FAMILY LAW DISPUTES: TO MEDIATE OR LITIGATE

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GOAL

To encourage parties to take responsibility for making their own decisions in a controlled process which encourages negotiation and allows parties to promote their own interests and thereby adjust their positions and views in a common effort to achieve a mutually acceptable outcome.

THE INCREASED IMPORTANCE OF MEDIATION

- Historically the practice of family law was almost purely an adversarial process
  - Settlement negotiations were conducted on an ad hoc basis between lawyers and their clients
- Introduction of Legal Aid Dispute Resolution Conferences
  - Initially chairpersons had no mediation training
  - Conferences were initially imposed upon lawyers acting for legally aided clients; although, eventually the process was accepted and encouraged by lawyers acting for legally aided clients
- Until relatively recent times, there was a lack of any real acceptance by lawyers acting for "private" clients to incorporate private mediations as part of the process in trying to reach a resolution; albeit there has been a significant cultural change in this regard of recent times.
- The decision by the Family Courts (particularly the Federal Circuit Court and Judge Baumann in particular) to embrace mediation as part of the Court process has further entrenched mediation as an increasingly important part of the Court process and, in doing so has impacted upon the manner in which family lawyers seek to represent the best interests of their clients.

Most significant event for the client?

- Interim Hearings
- Final Trial
- Mediation

Why are private mediations more successful than Court Conciliation Conferences?

- The Registrars conducting conciliation conferences are subject to time restraints as opposed to private mediations where such restraints are not normally a factor.
- There is a risk that the conciliation conference is seen by the client (or lawyer) as simply a hurdle to be overcome on the way to a Trial.
- In a private mediation the parties having a personal financial investment (at market rates) and therefore a greater investment/motivation to attempt to find a solution.

MEDIATE -v- LITIGATE -- WHY AND WHEN SHOULD I MEDIATE?

Advantages of mediation:

- There is no restriction on when you mediate, therefore timing is flexible.
- Given the overall success rate of private mediations, considerable expense can be avoided by parties.
- There is a minimization of the personal cost to parties in proceeding through an adversarial process, for example:
  - the parties may become more positional and/or conflicted as the litigation proceeds;
  - the parties are left to "pick up the pieces" at the end of the process.
- From the lawyer's perspective the longer the litigation/conflict proceeds:
  - the greater the risk that the client may develop a convenient recollection of your legal advice;
  - there is an increased risk of greater dissatisfaction with the lawyer and the legal process (a victim mentality can appear such that they take no responsibility for the eventual outcome).
- Parties have control over the outcome of the mediation which is an interest based process.
- Greater flexibility in solutions available to clients through mediation as opposed to litigation.
- Given that the process is completely without prejudice it allows the parties to be more comfortable in seeking a compromise.

- The unknown factors are minimised, for example:
  - Being able to prove your case
  - Performance of your client under effective cross-examination
  - Who is the Judicial Officer?
- Better prospect of the parties being able to cooperatively co-parent into the future as a result of the conflict between them resolving earlier rather than later and therefore a consequent minimization of potential damage to their children.
- Benefit to lawyers – financial return of early settlement as opposed to lengthy adversarial process; higher degree of client satisfaction, word of mouth advertising; actually getting paid!

Disadvantages of mediation:

- Greater expense if unsuccessful and the matter needs to proceed to Trial anyway.
- There is potentially a risk to the client who wishes to "settle at all costs" – the importance of effective legal representation at mediations in such circumstances cannot be overstated.
- The undisclosed agenda
  - The mediation may be used as an effort to continue a quest for reconciliation; or
  - As a delaying tactic; or
  - A fishing expedition; or
  - As a means of imposing greater financial pressure upon the less financially independent party.

WHEN TO MEDIATE

- Divorce is a process rather than a single life event.[1]
- People who separate usually go through a number of phases:
  - denial
  - anger
  - bargaining
  - depression
  - acceptance
  - moving on

  Therefore, given that one party may be in a far more emotionally secure position than the other, the timing of the mediation may be important.
- Mediation prior to the initiation of Court proceedings (assuming adequate disclosure has been made for that purpose) has a number of advantages:
  - clients are less likely to be as positional
  - clients have incurred less legal fees
  - there might be a greater acceptance of other interventions (eg therapeutic interventions in parenting disputes).
  - the client's personal functioning may not be as compromised as a result of ongoing conflict and therefore be better positioned to take a more objective approach to their problems. It should be remembered that decisions made by people in conflict can be short lived, irrational, simplistic and unpredictable.
- It is accepted however that some clients need to "get a taste of the litigation process" before they are ready to mediate.

CHALLENGES, PITFALLS AND TIPS FOR SUCCESSFUL OUTCOMES

What to look for in a mediator (some thoughts):

- Some degree of recognized expertise in family law and mediation is important if an evaluative approach is adopted.
- Trustworthy and able to inspire trust.
- Empathy (balanced with a degree of cynicism) coupled with an ability to:

[1] Folberg and Milne 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 and grief process at the same time or travel through it at the same rate (Folberg, Jay and Milne, Ann. 1988 *"Divorce Mediation Theory and Practice"* New York; London; The Guildford Press.

- Deal with parties in high conflict; or
- Possessing varying emotional investments; or
- Having hidden agendas

- An ability to establish a rapport with the parties quickly ("walk with Kings and relate to the common people")
- Be organized and prepared.
- Guide discussions in a positive way without being dictatorial;
- Impartial (perceived and actual).
- Comfortable in dealing with difficult matters.
- 100% effort every time.
- Be aware of the historical nature of the parties' relationship (power imbalances) and adjust the process to help achieve equality in bargaining positions.
- Not a bully.

LAWYER'S ROLE / CLIENT PREPARATION AND REALISTIC EXPECTATIONS

Prior to mediation

- Explain process to client
  - If not sure, speak to mediator
  - If necessary, introduce a new mindset (conciliatory -v- adversarial)
  - Inclusion of third parties?
- Enthusiasm is infectious – promote the process as an opportunity to finalize with dignity intact – be positive.
- "Risk analysis" – WATNA, BATNA, PATNA – confirm realistic expectations.
- Understand and be comfortable with the process (presentation to client). Having already established a rapport and hopefully earned the trust of your client can assist you in guiding them if and when the process becomes difficult and challenging.
- Disclosure – robust approach is required (what really needs to be clarified? – be wary as disclosure or lack thereof may be used as a tactic to avoid and/or unnecessarily complicate/procrastinate – read the discovered material and identify anything that might need clarification.
- Encourage your client to seek a compromise – discuss tactics and anticipated responses/interests of other side – have a "plan B". Remember "The problems that exist today cannot be solved by the same thinking that created them"2 .
- "Heads up" to mediator – DV issues; difficult/emotionally vulnerable client etc.
- Turn mind to preparation of brief to mediator
  - Joint? If so, the drafting of the instructions needs to be objective and non-inflammatory.
  - Timely delivery to mediator;
  - How much to be included?
  - Relevant material only – chronology/4 step analysis (property matters) – a summary as opposed to reams of court documentation may be sufficient.
- Confirm date for mediation and confer with other side as to what needs to be undertaken and by when so as to ensure that necessary preparation is completed in a timely fashion prior to mediation date – you would not proceed to trial with appropriate preparation!
- Be aware of client's vulnerabilities, shortcomings, personality – take into account emotional vulnerability of client.
- Ensure that both you and the client are available for the entire day of the mediation if needed.
- Valuation issues eg. Sole trader? – read the valuation and seek appropriate instructions so that an assessment can be made as whether further information needs to be supplied to the valuer. Is it necessary for the valuer to be available on the day of the mediation?
- Discuss with your client your "opening offer' and "where to" from there. If the opening offer is not a "considered" one, your run the risk of:
  - Creating false expectations in your client as to potential outcomes.
  - Broadening the dispute beyond the parameters that might be reasonably anticipated, thereby forcing the client to "compromise" to a far greater extent than might otherwise have been necessary.

[2] Albert Einstein 1879-1955

At best an ill-considered first offer/counter offer is unhelpful and might impact upon your credibility and that of your client. At worst it might be perceived as being insulting, divisive and ultimately, prove to be counterproductive.

- Money into trust – they are either serious or not.

Lawyer's role at mediation:

- Be a positive role model (trust and be comfortable with the process – appearances are important).
- Participate in good faith.
- Professional courtesies – the mediator is not there to mediate between the lawyers – it is not the appropriate forum to show how tough/hard- nosed you are to your client or the other lawyer – be quietly confident not arrogant.
- Not a fishing expedition.
- Whilst lawyers are by nature competitive it is important to maintain a conciliatory approach;
- Focus on your client's "interests" rather than "legal position" – what is really important to your client (subject to reality testing)? – remember that you do not need to win every point.
- Do not lose sight of commercial realities.
- Understand and explain that the mediator might spend greater time with one party than the other.
- Accept that you do not need to like the other lawyer (you catch more flies with honey than with vinegar!)

What else?

- Put aside entire day for mediation – if there are time constraints beyond that, indicate to the mediator and the other side prior to mediation date (not 10 minutes before you need to leave).
- You need to do more than just turn up and leave it to the mediator to advance the matter.
- Know when to stop negotiating.
- Beware of the influence of well-meaning third parties.
- Be conscious of the possibility of "settler's remorse".
- Post mediation – formalize agreement reached as soon as possible.
- Involvement of third parties ("the support person") – potentially a minefield.

CLIENT

- The client should be encouraged to appreciate the very real likelihood that commitment to the process may result in their finding a solution to their problem.
- They should feel informed about the process – do not just gloss over the process and meet your client ten minutes before the mediation.
- Keep them informed, i.e. contents of the brief to mediator, arrangements on day etc.
- Make them confident that you know what you are doing.
- Make sure there is a contingency plan if mediation takes longer than expected (collection of children from school/after school care etc).
- Prepare for various possible outcomes; for example, send them to the bank so that they can establish the limit of their borrowing capacity if their intention is to retain a particular piece of real estate.

WHAT YOU SHOULD EXPECT FROM YOUR MEDIATOR

- Remain independent (perceptions are important).
- Facilitative/evaluative - The difficulty in treating those who are "unequal" equally is the real risk that those who are underprivileged, oppressed, comparatively powerless will not be provided with what they need to enable them to participate equally and to achieve a fair and just outcome. It should be remembered however that mediator interventions do not alter the power balance between the parties per se, but rather are designed to affect power imbalance within the mediation.
- If a mediator chooses to "intervene" there is a need to be careful so as not to preclude the empowerment of the parties and principal of self-determination – there is however a risk of being perceived as "siding" with other party – ideally the party should be guided rather than dragged kicking and screaming through the process (better if they think it is their idea even if it is not).
- MISS and KISS.
- Positive approach/good people skills - give hope; encourage; educate; challenge; empathise.

- Control process:
  - Manage and influence bargaining (influence should not be such as to impact upon independence of role);
  - Reframe to make mutual and neutral – contain emotions;
  - Assist in effective communication;
  - Assist and guide parties to negotiate more constructively and effectively (also the role of the party's lawyer);
  - Identify and manage power imbalances.
- Have strategies to overcome impasses.
- Be persistent/patient/creative – persistence almost always defeats resistance.
- Try not to embarrass or undermine the client's lawyer – presentation of an alternate view is important; however, the manner in which it is presented is more important.
- Keep parties focussed and avoid arguing over minutia.
- Not pursue settlement at all costs (performance anxiety -v- process).

MEDIATION PROCESS

The mediator's opening statement can be a powerful tool in setting the scene for parties to find a solution to their problem and to understand their choices and the ramifications of those choices. Laurence Boulle[3] observes that it also allows the parties (who are often anxious) to settle into the process without having to speak or account for themselves immediately.

My opening statement attempts to address the following:

- Explain process/rules (shuttle conferencing).
- Explain choices available and ramifications (financial and personal) of those choices.
- Explain everybody's roles.
- Focus on difference between them and acknowledge agreements reached. In property matters I try to have them focus on the fact that it is a commercial dispute with commercial realities. In parenting matters I emphasize that the focus should be on the child's needs as opposed to those of their own.
- Warn them of pitfalls (if the parties understand that the last bit is always the hardest they may be less likely to give up when the negotiations become difficult).
- Be confident about parties' ability to compromise/find solutions.

My goal is to attempt to:

- Instil hope and encourage parties to actively seek realistic solutions.
- Allow parties to settle into process without having to contribute immediately.
- Encourage parties to make informed and rational decisions.
- Ideally have the parties commit to the process in the presence of the other.
- Keep parties focussed on what is important!
- If it is a parenting dispute remind the parties of their common goals, the importance of not "setting themselves up to fail", the need to resume being parents rather than litigants and being always mindful of the "big picture"
- Encourage the parties to keep their balloons floating.

Separate meetings:

- Opportunity for parties to raise concerns/issues unable/unwilling to raise in joint sessions.
- Allows you to probe for hidden agendas.
- Better understanding of party's motivations.
- More robust reality testing.
- Educate and allow greater pressure towards achieving settlement;
- Is the lawyer the problem?

[3] Boulle, Lawrence, "*Mediation: Principles Process Practice",* 2nd Edition, LexisNexis Butterworths 2005 @ 183.

TOXIC NEGOTIATORS

Toxic negotiators may:

- Adopt an adversarial/confrontational approach.
- Drown out/sideline client ("I would like to settle but my lawyer won't let me").
- Actively encourage their client to remain adversarial and encourage them to hold "conspiracy theories" etc.
- Be openly contemptuous of the other lawyer, the other client and any offers made or attempts to compromise. The result may be that the client is lead to believe that he/she is wasting their time and therefore their commitment to finding a solution suffers.
- Try to control the process by
  - bullying
  - imposing time restraints (often patience and persistence is needed to assist parties in reaching a resolution involving informed decision making)
- Be overly aligned with their client's case which can lead to subjective assessments of outcomes giving rise to false expectations to the client (emotional lawyers)
- Be overly confident in predicting Court outcomes
- Make insulting offers

CONFLICT, THE NATURE OF POWER AND POWER IMBALANCE

- There is rarely much logic to the cognitive processing of information by someone who is enmeshed in conflict and/or has a vested interest in continuing the conflict.
- A failure to address power imbalance between the parties may result in the more powerful party dominating the process thereby resulting in an outcome which only meets that person's individual needs and interests. If mediation is seen as a consensual process (as opposed to a coercive process), the issue of power imbalance is obviously an important one to be addressed.

ADDITIONALLY

Linda Fisher and Mieke Brandon in their book *"Mediating with Families"* Second Edition note that there are five modes of managing conflict:

- **Avoidance** – might arise when a party feels under attack and feels that it is better to withdraw than to respond in haste and regret it. Whilst a useful technique, it does not accomplish much as it does not address the conflict but simply seeks to postpone dealing with it potentially up a more deep seated conflict. If a party is habitually in avoidance mode they are sometimes call "yes but*ers*" because each time an option is suggested they say "oh yes that is a good idea but unfortunately …" A mediator might use private sessions effectively to move parties on and/or question their attendance at the mediation session.
- **Competition** – sometimes called "hard positional bargaining". The concern for competitive parties is to get what they want and there is no great interest in either preserving the relationship or in seeing to the needs of the other party. Whilst this approach can be successful, one of the obvious shortfalls is that the more committed someone is to making a stand on something, the more he or she has to defend it under attack and saving face becomes increasingly important.
- **Accommodation** – the opposite of the competitive mode – "soft positional bargaining". The parties' main interest in this approach is seeing that the other party finds a solution to the conflict or dispute that is satisfactory. The gamble on the fact that abandoning what he or she perceives as a need will lead to a better relationship. There is an element of hope that the other person will appreciate the gesture of self-denial and sometimes this happen. The problem with the accommodating approach, however, is that is preserves the power imbalance and makes it more difficult in the long term to change the status quo.
- **Compromise** – is used in a conflict situation to resolve a stalemate so that the two sides can move ahead. Whilst parties might appear to be cooperating, there can still be mistrust and doubt.
- **Collaboration** – people who favour a collaborative approach to negotiation acknowledge that, "the sum or greater than its parts". A collaborative approach to negotiation is also called interest based negotiation. It is necessary for parties to move away from their positional base and to look instead at their underlying interests and needs before they can agree on a mutual response to what becomes a mutual problem.

- Laurence Boulle in the second edition of his book *"Mediation Principles, Process, Practice"* identifies that positional bargaining (also known as adversarial or competitive negotiation) involves each side using the various sources of powers available to it, persuasion, intimidation and other tactics. It is associated with the legal culture in which adversarial negotiation is often a precursor to adversarial litigation with the difference that some degree of compromise is expected in the former whereas in the latter only one party is successful. In this context negotiators support their positions by reference to legal rights and entitlements. Where positional bargaining is accompanied by intimidation, coercion and aggression, it may cause the parties to lose face, to lock themselves into their positions and to become defensive and recalcitrant.

AND FINALLY

Like everything else you do – prepare, prepare and prepare some more. The mediation may prove to be the most significant event in your client's journey. Good luck!