

## Measures Of Success In Mediation

There need to be measures of performance ("MOPS") in any profession. Measures by which standards can be set and performance valued. It is probably not realistic to apply conventional litigation dispute resolution measures to mediation, but such do not exist anyway. By trying to measure success in mediation, we are applying a stricter discipline to a new profession than we have to the old.

At one end of the spectrum a couple settles everything pretty much themselves. Sometimes their lawyers make it binding and sometimes they don't. At the other extreme, about 2 % I believe, the case is decided by a Judge. There is then a winner and a loser and invariably substantial costs, not always proportionate to the issues at stake. In the middle are the vast majority of cases - settled sooner or later, before or after proceedings have been started, usually at an average cost of a few thousand pounds each per party. There is eventually a resolution one way or another. It may take a hearing or it may be The Finance Dispute Resolution meeting at Court ("FDR") or a few home truths from a principled solicitor - but eventually the parties make arrangements. The assessment of performance of mediators, solicitors, barristers or the Courts, against a value judgment on the appropriateness of those arrangements, is difficult if not impossible. Mediators help clients make their own arrangements and judgment about whether these are good or bad are arguably inappropriate, save that very unbalanced settlements may be morally unfair in some way or more likely to break down.

### What happens in mediation and how can we value it?

First of all, about half of all cases referred never proceed at all. Distance, unwillingness to engage and a whole battery of reasons mean that no-one comes, even for an assessment meeting.

Of the remainder, the clients arrive and the principles of mediation are explained to them. It is impartial, confidential, informed and voluntary and decision making authority rests with them. The mediator will help, but the problems are handed back to them to solve or not as the case may be. Mediation is not a soft option. With a solicitor you focus on your case, your needs and what you want. Obviously that is always going to be a much cosier relationship. Solicitors will always be a preferred buy and rightly trusted to look after your interests. Mediators - well they are just not on your side! Those people who think mediation is about cosy, sympathetic chats are wrong, an effective mediator is neither cosy nor chatty. He/she will ask uncomfortable questions, challenge entrenched views and often turn things on their head. Sometimes things have to be said and facts faced and it may be weeks or months before a party's position shifts and measuring that is difficult.

### An Example

Mrs X wants all the equity of £80,000 in the family home. She doesn't want her husband to have a deferred charge and thinks he should keep all the debts and maintain the children. When asked how Mr X is to house himself and live, she looks genuinely surprised and doesn't address the issue. He only earns £1,370 net pcm and after debt repayments of £250 pcm and CSA payment of £550 he is left with £570 pcm to live on. The wife gets £570 from the CSA to add to her own income, Working Families Tax Credit and Child Benefit, all of which we eventually establish total £1,900 net pcm. These figures are from a real case. The financial position, his and hers, are set out on the flip chart. Side by side their income and

expenditure positions are compared. Mrs X is very quiet. She knows the mediator is impartial. The mediator asks some questions. The light dawns. Her proposals are impracticable and unfair and she needs to adjust her expectations. It is the first or second full session. How long would it take to reach this point in principled negotiations through solicitors and what would it cost? Longer and more. Also, the adversarial nature of those negotiations tend to mean the solicitor may continue to try and get their client the best deal, even though it will leave Mr X continuing to camp in his mother's front room indefinitely.

One measure has to be, how long does any procedure take to make people realistic, look for workable solutions and at what cost? When mediation works, it will usually be quicker and cheaper.

A couple may or may not resolve their dispute in mediation. They may half resolve on the face of it. The shift required for Mrs X may be too far for them successfully to resolve everything at that stage without more pressure than the mediator can bring to bear. However, the exercise will not have been wasted. The fact facing will have sown a seed that will grow. It is likely that even if mediation breaks down, in the example described, there will have been an immeasurable benefit. Mediation will have been the first of a series of interventions which will lead to resolution of the matter. Somewhere along the line it will bear fruit - and lawyers will later find a client with more realistic expectations. They will doubtless get the credit for the final resolution. They will have fed and watered the plant - but the mediator will have sown the seed.

### **MOPS in individual cases**

It is very difficult to answer the question - what proportion of cases resolve completely in mediation? Our mediation team is trying to devise measures, so that we can estimate how many of our cases resolve - but how do you classify the following outcomes on the success scale of 0 - 10?

1. A couple go off halfway and never respond again. The mediator suspects they have sorted things out themselves without further help. This process was started in mediation. Does that count as broken down, partly or fully successful or unknown?
2. A couple resolve everything after full disclosure and there is a summary of proposals, which are implemented. Later the mediator gets a letter from one with a query over contents and the other spouse refuses to return to mediation.  
0, 10 or 8?
3. There is a resolution neither party is happy with, but is the best that can be achieved in the circumstances? Any other form of resolution would have produced similar dissatisfaction, but at higher cost.
4. A mediated child contact schedule works for 6 months then breaks down again. Is that a success, because it was sorted out the first time or a failure because it subsequently fell apart? Is it a success followed by a fresh start? Would mediation or litigation have achieved more in the long-term?

Mediation at least attempts to work at improving the parties' lines of communication. It tries to help them understand the effect they have on each other and break established, disastrous communication patterns. Litigation tends to make communication worse.

### **Cases that can't be mediated**

Litigation speaks the language of force - you have to do X or I'll do Y and then you will be made to do as I want. The sub-text of litigation is the hope that the Judge will force the recalcitrant other party to do what the protagonist wants, which will hold an irresistible allure for the bitter or embattled party. It hands responsibility to the Judge and avoids the need for the parties to compromise and face facts. Sometimes it may be pivotal that it delays the inevitable - the end of it all. For that reason it is likely that a significant proportion of cases will always be drawn to the litigation outcome.

Many couples are locked into a pattern of disastrous communication and repetitious dispute, which they act out with the help of lawyers and the Courts. Each hopes in this way eventually, finally get to the upper hand. It is, after all, their last chance to win. Mediation denies that opportunity. It challenges their automatic responses and encourages them to focus on other needs than their own, their children's for a start. It is never going to be a popular "buy". Currently the Legal Services Commission ("LSC") referral system recognises this by imposing consideration of the mediation option right at the beginning.

### **Is the LSC Referral System good value?**

The LSC has from May 2001 ruled that most clients who want to apply for public funding for family litigation be referred to a Mediator to see if they and their case are suitable for mediation. There are exceptions and not all will be suitable. Also, if the other party is unwilling to engage in mediation then the case does not proceed. When the mediator conducts the Willingness Test to see if the referred party's spouse/partner is willing to engage in the process, each party will hear the mediation message. This in itself is a valuable intervention delivered at the right time for many - before they have taken up opposing positions and run up legal costs. Even if the parties are unwilling to mediate at that stage - or at all - the message tells them "You can agree this - you do not have to fight. There is an alternative. You can sort out your futures co-operatively. People do". That is an important message. It is worth a certain level of investment and may well encourage a couple to settle later, even if they need to indulge in some ritualistic antler-locking to start with. Before the introduction of the referral code we had hardly any cases - indeed we barely existed. Since the referral system and the grant of a franchise to us, we have opened over 600 cases. Let there be no mistake about it, if the LSC referral system ends, that will be end of mediation as we know it today. The LSC administers public funds. Mediation therefore has to provide good value. I believe that it is good value and deserves that initial investment, without which it will slip back into a minority activity practised by very few people and not used or understood by the public at large at all. The referral system has to produce results that are valuable. Does it? In the following paragraphs I will attempt to demonstrate that it does.

### **Is mediation good value where it breaks down?**

For those cases that begin to mediate and break down or partly succeed, obviously the financial cost is higher, particularly if proceedings still follow. A valid question/measure is 'did the mediation intervention make it better?' For example, did contact re-start, was interim maintenance agreed if not capital division? Was a fear allayed here or communication re-established there? Were the proceedings that followed more limited in their scope? Did they settle quicker or were the parties more understanding of each other's position than they would have been? We may know there was a partial or temporary resolution, we may strongly suspect the intervention will have been beneficial, but it is impossible to measure. That is one of the weaknesses of an altruistic intervention which

ostensibly fails. Not that it has completely failed and is a dead loss (though that is sometimes the case) but that the benefit cannot be measured.

However, there also are tangible benefits in a financial mediation that breaks down. Disclosure should be complete. In many cases there will be an Open Financial Statement signed by both parties confirming disclosure is full and frank. It should incorporate both parties Mediation Forms Es with all attachments. The Mediation Form E is (bar 2 paragraphs) the same as the form required at Court for Ancillary (Financial) Relief proceedings, (also Form E). The disclosure is the same too. If there are gaps, the solicitor will have a good clue as to why mediation broke down. The "Background" should supply the basic Chronology for the Finance Dispute Resolution hearing at Court ("FDR"). The Statement of Assets and Liabilities required for the FDR will be in the Open Statement. Indeed the whole Open Financial Statement could easily be used at Court. It is an "open" document. The clients should return to the lawyers with a clear idea about issues. Net effect calculations are likely to have been conducted by the mediator on various capital and income options. If requested, the mediator can easily prepare a Statement of Issues where the couple could not agree. In other words, much of the pre FDR work should be done - and readily portable into Ancillary Relief proceedings - it has been done by one person - the mediator - with the couple sharing the cost. Lawyers and mediators need to work together to provide a seamless join between their services, so where one intervention takes over from the other, duplication can be avoided. Then money/time spent on one dispute mediation method need not be wasted. We just have to learn to work in harmony together - mediators, lawyers and the Courts. It will happen. It has started already.

### **Completely successful mediations**

The only cases we can clearly identify as being completely successful are those with a full Co-Parenting Plan and/or an Open Financial Statement and full Summary of Proposals. We are building a computerised Access system to try to measure our results - by branch, by mediator and overall. As mediators' experience grows and as public perception changes, we hope to nurture and grow the currently un-numbered percentage that are fully successful. This is not a threat to solicitors, whose advice and support will always be valued by clients – especially when in mediation. It will develop as a less embattled route of resolution than the courts. There will be a range of possible interventions of which mediation is one – but only if that vital intervention, the referral system, is maintained.

Solicitors and mediators need to stop seeing each other as competitors (if any still do). Solicitors do not see litigation as an alternative to their service - but as an outlet for and complement to their service. Mediation is simply another alternative intervention that will assist in a non-adversarial solution in a proportion of cases - with solicitors' help as well.

### **MOPS for the conventional dispute resolution model**

So what are the measures of performance for conventional dispute resolution and could we apply these to mediation? I am not sure there are measures of performance for family lawyers. We have never been particularly challenging about measuring the performance of the litigation option – simply because there was no alternative. In focusing on the effectiveness/value of mediation we have overlooked that we do not try and measure lawyers' successes and failures. It could be winning or losing (given that family law outcomes are on a sliding scale this is probably impractical) or simply resolution within a sensible time frame and at proportionate cost.

Take a property and finance case – is the case successful because it is resolved, whatever the outcome, by a judge or is it successful because a client has what she/he wanted and presumably the converse is true - the other party did not get what she/he wanted? If we use the measure of whether a party gets what they want or not, then it would be for the measurement system to decide which party was right in their aspirations, in order to measure the success of the process. That cannot be right in a measurement system. Also, it assumes getting the perfect outcome (for one party) is the only objective, whereas getting an outcome at a sensible cost in a sensible time frame may be a better objective.

### **Does mediation settle "easy" cases?**

Lawyers may say mediation settles those cases which are easy and where parties were always going to agree a settlement quickly and cheaply. Possibly true sometimes, but I am not convinced. There have been some serious disputes in my mediations. I would not describe them as "easy". Even if it were true, should those couples be left with the litigation/bipartisan model alone, which inevitably costs more, because there will be two lots of costs and takes longer, simply because lawyers do not want to be left with the hard cases? Surely hard cases are what lawyers are for. It is therefore questionable whether it is right to analyse the results of any intervention whether legal or mediated, by bivariate analysis or anything else – to nullify the positive results of one method of dispute resolution over another. This is an important issue. It seemed to me that the positive effects of mediation picked up by Professor Gwynn Davis's report were then analysed away by controlling for this, that and the other (this report is available on the L.S.C. website on [www.legalservices.gov.uk](http://www.legalservices.gov.uk), in the News section. Was this a valid approach? So what if mediation does resolve the easier cases before couples are herded into the previously only alternative of the bipartisan approach. There is still a benefit to those couples, which no amount of statistical analysis can deny. They should have it.

### **All mediators are not the same**

Professor Gwynn Davis's report was based on relatively few cases – about a thousand – of which 85% were from the not-for-profit sector. Are those results valid for all mediators/mediation services? I do not think they are. This is for two reasons.

Mediators are becoming ever more skilled at dispute resolution tactics. There is a learning curve, which only practice can refine. I am better now than I was. I will get better still. I believe others are the same.

Also in the past some mediators were simply not trying hard enough. The Willingness Test has stopped the enormous waste of time and money conducting sold intakes for clients whose partners were never going to engage in the process. Measuring good outcomes would be an obvious next step – and comparing outcomes and concentrating resources where successful practice lies. If disclosure is incomplete and/or all the issues have not been addressed, that is not good value. Best practice needs to be identified and spread to all services. Mediators, lawyers and Courts need to work on portability to avoid duplication and keep costs down and ensure the best form of dispute resolution is available to everyone at the appropriate time for them.

So if all mediation services are not equal and some have better success than others – both at getting mediations under way and at resolving all or most of the issues, why should that

cause surprise? Surely if we were to compare legal services we would find some firms worked 'better' than others at resolving cases at proportionate cost within a sensible time frame, others again might have more Court cases and go all out for the "best" deal for their client - at higher cost and over a longer timeframe. We are not all the same. We need to work out what our objectives are and be a little more scientific than we have been about how we are going to achieve them.

### **Conclusion**

So what final conclusions can we draw from all this? MOPS are needed which are simply and easily understood, that can be applied to all types of intervention, whether mediated, litigated or negotiated. I would suggest those measurements should include the following:

- Resolution of issues
- Cost (possibly considered as a proportion of overall assets)
- Time frame

Meanwhile we are left with the rather negative effect of Professor Gwynn Davis's report and continuing concern for mediation services as to the long-term prospects for the referral system and funding. Against this background we carry on working – and occasionally someone will speak. I hope to stimulate a debate on measures of performance which will flourish. We are all so busy doing what we do, that sometimes we forget why we are doing it and that it needs to be valued - and found to be valuable if people are to pay for it, whether directly or indirectly through taxation and public funding. Let us rise to the challenge and show what we are worth!

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