA 2002).

⁴⁷ B Roth, "Ethical Considerations for Advocates in Mediation" (2005), available on www.rothadr.com/pages/publications/ethics%20reprint.pdf (accessed 24 September 2011).

⁴⁸ R. Goode, "The concept of good faith in English law", Saggi, Conferenze e Seminari [http://www.cnr.it/CRDCS/goode.htm] 1992

⁴⁹ J, Mason, "Contracting in good faith – giving the parties what they want" (2007) *Construction Law Journal* 23(6), 436-443 Contracting and mediating in good faith do not necessarily equate to the same thing. In the latter context the parties have agreed to take proactive steps to resolve the issues that have arisen whereas the former is more by way of a general statement of intent.

United Kingdom and good faith provisions and its current use in other jurisdictions would make its inclusion into any new mediation advocacy code and/or existing codes of professional practice appropriate.

Elsewhere in Australian and American practice there are sound principles and workable ideas which would assist in any drafting of a domestic code. For example, in Australia the Commonwealth Government agencies are required to act as “model litigants”.⁵⁰ As part of this obligation, Commonwealth Government agencies are required to consider other methods of dispute resolution before commencing litigation.⁵¹ When participating in ADR, these agencies must ensure that their representatives participate “fully and effectively”.

Drafting a code for mediation advocates is beyond the scope of this paper, but the experiences and initiatives in other jurisdictions discussed above, suggest that it would need to be concentrated around the following three principles:

- i) Lawyers should act in the client’s best interests at all times. Interests can be protected by non-adversarial behaviour. This should be the norm in mediation settings.
- ii) Lawyers should act in good faith at all times in their dealings with all other participants in mediation including the mediator
- iii) Lawyers must never deceive or knowingly or recklessly mislead the mediator or knowingly allow the mediator to be misled.

4. A New Code?

Drafting an ethical code has been described as “bold, difficult and somewhat presumptuous” as well as “brave, pioneering and highly desirable.”⁵²

The desirable element of a new code is to lessen the incidence of lying or passively misleading in negotiation and mediation settings. While precisely what is permissible and impermissible in mediation is currently blurred, both of these “negotiation tactics” clearly fall on the wrong side of the line. The main benefit of a separate code for mediation advocates would be to sharpen the focus on the line and establish where it should be properly drawn. This would leave no-one in any doubt as to which actions were legitimate.

The advantages and disadvantages of regulation by code were discussed by the European mediation community in relation to the issue of the cross border mediations.⁵³ The resulting

⁵⁰ *Legal Services Directions 2005* (Cth), Appendix B, available at: <http://www.apsc.gov.au/foundations/legalservices.htm>

⁵¹ *Legal Services Directions 2005* (Cth), Appendix B, clause 5.1.

⁵² A. Thornton *Ethics and Construction Law: Where to Start?* (2004) Lecture given to the Society of Construction Law available at www.scl.org.uk

code has been described as “anodyne.” This leads back to the issue of whether or not codes are actually helpful. Is it realistic to expect a code to change behaviour or are all codes contradictory and unhelpful?

Lord Templeman has pointed out the existence of contradictions in existing code of practice provisions for legal advocates in court: “In the discharge of his office, the advocate has a duty to his client, a duty to his opponent, a duty to the court, a duty to the state and a duty to himself. To maintain a perfect poise amidst these various and somewhat conflicting duties is not an easy feat.”⁵⁴ The situation is apparently worse for a criminal defence lawyer who operates “on the horns of a trilemma – to accumulate as much knowledge as possible about the case, to hold it in confidence and yet never to mislead the court.”⁵⁵ The mediation setting is much more informal than a criminal trial. Nevertheless there is considerable scope for competing interests in terms of whether the client is truly committed to exploring settlement or merely on a fact finding mission as to the strength of their opponent’s case. The key conflict is to what extent to which a party can trust what the other party is saying.

Another issue is whether a code is in the long term interests of mediation practice. A cautionary note is struck by one commentator who points out that: “Once the decision is taken to unsheath a regulatory arrow, the choice can be crucially and frequently irreversible.”⁵⁶ The argument continues that mediation as an informal process does not need any regulation. “Our concern over the effects the codes may have on a relatively young professional field and a still developing canon of mediation practice. Full ethical codes are not only a long way off but should be.”⁵⁷

Codes themselves also come in for criticism. Professional codes of conduct have been called merely “self interest writ large”. However, the same commentator also concedes that codes can, on occasion, display “a genuine concern with high ethical standards. Potentially, ethical codes perform an important function for professional groups in helping them to justify the confidence, respect, status and high levels of remuneration. They resemble social contracts in terms of which professionals agree to accept self-regulation in return for the advantages which accompany professional status.”⁵⁸

The alternative to using a code of conduct to temper the adversarial imperative in mediation is for the parties and their lawyers to sign a participation agreement. The agreement to

⁵³ E. Birch, "The Historical Background to the EU Directive on Mediation" *Practical Law* 72 (2006) Vol 1 pp 57-61

⁵⁴ Lord Templeman, "The Advocate and the Judge" (1999) 2 *Legal Ethics* 1

⁵⁵ D Webb, "Civil Advocacy and the Dogma of Adversarialism" (2004) 7 *Legal Ethics* 2

⁵⁶ A Boon, R Earle, A Whyte "Regulating Mediators?" (2007) *Legal Ethics* Volume 10 Number 1

⁵⁷ B Honoroff and S Opatow "Mediation Ethics: A Grounded Approach" (2007) *Negotiation Journal* 23: 155–172

⁵⁸ D Nicholson, "Mapping Professional Ethics: The Form and Focus of the Codes" (1998) 1 *Legal Ethics* 1

mediate and appointment of the mediator are frequently contained in the same document.⁵⁹ These formal and legalistic appointments represent an opportunity to guide the parties and their lawyers on what is expected of them in the mediation session itself. The United Kingdom's mediation community could learn a good deal from Family Law's collaborative agreement procedure. **The latter provides an excellent example of what can be achieved.** The critical feature is that the lawyers become signatories of the agreement. The following is an extract from a typical collaboration agreement:

“Our Intentions

We will try to think creatively and constructively to find a fair solution to all issues without court intervention

Negotiation in Good Faith

We will make every effort to find amicable solutions that as far as possible satisfy the parties

We will be courteous and co-operative, truthful, open and honest and give full and frank disclosure and all information that may be relevant to the discussion

Signed [the parties] [the lawyers]”⁶⁰

The commercial mediation context is not always going to match the sensitive and complex situations which confront family lawyers. However, the differences are not as great as they may appear at first. The desire for a sensible and workable deal is common. Framing the expectations of the parties as to how their lawyers will perform in the mediation session has obvious benefits. The voluntary assumption of the collaborative approach also overcomes some of the issues around the extent to which behaviour can be dictated to recalcitrant parties and their lawyers. On this final point it should be noted that the Australian code is in use whilst the American Ethical Guidelines for Settlement Negotiation have not been formally adopted in any of the states in the United States.⁶¹ There is an obvious lesson here for would be lawmakers that codes need to have the support of those who are to abide by their terms. There are clearly therefore conflicting opinions as to whether or not the adoption of such codes actually results in improved ethical conduct.⁶²

5. Conclusion and Recommendations

⁵⁹ See the Chartered Institute of Arbitrators model mediation agreement at: <http://www.ciarb.org/dispute-resolution>

⁶⁰ N. Denny, “The Collaborative Law Companion,” (2011) Jordan Publishing

⁶¹ B Roth, "Litigation Tactics in Mediation: Are They Ethical?" (2005) *Massachusetts Lawyer's Weekly* 7 February 2005

⁶² J. Mason, "Ethics in the construction industry: the prospects for a single professional code", (2009) *International Journal of Law in the Built Environment*, Vol. 1 Iss: 3, pp.194 - 204

Previously only trailblazers, innovators or those naturally sympathetic became involved in mediation. But new practice rules and recent court decisions mean lawyers who were culturally opposed to mediation now find themselves forced into the process as part of their professional obligation to their clients. This paper has sought to investigate the best way of guiding the participants and their lawyers on how to avoid the pitfalls which exist when the litigation mindset is brought into the mediation arena.

The first option is to promote a new ethical code for all mediation advocates. Ethical codes and codes of conduct can be hugely beneficial despite all the limitations discussed above. Any code drafted would need to be short and to the point. The point in this context is to curb the excesses of adversarialism whilst promoting good faith, collaborative practice and to reduce the incidence of misleading behaviour. A lead can be taken from the Australian and American mediation communities who have introduced codes of this nature. However, it has also been noted that if the balance and content of a code is not correct, and if the profession fails to buy into it, then it is likely to be ineffective, and it is therefore important to consider alternative forms of regulation.

This situation is compounded if there is no effective enforcement for infringement of the code. Enforcement, or lack of it, was the problem encountered in 2008 by the Society of Construction Law in the United Kingdom when launching a Single Ethical Code for Construction Professionals.⁶³ The Single Code was clearly and concisely drafted by an eminent group of Judges and practitioners. Unfortunately no single body felt able to enforce its terms and it therefore remains of limited value.⁶⁴

The draftsmen of the Single Ethical Code made use of the Seven Principles of Public Life identified by the Nolan Committee set up in 1994.⁶⁵ These principles set out the benchmark of acceptable behaviour in the public sector. The principles were amended for the purposes of the Single Code on the basis of construction being a commercial activity and were regrouped as follows: fair reward (instead of selflessness) fairness (instead of openness) reliability (instead of leadership), integrity, objectivity, accountability and honesty. The Single Ethical Code could conceivably be used as a starting point for drafting a binding code for mediation lawyers.

The first alternative to a code is a pre-mediation agreement which includes the lawyers and is explicit about the behaviour sought in the forthcoming mediation sessions. Family law collaborative practitioners already have established agreements of this nature. For this approach to work there needs to be a sufficiently large number of mediation advocates willing to adopt this procedure with the power to persuade the remainder. The leading role in this

⁶³ A Thornton. "Ethics and Construction Law: Where to Start?" (2004) Lecture given to Society of Construction Law available at www.scl.org.uk

⁶⁴ See note 49

⁶⁵ First Report of the Committee on Standards in Public Life, Vol 1: Report, Cm 2850-1, May 1995, HMSO

context could be taken by mediation providers and nominating bodies. Through their initiative and encouragement of their members the voluntary adoption of best practice may emerge over time. Further impetus may result from the move to make mediation mandatory in the United Kingdom in small value civil cases.⁶⁶

The second alternative is to amend existing codes to make explicit reference to advocate's behaviour in mediation. The benefit of enforcement is a major advantage of working with existing codes. The professional codes for solicitors and barristers have the advantage of being mandatory in nature and policed. A voluntary mediation advocate's code and a pre-mediation agreement would run a substantial risk of being marginalised or at best honoured with lip service only. Lawyers ignore their professional existing codes at their peril.⁶⁷

Lawyers are nothing if not adaptable as demonstrated by the collaborative law movement in family law. This adaptability means that lawyers can easily accommodate the changes required of their practice to maximise their beneficial presence in mediation. The 2005 amendment to the Barristers' Code is a good starting point in facilitating the changes in practice required. The adoption of the amendment at Bar Code 708.1 into the Solicitors Code appears overdue. A further amendment in both codes to include specific reference to negotiating in good faith would go further towards curbing the adversarial imperative and changing working practices.

In conclusion, there are multiple and difficult challenges facing would-be mediation code writers. These challenges include the preference for informality and flexibility amongst the policy makers and the tenacity with which lawyers guard their autonomy, which can amount to a disinclination to obey codes and rules. To be beneficial codes must be neither unwieldy nor overly dogmatic. At the same time a code must be sufficiently precise to represent clear guidance rather than woolly exhortation. An appetite for a full new code may emerge in England and Wales as it has in other jurisdictions. The right environment in which a code could prosper can be created by promoting collaborative-style mediation agreements and by amending existing codes of practice. These two alternatives to a new code could, either on their own or jointly, temper the adversarial approach which some lawyers bring to mediation.

Words 4,817

⁶⁶ See note 11 above