THE LAWYER AND MEDIATION

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"*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

What is mediation?

There is no one single definition of mediation.

A classic definition of mediation 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."

Advantages of Mediation

- Can be undertaken at any time. You don't have to wait for the Court to be available to hear your dispute

- 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. As long ago as 1987 Sir Laurence Street (Former Chief Justice of New South Wales) in a speech at the opening of the New South Wales Law Term Dinner said "We are, I believe, rapidly approaching a stage where the professional legal costs of litigation will become

prohibitive". Of course if the mediation is not successful and the matter proceeds to trial then the cost of the mediation is an additional expense for the parties.

- The parties retain control of the outcome at all times whereas in the court process you are handing control to a third party and asking him or her to make a decision (which ultimately neither party may be happy with). In mediation, the mediator has no authority to make any decisions about separating couple's issues.

- A party is able to present his or her case and hear the other party's case at an early stage of the matter and the process allows for commercial or lateral solutions which may not otherwise be available.

- One of the great benefits of mediation to participants is privacy. If the matter is resolved the party can put the matter behind them and confidentiality can be preserved.

- Speed – the whole process can be organised and "done and dusted" quickly. Mediation is quicker than litigation and this helps the parties to avoid delay and uncertainty.

- Simplicity – the process is far simpler and more user friendly than a trial but of course this brings disadvantages with it as well as the parties don't always have the protections that a trial provides.

- Gives parties "their day in court". Whilst they won't be in Court in the usual sense, if they are listened to and have the opportunity to be heard then they can feel part of the process and satisfied that they have been heard.

- Litigation does not always provide a fair result whereas in mediation the mediator is not a Judge and can assist the parties in reaching a resolution that they are able to live with.

- Mediation is not only cheaper and quicker than litigation but may also save in terms of emotional stress.

- Mediation can help to reduce long term tension and hostility between parties and in so doing improve communication between separating couples which provides a benefit in terms of future cooperation particularly where children are concerned.

- Involvement of the parties in the decision making produces a sense of ownership and desire to see the settlement implemented.

- Mediation is a reasonably loosely defined concept and unlike the judicial process is not governed by stringent rules as to how and what the mediator and parties can do. This flexibility is both an advantage and a disadvantage.

- It is sometimes necessary however for the parties to travel some distance down the litigation pathway before the matter is ready for mediation.

Advantages of Co-Mediation

- Co mediation enables mediators to team up, combining different approaches, backgrounds, competencies, genders, levels of experience and styles,

- Sometimes it leads to increased efficiency by sharing areas of expertise, blending of styles and having two problem solvers in the room,

- More options are explored, more ideas are generated and more impasses are avoided,

- Positive communication between co-mediators can model collaborative behaviour for participants.

- However, some who have tried co-mediation express concerns about incompatibility or control struggles between co-mediators which adds to rather than reduces conflict in the mediation room.

- Co-mediation by sharing the load can reduce pressure on individual mediators,

Some Disadvantages of Mediation

- Agreeing not to litigate issues under mediation may reinforce the status quo (if the mediation fails).

- The client may be induced to make too many concessions in an effort to reach resolution.

- Time may be lost mediating. The costs of mediation are still significant and the failure to reach a resolution can delay the litigation process and simply provide an additional expense for the parties.

- Dealing directly with the other spouse may cause conflict and distress for the party. A trial while bringing its own distress also offers a certain degree of detachment.

- Mediating with the spouse may create false hopes about a possible reconciliation.

- There is generally no public accountability of the mediation process.

Is a Lawyer Needed?

- Mediation is not a substitute for independent legal advice.

- Lawyers can help their clients understand the law, make 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 by the parties as an informal working agreement. That working agreement is then referred to a lawyer for each party so that it can be checked and then drawn in final form.

How Do You Choose a Mediator

- The parties need to carefully consider the appropriate mediator before making an appointment.

- 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 will be appropriate to the dispute and the parties.

- It is important that lawyers refer clients to mediators who have undertaken appropriate training and have relevant experience.

- 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.

- Similarly if choosing a counsellor to refer a client to then again one should rely on qualifications, experience and reputation.

Collaborating with the Mediator and Other Professionals

The Lawyer Has a Role in Preparing the Client for Mediation

- Explain the process fully to the client – need to 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.

- Guide client's expectations – consider the best and worst possible litigated outcomes and address realistic expectations. There will 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 counselor or therapist to deal with issues arising on separation.

- Appropriate referrals to counsellors by lawyers can assist 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

- Consider referring the client to counselling to deal with issues arising on separation.

- 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 the mediation.

- Contact the lawyer of the other spouse to suggest mediation if mediation is considered appropriate.

- The lawyer consults on the terms of mediation with the mediator and the other lawyer and should 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 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 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 exerts to prepare and exchange reports.

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

- A sample agreement is attached.

The Mediators 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
6. any other information that may be relevant and assist the mediators

Role of the Lawyer in Different Stages of the Mediation Process

- 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.

- Sometimes a party just wants to say something in the hearing of the other party and express his or her own feelings and although this can 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.

- Agenda setting - the parties, with the assistance of their lawyers, can agree on the 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.

- Mediation requires a different mindset to the adversarial approach that lawyers traditionally apply to disputes and the lawyers should seek to not dominate air space at the mediation.

- Negotiations – lawyers of course with their legal expertise and advocacy and knowledge of the case have a real role to play in the negotiations.

- Give advice about settlement proposals.

- Give advice about any untenable positions that the client may be adopting.

- Assist clients to reach a decision and encourage the client to raise issues in mediation as and when appropriate.

- A successful outcome for mediation usually results in a written agreement between the parties which is normally quite detailed and covers all the issues raised.

- Lawyers should be alert to the possibility that their client does not properly understand the consequence of agreeing to a settlement proposal.

- The lawyers have a role to play not only in explaining the agreement but in encompassing the agreement in orders which adequately reflect the agreement reached.

- The lawyer must be careful to ensure that the client is making an informed decision unaffected by the pressure or duress of the moment. This is all the more so because the client will usually be in some 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 Lawyer Should Be Prepared

- 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,
- Sometimes a settlement is only reached through patience and persistence and the opportunity can be lost if time is cut short.

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;
    - Where 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.

Note: 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*".

Role of Lawyers Generally

- Lawyers have a role as Dispute Resolution Managers and it is part of such role to consider ADR and the form of ADR most appropriate for the particular client and their dispute and the role of lawyers in supporting each process.

- Lawyers can encourage or discourage 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*."

- They can prolong the litigation process by insisting a client can do better than the agreement or they can reinforce the benefits of compromise over a win/lose situation.

- Many lawyers no doubt fear that mediation will cut into their revenues.

- Some lawyers no doubt use it 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.

- ADR 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.

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.

Some Problems Lawyers Face in Mediation

- Failure to adequately prepare.

- 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.
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- Need to plan adequately.

- 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"*.

- 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 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.

- Lawyers have an important role to play in assessing power imbalances and the appropriateness or otherwise of mediation.

- Lack of knowledge is a primary source of power imbalance. It can be legal, financial or relate to some other aspect or implication.

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

Disclosure

- It is vitally important that there be disclosure of all issues relevant to the dispute – if financial issues are being mediated, the mediator may ask the lawyers to assist their clients in preparing financial disclosure forms.

- The mediator should be provided with full disclosure of all information pertinent to the issues in dispute.

- Lawyers can assist clients to provide disclosure where necessary and assess any disclosure given by a party.

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

  - **Demonstration of effort - the "I Wont 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 uniformed 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. 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 strong emotional issues and past failures that can complicate efforts to resolve them.

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 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 1991) 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 (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".

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

According to Pledge (1991/92) 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 (Rossiter 1991).

These stages are not unlike the stages of bereavement and mourning classically detailed by Kubler-Ross (1997) as denial, anger, bargaining, depression and acceptance.

Wiseman (1975) 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 (1993) 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.

Guttman (1993) 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 (1994) 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 (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.

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

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.

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