"MEDIATION – THE NEW REALITY" ♦

INTRODUCTION

With the exception of family practice, the legal profession in the UK has very low levels of knowledge about mediation and is largely indifferent to it. The profession divides itself into a small but active and enthusiastic band of mediation converts and the rest who at best have heard of mediation and its acclaimed benefits. There is a prevailing view that mediation has nothing to do for or with legal practice.

However, October 24th – November 4th sees the launch of the Mediation Awareness Campaign by Her Majesty's Court Service. London started to trial court annexed mediation in 1990. Gradually other courts have followed suit.[1] The government perceives that court annexed mediation can help to save time and money for the court service. HMCS has launched an initiative aimed at ensuring that eventually mediation services will be made available in every civil court throughout England and Wales.

In June 2005 HMCS organised a brain storming session for HMCS central offices, regional court staff, mediation provider organisations and mediation associations. Individual mediators were designated as the practitioner contact point for a wide range of courts. The list of courts with designated mediators is growing continuously.

The objective is to save court time and costs and (the carrot) to lower the costs of settlement for court users wherever possible. The incentive (the stick) is s44 Civil Procedure Rules cost penalties.

The strategy adopted is firstly to encourage the courts to advise mediation in all suitable cases and to ensure that judges understand which cases are suited to mediation and secondly to increase awareness of the mediation process within the legal profession and in the community at large.

In Wales there will be court based mediation activities in Cardiff, Newport and Swansea, ranging from meetings with the judiciary to mediation advice desks for the public and briefing sessions for court stag. For the profession there will be a discussion forum at the Law School, University of Glamorgan. The new reality is that mediation is entering the main stream, with a generous helping hand from the government, as a central plank of the administration of justice reform initiative. Practitioners can no longer afford to ignore it but rather should embrace it and learn to use it to their and their client's advantage.

HISTORICAL BACKGROUND

The concept of mediation, that is to say peer assisted negotiation, has been with us since time immemorial. That said, the roots of the modern mediation movement are firmly grounded in the fertile soils of the Southern US States. Much water has passed under the bridge since the giddy days of Woodstock and the free love movement, when all that was required to bring about peace and harmony was to talk to your neighbour, reinforced with a kiss, a smile or small bouquet of wild flowers, before sailing off into the sunset on a low slung customised Harley, trailing a sweet white haze and gaudy bandanna to boot.

Whether or not the concept of talking through problems was really anything new is debateable, but in an era of civil unrest, with previously excluded sectors of the community demanding a voice and faced with the reality of a quagmire in Vietnam when many felt the authorities were not listening, it at least appeared to be novel. The public had an appetite for the notion, which provided a small group of pioneering lawyers with the opportunity to experiment with new ways of helping clients (for a modest charge of course) to negotiate their way out of conflict. Much of the impetus lay in the ever rising costs of litigation, the uncertainty of trial by jury and massive judicial dockets that resulted in pre-trial listings in excess of seven years. As the movement gathered pace the judiciary found their dockets reducing to manageable proportions. The authorities made substantial savings and by the late 1980'ies embraced the process, introducing in some instances court mandated mediation. State and Federal legislation gave mediation an official standing.

INTRODUCTION OF MEDIATION TO THE UK

The movement was studied by visitors from the UK and led to the establishment of CEDR and a sustained period of promotion for the concept in the UK as the new wonder cure all for those plagued by disputes. Fifteen years later, where do we now stand? Is mediation a valuable concept that lawyers in the UK should embrace, or has it turned out to be nothing more than a bottle of snake oil, peddled by quacks in travelling

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[1] Manchester, Birmingham, Exeter, South Wales, Midlands.

sideshows, to exploit the gullible? It is curious to note that whilst US lawyers developed and embraced mediation, it is widely viewed within the profession in the UK with suspicion as a bag of false promises, promoted by unqualified meddlers, which at best achieves settlements which lawyers routinely broker in any case and at worst deprives lawyers of income, all the while adding unnecessary costs to the litigation process.

When the mediation movement was first launched here mediation was a popular C.P.D. topic exposing practitioners to the "benefits of mediation". Though many were not convinced, there was nonetheless a modest rush by practitioners to train as accredited mediators. Then gradually, it would appear, the rot set in. The unconvinced have by enlarge ignored the entire movement. Whilst undoubtedly many disputes have been settled by mediation, to date, unlike the US where in excess of 40% of civil work is now dealt with by mediation which forms a significant proportion of the professions work load, the take up of civil mediation in the UK barely registers in the grand scheme of things. Far from leading to new streams of income, the paucity of appointments has meant that many who trained as mediators never got to put their new found skills into practice. Perhaps then, the detractors have been vindicated?

THE CURRENT STATE OF PLAY

It is submitted that this is not the case. Mediation is not a fragile desert flower that rushes into bloom then fades away, never to be seen again. Rather, like a fungi, it slowly develops in the subsoil, spreading its roots out far and wide, before emerging into the light of day, an integral and indivisible part of its host.

Mediation is part of a popular movement which has been embraced by the community (or at least by the bureaucrats within it). It is not restricted to civil dispute settlement. It is a flexible concept which can be and has been adapted to meet a wide range of needs by diverse organisations in society who have discovered its potential as a structured mechanism for discourse in a society where pre-existing structures have crumbled.

Mediation has been adopted by an ever growing list of agencies[2] as their preferred mechanism for dispute management in spheres of operation that traditionally have not had any major impact upon the legal profession. Consequently, whilst the concept has been largely ignored by the profession, public awareness of the concept has grown exponentially as it is encountered by employees and others in their daily lives.

The way that mediation is used by its various proponents is far removed from that which a practitioner does and has helped to reinforce the prevailing view within the profession that mediation is not something that it should be concerned with. It is submitted that whilst practitioners were correct to note that they already engaged in negotiated settlement on behalf of clients they were wrong to conclude that mediation challenges or threatens this role. It does not. It merely offers an alternative way for them to engage in settlement negotiations and where appropriate, to continue it after an impasse has brought the process to a premature end.

Legal practice is not static. It continuously evolves and adapts to reflect the demands placed upon it by the system within which it operates. The Civil Procedure Rules have ushered in a prolonged (and continuing) period of change for practitioners. Case management is central to the CPR.

The objective has been to streamline civil procedure; to reduce court costs and the demands upon the judiciary's precious time.

The rules encourage dispute resolution, requiring practitioners to explore ways of reaching beyond the impasse points that would previously have seen cases proceeding to trial. In reality there is nothing new in this. It simply takes earlier developments by the courts such as the **Calderbank Offer** costs regime a step forward and formalises the process.

If we examine sections 1, 28 and 44 of the CPR it will be noted that references to mediation are merely one element of a regime designed to facilitate pre-trial settlement and to penalise those who do not take the rules seriously. By contrast with the US, in the UK we do not have a "Mediation Act". Thus mediation for the courts is not a distinct or separate concept. It is an integral part of the post 1998 regime and it is increasingly making its presence known.

[2] eg workplace mediation; community mediation; victim offender mediation; school mediation; peer mediation etc. The insurance industry has also embraced mediation with in excess of £2B worth of disputes being settled annually by P&I Clubs using the process since 2002.

It is submitted that whilst the mid nineteen nineties appeared to herald a false dawn for mediation the reality is that in fact it has taken till now for the process to cast down roots and entwine itself into the civil justice system. The government perceives that mediation has something of value to offer and has embraced it.

It will no longer be possible for practitioners to turn a blind eye to mediation. The cost consequences for clients ensures that this is no longer possible.[3] The courts are robustly enforcing the CPR and examples of cost penalties being imposed bound, whether it be for failing to pursue available avenues to avoid litigation or for unsuccessfully pursing litigation, where success is judged by whether or not the claimant has beaten any offer that was on the table prior to the trial.

It is only a matter of time before a client who has been deprived of costs seeks to recover those "lost" costs from his legal team for failing to make the danger of cost penalties sufficiently clear to the client, thereby depriving him of the opportunity to make a considered decision about the risk of ignoring a settlement offer or an offer to negotiate further.

The key factor to be understood here is not that like it or not, the profession must embrace mediation, but rather that the profession needs to understand what the courts require of a party in order to comply with the CPR. In the immediate wake of Halsey there was a rush by practitioners to exploit apparent loopholes in the regime. The reports are littered with accounts of parties making tentative offers to mediate which were subsequently offered up to the court as reasons from departing, under s44 CPR from the default rule that costs follow the event.

Gradually guiding principles have emerged establishing that the court will only take account of serious offers to mediate that were made at a time when the process stood a chance of producing beneficial results. The circumstances when mediation is not a suitable process are also becoming increasingly clear. On the other hand, the range of cases for which mediation is now deemed by the courts to be appropriate is widening on an almost weekly basis. As the category widens, so the range of circumstances where cost penalties may be imposed also widens, so practitioners need to keep abreast of these developments.[4]

MEDIATION AND THE PROFESSION

The key to the use of mediation by the legal community is to realise that mediation is not an alien concept, or a distinct take it or leave it process, but rather it is an additional tool for settling disputes. It is a valuable service that the profession can offer to its clients. The mistake is to assume that it is easy. The profession needs to learn how to engage in and how to maximise the benefits of mediation, both as client representative and / or as mediator. Mediation remuneration rates on larger disputes are attractive.

Best practice in mediation has not yet been established. There are many models of mediation. The final shape of court based mediation is yet to be determined. Lawyers can play a part in shaping its providing they are proactive. They cannot do so by boycotting the process. Mediation is here to stay so the profession needs to get on board.

[3] See Halsey for Civil Practice and Cowl; Royal Bank of Canada v MOD in respect of Public Practice.

[4] See the NADR ADR Law Reports at http://www.nadr.co.uk/articles/articles.php, which detail all the recent judicial developments in respect of mediation. Currently there are