Changing Practices for Changing Times

Diversify and Thrive: Mediation Practice Development

Good afternoon and thank you for staying for the final presentation in what has so far been an interesting and thought-provoking programme.

This slide outlines the structure of my talk – I shall comment on the context and suggest some reasons for a change of strategy before moving on to look at some practical points. As you have heard, there will be copies of the slides available on the resolution website.

First, a bit about my firm. We are in the Midlands with 3 offices. Unless you are from the area, you will probably not have heard of us. One of our better known trading names is The Mediation Centre (TMC).

Many of you will know our Mediation Director Neil Robinson who is present today. Those of you who were fortunate enough to hear his visionary Blue Sky address at our Dispute Resolution conference last year will not forget the experience. Those of you who missed it can catch up as it has been serialised in the best Dickensian tradition in the Family Law Journal.

This is the home page of the TMC website. I shall come back to some of the elements later. Suffice to say that you can also access
Neil's speech by following the blue Professional Development Button and then clicking, naturally enough, on The Cloud.

**Context – Why?**

I start by asking what is happening to our environment? What are the biggest threats facing traditional family lawyers?

- **Is it changes to public funding?** Well, the withdrawal of public funding for most of private family law will certainly be a challenge for my firm. We operate in one of the poorest areas in the country and it will come as no surprise to hear that over 50% of our family work is publicly funded. We estimate that the scope changes will remove funding from 800 of our poorest clients each year. There will clearly be further restructuring. It is noteworthy that our largest Stafford legal aid competitor has sadly already gone into administration.

- **Will it be new competitors?** You have today heard from Christina about Co-operative Legal Services (CLS) which already has a family legal aid contract. Last month their managing director Eddie Ryan announced plans to create 3000 jobs in the legal sector and to expand into all 330 of its high street branches. Clearly strong competition for the traditional high street solicitor.

- **What about new technologies?** Richard Susskind the well-known commentator and author of “The End of Lawyers?” (2008) says that we need to rethink the nature of legal services. If you have not yet read that book, you should. He says that our market is being pulled towards increasing commoditisation as we see the pervasive development and uptake of new and disruptive legal technologies. Are we in fact seeing a fundamental shift in traditional legal service from a form of advisory service to an internet-enabled and often packaged service? Look at wikivorce.com for example. They already claim to be handling over 50,000 divorces a year, which is probably over one quarter of the national total.

- **No. I argue that our biggest challenge is probably much closer to home – the way that we behave may be our biggest threat.**
We are too expensive, too insular, too stuck in our ways and too inflexible.

We can and must acknowledge these challenges and adapt to our changing marketplace. If we do not do so, then we have only ourselves to blame.

There are of course also opportunities.

- **New markets** – Neil Rose reminded us that de-regulation will expand the size of the legal marketplace. Cristina has mentioned that there is a latent legal market – those currently with unmet legal need. We must acknowledge that a significant proportion of our potential clients simply do not presently engage with lawyers.

- **We all see a greater demand for affordable fixed-price and lower risk legal services. If we do not design and deliver such flexible services, then someone else will do so. You have heard something of this today also.**

- **Tailored advice** – there will of course still be a need for expert tailored advice and some clients who are able and willing to pay for this. There are still opportunities if you really are or can become a specialist or niche practice and can genuinely develop a reputation as the go-to expert, or local hero, in your own area. But this is bound to be harder than it has been as the volume of traditional work continues to fall.

Today I want you to consider the significance of my final point – growing support for dispute resolution as a real alternative to court. This is something that Resolution lawyers have long been calling for and we should embrace it.

What then do we think family law services will look like in five years' time?

- **There will be a lot less law firms (20%+ less?)**
- **There will be a lot less family lawyers. This could mean a better and more viable market for those who remain**
• There will be a lot more Self-Represented Clients (LIP's)
• By the end of 2013 you will be able to go to court without seeing a family lawyer but not without seeing a mediator
• And if your finances are limited you may still be able to get free help from a mediator but not from a lawyer

Many see the Government's support for mediation as another element in their attack on lawyers. No. Their policy commitment is not to remove lawyers from family law but rather to refine the way in which families deal with their issues at the point of separation and in doing so drive change in the way that the professionals who work with them deliver their services. It could be the dawn of a brave new world and could herald the birth of a new breed of Family Dispute Resolution Professional.

**Growing Support for Mediation**

Some of you will remember Part II of the Family law act 1996. This was never actually brought into force but it would have required all couples to attend an information meeting where they would have received general information about mediation. Sound familiar?

We actually formed The Mediation Centre in 1996. It is ironic that our launch event took place on the very day that the Government announced that it was not proceeding with those proposals in the Act. However, from the outset TMC was receiving around one mediation referral per week and the number slowly rose.

The first big boost came with the Access to Justice Act 1999, we benefited from the Funding Code referrals as the majority of publicly funded clients were required to be referred to mediation.

The Family Procedure Rules 2010 came into force in April 2011 and introduced the pre-action protocol, and the expectation that everyone would be referred to a mediation assessment before proceedings. The LSC report an about 12% increase in referrals to publicly funded mediation compared with the year before. This increase is somewhat less than had been anticipated. There are no reliable figures, indeed no figures at all, as to the increase in privately funded mediations.

However, at TMC we are now running at around 100 referrals per month – This is a 37% rise, made up of an 18% rise in our publicly funded cases and a 120% rise in our private cases.

The Government’s impact assessment for the family legal aid changes estimates that 210,000 people will be adversely affected, but that there will be an additional 10,000 publicly funded mediation cases per year (a 70% rise from the present 14,500).
The King’s College report “Unintended Consequences” prepared for The Law Society in November 2011 suggests that this projected future figure is a significant under-estimate and that the total is likely to be over 45,000. Whatever the true figure, there is clearly going to be a lot more mediation both publicly funded and private.

**MIAMS**

Since April 2011, there has been a firm expectation that couples will attend a MIAM before commencing proceedings. As the President acknowledged in his conference address to us in March, this is not yet working in many areas and is to be tackled. This failure can only be due to a lack of support from both the judiciary and from practitioners.

These figures from our members survey reported in the most recent edition of The Review are telling. 78% said that the courts made no enquiry about Dispute Resolution and 20% said they referred less than 10% of their clients to a MIAM. Not surprisingly, the Government has now said that it will legislate to make attendance compulsory.

In our region, we are fortunate in that the new approach is well supported by our designated family judge and local practitioners. Contrast this with these adverse comments from our members' survey: an unnecessary hurdle, causes delay, is too expensive or that it is too late in the day for mediation, not a sentiment that many mediators would agree with.

If taken seriously, a MIAM should be part of a skilled procedure to assist couples in making an informed choice of process while also assessing their suitability for mediation and other forms of dispute resolution. I would like to think that all Resolution members provide appropriate information on the full range of process options, but I doubt that this is yet the case.

These are many examples of criticism of the way in which lawyers and judges are reacting to the new scheme. Dispute Resolution is clearly still being seen in some quarters as a threat to established interests. I have already mentioned the President’s speech but what of Lord Justice Jackson’s comments (LSG 15 March 2012) calling for a “serious campaign” to teach lawyers and judges the benefits of mediation to settle disputes - which would not have been out of place 10 or 15 years ago. Why is this still necessary?

In the new world those who pay only lip service to our code and who continue to seek to litigate or to act aggressively in the conduct of their cases will increasingly find themselves out of step with the new arrangements and find it difficult to retain their clients.
Final Report of FJR

The Final Report of the Family Justice Review confirmed their earlier proposal that mediators should be “key practitioners” in a new scheme, moving from information hub through working in partnership with lawyers, PIPs providers and others. It is not clear what the Review had in mind – active case management or general hand-holding and there is a need for further dialogue and for pilots to work through the details but we believe this to be a bold, and necessary, move.

As Neil Robinson has commented elsewhere, if these new practitioners are impartial managers of the process rather than partisan advisors, then the whole focus of the pre-litigation arena shifts from an adversarial to a collaborative model and clients should be encouraged to focus on the interests that they share rather than on those that divide them. And what Resolution lawyer could possibly take issue with that?

From this:-

![Diagram]

This slide shows the current model. Clients consult lawyers and may be referred to mediation. The lawyers are clearly in control.
Is this the shape of things to come? Clients attend a family law service and are, for example, assessed as suitable for mediation. The mediator refers the clients out to suitable lawyers, for a particular service, and the clients may well return. This model calls for collaborative working in the broadest sense and underlines the importance of mutual professional respect and good working practices between all parties.

Clearly, the winds of change are blowing. It is up to us how we respond to this. Get real adjust your sails.

**Strategy**

As Matthew has told us, it is now more important to have a proper strategy than ever. We each need to identify a new strategy, a response to the changing environment.

If you are not already trained as a mediator or not already involved in a firm offering a range of dispute resolution services, then why not? If you are trained, then are you practising and should you be bidding for an LSC contract? Time is running against you. What are you going to do?

What should be our response when faced with this inevitable decline in traditional practice?

There are only limited strategic options.

We could do nothing – this will lead to a drop in income as the volume of traditional work, both private and publicly funded, drops.
As Neil Rose said, for some firms this will be the right strategy but the truth is that for many it will not and such firms are unlikely to survive.

We could embrace change – find a new way to deliver existing services to existing and new clients (e.g. by introducing fixed price, packaged or unbundled services).

We could embrace change - find new services to deliver. After all, over one quarter of our members are already trained as mediators and/or collaborative family lawyers. Many of them do not practice as such. But they could.

We should not and cannot afford to simply sit back and wait for someone else to tell us what our role will be in this new world. No, I suggest that we must ourselves be the architects of the change we want to see and we should be the first to pilot new services and new ways of approach.

If you do not yet operate a wider dispute resolution service, what then are your options?

**Could you become a mediator?**

Well, you could join an existing mediation service as a trainee or fund your own training with a view to finding a placement or operating your own service once qualified. You would have to complete a Mediation Foundation training course run by an approved FMC trainer – e.g. Resolution

Once you have completed your foundation training you can work alongside another mediator and can also conduct private mediations.

Controversially, you must have completed at least 10 hours co-mediation experience before you can carry out a MIAM.

To be able to work alone with Legal Aid clients you then have to be assessed as competent by the LSC. This whole qualification process usually takes around 2 years. Bluntly, if you are not well on your path towards qualification, you have already missed the boat in respect of publicly funded mediation in this contract round.

Once qualified, you have to undertake 10 hours relevant CPD per year. You also need to meet regularly for supervision and support with a qualified mentor – the Professional Practice Consultant PPC.

**Could you bid for a LSC contract?**

We are in the middle of a bid round for contracts to commence in 2013. Existing mediation contract holders do not need to re-tender.
New suppliers had to submit their Pre Qualification Questionnaire (PQQ) by 18 June – so it is too late now if you have not done so but the good news is that there is just the one PQQ for all face-to-face contracted services so assuming that you have submitted one because you intend to bid for family work, you don’t need to worry.

The mediation bid round is non competitive. All providers who meet the criteria will be awarded a contract and there is no cap on size.

There are 2 further stages to the process

- Apply for Mediation Quality Mark (MQM) and pass a desk top audit
- Meet the requirements of the Invitation To Tender (ITT). Note that in order to do this you must already meet the MQM or have passed the audit. In other words, the MQM must be held at time of your reply to ITT.

For mediation, there will be two opportunities to reply to an ITT – one in October for contracts to start December and the second in January for contracts to start March

You can apply for the MQM now but the effective deadline for submitting applications for first round will be 31 July and the second round 31 October.

Note that in order to apply for the MQM, you must already have a mediator who meets the individual competence standards and also have an FMC recognised supervisor.

**Practical Delivery**

Having the best strategy in the world is no help if you are not able to carry this into action. As many trained solicitor mediators have already discovered, to simply decide to run a mediation service is not enough to guarantee success.

Assuming you do want to run a mediation service as part of your practice, what else do you need?

A commitment to quality. Quality systems and procedures – the good news is that if you have Lexcel or the SQM in place, then you will already have most of the elements required by the MQM.

Of course you also need the staff (mediators, a supervisor, administration), the facilities (e.g. separate waiting rooms and a second mediation room) as well as a properly costed and realistic business plan.
So much for the basics. It these elements that make the difference between having a mediation service and having a thriving mediation service:

You need to have properly resourced and trained administration staff. Our experience shows that our high take-up rate is largely due to the professionalism and dedication of the staff who make the first direct contact with the potential client. They share our vision and feel themselves to be part of a single dedicated team. They also have a full understanding of the process options. Yes, above all else, you need the right people at the core.

You need to have really good referral procedures. We accept referrals by post, phone, email, fax and on-line. We are seeing a growing number of people self-refer i.e. they come to us without any prior involvement with lawyers. This trend will clearly continue.

The whole needs really effective management and supervision.

You also need a clear vision. You need to be able to communicate this to potential referrers and the wider public. We have done a lot of work in training local lawyers and judges and this has paid off.

It is increasingly important to have a web presence that works - our new web site optimised for search engines. I should say that Simon helped us to design it.

What are we doing at TMC?

Mediation

TMC was always intended to operate on a spoke and hub model. Administration is handled centrally. We continue with a strategy of organic growth – opening outposts where we think there is sufficient demand for our services. Sometimes we take space in a managed suite or share offices with a third party. Sometimes we rent cheap office space for a limited term. Either way, this is a low risk approach.

One of the attractions of our business model is that it is a variable cost model - most of our mediators are self-employed and so we incur little by way of direct costs unless there is work for them to do.

We are presently building on existing relationships and forming new relationships in order to develop and grow a network of linked quality services. We are looking at more formal arrangements such as licensing or franchising and would be happy to speak to any of you interested in this.

Other initiatives under development include the introduction of a travelling mediation service, called TMC Prime, for higher value
cases. We have also been asked by local lawyers to develop and deliver an Informal FDR service.

**Information**

The second area of our work is the provision of information. We recognise that the days when we could charge clients for providing them with standard information are over. They can find plenty of guidance and standard forms on the internet.

On our website we still need to provide them with free information that will be of real use to them. This enables them to sample before they buy and allows us to demonstrate our expertise, our approach and our language.

Applying the suggestions made in the FJR, we are now separating out the information session and mediation assessment and are piloting a free information session for prospective clients designed to address all process options. With coffee.

**Professional Development**

The third area of our work is professional development.

For many years TMC has been delivering a growing range of training courses for family lawyers and mediators. We do not offer Foundation Training but rather a wide range of advanced professional courses.

The blue button on our website takes you to the right place. If you visit you will see, for example, that we are running a 2-day course on Mediation in Child Care Cases in November. Again, a suggestion made by the FJR which we are keen to pilot.

More generally, we wish to promote best practice and to build a community of excellence. We are therefore very interested in developing relationships with other like-minded mediators and services and have already formed links with a number of you around the country.

I have mentioned that new mediators need 10 hours observation before they can practice alone. This is a service which TMC already offers. We can also provide you with a PPC if required.

It is more exciting to report that we are currently aiding a number of firms set up their own family mediation service. This ranges from helping them in their contract bids, providing materials such as templates and a compliant office manual, to assisting them in training their administration teams and providing consultancy in a wider sense. Neil and I are again happy to speak to any of you who wish to explore such a relationship.
Conclusion

It may feel like the end of the world is upon us. After all – 21 December 2012 has long been foretold as the end of the world, largely because the Mayan calendar ends on that date. So where are we. Is this really the beginning of the apocalypse, the end of the world as we know it? Or could it be something altogether more welcome – a positive transformation marking the beginning of a new era for family lawyers?

Whilst you ponder the answer to my previous question, it is worth reflecting on the words of Charles Darwin and the principle of natural selection. You often hear his message expressed as “the survival of the fittest” but that is not quite right. This is what Darwin actually said – it is the survival of those who are most responsive to change, not those in the best physical shape.

The message is clear. The choice is yours. Your survival is in your own hands.