Bridging the Divide Between Lawyers and Mediators

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MEDIATION AND LAWYERS

"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.*

"Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often a real loser: in fees, expenses and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good person". Abraham Lincoln.

Context

- Alternative Dispute Resolution (ADR) initially developed as an alternative to adversarial litigation

- Mediation developed partly because it was seen to offer tangible benefits in avoiding the impairing of ongoing relationships; in providing a relatively low cost, high turnover and prompt model of dispute resolution and because it seemed to be effective where the matter involved perceptional, emotional or relational issues rather than purely factual or legal ones.[1]

- Mediation was adopted enthusiastically by the commercial sector which French notes "had long sought alternatives to costly and high risk litigation"[2]

- ADR was also seen as fundamental to the workings of the Family Court from its inception as evidenced from the Report of the Joint Select Committee on the Family Law Act of 1980 which noted:

  "The establishment of the Family Court of Australia was an attempt to create in Australia a new kind of legal institution. It was a recognition that matrimonial disputes and their settlement required a different kind of approach: one which recognised the relevance of a range of services besides those customarily available to litigants in law cases. This involves attention to the special needs of children and to the possibilities of conciliation in helping those involved in matrimonial breakdown to reach agreements as to how their affairs should be ordered in the aftermath of divorce" [3]

- There has been a wide proliferation of ADR and in particular mediation in recent years and a multiplicity of dispute resolution models have developed.

- Mediation is of course still developing and as French notes "much of the mediation terrain remains unmapped and critical questions remain"[4]

- It has been rapidly institutionalised in recent years. As Astor notes "Today mediation is a recognised part of the institutions of our society, found in our workplaces, schools, universities, in government and especially in our formal justice system".[5] Importantly there has been an acceptance of mediation and other forms of dispute resolution in our law schools[6] with consequent familiarity for newly admitted lawyers, although some would argue that this still has a way to go in terms of education of lawyers in the new culture of dispute resolution.

- French remarks on the "dramatic conversion of the courts to the advantages of dispute resolution, particularly in the marked-and growing tendency for courts to be empowered to mandate mediation for parties in conflict".[7] Court directed mediation is now accepted as a normal part of the litigation pathway and it seems clear that mediation whether court directed or otherwise is here to stay.

- Litigation is expensive whereas mediation can be cost effective. People generally can't afford lawyers' fees and people who can afford them don't want to pay them. Of course, if mediation is unsuccessful and the matter proceeds to trial then the cost of the mediation is an additional expense for the parties.

- The implementation of court annexed mediation has led to the development of an interrelatedness between mediation and litigation resulting in lawyers becoming increasingly involved in mediation.[8]

- In recent years the legal profession has embraced mediation as part of its professional service and as an integral part of the litigation process. Most lawyers I would surmise have at some stage had some connection with mediation

- Some argue a new breed of lawyer has emerged more attuned to settlement and the benefits of mediation amid signs that clients prefer a more "pragmatic, cost-conscious, and time-efficient approach to resolving legal problems". [9]

- Savvy clients anxious to avoid the costs of litigation are seeking out mediation which is increasingly seen as a time saving and cost effective way of resolving disputes, often in mutually satisfying ways

with minimum ongoing damage to the relationship from the process. Mediation can help to reduce tension and hostility between parties and in so doing improve communication between them. As a mediator, it is not unusual to see parties acknowledge and compliment each other at the end of the mediation for reaching a resolution without court.

THE TENSION BETWEEN LITIGATION AND SETTLING

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.[10]

- Many believe that lawyers' adversarial mindsets are inherently inconsistent with mediation. They question whether the adversarial position customarily adopted by lawyers is consistent with the conciliatory position required to make mediation work.[11]

- The argument is that lawyers' emphasis on adversarial advocacy and winning is ill-suited to mediation's co-operative problem solving approach to dispute resolution.

- 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.

- People in business may live to make deals but litigation lawyers live to fight.[12] Parties often see their lawyers as their gladiator or as MacFarlane notes pit bull, with female lawyers portrayed as bulldogs with lipstick[13].

- 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".[14]

- Others consider 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.[15]

- Their 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.[16]

- Others have concerns that because lawyers are adversarial they will not worry if they harm or destroy relationships or dissipate client assets.[17]

- They consider that lawyers lack vision and only see outcomes in terms of win/lose or good/bad.[18]

- 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."[19]

- 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, that it is the lawyers who are making the running.

- Lawyers are thought to be capable of hijacking the process by changing it from a co-operative problem solving operation into an adversarial contest by not understanding the philosophy and process of mediation.

- Some lawyers won't allow their clients to play an active role in the mediation e.g where the lawyer won't permit the client to make an opening statement or participate directly in the negotiation process

- 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".[20]

- 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 only reason the lawyer may be allowing his or her client to participate may be to use the process as a fishing expedition or 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 concerns:

    - that lawyers may abuse the mediation process to advantage their clients in subsequent litigation;

    - 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;

- 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.

- that the lawyer may take over the process by posturing or seeking to be the centre of attention, performing for the audience, or overly resorting to the use of legal jargon or by cross-examining the other party or adopting courtroom tactics As Gibson notes "when the occasion is structured so that there is an audience, even an audience of just the client, the mediator and the other side, even though the audience is in private, some start behaving a little like they do in Court. They may take technical points. They may refer to the pleadings. They may make a speech. They may even posture. Rather than sounding like a commercial lawyer who is there to conclude a deal with the other side, they may sound like a litigation lawyer who is there to assert a case against the other side." [21]

The problem with all of this is that lawyers can't all be put into the same basket. While some lawyers see themselves as gladiators, others have a genuine settlement focus, deriving 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 themself as a problem solver and perceive their role as being to help the client through the dispute with minimum possible damage.

In her book "*The New Lawyer: How Settlement is Transforming the Practice of Law*",[22] MacFarlane examines many factors that influence how individual lawyers practise and perceive their role and identity as lawyers, including the following:

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;

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" .[23]

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 for instance there is undoubtedly a high proportion of lawyers with a strong settlement focus.

While many lawyers still perhaps have little formal training in ADR, increasingly lawyers are developing familiarity with mediation and its processes and adapting to it. Some undoubtedly take to it like ducks to water, while others experience more difficulty.

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.

Concerns Lawyers have about Mediation

- Some lawyers have concerns:

  - that mediators will take clients and business away from them. In the early days particularly, there is little doubt that lawyers generally felt threatened by mediation but they have increasingly embraced it as it became part of the mainstream court process and as they recognised a role for themselves as part of that process, either as mediators or representing clients involved in mediation;

  - that there is a need to value the role lawyers play and the importance of protecting clients rights;

  - that mediators who aren't lawyers aren't competent to mediate disputes involving legal issues;[24]

  - that mediators who are lawyers want to play judge and make lawyers look bad in front of their clients;[25]

  - that they as lawyers are the best persons to advocate their client's case;

  - that if left to go it alone, clients might disadvantage themselves in subsequent litigation.

  - that although court ordered, and a necessary step in the court process, litigation is still the main game.

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- The issue is how do lawyers retain their traditional skills and continue to protect their clients' interests whilst developing new skills which assist them to better promote their clients' interests in the new dispute resolution environment?

The Lawyer's Role in Mediation

- People who engage in mediation generally do so because they want to avoid litigation or possibly because they have been ordered to do so. 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.

- A lawyer's role in mediation is very different from his or her role in litigation. Sordo describes that role as follows:

  "Since mediation is an informal meeting between parties in a non-adversarial forum,…lawyers are not present as advocates, or for the purpose of participating in an adversarial courtroom-style contest with each other, much less with the opposing party.

  Essentially the role of the legal adviser is to assist clients during the course of the mediation.

  As the clients are central to the dispute in mediation, the mediator will direct most attention to them, calling on the lawyer to assist them when required.

- It is of course an oversimplification to describe the lawyer's role in Sordo's terms as it goes much further.

- 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 of to them in terms of both legal and emotional cost if they can do so.

- Mediation can only produce an outcome and resolve the dispute if the parties reach agreement. There is no magic wand. There is of necessity an element of compromise in achieving an outcome. A result usually depends on one or other or both parties shifting ground and the lawyer has a role in this process.

- Advocacy in mediation if it is to be present at all, must be adapted to the audience and the type of dispute. As the parties and lawyers are normally conversing directly it should be expressed in terms that are both courteous and sensitive to the issues being discussed.

- In recent years undoubtedly lawyers have generally become more sophisticated in their reception of mediation and participation in the process.

- Lawyers can actively assist in achieving a resolution:

    - by preparing the client for mediation, explaining the process; preparing a best and worse case scenario and explaining the dynamics of mediation to the client. This also involves preparing the client adequately for the idea of compromise.

    - 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.
- 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 being a support or a resource person and providing technical advice that may assist the client to adopt a realistic stance.
- by generating creative and interest based settlement options;
- by agreeing to the mediator having a private session with the parties in their absence if this may help the mediation.
- 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).
- by providing legal advice to their client which helps the settlement process.

Having legal representatives present as a resource person can help overcome some of the risks inherent in mediation.

Lawyers are of course also able to provide invaluable assistance in drafting terms of settlement.

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.

As the popularity of mediation and the involvement of lawyers in the process grows, a number of important issues arise:

1) Should a lawyer representing a client in mediation act as an advocate for that client, or should the lawyer play a different less adversarial role when representing a client in mediation;[26]

2) How active should the lawyer be in the mediation process, and how should the lawyer relate to the client in the mediation? Should the lawyer play the role that many play in court by doing most of the talking and serving as a buffer between the client and the other participants in the mediation or should the lawyer take a back step and allow the client to be the primary participant in the mediation? Sternlight argues that lawyers need not and ought not abandon their advocacy or even their adversarial approach in mediation but contends that they must redefine their method or role of advocacy to serve their client's best interests. They should work with their clients to choose an approach which best serves the client's needs in the particular dispute. In particular lawyers should understand how their own economic incentives and psychological makeups may diverge sharply from those of their clients.[27]

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.

Riskin refers to the lawyers "philosophical map" which he says differs radically from that used by a mediator. He says that what appears on the map is determined largely by the power of two assumptions about matters that lawyers handle: 1) that disputants are adversaries – i.e. if one wins, the other must lose; and 2) that disputes may be resolved through application, by a third part of some general rule of law. These assumptions he says are plainly polar opposites of those which underlie mediation: 1) that all parties can benefit through a creative solution to which each agrees; and 2) that the situation is unique and therefore not to be governed by any general principle except to the extent that the parties accept it.[28]

Riskin propounds that the lawyers philosophical map rivet lawyer's attention to things they must see to carry out their functions and blinds them to others. The map is useful primarily where the assumptions on which it is based namely adversariness and amenability to solution by a general rule imposed by a third party are valid but when mediation is appropriate he says these assumptions don't fit. He says the problem is that many lawyers because of their philosophical maps tend to suppose their assumptions are valid in any situation they confront as lawyers and therefore tend not to recognize mediation as a viable means of reaching a solution and worse they see that the solutions that mediation can produce as threatening to the best interests of their clients.[29]

It is submitted that the view Riskin puts forward is now somewhat dated and overly rigid in its conclusions as many lawyers have now embraced mediation

and recognized the benefits it provides. It does however, in my view, help to illustrate some of the tensions felt by lawyers in adjusting to mediation.

Some of the other 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;

- 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.

Sternlight documents some possible reasons why the lawyer's and client's interest may not coincide:[30]

- The lawyer could have a short term interest in prolonging the dispute and maximising their fee;

- The lawyer's incentive to keep the client satisfied and on board as a client may derail a potential settlement. Clients typically hire lawyers on the basis that they will be their "gladiators" who will fight to uphold the client's position. This role can create a tension in the settlement context as in analysing a potential settlement the lawyer must discuss potential weaknesses in the case with the client and the client may feel abandoned by the lawyer when the gladiator is seeming to take the other side's position. The client may feel sold out when the lawyer tries to present a balanced view of the case and may even decide to sack the lawyer. To avoid this the lawyer may consciously or unconsciously exaggerate the client's likelihood of success;

- The client and lawyer may have diverging non-monetary incentives. The client may have non-monetary incentives such as an apology which are devalued by the lawyer or the lawyer may have ones which are not shared by the client such as running a matter to trial to hone his or her skills or to establish a precedent;

- Differences in the psychological makeup of the client and the lawyer may create a barrier to a negotiated agreement. Such disparities may cause the lawyer to see things differently to the client and to express himself differently and these disparities can cause the lawyer to stand in the way of a settlement. For instance the lawyer may see himself or herself as a gladiator fighting for a cause or to protect the client whereas the client may be more emotional, more open to new ideas and more creative. The lawyer might for instance focus exclusively on monetary gain or loss and their quest for justice or to protect their client which may lead them to insist on going to trial whereas the client may be better able to see beyond a short term financial interest and be more creative in structuring a mutually beneficial settlement.[31]

Sometimes, however Sternlight notes lawyers may cause or allow cases to settle which shouldn't settle -

- A lawyer on a contingent fee agreement may be more inclined to settle for the same reasons that a lawyer on a time billing arrangement may have a disincentive to settle.

- The client and lawyer again may have diverging non-monetary incentives. For instance the lawyer may for a variety of reasons prefer to settle a case rather than take it to trial. The lawyer may be lacking in trial experience or not enjoy the stress or time commitment of a trial or want to maintain an amicable relationship with the opposing counsel.

- The client may have non-monetary incentives that cause him to seek a trial. For instance the client may wish to vent emotions or seek vengeance on the other side

- Sternlight argues that two of the distinguishing features of mediation, namely the presence of a third party neutral to help the parties discuss their dispute and explore options for a solution and secondly the potential offered by mediation for represented parties to play a direct role in the negotiation, allow parties to surmount economic and psychological and other barriers to successful negotiation.[32]

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;

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.

The first thing the lawyer needs to do is to try to understand what mediation is and how it works. Education of lawyers in the proper approach to mediation is a vital part of this.

- 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 to understand and appreciate the mediation process

- Lawyers have a role to play in preparing clients for the mediation process.

- The lawyer needs to ask himself or herself what he or she is seeking to achieve at the mediation and how to best accomplish or achieve these ends.

- They have a role to play in helping their clients make informed decisions and by providing them with realistic advice.

- From their training as lawyers they are skilled problem solvers and can work with their clients to generate options.

- They can help their clients to assess their best alternative to a negotiated agreement or their BATNA.

- They can assist their clients to evaluate options that are on the table or to weigh the merits of settlement proposals.

- Lawyers will of course from their traditional role have their client's interests at heart and intervene to help protect their client's from being harmed or coerced or disadvantaged in mediation. They have an important role to play in assessing power imbalances and the appropriateness or otherwise of mediation.

- They can work with the mediator and the other party's representative to achieve an outcome in their client's interest.

- They are of invaluable help in securing the right terms in the agreement and foreseeing issues that might occur in the carrying out of the terms.

Many Issues Remain:

- 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 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.

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- 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.

- 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 practitioners 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.

- 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.

- MacFarlane emphasizes the need for lawyers who work as conflict resolution advocates to be 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.[33] 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".[34] Mentors, particularly more senior practitioners must show by example that it is ok to embrace the new conflict resolution environment.

- As early as 1982 Riskin noted that "The future of mediation … rests heavily upon the attitudes and involvement of the legal profession".[35]

- 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.

THE IMPORTANCE OF TIMING

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

A basic element in the negotiation process is willingness to compromise and Teply[36] notes that timing is essential since mediation cannot succeed unless the parties are ready to compromise.

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.

Fisher and Ury[37] 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".*

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

According to Pledge[38] 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[39].

These stages are not unlike stages of bereavement and mourning classically detailed by Kubler-Ross[40] as denial, anger, bargaining, depression and acceptance.

Wiseman[41] examined the five stages of mourning 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[42] 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 martial dissolution.

Guttman[43] 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.

Emery[44] 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.

Folberg and Milne[45] note that regardless of whether the stages in the process occurs 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.

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 failure in mediation may be a consequence of poor timing rather than of inappropriateness of the method*".

Folberg and Taylor[46] 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 experiencing intense grief at the time they see the mediator may need to be referred for professional therapy or counselling.

Undoubtedly 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 counselling can play in addressing

timing issues in divorce. Dealing with these issues provides scope for a collaborative approach between lawyers, mediators and counsellors.

In the general mediation context, Redfern comments that a "full appreciation of how time can be used to resolve a dispute is especially valuable in the mediation context". He notes that "Time limits may be imposed by corporate requirements, liquidity concerns, unavailability of witnesses or whatever, but whenever there are time constraints the party who is subject to them will usually be prepared to concede ground to resolve a matter. The party who becomes aware, even suspicious, of the other party's time constraints will usually adopt the approach of delaying the process to seek to resolve the dispute on terms favourable to it."[47]

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[29] Abid
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