Medical Mediation Symposium
14 October 2016

buon consultancy
solving problems

medical mediation foundation
resolving conflict between health professionals and families

GARDEN COURT
MEDIATION

UK Mediation Awareness Week
8-14 October 2016

CIVIL COMMERCIAL & CONSUMER
INTERGENERATIONAL
COMMUNITY & RUG
WORKPLACE
FAMILY
PEER

Medical Protection

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The Panel

Tony Allen
Senior Consultant, CEDR

Sarah Barclay
Founder, The Medical Mediation Foundation (MMF)

Dr Chris Danbury
Consultant in Anaesthetics and Intensive Care at the Royal Berkshire Hospital

Dr Zaza Elsheikh
Mediator and Partner in Commercial and Medical Dispute Solutions LLP, Co-founder BIMA

Julienne Vernon
Head of Claims Quality, NHS Litigation Authority

Karen Wadman
NCAS Lead Adviser, NHS Litigation Authority

Your Facilitator

Tony Buon
Mediator and Managing Partner, Buon Consultancy
buon consultancy
solving problems

workplace mediation
training & development
organisational consultation
mediation training
coaching & facilitation
specialist conflict services
workplace psychology

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Mediation of disputes can provide solutions which meet the needs of all parties, cost much less than litigation, are dealt with more speedily, avoid disruption to business, remove the debilitating effects of conflict and can restore professional and personal relationships.

Disputes in the business, construction, workplace, community and family sectors cost billions of pounds per annum in legal and other fees.

Indirect costs to organisations and individuals in terms of disruption, loss of productive time and reputational risks are similar.

Even the simplest dispute can be expected to take at least a year to reach a court decision and requires significant time input from all litigants.

The consequences of ‘losing’ can be serious to both business and individuals.

Private sector companies and individuals have much to gain by intervening early in conflict situations by using mediation.

Public sector organisations can also benefit from massive savings in time, money and efficiency.

UK Mediation Awareness Week 2016 will provide an opportunity to understand the benefits of mediation across all sectors.

UK Mediation Awareness Week 2016 is promoted by the Civil Mediation Council, the London Community Mediation Council, the Family Mediation Council, the Law Society, the Chartered Institute of Arbitrators, the College of Mediators, the Business Mediation Group and the Standing Conference of Mediation Advocates.

Events will include conferences, seminars, mock mediations, talks and debates involving all aspects of mediation. The list of scheduled events, promoters and supporters is growing and the website will be updated accordingly.

Are you interested in learning more about Mediation Awareness Week - UK?

Would you like to participate?
Would you like to support us?
Would you like us to assist you in arranging an event?

Please get in touch using our contact details below

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Medical Mediation Symposium

Friday 14 October 2016
1:30 - 4:30 pm

Garden Court Chambers
57-60 Lincoln's Inn Fields, London, WC2A 3LJ

Medical Mediation attempts to resolve conflicts in the medical setting through the use of an impartial third party. This can involve health professionals and families who cannot agree on treatment options for family members.

It can also be used when there are other conflicts between health professionals and patients/families such as communication breakdown and end of life care. Medical Mediation is also effective in helping to resolve complaints about medical care or negligence.

As part of UK Mediation Awareness Week 2016, this event aims to inform people about the practices and potential of Medical Mediation in the UK. There is no cost to attend the event. Only 60 spaces available.

Speakers
Tony Allen Senior Consultant, CEDR
Sarah Barclay Founder, The Medical Mediation Foundation (MMF)
Dr Chris Danbury Consultant in Anaesthetics and Intensive Care at the Royal Berkshire Hospital
Dr Zaza Elsheikh Mediator and Partner in Commercial and Medical Dispute Solutions LLP, Co-founder BIMA
Julienne Vernon Head of Claims Quality, NHS Litigation Authority
Karen Wadman NCAS Lead Adviser, NHS Litigation Authority (NHSLA)

Facilitator
Tony Buon Mediator and Managing Partner, Buon Consultancy

Programme
1:30: Arrival, Registration, Networking and Refreshments
2:00: Welcome: Helen Curtis, Barrister and Mediator, Garden Court Chambers
2:10: Brief Speaker Presentations, each followed by Q&A
3:15: Refreshment Break and Networking Opportunity
3:45: Panel & Audience Discussion in a “Question Time” format
4:30: Event ends

Programme subject to change

Free bookings only via Eventbrite
https://goo.gl/GezKA7

For further information, contact tony@buon.net or sarah.barclay@medicalmediation.org.uk

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Mediation: an overview
for Mediation Awareness Week

Tony Allen
14 October 2016

The essentials of the mediation process

• A flexible process managed by an independent neutral skilled in responsive process design
• A safe confidential environment enabling free and frank discussion of all monetary and non-monetary objectives without damaging any claims or defences
• Negotiations facilitated and enhanced by private discussions with the mediator
• Freedom to decide whether and how to agree binding settlements, or to rejoin the adjudicative track, with no penalty for non-settlement (for whatever reason)
From the NHSLA Annual Report: July 2016

“Mediation is a powerful forum, giving the injured person the opportunity and the ‘voice’ to articulate the basis of their case and other related concerns which is not possible at a meeting with just lawyers. It is also a good setting to explain why a legal liability has not been established to justify a financial payment.”

Helen Vernon: NHSLA Chief Executive

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### Mediation contrasted with RTMs/JSMs

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<td>Rare for joint meeting with parties during which lay parties can have a say</td>
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<td>Mediation agreement requires written signed settlement terms for parties to be bound</td>
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Mediation: an overview
for Mediation Awareness Week

Tony Allen
tony@allensmediate.com or tallen@cedr.com
www.allensmediate.com
My task is to give a general overview of mediation, with particular reference to its place in clinical disputes of all kinds. My fellow speakers will be giving their insights from particular angles of practice.

Two persuasive pieces of research have investigated what parties want when making complaints and claims against healthcare providers, both institutions and professionals - by Linda Mulcahy in 2000 and by Tamara Relis in 2009. There is a remarkable similarity in their findings on this. Claimants really do seek apology or acknowledgement, explanations and perhaps most of all reassurance that what went wrong is much less likely to recur for anyone else – as a sort of memorial. Monetary compensation is far less significant as an objective. As to clinicians, Relis shows that they too often want the chance to communicate with their patients often barred by litigation.

This research is borne out by my experience of about 100 clinical mediations in recent years. Discussions dealing with those non-monetary extra-legal concerns – whether joint or in private – probably occupies as much if not more time than bargaining over money.

The trouble is that, perhaps in the clinical sector above all others, the civil justice system is simply not geared to provide what that research shows that claimants want. A judge can only decide on breach of duty, causation and quantum, and has no power to order or facilitate apology, explanation or reassurance. The legal focus is paramount for the legal profession, with compensation (or not) the only available award.

There must of course be a last resort to judicial decision, setting objective standards against which to measure settlement outcomes and to resolve cases where the parties fail to settle. But settlement – which is what ends the vast majority of clinical claims – and settlement processes both need proper and better consideration, as these do provide the opportunity for those other objectives to be met and met well.

So how does the mediation process provide what the courts and other processes do not? The word “process” is fundamental here, and grasping the significance of deploying appropriate processes will I hope be fully relevant to healthcare disputes and differences of all kinds, some of which my fellow speakers will discuss.

At the heart of the mediation process are four fundamental features: [SLIDE 1]

- A flexible process managed by an independent neutral skilled in responsive process design
- A safe confidential environment enabling frank and free discussion of all monetary and non-monetary objectives without damaging any claims or defences
- Negotiations facilitated and enhanced by private discussions with the mediator
- Freedom to decide whether and how to agree binding settlements, or to rejoin the adjudicative track, with no penalty for non-settlement (for whatever reason).

I will discuss with each party their objectives and their fears both before the mediation day and on the mediation day before any joint meeting, so as to achieve maximum benefit. This includes ensuring the right people attend and helping parties to think imaginatively about non-monetary objectives. A formal mediation agreement signed by all importantly creates that legally confidential and safe
framework for discussion. It enables both parties and lawyers to interact authentically at a human and emotional as well as a legalistic level.

Here is a comment from NHSLA’s Chief Executive in its recent Annual Report:

Mediation is a powerful forum, giving the injured person the opportunity and the ‘voice’ to articulate the basis of their case and other related concerns which is not possible at a meeting with just lawyers. It is also a good setting to explain why a legal liability has not been established to justify a financial payment.”

This recognises that the commonest other settlement process - the round table meeting (JSM) - rarely provides for claimants and healthcare professionals to express themselves openly about their real concerns and feelings. In a mediation, all have had a guaranteed safe and private ‘day in court’. At the heart of almost every dispute is a breakdown of communication and even trust, and a significant difference of opinion on something significant. So process choice and design is important. JSMs and mediations have significant differences, illustrated by this slide.

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The mediator also brings valuable focus to negotiations. Having met with each party privately, I can add value and insight to their risk re-assessments leading either to mutually acceptable settlement
terms or a decision to litigate. I have seen claims paid virtually in full and claims withdrawn with dropped hands, the vast majority settling in between, often designed to allow the NHS and its professionals to learn and improve future care for the benefit of all.

But they really do settle, and in a way far more satisfying than acceptance of Part 36 offers or proposals emerging from a JSM with no lay participation. An illustration:
A woman’s late cancer diagnosis leading to death rather than cure 4 years previously. Her husband claimed but before issuing wanted to meet the two doctors he regarded as responsible. Breach was conceded within the mediation but causation remained at real issue. A well-prepared long joint meeting was very useful and satisfying for both him and the two doctors. A scheduled claim of £620,000 settled for a risk-discounted £365,000 in under 8 hours, with the hospital arranging for the CEO to write a confidential letter for his eyes only.

The NHS is sadly a hotbed of dispute and difference, whether about commissioning and purchasing contracts, employment, workplace stress, clinical decisions or non-clinical claims as well as clinical complaints and claims. The NHS has to make notional provision of £56 billion for known and anticipated claims, one-third of which will be spent on legal costs, plus whatever the Medical Protection Society (generous sponsors of this seminar) and the other Medical Defence Organisations have reserved. Something has to be done to make major savings in the huge financial and emotional investment and wasted time and stress currently tied up in this service dedicated to caring for our community.
Mediating Medical Conflicts

Medical Mediation Symposium 14 October
2016
Sarah Barclay
Medical Mediation Foundation
Medicalmediation.org.uk
Most commonly cited causes of conflict:

n= 136 individual episodes of reported conflict

- Communication breakdown
- Disagreements over treatment
- 'Micro-managing'
- Unrealistic demands and/or expectations

Conflicts in a paediatric hospital; a prospective mixed-methods study; Forbat L et al.

Six month follow up

Number of respondents = 311 (response rate = 43.7%)

Of whom: 176 (56.6%) experienced conflict since doing the training

Of these: 167 (95%) reported training helped them to recognise triggers/warning signs and 160 (91%) reported that training had helped them to de-escalate or resolve the conflict

Forbat L, Simons J, Sayer C et al. Training paediatric healthcare staff in recognising, understanding and managing conflict with patients and families: findings from a survey on immediate and 6-month impact. Arch Dis Child 2016 Apr 20
“Listening is more than hearing the words, it’s listening beneath the words, asking questions, allowing time for answers.”

‘Never assume anything until you have the full story’

‘It has made me try to put myself in the shoes of patients and their relatives and to think about things from their perspective much more’

Mediation case examples-sept/oct 2016

A mother faced with being forcibly prevented from removing her child from hospital to take him abroad from treatment because doctors said he was not safe to travel. Mediation de-escalates the immediate crisis and she agrees to stay.

A clinical team says the mother of a baby in hospital since birth is “difficult” and “threatening” A mediation meeting allows her to say she feels out of control and not listened to. Agreement is reached about how communication will be managed in future.

Parents whose relationships with multiple clinical teams resulted in severe conflict attend “resolution meeting” to allow points of view to be heard in a “safe” space.
Mediation in Intensive Care
Dr Chris Danbury, Consultant Intensive Care Physician

ICU Admissions per year

- 150,000 emergency admissions 2013/14
- All lack capacity

Hospital Episode Statistics, Health and Social Care Information Centre
Conflict

- 70% of ICU staff members have reported conflicts in intensive care – staff/staff and staff/family

- Families, ICU physicians and nurses report conflicts in up to 80% of patients requiring a treatment-limitation decision


Current Resolution Techniques

- Confrontation
- Second opinion
- Court of Protection / High Court
  - Aintree University Hospitals NHS Foundation Trust v James [2013] UKSC 67
  - St George’s Healthcare NHS Trust v P & Anor [2015] EWCOP 42
DR ZAZA JOHNSON ELSHEIKH MBBS PGDipLP
SENIOR PARTNER - COMMERCIAL AND MEDICAL DISPUTE SOLUTIONS LLP (CMDS)
CO-FOUNDER - BELIEF IN MEDIATION AND ARBITRATION (BIMA)
CHAIR - CONVERGE FOR LIFE (CONVERGE)

LIMITED ACCESS TO JUSTICE

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IMPROVING ACCESSIBILITY TO MEDIATION IN THE HEALTH SECTOR

WHAT ARE THE KEY CHALLENGES?

• MISTRUST, ALLEGATIONS OF BIAS
• FUNDING
• MEDICAL TERMINOLOGY
• CULTURAL/RELIGIOUS NUANCES AND LANGUAGE BARRIERS
• LAW – CAUSATION LIMITATION
Mediating claims in the NHS

Julienne Vernon
Head of Claims Quality, NHS LA

Background

• Established in 1995

• Claims management

• Learning from claims
Mediating claims in the NHS

- Following work in 2013/14, we launched a mediation pilot to test how effective this is as a way of resolving claims beginning with fatal claims or those involving elderly care where it is claimed the care fell below standard.

- The service provided access to an independent and accredited mediator.

- 360 degree feedback.
Pilot outcome

Offers of mediation were made in 91 cases:

- 49 cases were accepted into the pilot
- 1 case settled before mediation
- 1 case was withdrawn
- 47 completed mediation

Permanent mediation service
NCAS Assisted Model of Mediation Service

Karen Wadman
Lead Adviser
National Clinical Assessment Service

What is assisted mediation?

- The session is run by 2 trained mediators who work with the parties to create a better mutual understanding of the issues fueling the disagreement
- The focus is more on behaviour than content
- The mediators challenge assumptions and assist the parties to express themselves in more helpful ways
How do we do this?

- Most of our mediators are experienced NCAS advisers
- We ask the parties to identify the relevant issues creating the conflict
- At this stage we are not asking them for a solution
- We encourage an open and honest dialogue and exploration of interests

Outcome of the mediation

- A description of their understanding of the agreed issues
- Where an outcome is not forthcoming the mediators will generate options
- The mediators will provide a reality check to what is being agreed
- We will explore motives for change if discussions appear to have reached an impasse
- We record the agreement which is confidential to the parties
Case Study

- Rift between an MD and a Consultant of the Trust
- Both feel undermined by each other
- The consultant feels marginalised and ignored
- The MD is intensely frustrated by the constant level of complaints received by the consultant
- After 6 hours of discussion the parties agree to modify communication style
- The MD agrees to clarify decision making and designated levels of authority
- The parties agreed the importance of raising concerns through appropriate channels
- The MD agreed to review some specific organisational procedures
- The mediation also provided the opportunity to provide reassurance that the MD wished to support his colleague
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