

Rules of Engagement, Or, how to make the “Agreement to Mediate” document work for you

In all human endeavours that involve people engaged in a common task, rules are developed that make the activity work as smoothly as possible. Games and sports only “work” when the rules are made explicit and unambiguous, and all participants agree on them and their application. In other enterprises the rules can be less explicit, yet, for all involved to be happy rules will evolve. In those environments with which we are familiar, we know the rules, and we apply them, and have them applied to us, almost without realising. Only, say, on a holiday in another country, where the rules are different, do we become conscious that the guiding principles that we understand no longer apply.

In family mediation rules of engagement have been established and it is important that these are understood. It is likely that the mediators themselves, with their training and experience, are clear about the tenets that govern their practice. They may be equally sure how they want their clients to behave and operate within the mediation. However, family mediation is a relatively young profession, and clients may be unsure as to what it is, let alone have a clear understanding of its rules. This is why clients can be asked to sign up to a document called an “Agreement to Mediate”, in which the rules are laid out in a lucid and easy-to-assimilate way.

In talking to family mediators I have become aware that not all use this device to set out their stall. Those that do distribute an “Agreement to Mediate” to their clients may make the assumption that it is enough to send out the paperwork. I would like to suggest that there is more that can be done than simply sending out the rules. By spending time talking clients through the “Agreement to Mediate”, there can be no doubt about what the clients understand. More than this, as I intend to explain, mediators establish a device which is useful for dealing with various issues later into the mediation.

Setting the ground rules and establishing boundaries is unavoidable. However, I feel that this can be done before the work of the first session begins. At that point the clients can agree to work under those rules, or they can choose not to proceed.

I would also like to take this opportunity to make a pitch for another layer of conventions. As family mediators we have a body, the UK College of Family Mediators, that could hold a set of operational protocols, in particular documents, which would be freely available to every family mediator, and, indeed to every potential client. Naturally, there would have to be both mandatory and modifiable components, but it would be – to use an overworked phrase – joined-up procedure if all UK College members were all encouraged to work with the same documentation (at least, the same basic frameworks).

Anyway, in the absence of such specific and unified direction, I shall set out the way that my co-mediator and I establish our rules of engagement, and how we use them to facilitate the mediation process.

My preferred mediation model is that of co-mediation, so my experiences are based on working with a co-mediator. However, everything that I write about can easily be adapted to suit sole mediators. One of the advantages of co-mediation is that the mediator who is not addressing the clients directly can observe their reactions. So, for example, if I am describing the concept of privileged information to the couple, and my co-mediator notices a furrowed brow, she can expand my explanation. A particularly useful device is if one of us notices a client looking bemused or bored, we can ask the other mediator a question ourselves. What we establish is that it is okay not to be clear about something, and that asking questions is not a stupid thing to do.

In mediations my co-mediator and I share the talking; we do not interrupt each other, and ask each other permission to add or ask something. In other words, we model good communications for our clients. In the description that follows, in reality we do not talk as a chorus. It is always one or the other talking. Furthermore, my co-mediator and I do not have pre-ordained speeches or roles; what I might address in one mediation, my co-mediator may take on in the next. So, for a sole mediator, there is nothing in what I am writing about that is specifically solicitor (or non-solicitor) material.

The other general point is that we take great care to match our terminology and style to that of our clients. We work with people from a very wide range of backgrounds, so it is not helpful to them if we baffle them or, on the other hand, sound patronising.

At the first meeting, having introduced ourselves and asked our clients how we should address them, having seated them and made sure that they are comfortable and ready to begin, we ask the couple whether there is anything pressing that they need to say.

If this feels risky, if you feel concern that someone might take the stage to launch into a diatribe, let me reassure you. We will, note, by putting on the flip chart, if necessary, anything that is said at this point. We do explain that we will come on to anything that is brought up, but - at this introductory phase - we will only take note of these points.

Asking the couple whether there is anything pressing that they need to say is a vital question. There is no point trying to engage a couple in the introduction process if one or the other (or both) has their mind full of an important point that they are just bursting to make. Unless they are given this opportunity, the bigger risk is that anything that the mediators say will not register; the client is too busy trying to keep in their mind their own opening speech (or salvo).

Having dealt with any issues the clients have arrived with, we explain that we offer the first half session (45 minutes) free of charge. This allows us to say that we are going to deal with the ground rules, and if they are not acceptable to the clients, they can leave mediation without either any obligation or having incurred any expense.

Then we produce their copies of the "Agreement to Mediate", and say that they have both signed it. We explain that, without making assumptions about them,

people will often sign a document having taken it for granted that it should be okay to sign. Who reads the small print of a credit agreement, after all? However, we say, in this case there is a lot of information in the “Agreement to Mediate” that sets the way that we will work. So, with their permission, we propose that we will go through the document, point by point, to make sure that everyone in the room is clear and happy about the way that things will operate.

We explain that if there is anything that is unclear about our explanations or unacceptable about the “Agreement to Mediate”, we would like that raised as we take them through it.

In our “Agreement to Mediate”, the first paragraph deals with impartiality. We explain that this means that we do not take sides. We do not judge; mediation is not there to find out who is right or wrong. Mediators do not give opinions. This is probably the most useful point to make. This is the core of family mediation. Clients can easily imagine that, by making their case, they can draw the mediator into confirming or validating their feelings or actions. In the mediation they can, by direct appeal, or merely with a look, say, “Look how unreasonable my partner is.” Having said what mediation is not, the first paragraph then says what mediation is. We say that our role as mediators is to help the couple to explore their options, which will give them new ways of resolving differences of opinion, or making compromises on issues that have been sticking points in making plans for the children, property, financial matters and themselves, for now and for the future.

The second paragraph is about prior knowledge. We check that our clients do not know us in any other capacity, professional or social. For me, this is absolute, and I would not mediate with a couple if I so much as had met one of them at the school gates, picking up the children. We make sure that both clients know that neither mediator has any previous knowledge of either of them. That way, there is minimum concern that mediators can be tempted into an alliance with one client or the other on the basis of some kind of pre-existing relationship, however slight.

The third paragraph defines how and when we may provide information. This also gives me the chance to explain that we do not direct (tell the couple what to do) or even advise (suggest what they might do). The only basis on which we supply information is in a strictly neutral way so that the couple can understand the options that are open to them. It is at this point we make clear the value of having their own solicitor is to both clients. If appropriate, we can indicate other experts, such as counsellors, financial advisors or estate agents, who can provide support in the personal and partial way that we cannot. It is at this point that we can demonstrate empirically how we manage the balance of power. For example, one partner may have never had much to do with financial matters. We would put to both partners, never just the disadvantaged one, how their bank manager, or independent financial advisor may be a useful source of information. In this way, we do not single out one partner as deficient or inadequate for not knowing something.

The fourth paragraph explains that a professional body governs our mediation practice. We deal with how they may want to handle a complaint. We encourage the clients to talk to us first, if there is anything that they are not happy with in the mediation process. Obviously they may be unwilling to put their concerns to us, so

we make sure they know what to do, and are clear whom they can approach, in this case.

Paragraph five deals with the way that all information brought into mediation will be shared openly. There is an exception, and that is a phone number and (or) and address. If one partner wishes to keep their new contact details from the other we will respect that wish.

Next are paragraphs dealing with disclosure. Financial circumstances are to be made in totality, with supporting documents where necessary. We explain that we cannot verify the completeness and accuracy of the information provided but we will ask the clients to sign and date a statement confirming that they have made a full disclosure. We emphasise that resolutions based on information that turns out to be incomplete will probably have to be renegotiated.

The difference between open financial and other factual information, and the concept of privileged information that applies to proposals is dealt with. We explain that factual information is the sort of thing that is available to the couple's legal and financial advisors and, ultimately, in Court. However the proposals, suggestions and offers made in the mediation are not legally binding. We explain the benefit of this as giving both partners the chance to try things out, without the worry that, by making a suggestion, they have committed themselves irrevocably. As part of this we make it clear that we are not willing to be called to give evidence in Court to corroborate proposals put forward in a mediation session.

I would argue that it is imperative to set up all mediations with the concept of privileged discussion firmly in place. In the same way that the information about confidentiality liberates people in therapy, so the idea of not being held to ideas or thoughts expressed in a mediation session is reassuring. A couple cannot even brainstorm if they are inhibited by the concern that that anything they say may commit them.

Paragraph nine deals with the privileged summary (the memorandum of understanding) of the proposals for settlement and the open summary of the financial circumstances. The memorandum of understanding includes the proposals on all matters discussed in the mediation, arrangements for any and each child, property, finance, maintenance, child support and any other matters discussed and as appropriate to each partner. We explain the significance of these documents, and how much we charge for preparing them.

The next paragraph deals with confidentiality, and we state clearly that we do not pass on information to a third party without obtaining permission from both clients to do so. There are two exceptions to this. The first is where someone (especially a child) is at risk of serious harm. In these exceptional circumstances we would discuss any action that might be taken with both partners before taking any action to contact the appropriate authority or authorities in line with the Codes of Practice that apply to mediation. The second is about the professional obligation to discuss mediation in consultancy. However, in this case this is done without revealing any identifying details.

Then we cover the safety of both clients. This is a reinforcement of the exploration of matters such as domestic violence that takes place before the first meeting. We make it clear at this point that mediation cannot operate in a climate in which there is any form of threat, actual or implied, or intimidation. This is an essential matter to address. It gives us the opportunity, at any point in the mediation to deal with a client who uses inappropriate language, or makes threats.

Paragraph twelve covers the possibility of terminating the mediation. Either partner has the right to end the mediation on any basis. This is part of the principle that mediation is a voluntary process, and so there is no point continuing if one or both clients do not feel that the mediation is being helpful. The mediators may also terminate the mediation if there is a violation of the rules that is not addressable. If for example, one of the clients uses abusive language, we can invoke our rule of terminating the mediation. This can be extremely effective.

The penultimate point to raise is the cost of mediation. This will have been addressed at intake, but it is useful to take the time to remind the couple of the costs for the sessions and for preparing the summaries and also to deal with questions about the number of sessions that they might expect to need.

Finally we say that we will do our best to help them, and ask them to play their part by cooperating in the task of looking for workable solutions.

This may all seem a protracted process, but my experience is that it is very worthwhile. In going through the points, we make sure that there is no apparent difficulty with the understanding of the framework that we are establishing. Our experience is that people who come for mediation often expect that they are putting themselves in the hands of experts who will “sort things out” for them. This is, it is true, often the traditional role of the professional. However, family mediation is intended to ensure that it is the clients who make the decisions. In going through the “Agreement to Mediate” we make this clear, and there is often a distinct reaction to this.

Sometimes, people are disappointed. A person who is used to having their partner be in charge might be looking to the “experts” to take over this role. It can be quite scary at the outset for a person to take in that they are going to have to do jobs that are new to them. Yet, it is never impossible to do these tasks, it is usually important to learn to do them and there are many potential benefits to be gained from engaging with those learning processes.

It might seem boring if the mediators drone on for half-an-hour. Especially if the couple have made and rehearsed a speech in which they stake their claim, or attack their partner. This is why we give them the chance to get anything off their chest immediately after the introductions. However, whatever is said at that point we note and explain that it will be addressed in due course. What we establish then is that everyone has a chance to be heard.

Most people do seem interested, attentive and engaged while we establish the rules of engagement. It gives them a chance to connect with the mediation process without letting loose the feelings connected with their partner. It can be a “calm

before a storm”, but by setting up that calm at the start, it is there to go back to, if need be, during the mediation process. By asking the couple to recall the start of the first session, we can remind them of our rules of engagement. It may be that we have to repeat the rule. However, we avoid finding ourselves in a position of having to state the rule for the first time.

This way of operating comes into its own when working with high conflict clients. One of the difficulties of working with high conflict clients is that they have their own rules of engagement. They have very clear stances; understandable in as much as high emotional levels are inevitable, yet, in the mediation process, counterproductive. When a mediation becomes stuck with an emotional bombardment we have the useful technique of referring back to the rules.

For example, if one partner starts shouting at the other, and becomes abusive, we can make an intervention by reminding the couple that when we talked about the “Agreement to Mediate” (which we remind them that they signed) we did explain that mediation cannot work under duress. We can address the frustration or anger, of course, and acknowledge the feelings expressed, but by having the rules firmly in place we have the authority to refer back to them.

By referring to the rules the first thing we achieve is a pause, a time-out. We create a moment in which everyone can stand back from the emotions and look at something rational and non-emotional. The second thing we accomplish is a return to a point in time when everyone was attentive and receptive. The third thing that we achieve is the chance to remind the couple of the progress that they are making and how that progress will be best served by an adherence to the rules that were all accepted at the outset.

As another example, one partner might appeal to one of us. The wife might try and engage my co-mediator, “woman-to-woman”, the husband could petition me, man-to-man. This can be a covert approach (with a sigh or a raised eyebrow), or an overt one. One partner might try to have their view of their partner’s unreasonable nature endorsed by at least one mediator. Without the rules in place at the outset, it might feel like a huge put-down, if the clients hear, for what might be the first time, that mediators are impartial and do not take sides. If the partner’s lawyer, for example has recognised that the other partner’s attitudes are unrealistic or preposterous, why should not the mediators, at least the same-gender one? If the couple has not seen an “Agreement to Mediate” (or its equivalent), how would it feel for a mediator to reject an such an appeal from a client? How would the client take it? Most people are familiar with the scenario of playing a game or sport, and having some achievement disallowed because of the production of a hitherto undisclosed rule that has been (inadvertently) infringed. What feelings does that situation provoke - anger, frustration, disappointment? Of course, when “Agreements to Mediate” are sent out and are returned, signed by the clients, it may be expected that they have read them. After all, that is what they are registering with their signature. However, I know that people often sign documents in good faith. In any case, without interaction, they may believe that they understand something, which is, in fact, unclear or ambiguous.

It is not possible to prove that meticulous attention to rules of engagement is better than not establishing any rules at all. It is not possible to prove that is not a waste of time talking clients through a document that they ought to have read and understood before arriving at the first mediation session. However, I know that, if it does nothing else at all, it gives me and my co-mediator confidence. We are confident that we have covered the bases, we are confident we have the rules to refer back to, we are confident that we have made a full and complete disclosure. By being more confident I am sure that we can work more effectively. Since effectiveness is a key concept for family mediators, it may encourage them to give careful consideration to this way of working.

Hanno Koppel is a family mediator and professional practice consultant in South Wales. He has a BSc in microbiology from the University of Surrey, and a PhD in experimental neuropathology from the Faculty of Medicine, University of London. Once a lecturer in anatomy, he is now a counsellor in the Student Counselling Service at Cardiff University. He trained as a family mediator in 1992 and was one of the first two family mediators in South Wales. Hanno served on the Board of the Family Mediators Association for two years, was fully recognised by Legal Aid Board in 1998 and has been a full member of the UK College of Family Mediators and a PPC since 1996.