



MASTER OF
THE ROLLS

LORD NEUBERGER OF ABBOTSBURY, MASTER OF THE ROLLS

THE FOURTH CIVIL MEDIATION COUNCIL NATIONAL CONFERENCE

EDUCATING FUTURE MEDIATORS

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(1) Introduction

1. It is a pleasure to have been invited to your fourth, national conference. Looking round today confirms my impression that, like mediation, the Civil Mediation Council's annual conference is in rude health. And rightly so. Given the pervasiveness and popularity of mediation, the fundamental importance of educating lawyers in the field appears to be an apt subject for my keynote address. First, I want to look at the importance of education in the context of mediation; I then want to look briefly at potential educational reform; to conclude I will look at education in the context of the Jackson Report¹.

(2) Education and Mediation

2. I am of course not the first to acknowledge the centrality of education to the proper promotion of mediation, and it must be said, other forms of ADR. For instance, two years

¹ Many thanks are due to John Sorabji for all his help in preparing this lecture.

ago my predecessor as Master of the Rolls, Lord Clarke made the point at your second national conference, saying that if mediation was to properly become part of our litigation culture, lawyers and judges would need educating. They would need educating so that mediation became '*second nature*'².

3. More recently, as I'm sure you all know, Sir Rupert Jackson – who you will be hearing from shortly – added his voice to those calling for more education. In his final costs report he made two recommendations relating to ADR. First, that there "*should be a serious campaign (a) to ensure that all litigation lawyers and judges are properly informed about the benefits which ADR can bring and (b) to alert the public and small businesses to the benefits of ADR.*" Secondly, that an "*authoritative handbook should be prepared, explaining clearly and concisely what ADR is and giving details of all reputable providers of mediation. This should be the standard handbook for use at all JSB seminars and CPD training sessions concerning mediation.*"³
4. Proper education lies at the very heart of both recommendations. Education here is aimed at both practitioners and judges. It is aimed at teaching leopards the virtue of new spots. And it must be said that those leopards who listen, do indeed see virtue where previously they would have seen a different virtue, the virtue of litigation only. It is aimed at changing the litigation culture of those who are already engaged in it into one which properly appreciates the benefits of mediation. A point also made in the final Jackson costs report.
5. But education should not simply focus on those already playing the game. It should not just focus on judges and those already in practice. For mediation, as for very many other things,

² Clarke, *The Future of Civil Mediation*, (2008) 74 *Arbitration* 419 at 420; and see Clarke, *Can Mediation Work in Personal Injury*, (Speech at Eclipse PI Awards, 10 November 2009) (<http://www.civilmediation.org/files/pdf/Lord%20Clarke's%20Speech%20-%20PI%20Awards%202009.pdf>)

³ Jackson, *Review of Civil Litigation Costs: Final Report*, at 363 (http://www.judiciary.gov.uk/about_judiciary/cost-review/jan2010/final-report-140110.pdf).

as Wordsworth had it, the '*child is father to the man*'⁴. In this context, the law student is child to the lawyer – the mediator. The importance of this has not gone unnoticed. Last June Lord Clarke, echoing one of our former Prime Ministers, recognised this when he said this:

*“ . . . mediation and other forms of ADR should become second nature to litigators, litigants and the courts. It is surely the duty of people like you to spread the word. Education, education, education. I suggest that we should start with the law schools and the professional parties and their lawyers.”*⁵

More recently still Sir Henry Brooke, your, and mediation's, indefatigable champion emphasised the importance of developing mediation education in our law schools in his aptly and correctly lecture entitled, '*An authoritative review of the UK mediation scene today from the CMC's perspective*'⁶. He noted how your Academic Committee faces to continuing challenge of building '*strong links with the academic community*' and how it has recently agreed to "*agreed to undertake a study of what is being done to teach ADR – and particularly mediation - at undergraduate, graduate, and BVC and LPC level.*"⁷

6. In saying this Sir Henry and your Academic Committee are plainly right. They are plainly right because if we are to make mediation second nature, if it is to be litigation's twin, then we need to embed that culture from the very beginning of a lawyer's training. Cultures change in a number of ways. They change through training those who are already part of the culture – something which we all have experience of having had to reorient our approach to litigation following the culture change introduced by the Woolf reforms. And it must be said that one of the successes of the Woolf reforms has been to teach litigators the virtue of the

⁴ Wordsworth, *The Rainbow*.

⁵ Clarke, *Mediation – An integral part of our litigation culture*, (Littleton Chambers Annual Mediation Evening, Gray's Inn, 08 June 2009) at [15] (<http://www.judiciary.gov.uk/docs/speeches/mr-littleton-chambers-080609.pdf>).

⁶ Brooke, *Mediation in the UK Today: 'An authoritative review of the UK mediation scene today from the CMC's perspective'*, (20 January 2010) (<http://www.civilmediation.org/files/pdf/Mediation%20in%20the%20UK%20today%20by%20Sir%20Henry%20Brooke%20Jan%202010.pdf>).

⁷ Brooke (2010).

new spots of a less adversarial approach to litigation, or active case management and soon to be, I am sure, active costs management – Jackson’s extension of the Woolf reforms. Importantly though, cultures change through teaching those who have not yet entered it. They change by teaching the new culture rather than the old one.

7. But let us not get carried away by zeal. Zeal for justice, zeal for one’s client are fine, but zeal for a form of dispute resolution or any other idea, theory, or practice is not so healthy. It smacks of fanaticism, and it drives out one of the three most important qualities a lawyer should have – scepticism or, if you prefer, objectivity. (The others being honesty and ability.) Education should not only emphasise the enormous importance and value of mediation and how and when to advise on it and how and when to conduct it. Education should also put mediation in its context – a new means of resolving disputes, but not one that replaces well-established means - settlement, litigation, capitulation. Education should include when not to mediate, and when to cease mediation, as well as how not to mediate. Overstating the virtues of mediation will rebound in the long term, even in the medium term, to the disadvantage of mediation. And that would be very sad, because it is, as I have said, an enormously valuable and important way of resolving disputes – saving money, effort, and ill-feeling.
8. The work to be carried out by your Academic Committee is therefore of central importance. If mediation, and other forms of ADR, are to take their proper place in our justice system, they have to be part of every lawyer’s legal education. Ensuring that they are starts by ascertaining what is happening already. With that in mind I turn to my second theme today: potential educational reform.

(3) Potential Educational Reform

9. The starting point for reform, and I imagine your Academic Committee's research, was identified by Dr Kartina Choong in 2007. In an paper given at the 2007 Learning in Law Conference, she said this:

*“Legal education in the United Kingdom has, for a long time, been organized around litigation in the higher courts. This has led to a curriculum which places an almost exclusive emphasis on the adversarial system of law that has, at its heart, a rights-based approach to dispute analysis.”*⁸

Or, as Professor Riskin put it, describing the position in US law schools – a position which I doubt differs materially from our own –, as long ago now as 1984:

*“. . . nearly everything in the law school curriculum is viewed from the perspective of a practicing lawyer or, occasionally, a judge, working on disputes that can be resolved through application of an act-oriented rule by a third party. This, little in the ordinary law school environment prepares the student to employ a mediative perspective as a lawyer, let alone to serve as a mediator.”*⁹

10. It is of course hardly surprising that our legal education has been organised in this way. It is a truism that knowledge and understanding of law, of rights, is a necessary condition of what it means to be a successful lawyer. The exclusive emphasis as Dr Choong sees it in our adversarial system of law as the underpinning of legal education has wrongly operated as if it is both a necessary and sufficient condition of what is required to make a successful lawyer. That has to change.

11. What has to change in university law departments and law schools around the country, and which I hope your Academic Committee can help with, is a change of attitude and

⁸ Choong, *Mediation in the Law Curriculum*, (Learning in Law Annual Conference 2007) (<http://ssrn.com/abstract=1013295>).

⁹ Riskin, *Mediation in the Law Schools*, 34 J. Legal. Educ. 259 (1984) at 260.

understanding. It is a change Professor Riskin identified in the article to which I have already referred. He said this:

“Mediation is so different from the ordinary stuff of legal education that law schools easily can ignore, misunderstand, or misuse it, while nourishing mediation’s more familiar relatives – arbitration and negotiation – with which it is frequently confused. If mediation is to take root and thrive in the law school curriculum, careful husbandry is required.”¹⁰

What then is required seems to be this: a proper appreciation of not only the important role which mediation and other forms of ADR play in our justice system, in our universities and law schools. Careful husbandry is required. It is, I hope, careful husbandry which the Civil Mediation Council, and the other ADR organisations, can provide. It will be needed to ensure that our young lawyers from the outset of their legal careers, from the start of their first lectures and their first practical vocational courses gain a proper understanding that a knowledge and appreciation of mediation and ADR is as necessary a part of what it means to be a good lawyer as a knowledge of our adversarial system and substantive law.

12. That is the challenge for you and for all those who are involved in legal education. It is one which will, as Sir Henry put it in his January lecture, need to see the gap between the academic and the practitioner bridged. It will need to see mediation in particular and ADR take its proper place on the curriculum just as it is taking its proper place within our justice system. This is a challenge which I hope you can all meet; although it is one which I suspect will take time and proper consideration if it is to be rightly implemented. When this happens a fundamental building block of a new culture of justice will be in place; and our justice system, our society, will benefit accordingly.

(4) Education and Mediation Post-Jackson

¹⁰ Riskin (1984) at 260.

13. I have concentrated so far on educating future lawyers and mediators. I want finally to look at mediation post-Jackson, and, in doing so I hope that I will not to steal any of Sir Rupert's thunder. I want to concentrate on the second of his two recommendations, which as I mentioned earlier, called for the preparation and publication of an authoritative ADR handbook. We are all very familiar with the White Book and the Green Book, which have been in existence for some considerable time. Both are properly accepted as providing clear, authoritative guidance on civil procedure, on the proper conduct of litigation.
14. It is perhaps surprising that given the growth in mediation and ADR in general that an ADR version of the White and Green Books has not already come into existence. The benefit of what Sir Rupert called a '*standard handbook*' is obvious. An authoritative guide to all forms of ADR, giving details of every reputable mediation and ADR provider, setting out the different forms of ADR, outlining their benefits and drawbacks, and their applicability to different cases and circumstances seems to me to be an essential. I would hope that it could go further, possibly much further, but one must be careful not to run before one can walk. That such a guide does not yet exist suggests to me that more education of practitioners is still needed. It suggests that many of them are not yet routinely turning their minds regularly to the possibility ADR when they consider a client's dispute.
15. Litigation, as we all know, must, at least normally, be a remedy of last resort. But it is an essential remedy in a civilised society; indeed, without the prospect of litigation, mediation and ADR would be no remedy at all. They gain their strength from the shadow cast by litigation and the ability of courts to enforce rights. So there is no question of the proper promotion of mediation and ADR being in some way antipathetic to a strong commitment to a justice system based on litigating and enforcing rights. A civilised society properly understands the costs and benefits of litigation. But, as Jeremy Bentham might have put it,

such a society understands that in some cases there is a greater social and individual benefit to settling disputes rather than litigating them; that the consensual resolution of disputes is sometime preferable to the litigated enforcement of rights.

16. Where litigation is normally a remedy of last resort, it seems plain that each lawyer must at all times have in mind the option of ADR, of mediation: they must consider which of the alternative approaches to dispute resolution might be best suited to their client's particular case. Such thoughts should, I think, lead them to guidance contained in an authoritative guide, which should sit next to the White or Green Book on the practitioner's desk. It should not just be sitting there: it should be as well-thumbed and as well-loved (if that's the right way to put it) as either its white or green companion. When we have reach that stage when this is the case, we will know that ADR – that mediation – has taken its proper place in our civil justice system.

17. As you will all no doubt be well aware, the senior members of the judiciary, from the Lord Chief Justice downwards, are fully committed to doing all we can to ensure that the many recommendations contained in the final Jackson costs report are implemented. The recommendations are inter-linked. They come as an internally consistent and mutually supportive whole. Steps will be taken to ensure that both the recommendations made with regard to ADR and mediation, are implemented. Sir Rupert suggested that the ADR handbook should be produced by a neutral body, preferably by the Civil Justice Council. I certainly agree that the CJC should at least have a large role to play; the Council will have to consider for itself the precise extent of its role. Jackson also recommended that it needed to have a highly respected editor. To that end I have managed to persuade my predecessor and firm supporter of ADR in its many guises – and one who, which I think very important given the Handbook's all-embracing remit, has, as a sitting judge, no links to any specific ADR body, Lord Clarke, to take on the role of general editor supported by an experienced editorial

team; a team, which I am sure you are unsurprised to hear will see Sir Henry Brooke given his depth of experience, take a leading role. I am sure he will help to guide the handbook so that, as Sir Rupert envisages, it becomes the '*vade mecum of every judge or lawyer dealing with mediation issues.*'¹¹

(5) Conclusion

18. My theme this morning has been one of education. We never stop learning. Or rather we should never stop learning. Lord Woolf envisaged that the Access to Justice Reports would create a civil justice system fit for the 21st Century. He rightly saw ADR and mediation playing a central role in that civil justice system. That required and requires education, as is underlined by the Jackson Report, which shows we still have much to learn where mediation and ADR are concerned. I hope that over the next ten years we see the Civil Mediation Council go from strength to strength just as mediation and ADR have gone from strength to strength since the introduction of the Woolf Reforms. In doing so I hope it continues to contribute to our education, to the education of aspiring lawyers and mediators and to the education of those already in practise. I am sure it will and that our justice system, and society as a whole, will be all the better for it.

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¹¹ Jackson (2010) *ibid.*