

## REDEFINING LEGAL ADVOCACY THE DUTY OF OPPOSING COUNSELS IN FAMILY MEDIATION PROCEEDINGS IN NIGERIA

**Nneka Charity Nwokeabia\***

### **Abstract**

Family disputes involving divorce and child custody represent some of the most emotionally charged litigations in Nigerian courts. While mediation offers significant benefits for resolving these sensitive matters, the role and duties of opposing counsels during the mediation process remain largely undefined, often undermining effectiveness.

This article proposes a comprehensive framework establishing specific duties for legal practitioners representing parties in family mediation, including obligations to encourage good faith participation, facilitate disclosure, and prioritise child welfare. The proposed model incorporates innovative cost-sharing mechanisms ensuring universal access and accommodates both in-person and remote mediation formats.

Drawing from international best practices and Nigerian legal principles, this framework seeks to transform adversarial legal representation into collaborative advocacy that serves families' long-term interests while maintaining professional ethical standards.

### **I. Introduction**

Every year, thousands of Nigerian families navigate painful dissolution of marriages through an adversarial court system that often exacerbates conflict rather than heal it. In Lagos State alone, family courts processed over 3,200 divorce petitions in 2023, with custody disputes featuring in approximately 65% of cases involving minor children.<sup>1</sup>

While mediation offers a path towards more amicable resolution, the undefined role of legal counsel during this process frequently undermines its potential benefits,

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\* **Nneka Charity Nwokeabia**, Barrister and Solicitor of the Supreme Court of Nigeria; Professional Negotiator and Mediator; Associate Member, Institute of Chartered Mediators and Conciliators (ICMC); The Guardian Porters Chambers, G.E. Peter Odili Road, Port Harcourt, Rivers State, Nigeria. Email: [theguardianporterschambers@gmail.com](mailto:theguardianporterschambers@gmail.com); Tel: +234 803 305 4281.

<sup>1</sup> Lagos State Judiciary, Annual Report 2023: Family Division Statistics (2023, Lagos State Judiciary) at 47-52.

leaving families trapped in protracted litigation that serves neither their emotional nor financial interests.

The current approach to family law practice in Nigeria remains predominantly adversarial, with opposing counsel often viewing mediation as a preliminary skirmish before the "real battle" in court. This mindset not only undermines the transformative potential of mediation but actively harms the very families these legal professionals are meant to serve. Children, who have no voice in their parents' decision to divorce, bear the greatest cost of this adversarial approach, suffering long-term psychological and developmental consequences from prolonged parental conflict.<sup>2</sup>

This article proposes a fundamental reimagining of the lawyer's role in family mediation proceedings. Rather than mere advocates for positional bargaining, legal counsel should serve as facilitators of resolution, bound by specific professional duties that prioritise family healing and child welfare.

The proposed framework establishes clear obligations for opposing counsel during mediation, implements innovative cost-sharing mechanisms to ensure universal access, and provides practical guidance for both in-person and remote mediation formats.

The transformation of legal advocacy in family mediation is not merely desirable, it is essential. As Nigerian society grapples with rising divorce rates and increasing recognition of children's rights, the legal profession must evolve to meet families where they are, offering healing rather than harm, collaboration rather than combat.

## **II. The Current Landscape: Challenges in Nigerian Family Mediation**

### **Adversarial Culture in Family Law Practice**

The Nigerian legal system's adversarial foundation, inherited from English common law, serves many purposes effectively but proves particularly ill-suited to family disputes. Unlike commercial litigation where parties typically seek to maximise individual gain, family disputes require solutions that preserve ongoing relationships, especially where children are involved.<sup>3</sup> Yet Nigerian family law practice continues

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<sup>2</sup> Paul R. Amato, "The Impact of Family Formation Change on the Cognitive, Social, and Emotional Well-being of the Next Generation" (2005) 15 *The Future of Children* 75, at 89-92.

<sup>3</sup> John Lande, "Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering" (2003) 64 *Ohio State Law Journal* 1315, at 1320-1325.

to treat divorce and custody matters as zero-sum games, with legal counsel trained to "win" rather than to heal.

This adversarial culture manifests in several problematic ways during mediation attempts. Counsel often attend mediation sessions as advocates for predetermined positions rather than facilitators of mutual understanding. Discovery becomes a weapon rather than a tool for transparency, with parties withholding financial information or making exaggerated claims about the other parent's fitness. The result is mediation that mirrors courtroom combat, defeating the process's collaborative purpose.

### **Undefined Professional Duties During Mediation**

The Rules of Professional Conduct for Legal Practitioners 2007 provides extensive guidance for courtroom advocacy but offers little direction for lawyers participating in mediation.<sup>4</sup> This regulatory gap creates uncertainty about professional obligations during mediation and allows counsel to default to adversarial tactics that may be appropriate in litigation but destructive in mediation.

Without clear duties, lawyers face competing pressures. They must zealously advocate for their clients whilst simultaneously supporting a process that requires compromise and mutual understanding. This tension often resolves in favour of traditional advocacy, as lawyers fear that co-operative behaviour during mediation might be perceived as inadequate representation.

### **Cost Barriers to Mediation Access**

Perhaps the most significant barrier to effective family mediation in Nigeria is cost. Private mediation services typically charge between ₦150,000 to ₦500,000 per case, placing them beyond reach for many middle-class families, let alone those with limited resources. When combined with legal fees, mediation can become prohibitively expensive, forcing families into court-based resolution that is often slow-----

The current "each party pays their own costs" model assumes equal financial capacity that rarely exists in practice. Divorce frequently involves one party with significantly greater financial resources, creating power imbalances that undermine mediation effectiveness. Without mechanisms to address these disparities, mediation remains

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<sup>4</sup> Rules of Professional Conduct for Legal Practitioners 2007, Rules 15-24 (addressing courtroom conduct but offering limited guidance for alternative dispute resolution participation).

accessible primarily to wealthy families who could afford prolonged litigation anyway.

### **Impact on Child Welfare**

Children suffer most from the current system's inadequacies. Research consistently demonstrates that parental conflict, rather than divorce itself, causes the most significant harm to children's psychological and social development.<sup>5</sup> Every month that parents remain locked in adversarial proceedings represents continued trauma for their children, yet the current legal framework provides no special protections or expedited processes for cases involving minors.

Nigerian family courts are beginning to recognise children's rights more explicitly, with recent decisions emphasising the paramountcy of child welfare in custody determinations. However, this recognition has not yet extended to mediation practice, where children's interests often become bargaining chips rather than paramount considerations.

## **III. Proposed Framework: Duties of Opposing Counsels**

### **A. Pre-Mediation Duties**

#### **Duty to Inform and Advise**

Every legal practitioner representing a party in a family dispute involving divorce or child custody should have an affirmative duty to inform their client about mediation options and their potential benefits.<sup>6</sup> This information should be provided in writing within 30 days of engagement and should include:

- A clear explanation of the mediation process and how it differs from litigation
- Statistical information about mediation success rates in similar cases
- Estimated costs for both mediation and continued litigation
- Specific benefits for children when parents resolve disputes amicably
- The client's right to legal representation during mediation

This duty ensures that parties make informed decisions about dispute resolution options rather than defaulting to litigation due to lack of information.

### **Client Assessment and Preparation**

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<sup>5</sup> E. Mavis Hetherington and John Kelly, *For Better or for Worse: Divorce Reconsidered* (2002, W.W. Norton & Company) at 6-8.

<sup>6</sup> Section 11 of the Matrimonial Causes Act (MCA), Cap M7, Laws of the Federation of Nigeria 2004 indeed imposes a duty on legal practitioners to take reasonable steps toward amicable settlement before bringing matrimonial proceedings (such as divorce) to court.

Counsel should assess their client's readiness for good faith mediation participation. This assessment should consider:

- The client's emotional state and ability to engage constructively
- Any history of domestic violence that might make mediation inappropriate<sup>7</sup>
- Financial circumstances that might affect mediation accessibility
- Cultural or religious considerations that might influence mediation effectiveness

Where assessment reveals barriers to effective mediation, counsel should work to address these barriers or, in cases of domestic violence, advise against mediation entirely.

## **B. During Mediation Duties**

### **Good Faith Advocacy**

Counsel should have an explicit duty to ensure their client participates in mediation in good faith. This includes:

- Encouraging honest communication and genuine consideration of settlement proposals
- Discouraging tactics designed to frustrate or delay the mediation process
- Advising clients when their positions are unreasonable or likely to harm long-term family relationships
- Supporting the mediator's efforts to facilitate constructive dialogue

Good faith participation does not require counsel to abandon zealous advocacy but rather to channel that advocacy towards constructive resolution rather than positional bargaining.

### **Collaborative Information Sharing**

Family mediation requires transparency about financial circumstances, parenting capabilities, and other relevant factors. Counsel should have a duty to facilitate appropriate disclosure whilst protecting legitimate privacy interests. This duty includes:

- Ensuring timely and complete financial disclosure
- Correcting any material misstatements made during mediation
- Advising clients about the benefits of transparency for long-term family relationships

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<sup>7</sup> Karla Fischer et al., "The Culture of Battering and the Role of Mediation in Domestic Violence Cases" (1993) 46 SMU Law Review 2117, at 2119-2124.

- Identifying when professional evaluation (such as parenting assessments) might benefit the process.

### **Child-Centric Representation**

In cases involving minor children, counsel should have a heightened duty to consider and advocate for children's best interests, even when these interests might not align perfectly with their client's immediate preferences. This includes:

- Encouraging parenting plans that maximise both parents' involvement in children's lives
- Advising clients about research on post-divorce parenting effectiveness
- Supporting solutions that minimise disruption to children's lives and routines
- Encouraging clients to consider children's developmental needs over adult preferences.

### **C. Cost-Sharing Framework**

#### **Default Rule: Individual Responsibility**

The general principle should remain that each party bears responsibility for their own mediation costs, including mediator fees, legal representation, and related expenses. This default encourages serious participation and prevents frivolous use of mediation resources.

#### **Court-Ordered Cross-Subsidisation**

Where one party lacks financial capacity to participate in mediation, the court should have discretionary power to order the other party to bear mediation costs for both parties. This power should be exercised when:

- A significant disparity in financial resources exists between the parties
- Children's interests would be served by successful mediation
- The requesting party can demonstrate genuine inability to pay rather than mere unwillingness
- The paying party has sufficient resources to bear additional costs without undue hardship.

#### **Implementation Safeguards**

To prevent abuse of cost-sharing orders:

- Financial disclosure should be required from both parties before cost-sharing orders
- Courts should consider whether the requesting party's financial position results from their own misconduct

- Cost-sharing orders should be limited to basic mediation services, not premium or luxury options.

#### **D. Technology Integration**

##### **Standards for Remote Mediation**

Modern technology enables effective mediation even when parties are geographically separated, expanding access significantly. However, remote mediation requires specific standards to ensure effectiveness:

- All parties must have access to reliable internet and appropriate devices
- Video conferencing platforms must meet confidentiality and security standards
- Private communication channels must be available for counsel-client consultation
- Technical support should be available throughout the mediation process.

##### **Equal Access Provisions**

Courts should have power to order technological accommodation when one party lacks access to necessary technology. This might include:

- Providing access to suitable facilities with necessary technology
- Scheduling mediation at locations with appropriate technological infrastructure.

##### **Maintaining Confidentiality**

Remote mediation raises unique confidentiality challenges. Specific protocols should address:

- Ensuring no unauthorised recording of mediation sessions
- Preventing third-party eavesdropping on mediation communications
- Secure transmission and storage of mediation-related documents
- Clear agreements about who may be present during remote mediation sessions.

#### **IV. International Best Practices and Comparative Analysis**

The proposed framework draws inspiration from successful international models whilst adapting to Nigerian legal and cultural contexts.

The United Kingdom's Family Mediation Council has established comprehensive standards for legal representatives in family mediation, emphasising collaborative

advocacy and child welfare considerations.<sup>8</sup> Their model requires solicitors to complete specific mediation training and follow detailed protocols during mediation proceedings. Similarly, Australia's National Mediation Accreditation System includes specific provisions for legal representation in family disputes, with emphasis on good faith participation and transparent information sharing.<sup>9</sup>

South Africa's approach to family mediation offers particularly relevant lessons for Nigeria, given shared legal heritage and similar socio-economic challenges. The South African model incorporates sliding-scale fees and state subsidies for mediation in appropriate cases, ensuring that financial barriers do not prevent families from accessing mediation services.<sup>10</sup>

These international experiences suggest that clear professional standards for lawyers in mediation, combined with appropriate access mechanisms, can significantly improve family dispute resolution outcomes. However, successful implementation requires adaptation to local legal culture and economic circumstances.

## **V. Implementation Strategy and Recommendations**

### **Regulatory Framework Development**

Implementation of the proposed framework requires amendments to the Rules of Professional Conduct for Legal Practitioners to include specific provisions for family mediation representation. The Legal Practitioners' Disciplinary Committee should develop detailed guidance addressing common ethical dilemmas that arise during family mediation.

### **Training and Capacity Building**

Legal practitioners should complete mandatory continuing education focused on family mediation before representing parties in mediated family disputes. This training should address:

- Collaborative advocacy techniques
- Child development and family dynamics
- Cultural sensitivity in family mediation

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<sup>8</sup> Family Mediation Council, Code of Practice for Family Mediators (8th ed., 2023, FMC Publications) at 15-22.

<sup>9</sup> Mediator Standards Board, National Mediator Accreditation System Standards (2022, Mediator Standards Board) Section 4: Legal Representative Participation Standards.

<sup>10</sup> Boniface Ahunanya, "Access to Justice Through Alternative Dispute Resolution in South Africa: Lessons for Nigeria" (2021) 12 *African Journal of Legal Studies* 245, at 258-262.



- Technology platforms for remote mediation

### **Monitoring and Evaluation**

The Nigerian Bar Association should establish mechanisms to monitor the effectiveness of new professional duties and identify areas for improvement. This might include:

- Regular surveys of families who have participated in mediated dispute resolution
- Statistical analysis of mediation success rates before and after implementation
- Feedback from mediators about lawyer conduct during family mediation
- Academic research on long-term outcomes for families who used mediation versus traditional litigation.

### **Phased Implementation**

Rather than immediate universal implementation, the framework should be introduced gradually:

- Phase 1: Pilot implementation in major metropolitan areas (Lagos, Abuja, Port Harcourt)
- Phase 2: Extension to state capitals and major urban centres
- Phase 3: Universal implementation with appropriate adaptations for rural areas.

## **VI. Conclusion**

The transformation of legal advocacy in Nigerian family mediation represents both an opportunity and an imperative. As society increasingly recognises the paramount importance of children's welfare and the value of preserving family relationships even through divorce, the legal profession must evolve to serve these higher purposes.

The proposed framework offers a practical path forward, establishing clear professional duties that channel lawyers' advocacy skills towards constructive resolution rather than destructive conflict. By implementing innovative cost-sharing mechanisms and embracing technological solutions, Nigeria can ensure that all families, regardless of economic circumstances or geographic location, have access to mediation services that prioritise healing over harm.

The stakes could not be higher. Every family that endures unnecessary litigation, every child who suffers through prolonged parental conflict, and every parent who

loses meaningful relationships with their children represents a failure of our legal system to serve its highest purposes. The legal profession has the opportunity and the responsibility to lead this transformation, creating a family dispute resolution system that honours the dignity of all family members whilst protecting the vulnerable and promoting healing.

Implementation will require courage, commitment, and collaboration amongst lawyers, mediators, judges, and policymakers. But the potential rewards—stronger families, healthier children, and a more just legal system—justify the effort required to make this vision reality.

The time for half-measures and incremental change has passed. Nigerian families deserve nothing less than a complete reimagining of how legal professionals serve them in their most vulnerable moments. The proposed framework offers a roadmap for that transformation, creating hope where there was previously only conflict, and healing where there was once only harm.