

Mediation – the dos and don'ts

Michael Emerson

PRINCIPAL

Emerson Family Law



PARTNER

Brisbane Mediations



UNDERSTANDING THE PROCESS AND YOUR ROLE – TENSION BETWEEN LITIGATION AND SETTLING

WHAT IS MEDIATION?

There is no single definition of mediation.

A classic definition is that of Folberg and Taylor (1984) “mediation is a process in which the participants with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives and aim to reach a consensual agreement that will accommodate their needs.”¹

In practice there is a need to understand “Facilitative” and “Evaluative” Mediation and the strengths and weaknesses of each. According to NADRAC, Evaluative Mediation is a term used to describe processes where a mediator, as well as facilitating negotiations between the parties, also evaluates the merits of the dispute and provides suggestions as to its resolution whereas in facilitative mediation, the facilitator has no advisory or determinative role on the content of the matters discussed or the outcome of the process.²

In my view it is overly simplistic to define types of mediations in such terms as they are more likely to contain elements of both. Facilitative mediation often involves aspects of advice or evaluation and evaluative mediation of course also involves facilitation. The Lawyer may find some differences of emphases in their role depending on the style and type of mediation attended.

Mediation – the dos and don'ts

Is a Lawyer Needed?

“In order for our society to reap the benefits of mediation while containing its risks, many Lawyers must come to understand mediation and a significant number must develop an ability and willingness to mediate a variety of matters that are currently pushed through the adversary mill. Riskin “Mediation and Lawyers” *Ohio State Law Journal* 1982 at page 1.

In recent years Lawyers have undoubtedly become more accepting of mediation and their participation in the process. This has to at least some degree been in response to the wide proliferation of ADR and particularly mediation in recent years.

- Mediation is however not a substitute for independent legal advice.
- Lawyers can help their clients understand the law, negotiate informed agreements and write up the final agreement, however their role extends well beyond that.
- Where Lawyers are not present mediation agreements will usually be written up as an informal working agreement. That working agreement is then generally referred to a Lawyer by each party so that it can be checked and drawn in final form.
- Alternatively the agreement can include a clause to the effect that the agreement entered into is subject to parties obtaining advice from their lawyers and the lawyers formalizing the agreement.

Mediation – the dos and don'ts

ROLE OF LAWYERS GENERALLY

- Lawyers have a role as **Dispute Resolution Managers** and part of such role is to consider ADR as an option and the form of ADR most appropriate for the particular client and their dispute and their role as Lawyers in supporting such process.
- As Lawyers become familiar with the processes of mediation and interest based bargaining and appreciate the benefits that mediation offers, they can assist by helping their clients understand and appreciate the mediation process.
- The toolbox is a worthwhile analogy. The Lawyer should have many tools in his or her toolbox of which mediation is one. It is a matter of the Lawyer choosing the tool best suited to resolving a particular dispute and in selecting the appropriate tool, mediation, if suitable, offers many advantages. If all you have in your toolbox is a hammer then every job needs a nail.
- Lawyers can encourage the use of mediation through their acceptance of the process, and the agreements reached in mediation.
- Kressel (1987) notes that *“there is evidence from divorce mediation that when the parties’ attorneys are against mediation – and thus presumably, the parties’ own enthusiasm for the process is somewhat dampened – the prospects of settlement are reduced.”*³
- Lawyers can prolong the litigation process by insisting a client can do better than what has been offered or agreed at mediation or they can reinforce the benefits of compromise over a win/lose situation.

Mediation – the dos and don'ts

- Lawyers may quite justifiably feel that mediation (if successful) will cut into their earnings, however their overriding duty (apart from their duty to the court) is to their client and such duty must take priority over their own needs or the needs of their practice.
- A happy client however, guided by his or her Lawyer to a successful resolution within the parameters of a reasonable outcome, will undoubtedly be appreciative of the savings, both financially and emotionally and be a source of referrals and enhance the reputation of the Lawyer.
- Personally, I think that some lawyers undervalue the importance of turnover of matters in developing their reputation and their business. It is clearly possible in my view, for practitioners to resolve matters quickly through mediation or otherwise and still be successful.
- Some Lawyers no doubt use mediation as a fishing expedition or as an adversarial tool to gain an advantage in the litigation rather than resolve it whilst others still see ADR as an obstacle to be hurdled on the way to Trial.
- Mediation may also be used as a delaying tactic, or a financially stronger party may use the process and its expense as a means of draining the funds of a poorer litigant.
- People who engage in mediation generally do so because they want to avoid litigation or possibly because they have been ordered to do so.

Mediation – the dos and don'ts

- Many who only engage in it because they have been ordered to are at least willing to give it a try once they get there.
- The mediator will usually tell the parties that the mediation offers a real opportunity for them to resolve the dispute outside the court process and that there will be a real saving to them in terms of both legal and emotional cost if they can do so.
- Mediation can only provide a resolution if the parties reach agreement. There is no magic wand. There is necessarily an element of compromise in achieving an outcome. One or other or both parties must shift ground and the Lawyer has a role in this process. The power and capacity for resolution lies with the parties, not the mediator although the mediator, as with the Lawyers, can give the parties a prod and provide some direction.
- Advocacy in mediation must be adapted to the audience and the type of dispute. As the parties and Lawyers often converse directly it should be expressed in terms that are both courteous and sensitive to the issues being discussed. Lawyers are there to assist but ultimately it is for the clients to decide whether they want to settle and if so then on what terms.
- In general terms, Lawyers can actively assist in achieving a resolution:
 - ♦ by preparing the client for mediation, explaining the process; detailing best and worse case scenarios and explaining the dynamics of mediation to the client. This also involves preparing the client adequately for the idea of compromise. It is most important that you take time to explain the process,

Mediation – the dos and don'ts

the mediator's role, what is likely to occur and the costs involved. The confidential nature of the process and the possibility of the mediator conducting private sessions should also be explained.

- ♦ by trying to understand what lies behind the dispute and by exploring what the client needs to resolve the dispute as distinct from what the client says that he or she wants.
- ♦ by encouraging their client to make an opening statement and adding to or enhancing it by adding any point that the party fails to touch on. I touch on this further later in the paper.
- ♦ by encouraging the party to be realistic in considering options and guiding the client's expectations as there will always be a range of possible outcomes.
- ♦ by trying to narrow the issues without overlooking that there may be emotional issues underlying other issues which need to be aired if the mediation is to be successful.
- ♦ by listening and trying to understand the other party's underlying interests.
- ♦ by generating creative and interest based settlement options. As skilled problem solvers Lawyers can work with their clients to generate options.
- ♦ by being a support or resource person and providing realistic advice that may assist the client to evaluate options, weigh

Mediation – the dos and don'ts

the merits of settlement proposals and make informed but realistic decisions.

- ♦ by agreeing to the mediator having a private session with the parties in their absence if necessary, if this may help the mediation.
- ♦ by assisting clients to reach a decision, encouraging the client to raise issues as and when appropriate and providing advice about any untenable positions the client may be adopting.
- ♦ by having informal meetings with the other Lawyer and the mediator or just with the other Lawyer in the absence of the parties to advance the negotiation (providing of course that this is properly explained to the client), so that the parties don't feel the mediator and/or the Lawyers are ganging up on him or her.

As part of their traditional role, Lawyers can intervene to protect their clients from being harmed, coerced or disadvantaged in mediation. They have an important role to play in assessing power imbalances and the appropriateness or otherwise of mediation.

Having legal representatives present can help overcome some of the risks inherent in mediation.

Lawyers are of course also of invaluable assistance in drafting terms of settlement, ensuring the agreement covers all the issues raised and foreseeing issues that may arise in carrying out the terms.

Mediation – the dos and don'ts

The Lawyer has a role to play in explaining the agreement; being careful to ensure that the client is making an informed decision, unaffected by the pressure or duress of the moment, particularly as the client may be in turmoil.

Subsequently – the Lawyer is a valuable source of feedback for the mediator, as to how the process can be improved, what service the Lawyer wants delivered and how they want it delivered.

THE TENSION BETWEEN LITIGATION AND SETTLING

- A real dilemma for Lawyers practising conflict resolution advocacy is the need to constantly “switch hats” in their practice between a negotiation and litigation mode. Moving between these two roles can be difficult and cause tension for Lawyers. One suggestion in overcoming the dilemma is to have an overall commitment to dispute resolution but be prepared to call on and utilize different approaches as the situation demands in the interest of the client. Thus even in litigating, the approach of the Lawyer can be to getting the client “across the river” as it were, rather than prolonging the litigation for its own sake. The emphasis in the litigation should, it is submitted, remain on the outcome rather than on the process.
- A further dilemma arises from the emphasis in dispute resolution on involving and empowering the client and yet maintaining Lawyer control of overall strategy. Balancing these two aspects can be difficult for the Lawyer who has traditionally been in control, with the client playing more of a passive role.
- In her excellent book “The New Lawyer: How Settlement is Transforming the Practice of Law”, MacFarlane emphasizes the need for Lawyers who work as conflict resolution advocates to be

Mediation – the dos and don'ts

aware of the values they are bringing to the process and transparent in relation to such values in their dealings with their clients so that the clients know what they are buying.⁴ It is submitted that it is not unrealistic for a Lawyer to explain to the client that in the client's interest they are committed to negotiating the best possible outcome and achieving a resolution outside of the court, but that this does not involve "rolling over" and that they can "fight" if they have to.

- MacFarlane notes that "the challenge is to create credibility and legitimacy for new conflict processes within the profession itself".⁵ Mentors, particularly more senior practitioners must show by example that it is okay to embrace the new conflict resolution environment.

Concerns about Lawyers and Mediation

Concerns about the role of Lawyers in mediation are common and include the following:

- Gibson notes (Trial) Lawyers are trained to fight but questions whether their training and disposition fit them for mediation.⁶
- Litigation involves a contest. The parties are opposed to each other as self-interested adversaries. Each party wants to win and Lawyers traditionally see it as part of their training and duty to get them over the line.
- Parties often see their Lawyers as their gladiator or as MacFarlane notes their pit bull.⁷

Mediation – the dos and don'ts

- With their adversarial mindset it is thought that Lawyers may be reluctant to adjust to the co-operative mindset of mediation or find it difficult to do so. Caputo notes “this is particularly likely to be the case in court-annexed mediation, where the process has the potential to be viewed by disputants and their counsel as a mere “stop” on the way to court”.⁸
- Some fear that some Lawyers are concerned about a loss of professional fees through mediation and that the financial interest of Lawyers and the concept of ADR are in conflict.
- The view is that all Lawyers care about is billable hours instead of helping clients achieve the best possible outcome in the interest of the client rather than the Lawyer.
- Others have concerns that because Lawyers are adversarial they will not worry if they harm or destroy relationships or dissipate client assets.
- Some consider that Lawyers lack vision and only see outcomes in terms of win/lose or good/bad.
- Court mandated mediation is by nature conducted in the shadow of the litigation with parties being very cognisant of their rights and the merits of their case at trial and this may inhibit their options for resolving the dispute. It may also be that rather than the parties identifying issues and developing options for resolution, it is the Lawyers who are making the running.

Mediation – the dos and don'ts

- Some Lawyers won't allow their clients to play an active role in the mediation and some even go to the extent of hijacking the process by turning it into an adversarial contest.
- Lawyers are used to playing an active strategic role in litigation. They are used to calling the shots. Usually the parties are passive observers. This may explain why many Lawyers want to play the main role in mediation as well. As Rundle notes "Lawyers who consider that their job is to 'bark' for their clients, are extremely unlikely to encourage their clients to 'bark' for themselves".⁹
- Sometimes however a passive legal representative may create a problem as it may indicate that the Lawyer is just going through the motions and has no interest in settling the matter other than by going to court. The Lawyer may be allowing his or her client to participate to test or ascertain the other party's case or to make an assessment as to how the other party is likely to dress up as a witness in court.
- There are also concerns:
 - ♦ that Lawyers might use mediation as a fishing expedition to gain leverage for negotiations;
 - ♦ that information gained at mediation may be used in subsequent litigation. In such circumstances Lawyers may be cautious in revealing or encouraging their clients to reveal their underlying interests;

Mediation – the dos and don'ts

- ♦ that Lawyers may urge clients to maintain an adversarial position or urge clients to surrender control of the process to the Lawyer to ensure their protection.
 - ♦ that Lawyers whether through training or personality or habit are seen as sources of conflict and obstacles to resolution.
 - ♦ that mediation may also be used as a delaying tactic or a financially stronger party may use it and their Lawyer to drain the funds of a poorer litigant.
- Ardagh and Cumes discussed what they saw as “the problem with Lawyers in mediation”; noting that:

“the problem with Lawyers moving into this area is that they bring their legal “baggage“ with them, that is, their adversarial legal culture.....Lawyer’s concerns are with facts and certainty; from this follows a legal solution to the dispute. Mediation’s focus is with feelings and ambiguity; and from the drawing out of feelings and perceptions comes resolutions to the conflict. If Lawyers are to be mediators and/or participate as Lawyers in mediation sessions, a lessening of emphasis on legal methods and solutions is necessary.

.....There may be a conflict of interest between the Lawyer’s duty to a client and their duty to allow the free operation of a genuine mediation process. Sir Lawrence Street has observed that Lawyers who do not understand that their role is not one of advocacy are “a direct impediment to the mediation process.”¹⁰

Some other aspects of the role of the Lawyer at different stages of the mediation process

THE IMPORTANCE OF PREPARATION

The Lawyer Should Be Prepared

Like many things in life, preparation is in many ways the key to a successful outcome.

- Be on top of the brief – the Lawyer must know the case
- No advocate should go into court unprepared so similarly no one should go into mediation unprepared.
- Lawyers can advise parties in the “shadow of the law”
- Need to explore the “creative possibilities” available to settle the dispute.
- Lawyers are often slow to pick up the emotional dimensions of a dispute – at some level of course, emotion is present in all mediations.
- One aspect of the Lawyer’s role is said to be to assist clients to make wise decisions in the face of uncertainty.

Time

- Allow enough time for the mediation,

Mediation – the dos and don'ts

- Sometimes a settlement is only reached through patience and persistence and the opportunity can be lost if time is cut short,
- Parties, their Lawyers and the mediator should be prepared to extend the mediation if progress is being made but the Lawyers and mediator should also be conscious of the impact of party fatigue on their ability to mediate and to make informed decisions.

Choosing a Mediator

- The parties need to carefully consider the appropriate mediator before making an appointment.
- It is important that Lawyers refer clients to mediators who have undertaken appropriate training and have relevant experience.
- Some disputes are far more complex than others and require a mediator with special experience or expertise.
- Lawyers, by developing a store of knowledge about mediators can assist the parties to choose one who is suitable.
- Mediators have their own styles and it is important to consider the type of mediator who may be appropriate to the particular dispute and the parties.
- Some mediators develop a reputation for being prepared to go “the extra mile” to help the parties achieve a resolution.

Mediation – the dos and don'ts

- Mediators who deal with children's matters are required by the Family Law Act to promote an outcome which is in the best interests of the child.
- One should not be afraid to inquire of other practitioners or ask around as to suitable mediators.
- Consideration should be given as to whether a co-mediation may be of assistance. Sometimes the mediator may suggest a co-mediation and the Lawyer needs to explain the benefits of same to the client and also the additional costs involved.

THE LAWYER HAS A ROLE IN PREPARING THE CLIENT FOR MEDIATION

- Explain the process fully to the client and prepare the client adequately for the idea of compromise.
- Set out the costs and likely length. The mediator's fees and billing practices should be fully explained, including the hourly rate, method of billing, whether a retainer is required and cancellation policy. Attention to these details will avoid misunderstandings.
- Help your client identify their needs.
- Guide client's expectations – consider the best and worst possible litigated outcomes and address realistic expectations. There will

Mediation – the dos and don'ts

always be a range of outcomes. Need to address the weaknesses of the case.

- Timing is important and this is referred to at some length below. The client may not be ready for mediation. The Lawyer may be able to make some assessment of where the client is at in the separation process and perhaps consider referring the client to a suitable counsellor or therapist to deal with issues arising on separation.
- Appropriate referrals to counsellors by Lawyers can assist in helping the client deal with separation issues or in determining what is in the best interests of the children and hopefully by so doing assist in resolving the litigation / dispute.
- Help in framing a timely and realistic offer can always assist a settlement.
- Try to narrow the issues although don't forget that there are often emotional issues underlying other issues and these may need to be aired by one or other party if the mediation is to be successful.
- Encourage the client to approach the mediation with an open mind
- Allow enough time to prepare the client for the mediation.

Initially the Lawyer will...

- Describe the mediation process to the client.
- Obtain the consent of the client to proceed with mediation.

Mediation – the dos and don'ts

- Contact the Lawyer of the other spouse to suggest mediation if mediation is considered appropriate.
- Agree on the mediator to be appointed and a date for the mediation.
- Consult on the terms of mediation with the mediator and the other Lawyer and be committed to same.
- Consideration should be given to negotiating a form of agreement between the parties which provides for the following:
 - The appointment of the mediator;
 - The ambit of the dispute;
 - Where the mediation is to be held;
 - Who may attend the mediation and how the mediation will be conducted, eg face to face or by shuttle or by a combination of each;
 - Preliminary but important steps to be taken before the mediation such as:
 - Mutual discovery and inspection;
 - Obtaining and exchanging expert reports and appraisals.

The Mediation Agreement

- A written agreement to mediate is often signed by both parties. The agreement is usually provided by the mediator prior to the day of the mediation.

Mediation – the dos and don'ts

- The mediation agreement should deal with the general housekeeping and preliminary matters which may be required and should include consideration of the following:
 - The fee structure which will apply
 - Whether cancellation fees may apply
 - How the fees are to be apportioned between the parties
 - Whether fees for preparation are to be charged.
 - Whether any limits are to be placed on preparation time to be taken by the mediator.
 - It may also be desirable for the mediation agreement to deal with what material is to be provided to the mediator and what preparation is to be undertaken by parties such as exchanging documents and engaging experts to prepare and exchange reports.

- The Lawyer has a role to play in explaining the agreement to the client and suggesting any appropriate amendments.

The Mediator's Brief

- The Lawyer has a role to play in preparation of the mediators brief

What the brief should contain:

1. Relevant background information
2. Parties' statements
3. Chronology – an agreed upon non-contentious chronology is of great benefit.
4. Court documents
5. Valuation evidence

Mediation – the dos and don'ts

Obviously where both parties are represented the Lawyers must agree on what documents are to be provided to the mediator and this can often lead to the mediator only being provided with each party's Court documents and a schedule of assets and liabilities.

Clearly situations arise where what the mediator receives often falls far short of the ideal and the mediation proceeds. Effort made to provide an adequate brief is however rewarded in time saved at the mediation and in helping the mediator ensure that the mediation flows smoothly. Particularly in property matters, it is important that the brief contains all the essentials such as court documents, evidence of valuation, superannuation evidence, etc.

Where valuation and other important documents are missing, the risk increases that parties may agree to an outcome where one or other parties is not fully informed or in a position to make an informed decision.

AT THE MEDIATION

- In the mediation context the Lawyer owes all the usual professional duties of skill and care to a client.
- Instructions and party statements – Lawyers can assist in presentation and legal argument although it is important that the Lawyers don't totally usurp the participant's role in the opening statement as this is an opportunity for the parties to have a role in the process and to express their issues or concerns and be heard. If the Lawyer is to make the opening statement then he or she should try to avoid using legalistic terms or being aggressive or combative.

Mediation – the dos and don'ts

- Sometimes a party just wants to say something in the hearing of the other party and express his or her feelings and although this can sometimes be uncomfortable, having been said it can enable the party to move forward with the negotiation. The Lawyer has a role to play in not denying a party such opportunity and in not hi-jacking the mediation.
- I think that wherever possible, parties should be encouraged to say something in the hearing of the other. This may at times go no further than a simple statement of why they have come to mediation and what they are hoping to achieve. This often assists in setting a positive tone for the mediation and where a party goes further in expressing something they consider important, it can give the party a sense of being heard and assist the other party to understand that party's perspective and where they are at, or coming from. In my view, mediators should not be fearful or unduly apprehensive about the parties talking to each other directly, providing both parties are comfortable with this and agree to observe the normal courtesies.
- Of course, there are situations where the parties are clearly uncomfortable in sitting together in the one room or their conflict so intractable that the mediator considers that it may be counterproductive to place them together. In these situations a shuttle mediation is more appropriate. Sometimes however I think that mediators are far too ready to shift into shuttle mode immediately they detect conflict between the parties and this can deny parties the opportunity to come together when it may be appropriate for them to do so. This is especially important where the parties are going to need to have an ongoing relationship as in co-parenting children and need mediation to help them break the ice by facilitating and supporting them in this all

Mediation – the dos and don'ts

important meeting. By so doing, the mediator can help them find a way forward.

- Agenda setting - the parties, with the assistance of their Lawyers, can identify and agree on the key issues they want to discuss and the ambit of the mediation.
- Exploration of issues – Lawyers can filter the communication. The Lawyer, if sufficiently skilled, can ease communication between their client, the mediator and the other side. He or she is there to support and interpret the client's case to the other – he/she is also there to interpret commonsense coming from the mediator – he/she can help drive home hard points to his/her own client. The Lawyer should try to pick up any cue the mediator may be imparting to assist a resolution.
- Negotiations – Lawyers of course with their legal expertise and advocacy and knowledge of the case have a real role to play in the negotiations.

DEVELOPING A SETTLEMENT FOCUS

CHALLENGES TO LAWYERS IN MOVING FROM POSITIONS TO INTERESTS

Lawyers typically approach disputes in a competitive and rights or position based manner and are used to exercising control over the litigation process. Mediation on the other hand is premised on identifying interests rather than rights or positions and on the party being involved in the process.

Mediation – the dos and don'ts

Some commentators take the view that advocacy does not belong in mediation at all while at the other extreme, some consider that Lawyers should continue to serve as zealous advocates and protectors of their client's position in mediation.

Some of the issues and tensions arising in moving from a traditional adversarial to an interests based approach as noted by MacFarlane, include the following:

- adjusting their image of Lawyer from “warrior” to “conflict resolver” in circumstances where aggressive argumentation, withholding information and an unwillingness to acknowledge any weakness in the client's case is not a good strategy to achieve an effective outcome in negotiation or mediation;
- moving away from the provision of technical advice and strategies based on litigation and fighting toward a more holistic, practical and efficient approach to conflict resolution;
- developing advocacy skills focused on negotiating the best outcome using communication, persuasion and relationship building in contrast to positional argument and “puffing” up the case;
- reappraising the primacy of rights based dispute resolution processes where a rights based model is inappropriate for e.g where the issues are more about communication breakdown, personal losses or gains or relationships;
- assessing the weight to be given to the client's non-legal goals;

Mediation – the dos and don'ts

- accepting and adapting to greater client participation in the settlement process and negotiating a new Lawyer-client relationship;
- generating solutions that expand the pie by adding value to one or other party which fall outside what they are formally claiming;
- balancing client interests and professional judgment.

DEVELOPING A SETTLEMENT FOCUS

In developing a settlement focus the Lawyer needs to:

- 1) give thought to what skills can best serve the client in the new dispute resolution environment and be prepared to learn and hone those skills to best represent the client;
- 2) acknowledge that the best possible outcome for the client is often a negotiated outcome;
- 3) strive whenever possible to achieve a resolution which meets the client's needs rather than engaging in expensive and drawn out litigation;
- 4) look beyond rights based dispute resolution towards solutions that address the client's interests rather than a narrow legal position;
- 5) be prepared to work with the client in achieving a solution and in so doing allow the client to be part of the process rather than merely a passive observer;

Mediation – the dos and don'ts

- 6) be prepared to share information and to assist the client to work with the other side and the mediator in generating creative options for resolution;
- 7) ensure that the client's interests are always put before your own;
- 8) be prepared to litigate where the client's best interests cannot be adequately served through a negotiated outcome.

MacFarlane examines many factors that influence how individual Lawyers practise and perceive their role and identity as Lawyers, including the following:¹¹

- i) influence of family and upbringing, life experiences and role models outside of the profession;
- ii) legal education and training;
- iii) working in particular practice communities and the culture of the firm or practice environment;
- iv) Mentors and role models within the law;
- v) Professional codes of conduct;
- vi) Life experiences, both positive and negative, exposure to clients, cases, colleagues, opponents and judges;
- vii) Exposure to procedural alternatives, including involvement in settlement processes;

Mediation – the dos and don'ts

viii) The impact of popular culture on the role of Lawyers.

Personality also clearly impacts. Riskin notes that “A Lawyer’s openness to mediation and his ability to mediate will be directly and intricately related to the compound of his personality and his stage in life and in practice” .¹²

The point is that while there are norms and values that are very much part of the legal culture, how these impact and are interpreted and applied by individual practitioners is a matter of great variance and generalizations can be dangerous. In the Family Law area there is undoubtedly a high proportion of Lawyers with a strong settlement focus.

Some Lawyers are undoubtedly better able to adapt to mediation than others.

Of course even in litigation many or most cases settle at some stage and Lawyers are practiced at engaging in negotiation and settling cases. Many Lawyers are good at settling cases between themselves. Some Lawyers are not as good at settling cases as others are and such variance of skills is true of any profession. Many Lawyers do spend much of their time negotiating disputes but often value is still left on the table because parties have not explored their real interests and concerns and worked creatively in designing settlement options.

Lawyers can't all be put into the same basket. While some Lawyers see themselves as gladiators, others have a genuine settlement focus, derived possibly from their training and experience and outlook in life, from how they perceive themselves or their role as a Lawyer or from their psychological makeup and personality. Just as one Lawyer may perceive himself or herself as a fighter, another may see themselves as a problem solver or peacemaker

Mediation – the dos and don'ts

and perceive their role as being to help the client through the dispute with minimum possible damage.

From my observations a high proportion of Family Lawyers are committed to achieving a realistic outcome for their clients without excessive or unnecessary costs being incurred and whether through training, personality or a sense of professional duty, have been prepared to embrace mediation as a means to that end.

MANY ISSUES REMAIN

PROBLEMS AND PITFALLS

- Mediation requires confidentiality to work effectively. The problem with this is that the failures of mediation can remain unmasked. Because mediations are conducted in private and without transcripts, there is little way of knowing how they are being conducted and often little opportunity to review settlements and outcomes. There are no rules as such and there can be a very wide divergence in process. Privacy is an issue but is also of course one of the great benefits of mediation.
- The considerable party control and lack of procedural guidelines underlying mediation can reinforce bargaining imbalances between parties. There is real scope for parties who feel intimidated and unable to express their underlying concerns to feel pressured to accept an unfair outcome.

Mediation – the dos and don'ts

- The increasing use of mandatory mediation compounds the concern that unsuitable cases could end up in mediation or that coercion to participate in mediation could lead to a coercion to settle.
- The qualification, experiences and abilities of mediators are variable,
- Some hold the view that any settlement outside the court process must be a good thing regardless of the outcome and this clearly is not a good thing as the client may be induced to make too many concessions in an effort to resolve.
- Lawyers are faced with resolving the dilemmas arising from balancing the role of their traditional advocacy with the needs of the client in the new dispute resolution environment. There are new skills to develop and new training to undertake whilst retaining their traditional skills. Although continuing to pursue client goals, there is a new emphasis on negotiation, consideration of wider client needs and interests and use of creative problem-solving skills in achieving a resolution.

Sometimes Mediation Is Not Appropriate

- Mediation may not be appropriate for all situations and all approved mediation agencies have a procedure for assessing the suitability of clients for mediation (intake sessions).
- Mediation is inappropriate or less likely to be successful when:
 - The parties are out of control physically, emotionally or psychologically;

Mediation – the dos and don'ts

- Clients do not have the willingness or capacity to mediate or their mental competence is in question;
- There are indications of physical or sexual abuse, child protection issues or a risk of child abduction;
- Drug or alcohol addiction is present;
- A power imbalance between the parties is indicated and not amenable to the mediation process;
- Mediation is used by one party to gain information that will or may be used to manipulate, control, harm or disadvantage the other party.

The Lawyers have a role to play in determining when mediation is not appropriate.

The Lawyer may be concerned that the client may be placed in a vulnerable position vis-à-vis the other spouse.

Where there is a possibility of reconciliation, counselling or therapy may be more appropriate.

Kressel (1987) notes that *“there is one finding which stands out across all domains of mediation research: the lower the level of conflict the better the prognosis that mediation will produce a mutually satisfying agreement”*. He states that the research suggests that *“when there is a history of exacerbated conflict, including such things as physical violence or the threat of violence, innumerable disputed issues, the significant embroilment of third parties in the dispute, and little if any trust or perceived ability to cooperate the prospects of a mediated settlement are significantly reduced”*.¹³

Mediation – the dos and don'ts

Some Problems Lawyers Face in Mediation

- Failure to adequately prepare and plan.
- Over confident prediction of court outcomes.
- Can be overly emotional and antagonistic due to traditional embrace of litigious orientation.
- Many Lawyers are said to still wear their “adversarial suits” and conduct negotiations in a gladiatorial manner when engaged in Alternative Dispute Resolution.
- Sometimes not attuned to the emotive issues in a dispute.

Power Imbalances

- Wade (1984) states that power can “*be broadly described as actual or perceived ability of one person to exert influence upon another person’s behaviour or thoughts*”.¹⁴
- Parties hold different types of power in their relationship such as economic, emotional, physical, and psychological, status, language and information.
- Power is a dynamic rather than a static concept and can shift between parties in a negotiation or mediation.
- Imbalances can also be identified in terms of gender, culture, one shot and repeat players, wealth, the legally and non-legally aided, the

Mediation – the dos and don'ts

assertive and the inarticulate, the knowledgeable and the ignorant.

- Past domestic violence and the possibility of actual or implied intimidation is an important area to look at in terms of power imbalances and whether mediation is appropriate however of course the information relating to domestic violence may only become evident in the course of the mediation.
- Lack of knowledge is a primary source of power imbalance. It can be legal, financial or relate to some other aspect or implication.
- Lawyers have an important role to play in assessing power imbalances and the appropriateness or otherwise of mediation.

Where there is a wide discrepancy between the parties in terms of power, mediation may not be suitable.

Disclosure

- It is vitally important that there be disclosure of all issues relevant to the dispute.
- As in litigation, the Lawyers have a real role in assisting parties to provide disclosure and in insisting that disclosure is provided by the other party.
- The mediator should be provided with full disclosure of all information pertinent to the issues in dispute.

Mediation – the dos and don'ts

- There are real risks if mediation proceeds without adequate disclosure. The Lawyer should carefully advise their client of these risks and take proper precautions where appropriate.
- Particularly in financial matters, lack of disclosure is a real danger area for self-represented parties.

Is Court Ever a Proper and Necessary Alternative

- Sometimes going to Court or at least bringing an action is necessary or unavoidable and I refer you to an article by Professor John Wade aptly titled **“Don't Waste My Time On Negotiation And Mediation: This Dispute Needs A Judge”** in volume 18 of the Mediation Quarterly 2000-2001 at pages 259-280.

Professor Wade identifies numerous indicators that individually or cumulatively suggest that certain conflicts may need a judicial or arbitrated decision.

Included amongst the indicators relevant to the area of relationships are the following:

- **The need to shift responsibility elsewhere.** Where a settlement requires a compromise or loss of some important interest, that loss may be too hard to bear and the disputant may prefer to have a scapegoat such as a judge who can be blamed for being biased, stupid or uncaring even when the result was entirely predictable.

Mediation – the dos and don'ts

An example may be an interim residence dispute against a long term custodian.

- **Demonstration of effort - the “I Won't Give In Without A Fight” Syndrome.** This applies where the umpiring process is required to show oneself and others that “I Tried Hard” or “I Did Not Give in Easily”. An example is parents who fight long residence disputes to demonstrate to their children that “they did not give them up easily”.
- **Settlement offers that are too divergent.** Where disputants make extreme claims which have the effect of insulting the other and involving significant loss of face if a settlement is to be achieved. We are all familiar with the plea “How Dare She Ask For So Much Money? I told you she is entirely unrealistic/unreasonable/greedy/unbalanced.”
- **False expectations of one or both disputants.** Where one or both disputants have false expectations about the likely umpiring process and the range of possible results.
- **Disputes in which one or both disputants are not paying for the process.** Where the Court is seen as a consumer item which if free will often be valued less and used more. A similar situation can apply where a relatively uninformed third party is paying for the legal costs of one of the disputants. An example might be a parent funding property litigation on behalf of an adult child.
- **Adjustive Dissonance.** Where parties are at different stages of the grieving process and one is simply not ready to settle.

Mediation – the dos and don'ts

Professor Wade notes that it often takes about two (2) years to work through the grief process so that focused negotiations can take place but that meanwhile one party may have filed an application in Court and the umpire may have decided. This aspect is referred to in greater detail below.

- **Negative Intimacy.** Where the conflict gives meaning to life for some disputants who are “intimate” with the dispute itself and reluctant to resolve it, as settlement would involve a loss of meaning to their lives. This type of disputant can be constantly moving the goalposts to prolong the dispute.
- **Benefits of delay.** Where in some cases, an umpire’s decision is consciously preferred, as it offers one party the longest period of delay before a change in the status quo may be required.
- **Where expert helpers such as Lawyers or other professionals actually exacerbate the dispute** and the original conflict between the disputants becomes subsidiary to the needs of involved professionals.
- **The Lawless Renegade** – this relates to a category of individuals who regard themselves as being completely outside the constraints of the legal system or of dominant social values.
- According to Whiting (2003) literature in the field of Family Dispute Resolution tells us that family disputes display unequal characteristics because they often bring with them complex histories of past interactions, which tend to involve a variety of

Mediation – the dos and don'ts

strong emotional issues and past failures that can complicate efforts to resolve them.¹⁵

Negligence in Mediation

In **Studer v Boettcher** [2000] NSWCA 263 the NSW Court of Appeal was asked to consider an action against a solicitor for professional negligence in mediation. The appellant also alleged undue influence in terms of pressure applied to him to settle the matter. The case is worth reading in terms of the opinions expressed by the Judges on appeal in relation to undue influence and the standards expected of the practitioner. The Court dismissed the appeal and in so doing Handley J stated that he was satisfied “that the respondent (solicitor) acted with proper care and skill during the mediation, and that his advice to the appellant to settle on the best terms then available was good advice. Moreover he acted professionally and properly in the interests of the appellant in bringing considerable pressure to bear on him to settle on the best terms then available and I am satisfied that this was in the appellant’s best interests.”

Fitzgerald JA noted that advice by Lawyers to their client is not negligent merely because a court subsequently considers that a more favourable judgment may be obtained if the matter was litigated. His Honour stated that “advice to compromise based on a variety of considerations is not negligent if a person exercising and professing to have a legal practitioner’s special skills could reasonably have given that advice.”

In relation to the issue of undue influence Fitzgerald JA rejected the appellant’s evidence that undue pressure applied by the respondent and his barrister, including threats to withdraw from the original action, forced him to

Mediation – the dos and don'ts

capitulate and compromise against his will. In so doing His Honour noted that “Broadly, and not exhaustively, a legal practitioner should assist a client to make an informed and free choice between compromise and litigation, and, for that purpose, to assess what is in his or her own best interests. The respective advantages and disadvantages and disadvantages of the courses which are open should be explained. The Lawyer is entitled, and if requested by the client obliged, to give his or her opinion and to explain the basis of that opinion in terms which the client can understand. The Lawyer is also entitled to seek to persuade, but not to coerce, the client to accept and act on that opinion in the client's interests. The advice given and any attempted persuasion undertaken by the Lawyer must be devoid of self-interest. Further, when the client alone must bear the consequences, he or she is entitled to make the final decision.”

The Importance of Timing

This has been referred to briefly above under the heading of adjustive dissonance.

Parties are sometimes more ready to achieve a resolution than at others and if interventions are attuned to the stages and dynamics of the process and the changing circumstances of the parties then they are more likely to succeed.

A basic element in the negotiation process is willingness to compromise and Teply notes that timing is essential since mediation cannot succeed unless the parties are ready to compromise.¹⁶

It is important that Lawyers as well as mediators and of course counsellors are aware of the impact and importance of timing and the emotional aspects of separation.

Mediation – the dos and don'ts

Fisher and Ury (1997) speak of the importance of “*getting into step*” with the other person and timing is an aspect of this. By this they mean that “*in any negotiation it is highly desirable to be sensitive to the values, perceptions, concerns, norms of behaviour and moods of those with whom you are dealing*”.¹⁷

Much has been written about the psychological aspects of divorce, the loss it involves and the grief process.

According to Pledge¹⁸ divorce is increasingly being seen as a process rather than a single life event.

Many writers have spoken of or interpreted divorce or the experience of separation by delineating progressive, overlapping stages through which a spouse moves.¹⁹

These stages are not unlike the stages of bereavement and mourning classically detailed by Kubler-Ross as denial, anger, bargaining, depression and acceptance.²⁰

Wiseman examined the five stages of mourning²¹ described by Kubler-Ross in the context of the divorce process and suggested five stages: denial, loss and depression, anger and ambivalence, reorientation of lifestyle and identity and finally acceptance and a new level of functioning.

According to Parker and Reeves the perspective of divorce as a process evolving through phases and over time continues to serve as models for current investigations into the process of marital dissolution.²²

Mediation – the dos and don'ts

Guttman notes that the stages are typically described in a lineal way with individuals progressing from one stage to another until the end of the process whereas his model sees the stages as stations on a loop with movement among the stages not necessarily flowing from one to the next but free flowing and intermingled.²³

Emery develops a cyclical model of grief involving constant cycling back and forth between conflicting emotions of love, anger and sadness and taking account of differences between the leaver and the left.²⁴

Folberg and Milne (1984) note that regardless of whether the stages in the process occur in sequence, or patterns of reappearing tendencies or as stations on a loop, spouses rarely begin the psychological or grief process at the same time or travel through it at the same rate.²⁵

This adjustment dissonance between the parties has important implications for the appropriateness or likely success of mediation at a particular time.

Pledge notes that *“the simple passage of time which occurs as an individual progresses through the phases in the divorce process, appears to be an important factor in resolving some of the inherent conflicts experienced”* while according to Grebe *“the couple’s subsequent readiness to resolve its conflicts depends on the stage of each person in the divorce process”* and he concludes significantly that *“most failures in mediation may be a consequence of poor timing rather than of inappropriateness of the method.”*

Folberg and Taylor (1984) suggest the importance of mediation remembering that someone still in the denial, depression or withdrawal stage will not be emotionally ready to negotiate a mediated settlement and propose that consideration be given to forestalling the mediation and that participants

Mediation – the dos and don'ts

experiencing intense grief at the time they see the mediator may need to be referred for professional therapy or counselling.²⁶

My research suggests that timing is a vital aspect of the settlement process and Lawyers can benefit from a greater understanding of the role that timing can play in the success of mediation and the role that counsellors can play in addressing timing issues arising. Dealing with these issues provides scope for a collaborative approach between Lawyers, mediators and counsellors.

Best Practice Guidelines

In this paper I have referred to the Best Practice Guidelines for Lawyers doing family law work prepared jointly by the Family Law Council and the Family Law Section of the Law Council of Australia and, particularly, in relation to the section of the guidelines applicable to ADR and recommend them to you.

Ethical Aspects

- We all have a professional duty to help our clients resolve their disputes.
- The ethical duty of Lawyers is to advise clients about alternatives to litigation.
- The Lawyer must, as early as possible advise the client of ways of resolving the dispute without commencing legal action.

Use of Experts in Mediation

- Experienced Lawyers know that factual disputes make it difficult to predict the outcome of a case in Court.
- Consider involving neutral experts in your mediation.
- A neutral expert is an independent third person who can look objectively at the facts and offer an informed independent view which often forms the basis for a solution.
- We are all aware of the valuable role played by report writers in the Family Court and Federal Magistrates Court. The Courts usually place significant weight on the conclusions and recommendations of such report writers and the recommendations often form the basis of consent orders.
- Similarly in the course of mediations, parties and/or their Lawyers may propose that experts be engaged to undertake reports or appraisals as part of the solution to a dispute regarding children and similarly experts can be engaged to resolve factual issues or provide valuations in property matters.
- A forensic accountant for instance may prove of invaluable assistance in acting in an independent role to determine the asset pool in a property matter.

CONCLUSION

As early as 1982 Riskin noted that “The future of mediation ... rests heavily upon the attitudes and involvement of the legal profession”.²⁷

Clearly Lawyers have a real role to play in the new environment but their traditional skills are important and need to be retained as a relevant part of the Lawyers' repertoire. The answer it is submitted lies in adapting to change rather than throwing the baby out with the bath water.

Mike Emerson

Lawyer and Mediator.

June 2011

Copyright

© These materials are subject to copyright which is retained by the author. No part may be reproduced, adapted or communicated without consent except as permitted under applicable copyright law.

Disclaimer

This seminar paper is intended only to provide a summary of the subject matter covered. It does not purport to be comprehensive or to render legal advice. Readers should not act on the basis of any matter contained in this seminar paper without first obtaining their own professional advice.

Bibliography:

- ¹Folberg, Jay and Taylor, Alison. 1984. *“Mediation: A Comprehensive Guide to Resolving Disputes without Litigation”* San Francisco: Jossey-Bass
- ²NADRAC – Glossary of Terminology: A Discussion Paper 2002
- ³Kressel, Kenneth. *“Clinical Implications of Existing Research on Divorce Mediation”* The American Journal of Family Therapy, Vol. 15, No. 1. Spring 1987
- ⁴MacFarlane, J *“The New Lawyer: How Settlement is Transforming the Practice of Law”*.
- ⁵Ibid.
- ⁶Gibson, *“Horses for Courses Warlords as Peacemakers: Are Trial Lawyers Bad for ADR”*, 30.
- ⁷Above n.4
- ⁸Caputo, *“Lawyers’ Participation in Mediation”* (2007) 18 ADRJ 84
- ⁹Rundle *“Barking Dogs: Lawyer attitude towards direct disputant participation in Court-connected mediation of General Civil Cases, Vol 1 no.1 (QUT LJJ), 86*
- ¹⁰Above n.8, 88
- ¹¹Above n.4
- ¹²Riskin, LJ, *“Mediation and Lawyers”* 1982, Ohio State Law Journal, 12
- ¹³Above n.3
- ¹⁴Wade, J, *“Forms of Power in Family Mediation and Negotiation”* Australian Journal of Family Law. 1994, 2
- ¹⁵Whiting, R, *“Family Disputes, Non-Family Disputes, and Mediation Success”* Mediation Quarterly, Vol.11 Spring 1994. 25
- ¹⁶Teply, L L 1991. *“Legal Negotiation in a Nutshell”* Minnesota: West Publishing Coy.
- ¹⁷Fisher, Roger and Ury, William, 1997. *“Getting to Yes”* London: Arrow Books Limited
- ¹⁸Pledge, Deanna S. *“Marital Separation/Divorce: A Review of Individual Responses to a Major life Stressor”* Journal of Divorce and Remarriage, Vol. 7. 1991/92
- ¹⁹Rossiter, Amy B. *“Initiator Status and Separation Adjustment”* Journal of Divorce and Remarriage. 1991.
- ²⁰Kubler-Ross, Elizabeth, 1997, *“On Death and Dying”* New York: Touchstone
- ²¹Folberg Jay and Taylor, Alison. 1984. *“Mediation: A Comprehensive Guide to resolving Disputes without Litigation”* San Francisco: Jossey-Bass.
- ²²Parker, Ben L. and Drummond-Reeves, Susan J *“The Death of a Dyad: Recreational Autopsy, Analysis, and Aftermath”* Journal of Divorce and Remarriage. 1992.
- ²³Guttman, Joseph. 1993. *“Divorce in Psychological Perspective: Theory and Research”* New Jersey: Lawrence Erlbaum Associates, Inc.
- ²⁴Emery, Robert E. 1994. *“Renegotiating Family Relationships”* New York; London: The Guildford Press.
- ²⁵Folberg, Jay and Milne, ann. 1988. *“Divorce Mediation theory and Practice”* New York; London: The Guildford Press
- ²⁶Folberg, Jay and Taylor, Alison. 1984. *Mediation: A comprehensive Guide to Resolving Disputes without Litigation”* San Francisco: Jossey-Bass
- ²⁷Above n.12, 7