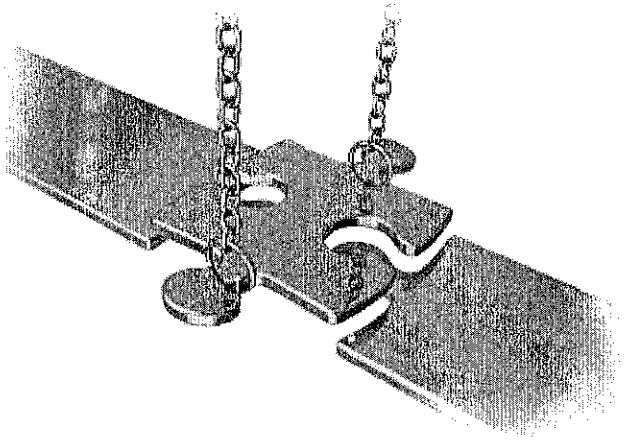
Mediation...



Mediation – It is just another step in the process isn't it?

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Introduction

This year I have reached the 30 year mark in my practice in Family Law. Being involved in family law in almost every role that there is for a family lawyer has brought me to the position that today I can assert with some confidence that change is ever present on the next horizon in the practice of family law and it always will be.

The present emphasis on mediation and family dispute resolution processes is part of that experience of change in family law.

As Family Law practitioners we need to embrace each change as it presents itself and quickly develop the knowledge and best skills to assist family law clients through the difficult experience for them and their families, as they separate and move to their future lives.

What is mediation?

Very simply put mediation brings together the parties to a dispute for a confidential meeting with an independent mediator to try and work out a practical resolution to the dispute.

At a mediation, the parties in dispute attempt to work out their own practical solution between themselves, with the assistance of a mediator. Mediations can be done using an interest based approach, a positional bargaining approach or a combination of both of these approaches. Most mediations in family law these days combine the interest based approach and the position bargaining approach. This seems to work best for most parties and lawyers.

Where we have come from

Over the past two decades in family law litigation we have seen the trend to mediate family law disputes evolve. You could say it started as a small trickle, used only by the converted brave. It then moved into a gentle flowing river as it became a useful tool for early intervention in matters for many lawyers and clients. It may now be likened to a ranging torrent where not only do litigants get to choose to voluntarily mediate their parenting and property disputes, they are positively required to do this both by the via the family dispute resolution processes in parenting matters and the Orders being made by Federal Magistrates and Family Court Judges in financial matters.

In 2006 the Family Law Act and Regulations were yet again substantially amended as part of this change in emphasis towards mandatory mediation processed. Those dispute resolution services that had long been provided free and within the Family Court itself to parties in parenting disputes through the compulsory counseling were outsourced to the Family Relationship Centres and Private Registered Family Dispute Practitioners.

Over the past two years the Federal Magistrates Court of Australia has stopped providing the parties in financial matters with in house Conciliation Conferences by Registrars as a matter of course in all matters. The Court will now only provide such in house conferences in matters where the parties can satisfy the Court that their resources are so limited as to warrant this. In

most financial matters the Federal Magistrates now order that the parties jointly engage a private Mediator and attend at their own cost, such mediation within a stringent time frame. These private mediations seem to now replace the Conciliation Conferences in most property disputes.

The Commonwealth Attorney General's Department, strongly back by the Family Relationship Centres and places such as Relationships Australia, are now seeking that a similar mandatory dispute resolution process as used in parenting disputes be introduced for financial disputes. This is currently being reviewed by the Family Law Section of the Law Council of Australia.

Family law does not stand alone in this regard, the use of mediation has strengthened in the broader legal community, in schools and workplaces to assist in the resolution of conflict.. Parties in most civil matters are now required to attend some form of mediation before they litigate in either the District or Supreme Courts of Queensland. Whether it be an estate dispute, a personal injuries dispute, a building dispute, a contract or commercial dispute, mediation is seen as a necessary dispute resolution process..

For family lawyers much of this is not new. Since the commencement of the Family Law Act in 1975 there has always been an underlying concept that parties to a family law dispute need to be encouraged, assisted and sometimes required to resolve their matter without resort to contested litigation.

Increasingly the emphasis is on keeping family matters out of a litigation process. The understanding is that the least harm done to people through separation process is the best thing for the families and for the health of our society. There is significant research data which makes this conclusion inescapable. We family lawyers need to embrace these changes to stay relevant to the needs of the community and our clients.

Many of you who have been in the practice of family law for sometime will recall these events:

- S62 Counseling
- Regulation 96 conferences
- Order 24 conferences
- Pre hearing conferences
- Pre trial conferences
- Conciliation conferences
- Case assessment conferences

How the times they are changing!

MEDIATION IS HERE TO STAY SO WHAT DOES THAT MEAN FOR ME?

It is a fact that mediation is now embedded into the practice of family law. It is also a positive duty placed upon parties to make a genuine attempt to resolve both their parenting and property disputes. As Family Law Practitioners we have a professional duty to assist our clients in this regard.

Many practitioners are now turning their minds to the question of what that means for their family law practice.

Despite the continued refrain heard in the media and out in the sometimes ill informed community, that lawyers who practice in family law fuel the dispute and are just in it to make as much money out of the dispute as possible, it is my experience that the opposite is true.

Most family law practitioners are constantly looking for ways to resolve their client's disputes in a safe and fair way for all concerned. They have embraced the use of mediation when appropriate before litigation. When court orders are made that their clients attend mediation, it is my experience that the lawyers use their skills and best endeavours to assist their clients negotiate a resolution at mediation.

When discussing this with a lawyer who attended mediation with me recently he articulated it in this way.

"I rely on referrals from other clients as the source of most of my work. You and I know that there are no happy clients if the matter has to go to court, no matter what the decision is.

If I settle matters for clients early and well then I have happy client's who refer me other like minded clients who also want to settle their matters.

If I only litigate matters then my referral base will only be clients who want to litigate at all costs and I won't get many referrals anyway.

A good mediator who assists me and the other lawyer in this process is important for my clients and my practice."

When to mediate?

The timing of negotiations is often critical to the success of the negotiations, so determining when the matter is ready for mediation is a critical decision.

Some of the following matters are those that should be considered when deciding if the matter is ready for mediation.

- ***Is everyone involved interested in mediation?***
- ***If not, why is one party reluctant?***
- ***Can anything be done to make it more attractive to them?***

Often parties want to mediate but feel that the other party has more power than they do and that because of this they will be disadvantaged. This may be the case if the disclosure process has been difficult or it is not properly completed. If that party, say a wife, has not been involved in all the financial dealings of the parties during the marriage. More than likely she feels insecure about her knowledge and understanding of the parties financial affairs and may not be ready to mediate and any attempt to mediate may not succeed while she still feels disempowered. However once disclosure is completed and valuations are available and she has had the benefit

of proper legal advice, she may embrace the opportunity to mediate and the matter is far more likely to resolve at that mediation.

If you can do so choosing the right time to mediate is the best option. If that is not possible then the considering the steps needed to be completed for a successful mediation is essential to a mediation that meets the needs of both parties.

At times this decision of when it is the right time to mediate is often not left within the control of the parties or the lawyers. This is the case when the Court makes an order for mediation to occur and sets a timetable within which the mediation has to proceed as ordered.

My experience is that most lawyers and parties still embrace the opportunity to negotiate at court ordered mediations in the same way they do when they get to decide when the mediation should be held.

The steps to get to successful mediation

- Choose the right Mediator
- Set aside sufficient time for the Mediation
- Prepare your client for Mediation
- Narrow the issues as far as possible with disclosure, valuations, single expert reports etc
- Prepare a powerful position paper
- Get into the zone of bargaining with your client before the mediation begins
- Do not take a bottom line or fixed position approach to the outcome or allow your client to do this

Choose the right Mediator

Each case and every family have differences and there are different issues that need to be resolved at mediation. It is important to ensure that you consider the elements of the dispute carefully in each case so that you choose the right Mediator. It is not the case that one Mediator fits all disputes or all parties to the dispute.

I recently did a mediation where the pool was small and largely agreed and the legal issues were not very complex, it had been a long marriage without any extraordinary contribution issues. However the underlying emotional difficulties and the anger of the husband surrounding separation issues were very complex. It was very clear that he did not either like or trust his wife or any woman. His wife's lawyer was a woman. Then I was chosen as their mediator.

In that instance the husband was able to justify to himself that he could reject every proposal put forward by the wife's lawyer who was female. From the outset of the mediation he was rude and dismissive of me. He could not deal directly with me without quickly descending into attack and anger against woman, seeing me as aligned with his wife and her lawyer (both women). I felt that this mediation was doomed from the start. It was clear that it would have been much better for the whole mediation process and for both parties to have chosen a male mediator who may have been seen as more relevant and more acceptable to the husband in that case.

It is an important and expensive step for parties to engage in mediation. The choice of Mediator is a critical one. It is useful therefore if the lawyers involved for both parties can openly and honestly discuss the skills and strengths of the three Mediators placed on the panel provided and try, as far as possible, to choose the Mediator who best matches the ingredients of the particular case to be mediated.

Find out as much as you can about the Mediators qualifications and methods and evaluate as best as you can if he or she is right for your client and your clients case.

Some of the things to look at when making the choice of Mediator are

- Style
- Familiarity
- Focus on Settlement;
- Expertise in the subject matter
- Training and experience

Style

It is often said there are different types of mediators. There are those who facilitate the process and those who evaluate.

Facilitators refrain from expressing any opinion about the merits of the case and will work to promote the communication between the parties to help them reach a mutually acceptable resolution.

Evaluators will express an opinion on what a case is worth or on the respective merits of the competing positions.

The best Mediators will use an approach that draws upon both of these styles according to the needs of the case and the needs of the parties. The evaluation process is best done as part of the risk analysis process in the later stages of mediation and should not be done in a manner which allows the Mediator to tell a party what they should do. The mediator may often use the evaluative process to assist the party with their lawyer to understand the strengths and weaknesses of the position they are holding in order to see if they understand the consequences of holding fast to that position and to encourage them to move from that position.

The Mediator must have good communication skills and be able to assess issues, assess problems and generate solutions. They must be able to actively listen and have good problem solving skills. Much of this has to be done on the run. They need to be able to work with complex information and figures and do calculations quickly and accurately during the mediation process.

They must genuinely be able to get on with people from all types, socioeconomic backgrounds and cultures. They must not be rigid in their thinking or judgmental in their approach to the parties positions.

Focus on Settlement

A mediator must be able to maintain their focus on settlement. They will be constantly evaluating where each party has moved and compromised. How the mediator can move parties forward from positions, how they may be able to use techniques such as widening the pie or breaking through impasses. Being outcomes focused is a skill they must possess. The Mediator must be able and willing to keep trying different strategies and approaches and must not give up too easily.

A mediator must prepare the matter and be willing to put in long hours if that is what the parties and the matters requires of them.

Subject Matter Expertise/Training and Experience

While it may not be essential it is I think very important to have a Mediator with expertise in the subject matter of the mediation. The lack of this experience can mean the parties or the lawyers may not respect them or their evaluation.

Also it is important that the Mediator is not able to be made to feel at any disadvantage in the process particularly where you have very experienced family law practitioners in the mediation. They must be able to quickly maintain control of the mediation process and will sense if there is one or other of the lawyers who clearly know more about the subject matter in the mediation. Given the complexity that surround issues such as how to treat initial contributions made, how to deal with inheritance and gifts or the importance to a party of the future needs component in a given matter, this can make or break the success of the mediation negotiations.

I often think that it is sometimes more about what you do not know that can cause the problems in financial mediations. For example, while parties and lawyers may know of the importance of matters such as CGT, wider tax implications in corporate structures or the costs of doing the deal proposed, if the mediator really understands that there are matters that need more careful consideration before the proposal is put forward, this can aid the getting to a durable settlement at mediation.

It is also important to have a mediator who not only has the initial training as a Mediator but is prepared to keep themselves up to date. A good way of knowing these things is to see if they are accredited. A nationally accredited Mediator has to satisfy stringent training requirements in each two year period.

The Length of the Mediation

Be realistic about how long the mediation will take. I have had requests in the past from lawyers who only want to book in mediation for half a day. There are clients who are anxious about costs and they are looking for a cheaper option. However this can be counter- productive. If you think about what is involved in a family law mediator you will probably see quickly that half a day is not going to be sufficient.

Each party needs to tell their story to the Mediator (even if you have prepared a position statement for them). In family law the client needs to tell their story and believe that important people they engage with least knows where they are coming from. This is critical to the Mediator developing a rapport with your client. If that does not happen quickly then the Mediation process will not work successfully.

Remember that the mediator will usually not have seen the parties before the day of the mediation. The parties need to get to know the Mediator and the likewise the Mediator needs to get a feel for the parties within the first hours of the mediation.

My experience is that most successful mediations take on average the full day. While this varies from case to case, those mediations where half a day has been booked, it has invariably been the case that the mediation has taken considerably longer than four hours. This can often cost more in fees for the mediation. If it a fixed fee and the time is exceeded, then either the mediation will just end without conclusion or if the Mediator and other involved can stay longer then an hourly rate is applied. This will usually mean the fees end up being more than if a full day was booked with the applicable fixed fee for the day being applied.

I can also say that I have had lawyers tell me "we only need half a day as it is simple case. We should know in a couple of hours whether it is going to settle or not".

As I said the "couple of hours" approach is usually not realistic. You need to come to mediation with an open mind. There may be underlying issues in the case that neither of the lawyers have yet identified. What may seem simple to lawyers may not be simple to their clients. Also the clear message in that statement above is "were pretty sure we are right and we will only mediate for a couple of hours to see if you can convince the other side of our position. If not after that we are going to leave." If that is the mindset coming into the mediation it is not likely to settle.

In those types of matters I ask myself, "well if it is as simple as that, why haven't two good lawyers been able to settle it?" I am sure all of you have had the case where the assets to be divided are very limited and the facts are simple and clear but it does not settle. In such matters each party have fewer options available to settle the matter and a far greater stake in getting the most they possibly can from that small pool. These can present far greater problems in settling the matter than a larger and more complex asset pool.

Often one of the impediments to settlement will not about what someone is going to get or even the legal of factual issues. It is about other underlying issues that are not found in the position statement. These are issues that will never be relevant to a Court in determining the matter but we all know that we ignore them at our peril.

I recall a matter where the parties had separated after the husband was diagnosed with a serious degenerative illness. He was not from Australia and the wife and her family were his only close relatives. The wife had an affair and left the marriage. He was living in dreadful circumstances. She had the children and was very emotionally distraught. He told me in the intake that he relished going to Court. When his lawyer and I examined this and explained what

the Court could and could not do, he was able to let go of his fantasy that the Judge was going to vindicate him in his pain by telling the wife she was a demon who had abandoned him in the worst way in his greatest hour of need. I call this "myth busting in mediation".

This is where the lawyers can assist the mediator by being honest and realistic about the timeframe for the mediation. You know your clients very well by the time the mediation is held. You know if they have "other" issues that impact on their ability to settle. You need to properly take these matters into account when determining the length of your mediation.

All of these things take time for clients to process at mediation. It is best to settle early than to run out of time.

Preparation

As it is more often than not the case that the mediation has to be arranged and take place within a limited time frame required under the terms of a Court Order, then the key component to a successful mediation is preparation.

We all know the saying *"Poor Preparation leads to Poor Performance".*

It is true. Lack of preparation is one of the main reasons that mediations I have been involved in have failed to bring about a resolution. Preparation for mediation is as important as preparation for trial.

The mediation usually represents the best settlement opportunity for the parties. It occurs before they lock down into their positions, prepare for trial, instruct Counsel and reach the door of the Court. By that time we know that much of the damage is done to each party personally. Significant damage is done to their future relationship as parents by then. Certainly most of the costs are spent. If they are going to mediation either pre-litigation or before a trial date is allocated to them, then it is critical that they be given the best chance to settle the matter.

Prepare! Prepare! Prepare!

I know I am harping on the same point. I will devote a lot of this paper to this area.

In the mediation where it is obvious to me in mediations that clients have been properly prepared by their lawyers it are able to move into meaningful negotiations much more quickly than clients who really don't know much about why they are at mediation.

The following lists of steps are those you should consider doing with your client before each mediation. This list is not exhaustive but aims to provide you with some guidance:

- Make sure you carefully explain the terms of the Mediation Agreement with your client.
- Have your client read all the information the Mediator has sent out before the mediation.
- Ensure your client knows how much the mediation will cost and how the fees are to be paid.

- Explain the concept of confidentiality to your client and any other person who will attend the mediation with your client. Go through those provisions in the Mediation Agreement carefully and check that they understand them.

- Discuss what mediation means e.g. it is not about winning or losing but a chance to compromise and resolve the matter.

- Go through the advantages and disadvantages of the position your client holds going into the mediation to get them thinking of the reality of negotiation and the concept of compromise prior to the day of mediation.

- Tell them about the true delays in the litigation pathway and court systems.

- Discuss with them the intangible benefits of resolution outside court, such as control of outcomes, minimizing stress, minimizing the damage to their ongoing relationship with the other party where they share children together, getting on with their lives and the danger of lost opportunities while the matter proceeds through Court.

- Give them an honest and clear assessment of the costs if the litigation proceeds to trial.

- Advise your client of the Mediators role and your role at mediation. Make sure that your client understands that you are not there to put his/her case as if the matter were in Court nor are you there to convince the other party that you are right. It is important that they understand that their lawyer is there to assist resolution and plays a very different role than being only their advocate.

- Discuss with your client the process of the mediation, that is what happens on the day of mediation. Whether there will be a joint opening session, will it be a shuttle or joint mediation and what each of those means to your client.

- If there are to be joint sessions prepare your client for what might be said by the other lawyers so they do not get angry or distressed when they hear things said at mediation.

- Make sure all valuations are done on assets where the value of major items of property are in dispute. If there are minor items in dispute, discuss ways that compromises may be reached on those values, such as, the use of the Red Book value of vehicles.

- Try to reach agreement with the other lawyers prior to mediation about how to overcome valuation or disclosure disputes.

- Prepare the list of assets and liabilities and ensure your client is familiar with that list and highlight with them the items that are still in dispute and the need to look for compromises on the values.

- Have your client provide you with a list of goals and concerns for the mediation and help them put these in some order of priority.

- Do not tell your client "just go along and see what happens". This will ensure they are only a passive participant at mediation not a proactive participant.

- Give your client an assessment of the legal strengths and weaknesses of their case.

- Discuss with them the legal principles in their case; particularly where they are at issue with the other party on matters such as initial contributions, inheritances, future needs, add backs etc.

- Discuss with your client the sorts of offers they might make at mediation (soft offers, hard offers, interest based offers, target offers and bottom line offers.

- Discuss the negotiation style of the other lawyer if that is known to you.

- Most importantly, work on the basis that the more fully informed your client coming into the mediation and the less surprises your client receives at the actual mediation; the better they will be able to engage in mediation and focus on the task of compromise and negotiation.

Your client's role at Mediation

I would also suggest that you discuss how your client will conduct themselves at the mediation.

Again I provide some suggestions you could discuss:

- Ensure they know the Mediator cannot be asked what should happen or what outcome the client should seek.

- Tell them honestly what to expect from the other side and how they should react to this. At times I find that a client will be very antagonistic to the other lawyer in the matter and this is very unhelpful to the process.

- Tell them to try not to personalize the case and try to separate the people from the problem.

- Be prepared to admit if the other side has merit to things they may raise at mediation.

- Keep an open mind and don't adopt a fixed or bottom line approach.

- Be reasonable and courteous as people are much more likely to compromise if that is the approach they take.

- Explain to them about creating good will at their mediation, how this can be done and how this will enable to other party to respond in a similar way. Likewise explain that if the

mediation becomes a process where neither party is willing to give ground nor move from their starting positions then the mediation will not succeed. This will help them from locking down early into an immoveable position.

- Ensure your client really does understand that the Mediator is not there to tell the other party where the position they are taking is wrong and where they are right. This is a common issue at mediation. A party can expect the Mediator to go and tell the other party that they are getting it wrong and they should change their approach. They need to understand this cannot happen.

- Explain to your client that it is important that he/she does not exaggerate, take the high moral ground or make false statements at the mediation, as they will lose credibility if that happens.

- Make sure that your client has given the other side everything they have asked for in disclosure prior to the day for mediation. Nothing will delay mediation more than when the first two hours are taken up with a Mediator shuttling disclosure documents back and forward between parties.

- Make sure that your client is prepared to stay until mediation is over on the day. Parents will become unfocused and anxious if they have not anticipated that they may be at the mediation after school hours. Ensure they have made proper arrangements for care of their children.

- Prepare your client in the event that the matter does not settle at mediation. Explain that mediation is part of a settlement process. Many matters that do not settle on the day of mediation will settle soon after using the goodwill and impetuous that mediation has created in the negotiation process. It is important clients do not become discouraged or angry if the matter does not settle. It is important that they do not become entrenched back into their positions even more firmly then they were before mediation if the matter does not settle.

- Explain to them that they do not need to persuade the Mediator to the "rightness" of their position or try to enlist the Mediator to their view of the dispute and that to do so simply wastes time and causes them distress when a good Mediator will not engage with them in doing this. If this is not done in the preparation for mediation then your client may feel that the Mediator is not on their side and therefore not to be trusted.

- Last but by no means least, explain to your client that they will need to be patient as the Mediation process cannot be rushed. Many people at Mediation get impatient while waiting for the other party to consider their offer or formulate their counter offer. This often occurs because the other party may have further to move on the day of mediation or the other party may be more emotionally distressed at mediation. Patience is often required of the other party in these instances.

I cannot stress enough the importance of preparing your client for Mediation. It is your client who at the end of the Mediation will need decide whether they accept the deal and settle the dispute.

If they are not prepared for the Mediation they will not be able to take full advantage of the process and this will impair their ability to get the most out of the Mediation. Further if your client is well prepared for their mediation they will enter into a durable agreement and you will not receive that dreadful telephone call the next morning when they say, *"the deal if off. I have thought about it and....."*

Preparing the Position Statement

The purpose of the position statement is to educate the Mediator about your client's case, to demonstrate the strong points and set the stage for successful negotiations. As this is given to the other party, do not provide a position statement which denigrates or antagonizes the other party or their case.

Remember what the goal of mediation is when preparing the position statement. It is to end the dispute. Many position statements I see appear to have the objective of inflaming the dispute. Name calling, accusing people of lying or expressing outrage at another position will drive the parties further apart.

Remember when preparing this document that mediation is intended to be time out or a side step from litigation. Be productive and problem solving and not litigious and inflammatory in your position statement.

Doing it in the form of a letter is a good idea. Identify key issues and areas of agreement and disagreement to assist the mediator prepare for the mediation.

In Family Law Mediations the position statement should include:

- The length of the relationship
- Particulars of any children of the relationship and details of their care arrangements and the financial support provided by each party
- Chronology of the relevant issues
- The initial contributions made by each of the parties
- Particulars of gifts or inheritances made to either party
- Other relevant contributions made by each party both financial contributions and those made in their role as homemaker and parent
- If applicable, particulars of relevant post separation contributions
- Relevant matters in the assessment of each parties future needs

Exchange Position Statements

Position statements should be exchanged and preferably two working days before the Mediation. Try not to exchange the position statement on the day of the mediation or only give it

to the mediator that day as this will cause a delay in starting the mediation while everyone gets on top of your position statement.

If the other lawyer and party need to assimilate your clients position on the morning of the mediation then this is going to put them on the back foot and is likely to impede their ability to negotiate successfully. It is my experience that position statements usually contain matters that upset the other party. To start a mediation in that way is not either in the spirit of a mediation or helpful to the process. It does not advance your own client's chance of getting the best outcome from the mediation if the other party and their lawyers feel they have been put on the back foot from the commencement of the day.

Intake and Rapport Building between the parties and the Mediator

I like to spend at least half an hour at the beginning of each mediation with each party separately to try and build some rapport with them. The more you as their lawyers have told them about the Mediators style, process and background the easier this will be for your client and the Mediator.

Also if your client has been well prepared and hears the Mediator saying things that are consistent to the things that you as their lawyers have already told them this enables them to feel comfortable and at ease in the process. If they hear everything from the Mediator on the day of mediation, this will make it more difficult for them to understand what is required of them at the Mediation.

Who should your client to bring to the Mediation?

Identify honestly with your client if they have someone in their lives that they will not settle or cannot settle without their approval. There is nothing worse than thinking that the matter is progressing well towards settlement to then have your client ring their partner, parent or some other third party and find that the settlement process is derailed by that person. I am a firm believer that if they are part of the problem then the smart thing is to make them part of the solution to the problem.

The benefits of bringing those people to mediation are that they travel the same journey as your client through the whole mediation process. They are involved in all decisions to compromise. They then own the process along with your client. They are not likely to derail the process if they have been party to the process. While they may not be able to be present in any joint sessions they will be privy to all separate meetings your client has with the mediator and also with you at the mediation. Their understanding of the journey will be as complete as it can be.

Also it is a long and difficult day for most parties and they can find it eases the experience if they have a friend or family member to support them through the mediation.

If a support or third party does attend with your client at the mediation ensure that you have them commit to and fully understand the confidential nature of mediation. Ensure that they understand that they are also bound by the confidentiality requirements of the mediation.

Also advise the Mediator and the other lawyer prior to the mediation that your client will be bringing along a support person and why you believe this is necessary. Likewise if you wish to bring a work experience student or para-legal advise the other lawyer and the Mediator in advance of the day of the mediation. Make sure that such people understand that they are also bound by the confidentiality requirements of the mediation.

Recently I did a mediation where one party was in person. He brought along a family member who told me that he had also been involved in his own property settlement matter. Initially I was dealing with two very oppositional people in that room. As the day progressed I shamelessly used him to assist me in the process and he became my best ally in settling his brother down, making him look at a realistic options and explaining different positions and strategies he might use to address impasses. He assisted me to work through the figures and discuss all the available options with his brother who was emotional and angry. He knew his brother much better than I ever could. He knew the way to approach the offers that were being put and to settle his brother down when he could not focus and wanted to walk out and end the mediation.

If there are complex issues of tax or accounting issues then it may assist to bring along your client's accountant. At times it is useful to have professional support people on the end of the telephone and available to your client to consult with if they need to do this.

If your client wishes to purchase an asset but needs finance to do so, ensure they have made all necessary enquires of their proposed lender before the mediation so that they know the extent of their capacity to borrow as this may shape their offers to settle. However for some clients this can become a lockdown issue. Make sure your client understands that the matter may not settle for the limit of their borrowing capacity and they may need to look at options which include sale of that asset or the other party retaining the assets they may wish to keep. If the clients have explored all these options before the day of the mediation they will have a more realistic approach to problem solving the matter at mediation.

Offers at Mediation

Who makes the first offer?

There is no magic in who makes the first offer. Many people may see an advantage in setting the first parameter in the negotiations of the day. Alternatively one party may genuinely have no idea of the other party's position in the dispute or what they want. They may then need the other party to make the first offer in order to be able to gain this information.

Well prepared position statements should overcome that sort of issue and each client should know the other parties BATNA (Best Alternative Outcome to Negotiation) as this would be set out in the position statement. Clearly if that has occurred then each of the parties are in the position where they will be ready and prepared to start to negotiate. Recognise that people are likely to be starting at extremes in their position statements and the early offers made at the mediation.

Prepare your client for receiving offers they may not like to hear. A Mediator is bound to bring your client any and all offers made and to explain to the client the basis of each offer made. I

often discuss with the parties at intake that this may happen and discuss with them what will help me as I do this in the mediation process. One thing I will always say is not to personalize the offers made. If your client personalizes the offers they will not be able to focus on working on making counter offers. For example I will hear things *like "is that all he/she thinks I'm worth after 30 years of marriage to him/her"*. My response to this is to gently say "*no it is just their first/next offer*".

Family law is a very emotional area of the law. Parties need to retain the ability to analyze each offer as it is put to them. They need to stay focused over a long day. Many parties will not have even seen the other party since separation until the day of the mediation which adds to emotional strain they will be placed under at Mediation. Make sure you take your clients emotional state into account in processing offers and formulating counter offers at mediation.

Making offers in the "settlement range"

If matters are going to settle at mediation most good family law practitioners will know what the settlement range or the bargaining zone. That is when both the offers, given the known facts of the dispute, fall within the likely range of supportable outcomes. Getting into this range will make the matter more likely to settle. The longer parties or one of them stay outside this range the harder it is to settle it. The reason for this is if one party is being very unrealistic then the other party will feel that if they make realistic offers too quickly they will be driven to their bottom line giving them no further room to negotiate or they will be put in the position of their client looking unreasonable as they have no further offers to make.

If this happens then the Mediator needs to discuss in private sessions with both parties and their lawyers what is happening and discuss with them what can be done to move the matter more quickly to the "settlement range". I am very upfront and honest with the parties and the lawyers if this starts to happen as it causes significant time wasting at the mediation and the risks of the more realistic party just walking away is very high. Identifying what is happening with everyone involved allows that party and their lawyer to feel comfortable that the Mediator has this under control.

The difficulty may come about if someone has a very unrealistic view of what the outcome should be and the Mediator needs to handle these situations with extreme caution. If it is the party who is unrealistic this may be very different from the position where the legal advice they are receiving is not within the settlement range. Mediators are not decision makers and they do not have magic wands. They have to deal with the matters as they find them. Be prepared to enter into honest dialogue with the Mediator and the other side about why these things may be happening in the mediation.

What you can learn from mediations

The process of mediation is negotiation but it is also an opportunity to learn. As I have said it is as important to properly prepare the matter for mediation as it is to prepare the matter for the trial. This means that you should be fully informed and armed with as much information at

mediation as you would be for a hearing. Unfortunately this is often not the case and the mediation process suffers as a result.

You will see the other party perform and get feedback from the Mediator about how they present on particular issues in dispute. This can be very important information to have when discussing the risk to your client of proceeding with litigation.

You will also learn about the strengths and weaknesses of the other parties case. The mediator will discuss various strengths and weaknesses of each parties positions towards to the end of the mediation. This can allow a party to understand that their case will not be the only one that is important in a consideration of the matter if it proceeds to litigation.

This has often been a very important feature of mediation. Your client may have convinced you that the other party is a certain sort of person and you are formulating your advice and strategies based on this information. When you have the chance to meet the other party and see how the parties each perform at the mediation it gives you an invaluable insight into how they and your client may present if called upon to be cross examined in the witness box at trial. There is often no other opportunity a lawyer gets to assess these matters other than at a mediation.

Risk analysis and techniques to break impasses or bridge a final gap

Risk analysis

Towards the conclusion of the mediation if parties are stuck they are also often unable to see that the position they wish to maintain is one with significant risk to them. If at that time an offer is on the table from the other party which is one you are concerned your client should not readily reject, it may be sensible to ask the Mediator to undertake a risk analysis with you and your client.

This is when it is appropriate for the Mediator to give an evaluation of the strengths and weaknesses of the current position held by each party at that point in the mediation.

In my view this should be done only in separate meetings with the party and their lawyer and not in a joint session. To do otherwise will alienate the party who may need to feel secure and look at the evaluation with an open mind. That party should not be humiliated or made to feel in anyway under attack.

It is important once a clear evaluation is done by the Mediator for the Mediator to withdraw from the room and allow you and your client to discuss the evaluation to see if your client then wishes to put alternative proposals in order to keep the negotiations alive.

It is important that the Mediator then does the same evaluation for the other party and their lawyer so that the Mediator remains neutral and impartial.

Breaking through impasses

Be prepared to look for solutions to impasses in the negotiations. Share your ideas with the Mediator. Get your client to look at a variety of solutions. The best way for this to happen is if both lawyers and their clients are well prepared on what they will have to do to make mediation successful.

The mediator may wish to widen the scope of the parties discussion by introducing into the negotiations more needs based outcomes. The mediator may discuss with one or other of the parties a way in which they may widen the pie.

The last dance

This occurs regularly at mediations as parties have to accept that it is most likely the final loss of conflict or the relationship. It happens in family mediations due to unresolved emotional issues between the parties and will most usually present over an item or issue that to the lawyers can seem immaterial and petty but to the party pursuing the issue for all the wrong reasons, it can become the deal breaker.

This is where good work done by the lawyer with the client in preparation will assist. Also I usually address some of these scenarios with the clients in my intake or opening so that I can without attack or rancor refer them back to the statements I made at that time and the clients response or commitment to work through this sort of thing if it arose. That is always a useful technique for the mediator to be able to say *"you remember we talked about how this sort of thing can happen about this stage of the mediation and you thought that if it did we could deal with it this way".*

It is useful if you with your client in your preparation talk openly about how these things can and probably will occur. Late in the day after a long day in mediation when significant compromises have been made it is easier for clients to let go of these impasses if you and the Mediator can address them as a usual part of the process that was discussed with them in advance, rather than in a weary and impatient manner with a fed up client who feels they have made the last possible concession or compromise they can make.

I often will take the client and lawyer to another room than the one they have been working in throughout the day to provide a change in focus. It is useful for the lawyer and mediator to use the whiteboard or butchers paper to help the client understand the gains and advantages they have achieved in thus far in the mediation and not just the losses or concessions they have made.

If there has been a very significant gain made by your client early in mediation which they risk losing if the negotiations break down, this will be the time to revisit that with your client and remind them of this. In negotiations that run over the full day, clients can often forget how hard they fought to get something once they had actually got the concession made and the matter agreed to. Using the technique of revisiting and reminding them of these gains can refocus the client and help them move over the last gap.

An example of this.

The parties had been separated since 2007 and had sold a property which had netted them $380,000.00. In around 2010 they had each received half of those sale proceeds of $190,000.00. The husband had used these monies to buy a real property which still had a value of $189,000.00. The wife had used the monies for various things and only around $74,000.00 was still available in assets in the net pool. Early in the mediation the wife conceded that she would agree to reduce the pool by leaving out the $380,000.00 and conceding that each of the assets which were attributable to those funds would be left out of the pool and kept by the party who then owned them. This was an important concession for the husband. Late in the mediation when he got stuck on whether he would bridge the gap of the last 2.5% in the offers, which in real terms represented only about $32,500 I was able with the help of his lawyer discuss with him the wisdom of losing the negotiations which had left out $189,000 in an asset that he could not be certain would ultimately be left from the pool or arguing about an amount of $32,500.00. After he thought this through he was able to happily move over that last gap.

Documenting the agreement before leaving the mediation

- Heads of Agreement
- Consent Orders
- Binding Financial Agreement
- A combination of all of the above

Think about how you propose to document any agreements reached at Mediation before you attend on the day.. Do you propose to do a Binding Financial Agreement, Consent Orders, Heads of Agreement or a combination of all of those?

Most lawyers will wish to have the parties sign Heads of Agreement or Consent Orders at the end of the mediation. If Consent Orders are proposed then bringing along a proposed draft of those Consent Orders in a format which can be amended once the precise terms of the agreement are known is a good habit to develop. That then cuts down on the potential for parties to want to revisit the terms of the settlement when final documents are drawn by their lawyers. This is not always possible as details as to which party will retain which assets and liabilities may not be clear or possible to predict in advance.

There are of course real difficulties in the parties signing a Binding Financial Agreement given the obligations under the Family Law Act to provide the detailed advices that do with those being signed.

If your client signs the Heads of Agreement then make sure you tell them these are not binding if the other party changes their mind. That it may however be used to support an application for a costs order to be made either against them or the other party and that the agreement will only become binding once the Consent Orders are made by a Court or the Binding Financial Agreement is signed by both parties and each complies with the requirements of the Family Law Act.

Discuss honestly with your client the concept of what I call "Settlers Remorse". This is particularly important if your client has played hard ball in the negotiations and the other party has moved down to the bottom of the range to get the matter settled. Your client needs to understand that such settlements are often not durable and will fall over once the other party leaves the pressured environment of mediation and has time to reflect on what concessions they had to make in achieving that settlement.

I find that in those mediation where the parties do not sign a Heads of Agreement then there is a greater chance the settlement will not endure until the required Consent Orders or Binding Financial Agreements are prepared and signed.

The devil is in the detail. Make sure you do not inadvertently leave things out of your client's offers to settle and then expect these to be inserted in the final Heads of Agreement. It is important for each lawyer to keep a note of the offers and counter offers made so that when the time comes for preparing the Heads of Agreement at the end of the mediation there are no nasty surprises that may derail the overall settlement. If something is important to your client it is best to make sure it is clearly outlined in the final offer made.

Conclusion

All of us know that most matters will settle without the need to proceed the whole way down the litigation pathway.

Mediation is now accepted by lawyers, members of the wider community and by Courts as being a superior form of dispute resolution.

If Mediation is not seen as just another step in the process or just another hurdle to jump in your clients journey to the Judge or Federal Magistrate then this will be a powerful instrument to achieving a good and durable settlement for your clients early and before they have invested too much of themselves, their ongoing relationship with the other parent to their children or their hard earned money in the destructive dispute.

To achieve this each lawyer needs to take a different approach to the one adopted in litigation. The skills you need in a courtroom are counterproductive in mediation. If you prepare thoroughly, think about your client's dispute carefully, prepare your client well, adopt an open approach, have patience and are willing to compromise and problem solve you will find that mediation will be an important part of the dispute resolution options you can offer to your client in family law matters.

In conclusion I leave you as I started, with the words of that great man, Abraham Lincoln...

"Discourage litigation. Persuade your neighbours to compromise whenever you can. As a peacemaker the lawyer has superior opportunity of being a good man (added by me ..."or woman")".