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# **Mediation, financial remedies, information provision and legal advice: the post-LASPO conundrum**

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**Abstract:** The near-total collapse in numbers of solicitors providing legal advice and assistance to publicly-funded clients attempting to settle private family law issues through mediation since the legal aid reforms implemented in 2013 raises important questions about how, if at all, clients in mediation can receive legal information and advice other than from lawyers in financial cases following divorce. This article explores, in a preliminary way, this aspect of mediation practice, drawing on small-scale qualitative data from a study conducted shortly prior to the legal aid reforms concerning the settlement of such cases. It explores how mediators then approached their (permissible) function of providing clients with legal information and how they dealt with cases where they felt that the proposed outcome was particularly unfair to one party or unlikely to be endorsed by a court, and asks how mediation practice – and legal practice – may come under pressure to change in this brave new world.

**Keywords:** legal aid; mediation; legal information; legal advice; financial remedies on divorce; family law reform;

## **Introduction**

This article explores in a preliminary way how parties who need to resolve the financial issues arising following divorce and who are attempting to achieve settlement through mediation might receive legal information and advice to inform their discussions. On an orthodox view, the roles of lawyer and mediator in such cases are complementary: the mediator takes an impartial approach towards facilitating settlement, very clearly not advising or otherwise siding with either party (Family Mediation Council 2010, para 5.3), whilst each party's lawyer provides tailored, partisan legal advice in order to enable their client to mediate with some understanding of the potential (and limits) of their legal rights and obligations, and so with some view about what a legally sound settlement might look like. Mediators themselves

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extol the importance of their ‘explicit and constructive alliance with solicitors’, both to protect their clients’ interests and to help manage client expectations in mediation (Stepan 2011, 304-5; see also Hamlyn et al. 2015, 4.3, Roberts 2015, 719).

But the recent legal aid reforms effected by LASPO (the Legal Aid, Sentencing and Punishment of Offenders Act 2012), and their apparent impact on solicitor and client activity in this arena, throw into starker relief an issue which was present to some extent even prior to those reforms, particularly where one or both parties were ineligible for legal aid and yet struggling to pay both a lawyer’s and a mediator’s bill: what is the mediator (and what are the parties) to do when one or both parties do not have the support of legal advice from a lawyer? How might the absence of lawyers prompt an evolution of – or, some might say, compromise – the mediator’s orthodox impartial facilitator role? The nature of these reforms and their impact on practice are discussed in more detail in the next section.

The questions that we pose in this article are prompted by qualitative data from a small-scale interview-based study conducted with practitioners prior to the legal aid reforms, which address the type of legal information that mediators indicated that they provided to clients during mediation sessions dealing with financial issues arising on divorce. Our data suggest that, pre-LASPO, a variety of approaches were taken, some mediators taking a minimalist/generalist approach to legal information provision, others taking a more individualised approach, centred more clearly on features of the parties’ situation and the feasibility of proposed or possible settlement outcomes, whilst seeking still to remain on the right side of the information/advice divide. With lawyers now even less likely to be present in the background, a legal advice gap has opened up: the key question is how mediators will respond to the pressure, to which they may increasingly feel subject, to move closer towards that information/advice boundary, and what other sources of legal information, if not advice, the parties might access.

Before proceeding further, it is perhaps worth unpacking an assumption on which the following discussion is based: that the receipt of legal information and advice by mediation clients matters. Some might feel that mediation is a paramount example of private dispute resolution in which parties can be free to fashion their own solutions to the practical problems that arise on relationship breakdown; that it is above all about party autonomy. Viewed in this light, the achievement of a settlement with which both parties are content might be regarded as a sufficient goal – what the parties’ legal rights might be is neither here nor there if both are content. But in a society governed by law, including the sort of fuzzy law exemplified by the discretionary, distributive jurisdiction of the Matrimonial Causes Act 1973, we should be concerned that parties who have what is, on one level, a *legal* dispute should have at least a

basic understanding of what the law would suggest as an appropriate settlement outcome or range of outcomes. Otherwise, the autonomy apparently exercised in mediation devolves into a somewhat limited, formal autonomy only, and the supposed freedom of choice being exercised somewhat empty. Settlement for settlement's sake may be more dangerous than no settlement at all. As John Eekelaar powerfully argued in 1999 (in response to the then government's abandonment of the Family Law Act 1996 divorce reforms following the finding that parties attending the information meeting pilots retained a strong wish to consult lawyers rather than mediators), it could be 'deeply corrupting of the law itself' for government to

utilise the institutions of law itself to obstruct individuals from access to the rights conferred on them by law... We should not forget that both marriage and divorce are *rights* and that post-divorce settlements *do* reflect legal entitlements (however imperfectly expressed in the discretionary system). Disenchantment with some of the excesses of the legal process should never obscure these facts. The role of the legal profession has perhaps never been more important in helping people to negotiate their way through some of the hazards which changing behaviour patterns and an increasingly complex world visit on them. (Eekelaar 1999, 396)

Indeed, as Batagol and Brown (2011, 208) concluded from their study of family mediation in Australia, the discretionary nature of family law makes it *particularly* important for mediation clients to have access to 'clear, consistent legal advice'. There is otherwise a real risk that the uncertainty that may otherwise prevail is exploited by the more powerful party in the mediation in order to 'undermine claims that were supported by law', thereby reducing 'the protection that law was able to provide in mediation for those it was designed to empower'. And as Alison Diduck has argued (2014), this is important not only for the negative impact it has on the attainment of individual justice between the parties, but also for the damage it does to the socially valuable norms expressed in family law. As things stand, it may be said that 'legal disputes between family members have become in the rhetoric less "legal disputes" and more "relationship problems"' thus 'detach[ing] them, or render[ing] them autonomous, from law and family law claimants take this message in' (Diduck 2014, 616; see also Batagol and Brown 2011, 222).

### **The background**

Prior to LASPO, solicitors could undertake significant amounts of out of court work for their clients with public funding. Under the most recent fee structure (following 10% cuts effected

in 2011), an out of London solicitor assisting with a divorce petition and then helping the client to bring both children and financial matters to a settled conclusion could expect to recover fees of at least £737: £86 (Level 1) for the petition work, then (Level 2) £199 fixed fee and £119 settlement fee for the children issues, and £208 fixed fee and £125 settlement fee for the financial issues. If the work actually undertaken exceeded three times the level of the fixed fee, the solicitor could instead seek to recover for the actual time spent, in line with the LSC's hourly rates (see SI 2011/2066). As part of this work, at either Level 1 or Level 2, the solicitor could support his or her client in mediation, which – if the case were suitable – would have to be attempted before any question of the solicitor helping the client to bring contested court proceedings could arise, and further levels of public funding become available.

All changed with LASPO, and the government's strong promotion of mediation over lawyer-led negotiation of disputes arising on divorce (Ministry of Justice, 2011, 4 and 10). Save in cases involving domestic violence or child abuse concerns, solicitors are no longer funded for any private family law work other than 'Help with Family Mediation' (HwFM). The solicitor receives a fixed fee of £150 for advice provided in support of mediation (whether the case involves children, finances or both) and £200 for drafting a resulting consent order application in a money case (see SI 2013/422, table 3(e)). The £150 fee was based on an analysis of LSC data which indicated that this was the average amount of time spent by a solicitor assisting with such mediations (Ministry of Justice 2010, para 4.72). There is no indication that this analysis differentiated between time spent in children cases, financial cases and 'all issues' cases, or that any consideration was given to offering different levels of fee depending on the issues at stake, their likely complexity and time required. Even before LASPO's implementation in 2012/13, child-only cases accounted for half of all publicly-funded mediations (MOJ 2015c, figure 18), so a simple mean of all mediations supported by a solicitor is likely to have under-estimated time spent on at least some cases involving finances.

As is well known, the post-LASPO gulf between the numbers of couples using mediation compared with government projections has been substantial. The Ministry of Justice expected that mediations for private family law matters would increase by 74% in the year after LASPO was implemented, but numbers instead dropped by 38% (Public Accounts Committee 2015, 4). Interestingly, the drop in publicly-funded mediations has not been sustained equally across all three case types, and it is money-only and all issues cases which have taken the hit: these dropped from 19.7 per cent and 29.5 per cent to 14.5 per cent and 23 per cent respectively from 2012/13 to 2013/14, while child-only mediation accounted for 61.8 per

cent of mediation starts in 2013/14, up from 50.8 per cent in 2012/13, (figures calculated by authors from MOJ 2015c, fig. 18).

More disturbing, however, were the data regarding take up of Help with Family Mediation: as the Family Mediation Task Force reported (2014, para 54), ‘little use has been made of [HwFM]. The potential 16,000 HwFM clients last year made fewer than 30 claims in the same period, amounting to £6,000 of legal aid expenditure’. So less than 0.2% of clients entitled to HwFM received it, and almost every publicly-funded mediation in that period involved at least one client conducting mediation without any (funded) legal advice at all (if not both, depending on what any privately-funded client could afford by way of legal advice).

It is worth pausing here and noting that legal advice may be considerably more important in money cases than in cases involving the arrangements made for children following divorce or parental separation. Most publicly-funded mediations exclusively concern the latter. In 2014/15, for example, out of 8,035 family mediation starts, 4,970 concerned children only, while just 1,167 concerned property and finance only, and 1,898 were ‘all issues’ cases, involving both (3,065 total) – so around 38 per cent of cases involved financial issues on which legal advice might have been particularly valuable (MOJ 2015c, fig 18).

However, there is evidently still a large shortfall in the proportion of even those clients obtaining HwFM. The most recently published data (MOJ 2015b, tables 5.2 and 7.1) reveal that numbers have not risen considerably in raw terms: in 2014/15, there were just 325 HwFM claims, compared with 8,035 publicly-funded mediation starts, the fourth quarter being the first to see over 100 such claims. So perhaps the tide is, painfully slowly, turning. It seems likely (the published data do not indicate) that most of these cases will have involved financial matters, so it may be hoped that at least a larger minority of such cases are now accompanied at least by the modest provision of legal advice that can be offered under the HwFM payscale – but the gap remains: 325 HwFM claims as against 3,065 mediation starts involving financial issues in the same period means at most only around 10 per cent of such cases involving legal advice for the publicly funded party.<sup>i</sup> So there is still some way to go.

It was suggested by the Task Force that one reason for the lack of take-up might be solicitors’ lack of understanding that they could undertake HwFM cases without reducing the total number of matter starts permitted under their legal aid contract (2014, para 56); the Legal Aid Agency may have managed to remove any misunderstanding on that point. But the ‘main barrier’ they identify – the level of payment – remains unchanged, as do concerns about ‘advice deserts’ opening up post-LASPO (see National Audit Office 2014, 3.23). As the Task Force noted (2014, para 57), the work involved in converting an agreement reached in

mediation into a consent order ‘can involve substantial work and the solicitor would be exposed in the event of later problems. The fact that almost no one has taken up this business despite the other pressures on solicitors’ income suggests that this is right.’ HwFM clearly raises issues of both cost-effectiveness and potential liability for solicitors. The Task Force recommended that the £200 fee for drafting the consent order be raised to £300, but government rejected this saying ‘we do not feel that there is sufficient compelling evidence that making such changes would increase the take-up of mediation’ (Hughes 2014a). This reasoning is itself rather telling of government priorities: not to improve the legal awareness of those undertaking mediation, but simply to boost the numbers mediating.

Some mediators predicted increased problems of working without adequate or any solicitor support for clients post-LASPO. One mediator in our study put it this way:

*How can one solicitor draft an effective impartial consent order without there being any funding for the other solicitor to check it? And therefore my concern is that I don't believe there are going to be very many solicitors interested in doing that work, even though there will still be solicitors for contracts doing care work or doing the work where they're acting for victims of domestic abuse or domestic violence, or, of course, where they're working for children who have been made parties in private law [proceedings]. So that's a big gap because, as mediators, we can only do so much benchmarking in terms of showing clients where they are in terms of workability of their settlements. If they really don't like what they're working with – if they can't be steered, guided by their solicitors to be told, actually this is a perfectly realistic way forward however much you may not like it, you're not going to do significantly differently in the court - once that's taken away, it's going to be a significant problem. (M1)*

As this prescient mediator anticipated and the recent data confirm, the concern of this article therefore remains a pressing one. If there is no legal advice for those mediating, what, if anything, can mediators do about that in their own practice?

### **The qualitative data**

The qualitative data drawn on in this article were collected as part of a mixed methods study examining settlement of financial cases on divorce, funded by the Nuffield Foundation (see Hitchings et al. 2013). These data come from semi-structured interviews with 32 family justice practitioners – 22 solicitors (six of whom were also qualified as mediators) and 10 mediators working in or around the four court areas in which a court-file survey was

undertaken (eight from each region). In order to achieve a diverse sample, practitioners were purposively selected from the Resolution Directory, Law Society and member organisations of the Family Mediation Council to reflect various backgrounds, including regional ‘premier’ law firms, specialist family law and mediation organisations, firms with a legal aid franchise, through to high street and sole practitioners and mediators (in-house and independent). Using information obtained from the various websites, we attempted to include respondents from both genders, with varying experience (in terms of years qualified) and degree of specialisation. The interviews took place during winter 2012/2013, shortly before LASPO’s implementation.<sup>ii</sup> This article draws principally on the 16 interviews with the 10 mediators and six solicitor-mediators. The sources given for quotations from the interviews indicate the interviewee’s professional practice by reference to the following code: M for mediator, SM for solicitor-mediator, and S for solicitor. The interview sample that we draw upon for this article is evidently relatively small and not necessarily representative – we cannot say that we reached saturation point in the collection of all views and approaches that might exist amongst mediators. It is also important to acknowledge the limitations of data based on professionals’ reports of what they do, as compared with data derived from researcher observations of what professionals actually do in practice (Della Noce 2009, 210). But with that caveat in mind, the data are nevertheless indicative of a range of approaches that mediators may consider themselves to be taking to legal information provision prior to LASPO’s implementation, and this in turn prompts future research questions about how mediators are coping now, very largely – it seems – in the absence of legal advice for the vast bulk of their publicly-funded clients. Before we turn to the data, the next section outlines the various approaches to mediation itself.

### **Mediators’ approaches to mediation**

In her influential book, Lisa Parkinson explores the different approaches to mediation, emphasising that mediation is a lot more nuanced and diverse in its types of practice than might be assumed (Parkinson 2014, ch 2). A dominant model in England and Wales is settlement-seeking mediation. Settlement-seeking mediators expect parties to be able to put aside their emotions, although ‘suppressing emotions or putting them aside may not be possible or helpful’ (Parkinson 2014, 37). Indeed, as demonstrated elsewhere, parties’ emotional readiness is a key factor to achieving settlement and not all parties will be ‘in the right place’ emotionally – at least in the immediate aftermath of the separation and initiation of divorce proceedings. (Hitchings et al. 2013, 40-42 and 86, and Bloch et al. 2014, 2, 23-24 and 35). This being so, settlement-seeking mediation may not always be the best option (or the best



*initial* option) for all couples, and other types of mediation may have to be attempted to help the parties move on from the emotional fallout of their relationship breakdown.

Transformative mediation, for example, can be cathartic for some parties: compared with what may seem to be the unhelpfully logical and ‘cold’ nature of settlement-oriented mediation, transformative mediation focuses on the human aspects of the parties’ situation (Bush and Folger 1994). However, transformative mediation is not without its difficulties (see Parkinson 2014, 37-40). Both the concept and the cost of transformative mediation, or indeed pre-mediation counselling or therapeutic family mediation, may be troubling for one or both parties (and public funding bodies). Yet without such support to facilitate parties’ engagement with more directly settlement-oriented activity, we are then left with a family justice system that promotes settlement – and settlement-oriented mediation – regardless of whether settlement is achievable in practice by the individuals concerned. Marion Stevenson has noted recently that there is ‘increasing pressure to ‘achieve settlement’ as a measure of success’ (Stevenson 2015, 716). She has suggested that mediators should focus on respecting their clients’ autonomy, allowing the parties to come to what they regard as the best settlement for themselves – but this raises all the concerns we outlined in the introduction above. Furthermore, the role for the mediator as ‘impartial’ and/or ‘neutral’<sup>iii</sup> facilitator that this involves, appears to be the traditional approach to mediation in England and Wales and one put into practice by several of the mediators whom we interviewed:

*You have to be very careful obviously that as a mediator you’re not put in the position of advising or overly selling an option to them – that’s simply not the role, it’s for the parties to decide what’s going to be best for them. (SM29)*

*There’s a fine line between neutrality and balancing and you’re trying to achieve that balance, remaining neutral. (M3)*

Both mediators and solicitor-mediators in our sample emphasised the central importance of impartiality. Parkinson argues, however, that mediators are not ‘neutral’ as neutrality ‘suggests an absence of values, whereas mediation has value-laden objectives and mediators are not value-free’ (Parkinson 2014, 24). Parkinson therefore focuses on a mediator’s impartiality as to outcome and the notion that in their approach to mediation, they hold a centred and balanced position between the parties, encouraging the couple to reach their own agreement without threat or pressure from each other and without direction from the mediator (ibid, 2).

Against this background, we turn to the data from our study which cast light on how our mediator and solicitor-mediator interviewees approached information provision in the mediation. We did not ask a direct question on this issue; rather data on this point emerged organically from the analysis, enabling us to offer some tentative answers to the following questions. Did mediators classify their role as passive and impartial, or as a facilitator with a more active function, perhaps one which may even involve subtly guiding parties towards what they regard as a workable settlement? And what view did they take about the necessity and timing of supporting legal advice for their clients? We start with that last issue.

### **Mediators' view of solicitor input**

#### *The need for solicitor input*

Ideally, given the orthodox view of the impartial/neutral status of the mediator, clients in mediation are supported by a solicitor outside the mediation, who can provide full legal advice about settlement options under consideration and so provide a 'legal benchmark' against which the client can evaluate offers on the table. Research amply demonstrates the importance of some form of legal benchmarking for clients without solicitor support in both court proceedings and attempts at out of court settlement (see Trinder et al. 2014, and Hitchings et al. 2013). Yet over a decade ago, Davis et al. (2000b) found that mediators in the 'not-for-profit' sector<sup>iv</sup> rarely explored with the parties their possible need for solicitor support during mediation. Our data suggest that pre-LASPO the ideal of solicitor support had become embedded in mediation practice, with one solicitor-mediator reflecting the views of the majority of interviewees in suggesting that '*mediation works best if [clients have] got access to legal advice*'. (SM27) The mediators in our study reported that it was harder to mediate in a case where only one or neither party has solicitor advice in the background. One mediator suggested that where only one has solicitor support the client without the support of a lawyer feels disadvantaged, and they demonstrate that by expecting the other person's solicitor to work for both of them or by scuppering any deal reached '*because they go away and think that they've been somehow stitched up – because why wouldn't they, because the other person had a solicitor*'. (M9) Likewise, another mediator suggested that if *neither* party has lawyer support that too affects their approach to settlement as neither is getting the benefit of any legal benchmarking outside the mediation:

*I think that if you catch people that have had a discussion at home and have not had any legal advice at all, then quite often their ideas can be different, to put it kindly. Some will be totally unbelievable and you'll think – you do have to say to them, 'look, it's got to be workable'. (M3)*

As these quotes highlight, without some form of legal benchmarking, neither party will have any sense of what they should be seeking, nor what they are in principle, broadly speaking, entitled to. Despite LASPO looming on the horizon at the time of the interviews, both the mediators and solicitor-mediators in the sample consistently emphasised how important it was to have a solicitor in the background during the course of finance mediation in particular:

*I think for finance you need a solicitor. (M10)*

### ***The timing of solicitor input***

The majority of our interviewees reported that they recommended that clients seek legal advice from solicitors either throughout the process or from the outset, not just at the end once an agreement had been reached and a consent order was wanted – though clearly some knew of other mediators who did the latter:

*(W)e make absolutely sure that we send clients out through the process. We don't, which I know some firms do, do mediation and then send them to get legal advice on the agreement after. We don't do that, we send clients out along the way. (M3)*

*Interviewer: How often would you say, when you're acting as a mediator, are you referring your clients to solicitors [during] that process?*

*SM32: Continuously. I would be much more cautious in mediating if there weren't solicitors in the background.*

Several reasons were suggested for the importance of directing clients to solicitors throughout mediation: remedying imbalance in the relationship caused by having one party legally represented and the other not having any legal support; reassuring clients that they are going about settlement in the right way; encouraging the clients to be more flexible; preventing a final panic where the client thinks they have been 'stitched up'; and finally, supporting the settlement process, as without legal advice, clients are in a kind of 'legal vacuum' that can impede settlement:

*(Y)ou might think it's very fair that you get 90% of everything but actually you need to check out whether your understanding of what is fair ties in with what the law says is fair. (M7)*

Where one client has no lawyer support from the outset, one mediator suggested that it may be more productive and cost-effective to go to see a solicitor with questions after a couple of

mediation sessions because that ‘clarifies all the issues, so at least then they can get a feel of everything.’ (M5) However, as a number of mediators suggested, if such a client waits until most of the mediation sessions have passed and legal advice comes late in the process, there is a risk that a solicitor may advise that the proposed settlement is not in their client’s best interests and result in alternative options being tabled. This could at least potentially delay settlement and increase mediation costs, or raise fundamental questions over the legal efficacy of the mediated agreement.

Where mediation failed to achieve settlement, the vast majority of interviewees in our sample (who were asked about this issue) either directed clients to a solicitor or at least raised various questions with them, such as how the clients planned to get the finances sorted, how long they envisaged that taking and the potential costs involved. As noted above, these proactive approaches can be contrasted with the earlier finding of Davis et al that in relation to mediators from the not-for-profit sector, on termination of the mediation, ‘following a failure to reach agreement [it] is left pretty much up in the air. It is effectively a message – “you’ve been here and failed and now it’s up to you”.’ (Davis et al. 2000b, 250) By contrast, our findings suggest that – as Lisa Parkinson recommends (2014, 256) mediators appear to be prepared to signpost clients to solicitors at various points throughout the mediation process, including when mediation fails to achieve settlement.

### **The mediator as information-provider: neutral information versus advice**

But the discussion thus far assumes the likely presence of solicitors in the background. Analysis of the data indicated different approaches in terms of how interviewees dealt with information provision generally - and legal advice specifically - and how far the mediator might be able to plug the ‘legal advice gap’ to some extent by providing legal information to their clients.

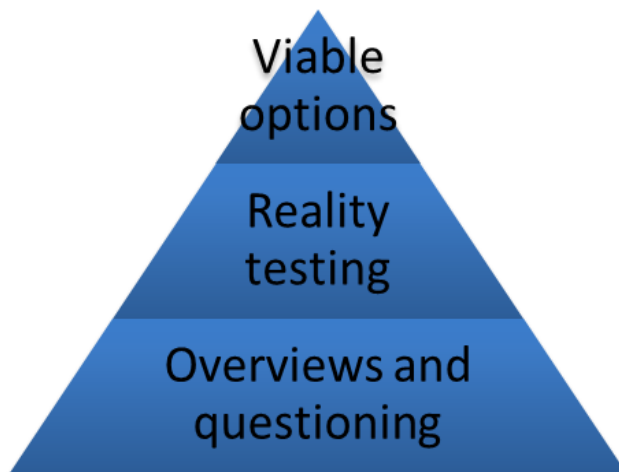
One mediator noted that some of their mediator colleagues gave only limited information to clients on the premise that the mediator’s role is about empowering clients to go out and get the information they need themselves:

*If I get irritated with mediators, it’s when I go to things and people say to me, our job is about empowerment, it’s not to give anybody information, it’s empowerment for them to go out and get it. Why make their life more difficult than it is? (M3)*

None of the interviewees reported that they themselves adopted such a hands-off practice. However, some differences can be discerned in the style of information-giving that our

mediators reported providing to their clients. Figure 1 depicts the three main approaches to information-giving that we identified from interviewees' accounts of what they did, working upwards from the most to least common.

Figure 1: Approaches to neutral information-provision during mediation



#### *Overviews and open questioning*

Starting at the base of the pyramid: most interviewees reported that they provide only neutral legal information and signposting in mediation. Unsurprisingly, they said that they would not cross the dividing line between the provision of legal information and legal advice. Although few practitioners articulated the difference between these two concepts, 'advice' appeared to be viewed as something tailored to the clients and their specific legal advice needs, whereas 'information' encompassed more general, neutral information on various issues, including an overview of the current law:

*(W)e emphasise in the agreement to mediate that we can provide legal information but we cannot provide legal advice. Indeed, how I frame it is, I say we can provide information on all sorts of issues and topics but it's always neutral. We don't tell you this is what you should do, we think this is a good idea, take this offer, or don't take this offer, it's a bad idea. (M1)*

Mediators suggested that – consistently with this approach – they would be able to flag up relevant issues, ask questions and enable clients to focus their own questions to make the best use of their time with a solicitor. As one mediator succinctly put it: 'I can only ask the question ... I can't find the answers.' (M2). A complication with that approach necessarily arose, however, where one or both parties did not have any legal support in the background and it was suggested that the role of information-provider increased where there was a LIP

(litigant in person). Another mediator suggested that they were getting more self-referrals from the website, and observed that such clients' expectations were different from those referred by a solicitor: 'the subtext is that they're expecting free legal advice as part of the mediation and we have to be very clear in terms of the boundaries which are "we can give you legal information, but we can't give you advice".' (M4)

### ***Reality-testing***

The approach described by a smaller number of interviewees sits on the second tier of the pyramid: the use in certain circumstances of a more amplified approach which went beyond simple neutral delivery of general legal information to encompass more focused reality-checking.

*(S)o you are in mediation trying to reality-check as well, so the reality is that hopefully the house will sell, or if it doesn't sell, it's about realities – the debts – what's happening with the debts – paying them off and then from what's left then they can sort of share the equity and how they share it depends on what the pot value is with pensions as well. (M5)*

M1's approach appeared to sit in both the base and middle tiers of the pyramid by suggesting that certain situations may call for additional benchmarking beyond overviews and open questioning. When this was required, the mediator would ask specific questions of the couple that focused on the workability and realistic prospect of success of the proposed settlement: 'Can you live with this? Do your children have some place that they can live in? Can you afford to pay for it? Can you run it? Can you pay the outgoings?' (M1) One solicitor-mediator suggested that, when acting as a mediator, they would adopt a reality-testing approach that was based on their experience and working knowledge of what is achievable from a legal perspective:

*I think it's helpful to have a working knowledge of what is achievable, what's realistic, and what's likely to be considered appropriate by the court (when) the parties are discussing things. You have to be very careful obviously that as a mediator you're not put in the position of advising or overly selling an option to them – that's simply not the role, it's for the parties themselves to decide what's going to be best for them. (SM29)*

### *The 'viable options' approach*

Finally, at the top of the pyramid is the 'viable options' approach, a slightly more robust approach than the second tier and the least common account amongst our interviewees. Instead of providing neutral information simply in the form of overviews, questioning and reality-testing, these mediators would make positive suggestions of options that the clients might *not* have previously considered. In doing so, the mediator remains 'neutral' in the sense of not telling the clients what to do, but directs them by introducing possible options for discussion. Following Parkinson's analysis of the 'neutral/impartial' terminology issue, information provision by the mediator under this approach might be said to become less 'impartial' in so far as he or she is bringing new ideas into the room, highlighting alternative issues and avenues which clients may want to consider, even if leaving it to the clients to decide which route to take. This most directive layer of information-giving is still not legal advice in the narrow sense, rather a highlighting of particular issues in an attempt to get the clients to see the 'wood for the trees'.

*(I)t's frustrating – you can sometimes see clients wrestling with the issues and you say, 'I can't give you legal advice because I know I'm a lawyer but I'm not a lawyer today, I'm a mediator, so I can't give you legal advice, you're going to have to go back to your solicitors'. But mediators can be more hands on nowadays than they used to be. You used to have to completely step back but it does mean that you can come forward and say, 'have you not thought about doing it this way?' Or 'let's brainstorm, let's think of some options – you could sell the house' – 'oh I hadn't thought about that'. So you do try and help them in that respect. (SM27)*

The other solicitor-mediator who adopted this approach similarly suggested that it was helpful for the clients to have a working knowledge of what is achievable, what is realistic, and what is likely to be considered appropriate by the court presented with a consent order application. Another non-lawyer mediator who indicated that they used this approach did so in conjunction with reality-testing. When describing a financial remedy case, this mediator suggested that clients:

*(O)ften come with 'I need money from the house' but the realities as you go through the process and you're explaining the financial picture – would it be that a pension share might be what they want because it would give them an income to pay bills? So yeah, it's informing [them] of all the options that are out there. (M5)*

### *Straying into advice?*

Sitting entirely outside the pyramid of approaches to neutral information-provision are the few mediators we interviewed who could be taken to have suggested that their practice strayed into the advice category. In the case of one mediator, in particular, it is unclear whether their use of the word ‘advice’ during the interview was inadvertent. But the context in which the word ‘advice’ was used implies that they might be willing to be more forthright in the type of legal ‘information’ given to clients. When discussing the level of information given to litigants in person, this mediator (who lacked a legal background) suggested that:

*It is difficult because it then places a greater obligation on you to explain the law to both of them while they are with you. You can say to them, ‘Look, maybe you ought to take advice’, but – it places a big obligation on me to be up to speed with my law and give them legal advice which is something that they need to feel comfortable with ... I know there are mediators who are not actually solicitors and who are social workers, psychologists, who don’t know what the latest law is and so would not be able to provide that sort of input. (M8)*

Some mediators were concerned that solicitor-mediators would overstep the boundaries of neutral information-giving into tailored legal advice-giving: ‘I worry about lawyers giving people the solution rather than letting them find their own solution, which might not quite fit the model that we sell or that is sold by the court.’ (M3) However, overall, it appears that such concerns were misplaced (at least as far as this small sample is concerned): the solicitor-mediators that we interviewed remained committed (when acting with their mediator hats on) to enabling clients to find their own solution – although for some this may only be achieved by presenting them with all the legal options, some of which the clients may not have considered by themselves.

It is interesting to observe that most of the interviewees who self-reported as being a little more directive in their approach to information-provision by outlining viable options were solicitor-mediators. However, that is not to say that all solicitor-mediators are more directive in the provision of information to their mediation clients. Other solicitor-mediators in our sample sat within the first and second tier of our pyramid of approaches, apparently providing less directive information but incorporating neutral legal information, signposts, questions, overviews and reality-testing. Whether a mediator’s background has any effect on their approach to information provision is beyond the scope of this article and would need to be a topic for future research. Questions are, however, raised about whether professional training and experience (for example, being a repeat player in legal negotiations and, albeit less



frequently, in court and therefore having a clear, personal view of what the court is likely to say) affects a mediator's approach to information provision and their 'parameters of the permissible' (see below); or whether professional background makes no difference, and so differences in approach to mediation simply reflect professional choice exercised by the individual mediator based on their views about the nature and purpose of mediation as a form of dispute resolution and the role of the mediator within it.

### **Mediators' approach to the 'parameters of the permissible'**

A related issue that we explored was whether mediators adopted 'parameters of the permissible' when it came to financial and property matters. In other words, where a potential agreement between clients appeared to the mediator to be particularly unfair to one party, was there a point beyond which the mediator felt that they had to intervene, or did they remain impartial despite a potentially unfair agreement? Commenting on the training and accreditation requirements for mediators set out by the College of Mediators, Webley has noted that although the literature provides some training in 'relevant legal norms', it is silent about when, if at all, a mediator must intervene in the decision-making process or to prevent a manifestly unfair settlement. (Webley 2010, 124-6). However, the College's material may not be representative of all mediation organisations' training, and – as we discuss further below – the 2010 FMC Code of Practice provides that *if participants consent*, the mediator may inform the parties that the resolution that they are considering falls outside the parameters which a court might approve or order (para 5.3). That is just one, quite strong, form of intervention, but there are others that might be deployed.

Our research identified five differing approaches to potentially unfair agreements, several of which might be deployed in one case; for example, mediator M1 emphasised that they used three of the five strategies in an attempt to get clients to see that their agreement was either unfair or not workable. The five approaches sit on a spectrum along which the mediator's reaction becomes increasingly emphatic.

The first, most modest, approach involved trying to get the parties to see for themselves that the agreement was unfair or unworkable through a narrow degree of questioning. The mediator who preferred this style of intervention offered the following rationale for this approach:

*... the danger is, if I suddenly say, this is totally unfair, the person who thinks it is fair will say, whose side are you on? And then I'm of no use to them, whereas*

*if I said something like I said before, what do you think your solicitor will say about this, or well, hold on, you're getting 90%, let's just look at the net effect of that, so you can buy a house, what about X, what do they do? So often by different sorts of questions, they themselves will sort of say, oh yes, I see that doesn't work. (M7)*

The second approach (one of the three most common reported) involved the mediator either flagging up the problematic issue more explicitly as being inequitable or noting how an outcome is unworkable or unrealistic. Unlike the first approach, this approach involved the mediator directly bringing into play a measure of validity that is external to the parties, rather than allowing the parties to identify those values for themselves. It involved questioning the parties rather more emphatically about their proposed settlement in order to try to get them to view their potential agreement differently. The following two quotations exemplify the type of 'realistic questioning' that would be used in this approach:

*How can you expect to be realistic that dad has nowhere to live? Or has a one-bedroom flat when he's got children of 8, 6 and 4 who need to come and stay? So you focus on the unreality or the non-workability or the lack of it of the settlement to the circumstances on the ground. (M1)*

*When it's manifestly unfair, I'd go back to that guy with his pension. He was determined to keep it and I think when it's manifestly unfair I'm saying to them, 'look, these are the real figures – if you're saying all she's having is £30,000 out of the family home and her pension is £60,000 and your pension is £977,000, I've got a bit of a problem with that. (M3)*

As the point was put to us in interview, it might appear that the mediator here personalised the objection to the proposed settlement: 'I've got a bit of a problem...'. But we simply do not know whether that is how M3 put the point to the clients: observational research would be required to explore that issue. The opinion may in fact have been expressed to the clients in more impartial terms, for example by framing the unfairness of the potential settlement in terms of its acceptability for the court. However, this quote does highlight the fine line which can be drawn between the neutral stance of the 2010 Code of Practice, invoking the external, objective authority of the court as the arbiter of fairness, as opposed to the apparently personalised message described by M3.

The third approach ramped things up yet further by the mediator suggesting that their clients take legal advice at a particular point, bringing another, wholly external factor into the

mediation room. There is a subtle difference here between our unexceptional finding that most mediators in *general* terms encourage their clients to have a solicitor in the background throughout the mediation process, and the mediator cutting into the mediation to flag up a *particular* need to take legal advice on a specific issue that has arisen during discussion. This approach was often used in conjunction with another of the strategies, but one mediator was particularly forceful about the value of the couple going off to consult their solicitors if the potential agreement looked like it was becoming unworkable or unfair, to the extent that they would stop mediation:

*I stop people in the middle of mediation and say 'I think this is where I told you I would ask you to go and see your solicitor. This is the situation. Please, I'm telling you now very clearly, go and consult your solicitor.'* (M8)

A further, more emphatic version of this third approach, reported by only one mediator interviewee (alongside other approaches) was to get the couple to sign a disclaimer, although they had not yet had to ask a couple to sign anything: 'I would be saying very strongly that they need to get legal advice and that they may in fact need to sign a disclaimer' (M2)

And finally, the last of the three most common approaches identified involved reference to the *court's* expectations of what would be required to convert any agreement reached during mediation into a legally binding document, suggesting that judicial approval might not be forthcoming. This can be regarded as going considerably further than the 'talk to your solicitor' approach, and effectively takes the form of a piece of (negative) legal advice to the effect that the particular settlement proposed is clearly not legally acceptable. For example, M9 explains to clients in this position that what happens in mediation is not legally binding and the only way an agreement made in mediation can be made legally binding is if it goes to court:

*And if the court believes that the settlement is manifestly unfair, then the court will throw it back. So I don't overtly ask them to change their agreement but I do make it clear to them what the consequences of going without that agreement might be. And that's also made clear in the documentation, as I want to cover my back.* (M9)

## **Discussion**

Both the general issue of mediators' approaches to information-delivery and the more specific issue of how mediators confront an agreement they regard as unfair or unworkable raise

particular questions following LASPO's effective removal of lawyers from the arena in so many cases.

Given the dearth of HwFM (and assuming that the parties cannot afford legal advice), any technique deployed by the mediator which presupposes the availability of legal advice – for example to help the parties reality-test a possible outcome, or to ascertain whether a court would approve a proposed outcome in a consent order – is doomed to fail. As the *Mapping Paths to Family Justice* study found, one of the negative features of mediation articulated by some mediation clients was the difficulty of having a lack of legal context (Barlow et al. 2014, 10). Parties in such cases may settle for various extra-legal reasons, including emotional readiness, a willingness to settle, concerns about litigation, child(ren)'s welfare and norms brought into the process for example (see Hitchings et al. 2013, chs 2, 3, 5 and 6; Barlow et al. 2014, 22-24; Batagol and Brown 2011). This in turn raises concerns of the sort made in the introduction above about the focus of government non-court dispute resolution policy being on settlement of the dispute, rather than substantive justice for the parties (Genn 2012, 15 and Diduck 2014, 616).

Unless the mediator can step in to fill the gap by helping the parties do a thorough reality-testing in the mediation session or confidently (and correctly) deliver negative advice about unacceptability to the court of a proposed outcome, parties may agree on outcomes (whether or – one would hope – not enshrined in a consent order) which serve them poorly in the longer-term, if not sooner. As Batagol and Brown (2011) concluded, the notion that parties mediate in the shadow of the law (Mnookin and Kornhauser 1979) is somewhat attenuated by the absence of legal advice – the 'law' in whose shadow they bargain may in fact be a rather distorted, 'folk law' version of their legal rights that they have received and processed from more or less reliable sources. The fact that the 2010 Code of Practice only permits the mediator to inform the parties that a proposed settlement would not be acceptable to the court where both parties consent to that information being provided is interesting. By necessary implication, provision of such information would otherwise be regarded as compromising the mediator's neutral position, a defining feature of the mediator's professional role. And as we have noted above, this sort of 'information' might actually be characterised as a form of legal advice, specific to the parties' proposed settlement, again straying from the conventional notion that mediators inform, but do not advise. It is perhaps curious that the mediator's ethical position can be modified by the simple expedient of party consent. Could a lawyer's professional requirement to avoid a conflict of interest similarly be 'cured' by consent, or should these principles be regarded as immutable?

As well as lack of *legal* advice, parties to mediation may also feel the lack of basic financial and other guidance, or issue-raising, that a solicitor might have offered. Research has shown that patterns of money and finance management within relationships ‘tend to emerge more by default or force of personality, than as economists have traditionally assumed (Becker, 1993), by rational consideration and open negotiation.’ (Vogler 2009, 64). Financial capability is multi-faceted, entailing: making ends meet, planning ahead, organised money management, controlled spending, staying informed and choosing products (Finney and Hayes 2015). As the Financial Capability and Wellbeing report highlighted: ‘During and after a life event (e.g. ill health or separation) the emotional turmoil experienced made it more difficult for people to think clearly about their finances in order to adapt appropriately.’ (TNS BMRB 2015, 5) If the parties themselves are unable to ‘see the wood for the trees’ or are enmeshed within their existing money management relationship framework, then an informed ‘outsider’ who can direct them towards further possible ‘viable options’ may be particularly valuable in the absence of access to independent legal or financial advice. It is therefore important to ask how those who are ‘less capable’ financially, whether generally or temporarily following the relationship breakdown, deal with the complex decision-making required on divorce in the absence of partisan support and advice, legal or financial. Are they able to process and act upon the information they are given? Are they able to plan ahead and weigh up long-term (pension and income) requirements against short-term (especially housing) needs? (See generally Perry et al. 2002, and on inadequate pension provision following divorce, even where a court order is made, Woodward with Sefton 2014).

This lack of financial capability was emphasised by one mediator, discussing some clients’ inability to appreciate the inadequacies and potential consequences of a proposed settlement:

*So you can ask rather pointed questions to get them to appreciate that perhaps what they’re doing doesn’t make much sense. The difficulty is that all of these techniques or approaches require an element of insight and appreciation from the clients. Sometimes you’re working with less able clients and less able clients are less seeing as easily the consequences of their decisions. (MI)*

But it is doubtful how far the mediator can go, even if financially and legally literate, in making up for the absence of partisan advice in these matters. As ever, much will depend on the skill-set and knowledge-base of the individual mediator:

*(I)t’s being able to be forensic without being aggressive and that is a skill that certainly many family lawyers have and it’s one that family lawyers who become mediators mustn’t forget that they have. But equally our counsellors, therapists,*

*psychologists from the other side of the mediation discipline are brilliant at asking questions and brilliant at framing questions in such a way as to get useful answers. (M1)*

*I was a trained counsellor. Also experienced in financial services – so I have got accountancy qualifications which are very useful in [all-issues mediation] work. (M2)*

It might be wondered what role the judges might have in filling the gap left by the lawyers. But that assumes that the parties will get as far as a judge: around two-thirds of divorcing couples do not obtain a financial remedy order at all.<sup>vi</sup> The proportion of couples without an order who have no legal support is probably much higher. But if parties to mediation get as far as concluding an agreement and (however unlikely) presenting a self-drafted order for the court's approval, the ultimate responsibility for assessing the fairness of the proposed order of course lies with the court. Elsewhere we have reported from court file data that judicial intervention in consent order applications is more prevalent than Davis et al. (2000a) found. Judges intervene for various reasons, not only drafting or technical queries, but also where they have questions or concerns about particular substantive issues and overall fairness of proposed orders (Hitchings et al. 2013, 52-61). However, relying on the court to assess an agreement's fairness presupposes that the mediated agreement will find its way to the District Judge's desk, and that the judge will have sufficient contextualising information on the face of the application – or following a short hearing with the parties – to be able properly to appraise the fairness of the proposed agreement. Yet given the limited nature and extent of information that can be accommodated on the court form and pressure on court time, it must be seriously doubted how often this will be possible. Judges have – quite understandably – previously relied to some extent on the fact that lawyers will have been involved and advised the parties as to their rights, an assumption which will often no longer be safe (see, for example, remarks in *Harris v Manahan* [1997] 1 FLR 205, 213; and findings of Batagol and Brown 2011, ch 7, on this issue in Australia). Whilst the judges might provide a good back-stop against unfairness in some cases, they cannot be expected to weed out all unfair orders – and, like mediators, they cannot provide legal advice.

### **Concluding thoughts: reconfigured roles for mediators and for lawyers?**

The mediator's role is currently conceived as an impartial/neutral facilitator of settlement. Within that role, we have identified different levels of intervention, even of directivity, by mediators; observational studies would provide a more reliable and detailed insight into whether and how mediators' descriptions of what they do are reflected in their practice. But

our interviews with both mediators and solicitors also suggested that doubts exist about the desirability of continuing with the ‘impartial’ facilitator approach of mediation to the exclusion of alternative styles of mediation:

*I have a problem with the way mediation is set up. I think some countries – I think the US has a model of evaluative mediation, so you engage in mediation but the mediator will evaluate the discussions and may give a view on what the mediator thinks would be a sensible course of action. ... I want to see something more evaluative, to have some type of evaluative mediation, and we don't have that. So I think the neutral mediation that we have is really not going to get very far in the absence of public funding, so that people can take advice. So I anticipate that being a problem. ... I think it [mediation] should be more robust and really aim to assist the parties. (S25)*

Solicitors appeared to be more critical of the impartial facilitator approach to mediation; two solicitors framed their criticism of impartiality (although they described it as ‘neutrality’) in terms of its ‘unhelpfulness’ and lack of directivity for the client(s). A further solicitor suggested that mediators who were very passive during mediation sessions appeared to get very little out of their clients, who consequently returned to the solicitor frustrated about the lack of direction and progress in mediation. ‘(S)ome people [mediators] just sit in the corner and don't say anything. My client comes back and says, what was the point of paying this person to sit there?’ (S26)

Evaluative mediation (Riskin 1996, cf Riskin 2003; Lowry 2004) is conceptually quite distinct from conventionally understood facilitative mediation, though one mediator's practice – in quite complex, subtle and dynamic ways – might entail aspects of both (Riskin 1996, 35-8, Riskin 2003). Facilitative mediation is characterised by studied neutrality designed to enable communication between the parties so that they can together create their own solution. Evaluative mediation, by contrast, entails direct commentary from the mediator on the substantive issues at stake in order to provide a more or less prescriptive guide to what would constitute a reasonable basis for settlement. (See generally Roberts and Palmer 2005, 181-8) Both styles of mediation have a settlement-seeking orientation, and so to that extent fit within that part of Lisa Parkinson's typology (discussed above). But they take opposing views on the legitimacy of mediators making positive substantive interventions on the merits of the dispute, so much so that some would resist applying the term ‘mediation’ to the evaluative approach at all (cf Riskin 1996, 13). Indeed, it may seem to some to be a short step from evaluative mediation to the controversial practice of ‘med-arb’, in which the parties appoint the ‘mediator’ to take a binding decision in the event that they fail to settle by conventional

mediation (see Roberts and Palmer 2005, ch 8 part D), and from there, considerably less controversially, to orthodox arbitration. Evaluative mediation is not, therefore, without detractors (e.g. Love 1997, Della Noce 2009), and is viewed by some as ‘oxymoronic’ (Kovach and Love 1996). But proponents argue that providing parties with an evaluation of their case might in the long-term support, rather than undermine, the self-determination that mediation seeks to uphold, by improving the information base on which parties take their decisions rather than firmly directing them to ‘the’ answer (e.g. Riskin 2003, 18-20).

It is perhaps unsurprising that some lawyers should be the ones to express frustration with the neutrality of facilitative mediation and to prefer more directive, evaluative approaches:<sup>vii</sup> they are professionally wedded to dispute resolution shaped by externally-derived substantive norms. By contrast, mediators who have a psychology, social work or counselling background may be expected to endorse the approach that mediating parties should be facilitated to generate their own norms for problem-solving and find their own solution (Riskin 1996, 35-6). But as mediators generally come under pressure to achieve settlement of the core legal dispute, and to do so quickly, the temptation to be more directive in mediation may increase, and scope to pursue other relationship-based or therapeutic goals may be lost.

Indeed, the problems created by LASPO’s implementation – and the resulting pressures on mediators to take a more proactive, directive role – are made more acute by the lack of prior expectation management of clients who have self-referred to mediation and who, it seems from our interviews, may be expecting mediators to be able to give them legal advice, just as a litigant in person might expect the other party’s lawyer or the judge to advise (see Trinder et al. 2014). In the post-LASPO environment, a much higher proportion of clients are coming in on self-referrals, making this problem more common, and mediators will have to develop strategies to deal with it, whether holding their preferred line of limited, general information-giving or edging further along the spectrum of more specific, proactive information more closely tailored to the parties’ situation.

There are clearly limits to how far the mediator can go in information-giving before they fundamentally compromise their role as neutral facilitator and tip decisively into a more evaluative mode. Some assistance may be offered by online and other generally published legal information to which the mediator can refer clients, such as the Family Justice Council’s guidance for litigants in person in relation to the substantive law governing financial remedy cases (Advice Now 2015). But there is only so far that published legal *information* can go – it cannot perform the function of tailored legal *advice*.



It is tempting – but for the time being very probably futile – to suggest, as Batagol and Brown did in Australia, that the solution lies in reinstating the lawyers into the process by ensuring a funding regime that makes it commercially feasible for them to provide their valuable out-of-court services, as they always had before. As Batagol and Brown argue (2011, xxv), ‘strong collaborative partnerships between lawyers and family dispute resolution practitioners may assist in empowering vulnerable clients attending mediation’. But in the likely absence of the necessary structures being put in place to ensure such collaboration for mediating parties (particularly in publicly funded cases), the brave new post-LASPO world may therefore yet prompt radical thinking, not confined to the role of mediators as conduits for the delivery of legal information. For example, one of the Family Mediation Task Force’s recommendations to increase the use of mediation post-LASPO was ‘for the Law Society and the SRA to consider whether the regulations should enable solicitors to see both parties together where they want that ... when they have mediated’. (Family Mediation Task Force 2014, 4.) This recommendation was not rejected by government or the SRA and in August 2015, the SRA issued guidance which enables solicitors to take on joint instructions to draft a consent order. (Solicitors Regulation Authority 2015, Annex A.) This is a radical development. Allowing a couple to see one solicitor jointly raises several fundamental concerns, not least whether it is possible for the solicitor to avoid a conflict of interest in drawing up a consent order for both parties when neither have had individual legal advice and how a solicitor would deal with an agreement which they consider is not in the best interests of one of the parties. And (how) can this role be taken on by a solicitor who has just acted as mediator for the parties? (See generally Bowden 2015.) Particular care will need to be taken in establishing the scope of the retainer and so potential liability assumed by the solicitor in such cases (cf *Minkin v Landsberg* (*Practising as Barnet Family Law* [2015] EWCA Civ 1152).

The integrity of both professions is at stake. As Parkinson has observed: ‘...there are risks of mediation being used with a double agenda, ostensibly to assist potential litigants to settle disputes out of court, but actually serving government policy to reduce public expenditure by restricting access to legal services and cutting legal aid. Mediators need to preserve their independence and avoid being used as part of an austerity programme.’ (Parkinson 2013, 214). Both professions are coming under pressure to adapt their roles in ways that would require a greater or lesser degree of departure from their orthodox professional ethics. But if each professional group remains committed to its traditional role and the funding regime is unchanged, who, if anyone, will provide the legal advice that divorcing couples patently need?

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<sup>i</sup> We have assumed in this analysis that one party per case is publicly funded and that all HwFM claims related to money cases.

<sup>ii</sup> A full discussion of the selection process and problems encountered during both stages of the research is provided in Appendix A to the Settlement Report (Hitchings et al 2013).

<sup>iii</sup> See Astor (2007) for discussion of the concept of neutrality in relation to mediation.

<sup>iv</sup> Different categories of mediation supplier were used in the Davis et al report: ‘not-for-profit’ services were staffed for the most part by non-lawyer mediators; the ‘for-profit’ sector was classified as solicitor firms that offered mediation and the ‘FMA’ consortia were the third branch classified in the report, operating on a ‘for profit’ basis and therefore placed with solicitors for the purposes of analysis in the report. (Davis et al. 2000b, 11) This can be contrasted with our study where there were two main categories – mediators and solicitor-mediators. The former included mediators from a variety of the mediation organisations (mediators often belong to one, two or more organisations simultaneously) and solicitor-mediators who maintained a practice in both fields.

<sup>v</sup> Davis et al previously identified this concept in relation to child-related disputes (Davis et al. 2000b, 242).

<sup>vi</sup> See Hitchings et al. 2013, 9. See more recently Ministry of Justice (2015a) table 8, which charts the decline in proportion of divorces with financial remedy orders from 41% in 2003 to 34.7% in 2014.

<sup>vii</sup> We have used ‘directive’ more loosely than Riskin (2003, 20) – he distinguishes between ‘evaluation’, which simply gives the parties information, e.g. about appropriate settlement ranges, and ‘direction’, which goes further in indicating to the parties more or less forcefully that that is how they *should* settle the case. Indeed, in his 2003 work, he moves away from facilitative/evaluative to prefer a continuum between elicitive/directive as a model for describing mediator roles. Our use of ‘directive’ is more synonymous with ‘evaluative’, intended to convey a more substantive, case-specific intervention from the mediator, without any implication of pressure on the parties to adopt that line.