Lawyers and mediators: what each needs to learn from and about the other

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Lawyers and Mediators:
Learning From and About Each Other

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LAWYERS AND MEDIATORS

WHAT EACH NEEDS TO LEARN FROM AND ABOUT THE OTHER.

Introduction

This article is based upon impression and anecdote. These obviously cannot be relied upon to “know” anything. Nevertheless, there are glaring gaps between theories of what people (including lawyers) do, and the multiplicity of behaviour patterns of people (including lawyers). These impressions may build a few shaky bridges which can in the fullness of time be stabilised or demolished by more methodical observation inside the private offices of many lawyers and mediators.

The writer considers it worthwhile to record impressions, as much existing literature is too confident and simplistic in attempting to squeeze complex lawyer or mediator behaviour and thinking into models or critiques.¹

To walk in the shoes of a mediator and family lawyer begins to reveal the unknowable complexity-of professional behaviour.

The mediation movement has been given publicity, funds of taxpayers, and support by propagating simplistic notions of the “adversary” system and of what lawyers do on a daily basis. Conversely, lawyers have often attempted to neutralise this rival profession by (as major doorkeepers to serious family disputes) wilful ignorance of their own behaviour, ignorant criticism of mediator behaviour, anecdotal warfare and attempts to co-opt mediation under their own monopolistic umbrella.

This paper reflects upon the behaviour of both family lawyers and family mediators with the aim of assisting each group understand the other. Both groups have much to learn from studying the other. The legal profession has only begun to study itself - some of its members remain unduly fearful of demystification.

These reflections are based upon observing competent practitioners in both lawyer and mediator groups. Too much useless anecdotal warfare has taken place already comparing worst with best from alternative groups (compare the traditional analogous worst-best anecdotes as between lawyers and counsellors).

Three broad topics will be addressed:

- Understanding lawyer behaviour - how it both complicates and assists successful dispute management.
- Why refer disputes to mediation when lawyers settle so much already?
- Lessons for lawyers from the mediation process.

A. Understanding Lawyer Behaviour

Aspects of the Behaviour of Family Lawyers

Once lawyers become involved with negotiations between disputing family members,

then a number of dynamics begin to operate which may either hinder or assist the processing of the dispute. Mediators (and others) need to be aware of these dynamics. As family disputants are usually not regular customers in the lawyer marketplace, they do not have a fund of educational experience from which to understand lawyer behaviour. They are usually “one-off” clients.2

By way of contrast, large corporations enter the lawyer/legal system market place regularly (they are “repeat players”) and therefore become reasonably well educated about the dynamics of lawyer behaviour. Lawyers must necessarily be more accountable to repeat players than to one-off clients in order to retain their custom.

**Professional Self-Protection**

Competent lawyers, particularly in family disputes, develop a keen sense of self preservation. What personal interests do family lawyers have to protect? Why are they so vigilant about self-preservation in family dispute processing? What self protection methods do they use?

**What Personal Interests do Family Lawyers Have to Protect?**

- A lawyer has years of education and other sunk costs invested in obtaining a license to practise law. Law societies have draconian powers to cancel or suspend the license of a lawyer who oversteps the often vague boundaries of acceptable behaviour.3 Most clients in crisis have little interest in their lawyers' past or future careers. Clients want results - even if this means transgressing traditional standards of professional propriety. In this sense, all professionals are in a conflict of interest with their own clients.

- A lawyer has an interest in avoiding the publicity, gossip, ridicule and expense of a professional negligence action by a disgruntled client. Wealthy clients in particular have the resources and incentive to bring actions for damages against their own lawyers who fail to obtain full disclosure from the other party, fail to explain the possibilities for re-opening “final” settlements or fail to draft settlements which comprehensively deal with future contingencies.

- A lawyer has a reputation to maintain or make in the local, Australian or international tribes of family lawyers. (S)he must gain or maintain the reputation at least of drafting comprehensive settlement documents, of not overlooking future complications such as troublesome access days or capital gains tax, of insisting on full disclosure, of knowing both book and street law, of not being a soft touch, and of having a reputation for dogged pursuit. “Outsiders” need to be wary of pushing for settlements which may cause loss of face.

- Family lawyers have an economic reputation to protect within their own law firms. Commercial partners are notorious for their less-than-subtle criticisms of unprofitable family law divisions within the firm. Therefore, family lawyers under such pressure either complicate or assist the resolution of disputes by insisting on

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parties signing costs agreements, or upon accounts being paid monthly, or upon lump sums being paid in advance for legal costs.

- Family lawyers have an interest in orderly office management. Although a client may perceive that a dispute requires an instant litigious or threatening response, lawyers rarely agree (for a variety of reasons). If a dispute is processed in an orderly fashion, this reduces labour intensive expenditure on the dispute, enables delegation of tasks within the legal office, minimises lawyer absences from the office, reduces stress and premature escalation of confrontation.

Why Are Lawyers So Vigilant About Self-Preservation In Family Dispute Processing?
The basic answer is that there are many opportunities for causing damage to personal professional interests in the practice of family law. Competent family lawyers are noted for practising “defensively”. Examples of reasons for practising defensively include:

- Marriage breakdown brings many intimate secrets out of the closet including child abuse, violence, social security, taxation and immigration fraud. Many clients are eager to commit perjury in affidavits in order to keep these matters from investigative bodies. The fact that a lawyer has several personal interests (backed by professional and public duties) to draft and witness only truthful or at least not-false affidavits, is of little concern to fearful clients.

- A number of clients prefer perjury, procrastination and contempt to complete disclosure of their on-shore and off-shore wealth and employment. Again legal representatives face loss of reputation, judicial and collegial credibility and perhaps license if complicity is proved or even suspected.

- Some clients, in the pursuit of self interest or the expression of anger, are wont to neglect or damage the emotional and financial interests of their children. They seek to draw their legal representatives. (or are drawn by those legal representatives) into tactics of freeze and starve, scorched earth, child snatching and bluff custody applications.

- More than any other area of legal practice, clients involved in family disputes are going through the grieving process. This takes them on an emotional roller-coaster through shock, denial, depression, anger, hopefully eventually resolution over losses suffered. Clients often enter into complex relationships of dependence and/or hostility with their legal advisers.

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5 Eg, T v~ (1984) FLC 91-588.


The result is that clients are often not ready to hear preferred advice, frequently have unrealistic expectations of litigious results and regularly change their minds about legal instructions given the day, week or year before. On alternative days tactical procrastination by a lawyer may amount to either profound wisdom or professional negligence.

This is not stated to be critical of clients, who are progressing through “normal” stages of grieving. But the complexity of client emotions make the options for “proper” professional behaviour far more complicated than in other spheres of legal practice.

- For a variety of reasons, family lawyers include a number of incompetent and/or dangerous practitioners. This occurs because of poor training, inadequate supervision, absence of excellent visible role models, the low professional status of family law, the predominance of one-off clients, disagreement on the meaning of competence, inadequate public education about professionals, and difficulty of weeding out the dangerous and deviant legal practitioners.

What Self-Protection Methods Do Family Lawyers Employ?

The following behaviour is depicted as serving the interests of the family lawyer. Obviously it frequently also serves the perceived long term interests of clients. However, lawyer behaviour needs to be considered from the dual motivation of self and client protection. Halcyon lawyer mythology and law society rhetoric have unduly emphasised the latter.

Family lawyers engage in the following defensive practices:

- During initial interviews, clients are in effect cross-examined by their own lawyers in an attempt to determine credibility, emotional stage, trustworthiness, psychiatric disorder and ability to pay for services. “Unstable” clients are given initial advice but are also encouraged to seek long term professional assistance “elsewhere” (counselling, legal aid).

- Given fading or selective memories and changing client instructions, family lawyers record conversations in writing. This is no doubt both time-consuming and expensive - but a necessary form of self-protection. Thus so many letters from solicitors begin with “We confirm our advice to you over the telephone yesterday that “ or “We refer to our interview last Tuesday and note your instructions to “.

Likewise, conversations with lawyers acting for the “opposing” spouse are recorded by the ubiquitous follow-up letter.

- Lawyers are usually very reluctant to have conversations directly with their own client's spouse or partner. Such conversations can readily compromise the lawyer at a later date if:

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9 Eg, R. Crouch, ante n. 3.


11 Eg, R. Crouch ante n. 3.
(i) the spouse relates on oath a version of the conversation which includes either legal advice or disclosure of confidences;

(ii) the lawyer himself/herself must then personally enter the dispute by submitting on oath his/her own version and memory of the conversation.


Outsiders often interpret this behaviour as an elitist obstruction to negotiations and a monopolistic market trick, rationalised as professional ethics, to promote employment of yet another lawyer.

Family lawyers usually insist on all professional fees being paid in advance in a lump sum before an appearance in court. This practice has arisen out of repeated experience of non-payment of professional fees. One Australian study indicated that clients were overwhelmingly satisfied with the conduct of their family lawyers unless and until the case reached final adjudication. Thereupon over 50% of litigants were seriously disgruntled with their own lawyers. Outsiders often interpret this behaviour as an elitist obstruction to negotiations and a monopolistic market trick, rationalised as professional ethics, to promote employment of yet another lawyer.

Family lawyers invariably insist upon full written disclosure on oath of the property and financial resources of the “opposition”. This practice is supplemented by a statutory obligation to make such full disclosure. However the practice is seen by some clients as cumbersome, expensive, time-consuming and inflammatory - especially when a spouse risks various kinds of prosecution if full disclosure is made. Many a client is willing to settle without full disclosure. Most lawyers bend to such client pressure only infrequently knowing that today's contentment may change to tomorrow's grievance.

Family lawyers frequently lodge caveats on real property or seek consent injunctive orders in relation to bank accounts and chattels in order to prevent dissipation of assets. “Outsiders” sometimes interpret this behaviour as unnecessarily inflammatory. Lawyers argue both client and self protection.

P. McDonald ed Settling Up AIFS 1986 p 244-245.

Eg, Family Law Rules O. 17 r. 2; Briese and Briese (1986) FLC 91-713; Oriolo and Oriolo (1985) FLC 91-653.

Experienced family lawyers are quick to identify opposing lawyers who are inexperienced, incompetent or gladiatorial. Dangerous lawyers are blacklisted. Tactics are devised to graciously educate the inexperienced, circumvent the incompetent, and stonewall, whiteant or undermine the gladiator.

Family lawyers appear unduly cynical about settlements which include promises about future behaviour. They insist that promises should be backed by security, caveats, signed mortgages, default clauses with compound interest, elaborate detail on access handovers and surrendering of passports. Again clients may find such a degree of distrust somewhat offensive, expensive and a hindrance to successful negotiation. Nevertheless every lawyer has a sufficient number of horror stories to justify such measures. Moreover one tends to distrust the motives of (s)he who protesteth too much about “unnecessary” security.
The resolution of disputes by disputants actually sitting down and talking is culturally and habitually abnormal and uncomfortable. It requires skills and attitudes which are unusual. Flight or fight is far easier and normal. Additionally, mild conflict through solicitor's correspondence represents for some a symbolic step to “freedom”. Such ritualistic conflict gives sufficient energy and distance for some clients to take the necessary remedial steps away from a destructive marriage relationship.

The use of the litigation process is also replete with symbolism and latent functions. For example, employing a lawyer may represent an important stage or statement. These client statements include:

“I've finally had the guts to do something.”
“I don't want to talk with him/her anymore; he/she just plays the same old games.”
“Our lawyers will be able to put this onto a dispassionate business level.”

- “Our lawyers will keep us apart.”

In a vague sense, family lawyers are aware of the emotional effort it has taken for many clients to even walk into a lawyer's office; and that the legal letterhead is being used to express seriousness, separation and finality. While a client is using a lawyer to make a strong symbolic statement, it would be trite and demeaning for a lawyer at that time to press for any mediation or other kind of referral.

In some cases, a lawyer fears loss of face and client loyalty which may be experienced at mediation (or counselling). One side of this coin is the repeated fear of lawyers that mediators will give incorrect legal “advice” concerning delay, legal costs, superannuation, judicial behaviour, current maintenance rates and capital gains tax. A lawyer then has the difficult task of re-educating a confused or demoralised client. The other side of this fear is that the mediator may present correct “legal” or psychological information which has been omitted or contradicted by the lawyer's advice. Mediation may bring a day of accounting too soon. Whereas barristers are accustomed to graciously covering a multitude of solicitor mistakes in door-of-the-court settlements, mediators are not so practised in that art.

(In similar fashion the mediation process when applied to inter-organisational disputes, can be very threatening to individuals within each organisation. When negotiating in teams, it readily becomes apparent if a particular individual has a mistake to hide, or has an emotional attachment to the dispute.)

Dispensing With Self-Protection

Some lawyers are willing to dispense with certain self protection methods either through inexperience, ignorance, risk taking personality, need for business, government payment of salary, belief that a client has neither resources nor the will to seek redress.

Occasionally clients are given clear education on why all these self protection methods are necessary. Then the client instructs the lawyer IN WRITING, SIGNED and WITNESSED preferably by an independent lawyer to DISPENSE with some or all of the self protection methods. (Self-protection methods to dispense with self-protection methods.) More often, the lawyer will make it clear that (s)he will cease to act (“we cannot take the risk”) if the client does not acquiesce and co-operate with the self protection methods.
Usually most of the self-preservation behaviour also directly benefits the client. But sometimes that is not so, and often it is not perceived to be so. (Eg full disclosure; costs in advance.)

Reform - Legitimising Contracts for a Strata of Professional Service?

There is an ongoing tension between providing inexpensive yet competent dispute processing services to disrupted families. Lawyer self protection methods necessarily increase costs for individual clients (though may arguably be more economic on a societal or macro level).

There is an irony that as family law practitioners become more specialised, expected standards of service and care increase, leading to further professional self protection, and at first glance to higher dispute processing costs.

The market and social interest in inexpensive legal services will lead inevitably to pressure for statutory protection for lawyers, dispute managers or a special class of para-legals who contract to handle cases on a budget basis minus self protection methods. That is, legislation may eventually allow scaled exemption from liability for professional negligence by means of a standard form contract with clients. Thereby a client could contract for a budget, moderate or full risk service, and pay lump sums or hourly rates accordingly. This is analogous to proportional risk distribution between customer and carrier in any contract of carriage. Such scheme already has its seeds sown in de facto budget practices for running budget family law cases, and by statutory waiver of full disclosure on affidavit when appearing in magistrates courts. These random practices are likely to be squeezed (reluctantly) by market and state into a more formal description and scaling of costs and services.

The ability to contract formally for budget or intermediate legal services would inevitably raise the question of whether clients can obtain insurance to cover risks (eg from non-disclosure, absence of valuation, failure to cover contingencies) which contractually or legislatively fall upon them.

Some Dynamics of Door-of-the-Court Settlements

Lawyers have a great advantage over mediators in that lawyers happen to be present as structural deadlines arrive. These deadlines are of course, the date of a final court hearing, and to a lesser extent the date of a conference before a Registrar. The negotiation adage is that “90% of issues are decided in the last 10% of the time available”.

Lawyers have often been anecdotally criticised for the high incidence of door-of-the-court settlements which appear to be expensive, tense, disempowering, hastily drafted, error prone, pressurised, and conducive to poor case preparation. However predictably, there are two

Family Law Rules 0. 9 r. 2 - duty on either both parties to file an statement of financial circumstances is waived for maintenance proceedings in magistrate's courts.


But compare ALRC, A Survey of Family Court Property Cases in Australia 1985 p 20 (this survey produced adverse comments from clients about lawyers in 25% of the cases surveyed); also P. McDonald, Settling Up 1986 pp 244-45.

sides to the coin of the door-of-the-court settlement syndrome. There are some reasons why the process of “late” settlements is both inevitable and advantageous (and therefore will tend to remain in the domain of lawyer control).

Those of us involved in mediation observe with envy a number of structural advantages which a traditional lawyer has by following the “litigotiation” process towards settlement.

The Economic Value of Legitimised Routine

The litigotiation path has a routine. This involves initial interviews, information collection, opening exploratory correspondence, filling in forms and administrative appearances before court officials. Routine enables delegation, orderly office management and the processing of many disputes at the same time. Much of the commencing process is repetitive and clerical though certain tasks in the process, such as the advice given at the initial interview, require high degrees of substantive knowledge and discernment.19

By way of contrast the mediation process is at this stage in Australia much less structured and routine; and is labour intensive, exhausting and demanding of high skills in the actual preparation, conduct and debriefing of mediation sessions.

The Power of the Impending Deadline

Negotiation the door of the court has a helpful built-in deadline, an equivalent of which is not available in mediation. This is a deadline for both client, solicitors and barristers. Control of the dispute will be lost and the result placed in the hands of an unpredictable and arbitrary process. Most clients who have procrastinated about settlement for tactical or emotional


reasons are forced to make a decision about a bird in the hand or none or two in the bush. For some solicitors who have engaged in threatening, bluffing, stalling, non-disclosing or incompetent behaviours, imminent litigation amounts to a day of judgement in a public arena. Likewise, it is impossible to prepare a case to cover every contingency and twist of evidence. Therefore, many solicitors do not wish to have their mistakes publicised before clients or before judges whose goodwill is required for future business success. Settlements cover a multitude of sins. For all solicitors there is also one major statistical study which shows that more than one half of the clients who proceed to a defended hearing become disgruntled with their lawyers.20 Thus proceeding to a defended hearing has serious implications for the reputation of the individual lawyer, of the firm and for the non-payment of outstanding legal costs.

Absence of a Cooling-Off Period

Door of the court settlements have another advantage in that the agreement can be drafted, finalised and filed while consensus is hot. Lawyers draft and redraft the terms of the settlement in handwriting in the corridors of the courtrooms. The opportunity for a “cooling off” period is expressly denied by the waiting judge, or by lawyers'
knowledge that most clients can later be convinced to procrastinate further, or that a better deal is possible/probable.

Mediators face hurdles to their “success rate” as they do not negotiate on court premises, do not have access to the immediate rubber stamp of a judge or registrar, are not experienced in drafting “tight” settlements, and ethically are constrained to refer their clients back to their respective lawyers for advice. Such structural cooling-off periods necessarily mean that mediated agreements will be reneged upon (particularly in relation to money and property) more often than door-of-the-court settlements (or commercial mediations) which are structured in ways to avoid cooling-off.

20 P. McDonald, Settling Up 1986 pp 244-245.

Of course, the converse position is that if a “final” settlement (particularly relating to children) is reached by undue pressure it will often not be final at all. An unsatisfactory negotiation process may buy cheap peace, or market a low grade product.

Reformers who are searching for ways to reduce the costs of dispute management for the poor and middle class will inevitably look at alternative methods to seal the bargain at the manager's doorstep (e.g., co-mediation between a Registrar and a Counsellor; mediation offices next to registrar's offices; Registrars as mediators; fixed price, court annexed and statutorily immunised lawyers who draft instant settlements).

Sometimes, the door-of-the-court is too far away. If delays before a final hearing are 2 or more years, then the advantages of litigation process diminish dramatically. The levers to promote serious negotiation are too far off. Interim visits to Registrars create some moderate procedural deadlines, but lack the adrenalin rush of an approaching hearing day when control of the dispute is lost. Accordingly when court lists involve delays of more than about 2 years, there is strong market pressure from lawyers to shorten the lists or to consider arbitration or mediation.21

Outside Experts

Near to the door of the court the dynamics of negotiations are often changed by the appearance of at least two “outside experts”. Barristers enter the scene as objective new faces who are distanced from the dispute. They have not been involved with the early emotions, messy fact collection and perhaps professional hostilities of the dispute. They are experts with insider knowledge of the legal system. Their learned advices are given after private consultation with opposing barristers. This advice comes at a time when clients may be more emotionally able to hear.


A further “outside expert” introduced into the dispute inside the door of the court is of course the judge. Traditional images of the judge as a passive umpire have always been false to a greater or lesser degree. One study has identified seventy one methods whereby judges intervene just prior to or during litigation to pressure the parties into settlement.22

Structured and Sanctioned Information Collection

The legal system provides a structured process for collection and exchange of information together with a deadline for this information exchange. Like many tasks, most information exchange occurs just before the deadline expires. Lawyers often have to press clients to cooperate in these onerous and time-consuming tasks. Lawyers have strong interests of professional reputation and judicial approval to ensure that the information collection is both honest and completed at the latest by the morning of the hearing.
Lack of information is a classic reason for disputes. The processes available to lawyers, namely mandatory filing of affidavits, subpoenas, discovery, interrogatories, valuations and medical reports complete many pieces of the data jigsaw by the day of the hearing.


Self Fulfilling Expectation of Settlement

At the door of the court there are a number of structures and practices which both expect and promote settlement. For example, in some (Family Court) registries a number of cases are listed for hearing before the one judge on the assumption that all but one will settle. The prospect of an adjournment for the unsettled cases is emotionally exhausting and financially expensive. Clients will have to take further days off work; solicitors be absent from the office again; affidavits and valuations updated; barristers paid again; witnesses reorganised to appear again and all parties fund another date convenient in busy schedules. The inefficiency of the listing process leads to inconveniences which have a latent function of compelling settlement.

Secondly, barristers themselves frequently attend at court with the expectation and hope that settlement will materialise. Some are relatively unprepared for a day of adversary proceedings and therefore have a strong interest of reputation preservation to pressure for settlement.

Thirdly, the Family Law Rules require that each party prepared file and exchange summaries of the history of the case and of legal issues. These “chronologies” have the tendency to clarify on paper areas of agreement and many of the emotive and convoluted allegations of the past. Mediators can readily appreciate the value of such institutionalised and compulsory written summaries.

Identifying the Umpire

By the day before the hearing another important and missing fact is added to the settlement jigsaw - namely the identity of the judge. Previous negotiations have taken place in the shadow of written case law, legislation costs, delays and street cunning. The identity of the judge clarifies law in the flesh. More accurate predictions about judicial attitudes towards process, evidence, costs, fault and appropriate outcomes become possible.

Stabilising of Information

Apart form ignorance of the identity of the judge, there are many pieces of information which are in a state of flux soon after a separation - for example, employment, retraining prospects, day care and schooling patterns, repartnering, and stability of business ventures. Often, negotiations run more smoothly when these variable factors have become more stable. However, this point should not be overstated as it is a chicken and egg process. Fact stabilisation may assist settlement but settlement also assists fact stabilisation. The substantive result and emotional release provided by a settlement often enables parties to “get on with their lives” and organise housing, employment, schools and day care.

New Dynamics of Negotiation
At the door of the court, (whether at a registrar's conference or especially on the day of a final hearing) new spatial and interpersonal dynamics operate. A team (a barrister, solicitor and client) negotiates by shuttle process with another team. In the past negotiations would usually have been between solicitors by correspondence and over the telephone. The lawyers in the team meet one another in the flesh - perhaps for the first time. There is less opportunity for posturing with a group of fellow professionals looking on. The other member of the team (like a co-mediator) offers a different perspective, a devil's advocate and “reality testing”.

The meetings also take place away from interruptions and the telephone at each solicitor's office. Each solicitor, barrister and client is entirely free (perhaps for the first time) to devote his/her uninterrupted attention to detailed evaluation of the areas of agreement and disagreement and to the dynamics of negotiation.

The client is also placed in an unfamiliar environment of a court waiting room. This new environment, the proximity of the other spouse, adrenalin and the mystery of the impending process combine to challenge entrenched views and former certainties.

**Process Can Cover Professional Mistakes**

By the time the door of the court is reached, a number of processes, checks and balances have occurred which can frequently compensate for professional inexperience or mistakes. The process inexorably moves the parties towards settlement without requiring a high degree of competence on the part of the solicitors. The same does not appear to be true of mediation: a mediator usually requires a considerable degree of skill and planning to assist parties to negotiate a settlement. There are no institutional checks, balances, structures or deadlines which complement or compensate for a mediator's mistakes. Co-mediation is an in-built form of balance. Externally, reference of any agreement back to legal representatives is an important check. However, the point remains that the successful management of a dispute through mediation appears to involve far more energy and expertise than the routine processing of disputes towards the pressure at the court doorstep.

**Delay Gives Time to Grieve**

Settlement delayed until the door-of-the-court gives both parties time to move through the grieving process. This is another latent function of apparently inefficient official process. Delay probably does not benefit couples who have both reached grieving resolution. But where one party is subject to an unexpected “bombshell” separation, to strong anger, or recurring depression, or is emeshed in negative intimacy then an early settlement is both unrealistic and unstable. Settling Up records the early distress of some separated spouses:


“Property applications can now be made ......... during the first year of separation. This may have unfortunate repercussions for those who are so distressed about the event that they can't think rationally, or for those whose animosity towards their spouses or whose guilt colours their decisions.

*When the marriage first breaks down, you're not in a proper frame of mind to face the Court etc. One is at a disadvantage. It's not the best time for making decisions.* (man)
People are so mixed up after separation. The settlement should be decided by independent people. (man)

I signed away custody of the children while under stress and medication. I have no chance at present of getting them back. (woman)

The process of separation and divorce were depressing. I couldn't think straight about making decisions about property settlements. (man)

At first I didn't know what I was doing - where I was going. (man)

Because of the shock nature of our marriage break-up I was unable to emotionally love my last child. I had to give her up for adoption as I looked on her as an unhappy memory of our marriage break-up. I was worried how I cared for her. I now feel an emotional void about her and my feelings for her. I was unable to project how I'd be in five to ten years' time. That annoys me in general about our system - I think decree nisi should be issued only after say five years time. (woman)

I went through a great deal of stress and strain. It wasn't a good period to know my own mind. Even though I made the decision to break up, my husband brought the divorce proceedings against me. If he had wanted, we might have been reconciled. (woman)

The hassles of delaying make you reach a point where you can't bear to fight. Because of the emotional drain on you, you just want to get out no matter what the cost. (woman)

Most lawyers tend to avoid spending time and money pursuing negotiations or settlement with lawyers or clients categorised as “unreasonable” or “out of control”. They routinely pursue the dispassionate clerical processes leading to the door-of-the-court. These processes gradually build up settlement pressure which culminate on the morning of a hearing. In the meantime, many lawyers avoid inflaming unresolved anger on the other side by minimising contact until that day.

Upfront Legal Costs

The resolve to litigate of even angry clients is put to an acid financial test shortly before a proposed court hearing date. Most lawyers are at pains to educate their clients about the legal costs associated with non-settlement and with resulting litigation. The client's affirmation to the payment of costs now faces reality testing - a bank cheque for a large lump sum is required before the final litigation preparation can proceed. This deadline for the actual production of money convinces some clients that they can nurse the dispute no longer - and settlement negotiations recommence in earnest.


At earlier stages of negotiations, some clients are able to deny the harsh reality of legal costs, or are able to find lawyers who allow abundant credit in the unrealistic hope of eventual payment from a grateful client. Mediators sometimes see clients who are unrealistic because they have yet to experience the pressure of actual payment of legal costs.

Underestimated Client Satisfaction

Lawyer behaviour in family disputes has been subjected to constant anecdotal criticism for poor communication skills, tardiness, keeping clients in the dark especially about costs, aggressive and clumsiness of negotiation skills. No doubt many of these
anecdotes are true. Legal practitioners and judges readily relate (in private) a litany of incompetencies by their colleagues, particularly the non-specialist practitioner. However, it is important to give some balance to the anecdotes. First, client-professional hostility is inevitable in cases of client loss - whether it be loss of health, children or marriage. 26 Only a formally specialised profession will be able to embark on the kind of specialised training and supervision which is necessary to prepare for and respond helpfully to such client hostility.

Secondly, in the only systematic survey done in Australian on family property settlements, over 90% of those interviewed were satisfied with the behaviour and service of their lawyers.27 No doubt there was a bias in that survey towards middle-upper clients and therefore presumably towards more specialised family lawyers. Nevertheless, the individuals and the process produced a client satisfaction level which other high conflict professions might look upon with envy. Thus it is arguable that, despite anecdotal criticisms, and despite a lack of self-reflection and systematic education, family lawyers have inherited or devised a litigation and settlement process which has considerable, though rough and ready merits.

26 Ante n. 7.


WHY DO FAMILY LAWYERS (AS THE CURRENT MAJOR DOORKEEPERS TO FAMILY DISPUTES) REFER DISPUTANTS TO MEDIATION WHEN “THEIR OWN” EXISTING STRUCTURES AND INEXORABLE PROCESSES PRECIPITATE SETTLEMENT IN MORE THAN 90% OF DISPUTES?

Here is one well-known list of criteria which make a family dispute particularly amenable to successful mediation.

“UNDER WHAT CONDITION IS MEDIATION MOST EFFECTIVE?

The parties have a history of cooperation and successful problem-solving on some issues.
The parties do not have a long history of adversarial relations or prior litigation.
The number of parties is limited and the dispute has not spread to tangential persons or groups.
Issues in dispute are not overwhelming in number and the parties have been able to agree on some issues.
The parties' hostility and anger toward each other is moderate or low.
The parties have, or may have, an ongoing relationship.
The parties' desire for the settlement of the dispute is high.
The parties accept the intervention and assistance of the third party.
There is some external pressure to settle (time, diminishing benefits, unpredictable outcome, etc)
The parties have limited psychological attachment - negative intimacy toward each other or the dispute.
There are adequate resources to effect a compromise. (limited resources tend to create more competitive relationships and striving for win/lose outcomes.)
Parties have some leverage on each other (ability to reward or harm).
NOTE

Absence of the above conditions does not make successful mediation impossible. It does mean that disputes without these characteristics will settle less frequently than cases where the criteria listed above are present."28

The obvious comment of a competent family lawyer is that these criteria make the dispute a readily settleable one by the litigotiation process. WHY REFER THE EASY CASES ELSEWHERE?

In general terms lawyers refer cases to mediators where they predict economic or other disadvantage in their litigotiation process to themselves or their clients; or advantage to themselves or their clients in the mediation process. More particularly, lawyers appear to refer family clients to mediation for one or more of the following reasons: (It is clear that mediators should become as street smart as possible concerning lawyer expectations, motives and behaviour. The “success” of mediation will often depend not only on identifying the interests of the immediate parties, but also of those more distant, namely legal representatives.)

A lawyer can retain all the low conflict cases which will settle with the passage of time and the orderly exchange of information and interests. These cases serve all the professional self interests of lawyers as previously discussed.59 Highly conflicted couples can then be referred to counsellors or mediators. This pattern will persist so long as lawyers are doorkeepers to family disputes. It also means that the mediator settlement rate will be for lower than the solicitor settlement rate. Moreover, such settlement rates cannot be fairly contrasted as they reflect two professions dealing with different client groups.

Centre for Dispute Resolution, Divorce and Child Custody Mediation (1986) p 63.


If legal aid officers, counsellors or mediators ever became culturally accepted doorkeepers to some or all family disputes, then presumably the mediation “settlement rate” will escalate, as they could retain all the “easy” cases, and delegate the difficult ones to other professions. Thus for example, as poor and middle class people increasingly cannot afford private enterprise lawyers (particularly specialised lawyers), then relatively low priced mediators may become the first official point of call.

Following the first point, a lawyer sometimes perceives that there are some deep seated “psychological” issues on the agenda which will not be resolved by the cold words of a door-of-the-court settlement. If the parties necessarily need to have ongoing contact in the future over children, then a paper settlement will be no settlement while the psychological agenda remains unresolved.

A lawyer may push for mediation, as (s)he identifies that the lawyer for the other party is a “problem”. That lawyer may be a gladiator, a journeyman,30 a procrastinator or a totally incompetent negotiator - all possible reasons for attempting to circumvent the normal process of lawyer negotiation.

Some clients have a strong interest in avoiding publicity for their family disputes. They do not want to even file affidavits at the court registry, let alone appear in person in a public courtroom. This applies particularly to politicians, barristers, solicitors and members of the entertainment industry. For these public figures even the preparation and
filing of an application in the court registry carries the risk of gossip and loss of reputation.31


31 Family Law Act 1975 (Cth) s. 121 - restrictions on the publication of court proceedings.

At the beginning of, or during a family dispute one lawyer may decide that his/her client cannot afford the costs of the legal negotiation process particularly when legal costs include professional self preservation procedures. Thus a reference to a mediator takes place in the hope that the mediator can process the dispute cheaply.

Such a reference may be entirely unrealistic, as mediators need to eat, are not miracle workers and will refer any settlement back to the lawyers anyhow for formal embodiment in a binding document. Moreover unless both parties want to attend mediation, the economically stronger may use the process as a sortie to wear down the initiator by incurring further professional costs where the initiator is already hard-pressed for cash.

Some clients express doubt to their lawyers whether their marriage relationship is really over. Processing other disputes (particularly property claims) appears to be premature until that threshold issue is decided. Reference to a counsellor or mediator is seen as one means of clarification.

Lawyers may sometimes acknowledge that the litigation process is ultimately “successful”, but that meanwhile it is clumsy and confrontational. They are aware that legal correspondence and phone calls sometimes seriously hamper clear negotiations as they induce fear, misinterpretation and retreat to bunkers. That is, they believe that the mediation process conducted by the right personality at the right time is potentially more successful even for some low or moderately conflicted couples because it creates empowerment, stickability and role models for settling future disputes between the couple. Lawyers particularly believe this orthodox propaganda from the mediation movement if they have witnessed a competent mediator in action, and acknowledge that (s)he exercises many skills foreign to traditional lawyers.

Where clients are wealthy, a number of other factors may encourage client and/or lawyer to recommend mediation. First, property disputes, involve mandatory disclosure of assets on affidavit32 unless settlement by consent orders can be quickly achieved33 For some clients full disclosure is anathema - they have never made full disclosure of anything to anyone, much less to a potentially hostile spouse and lawyer. Therefore, mediation offers the prospect of agreeing to limited disclosure only and then to a large settlement on the less financially informed spouse (usually the wife).

Secondly, as the pool of assets moves above about half a million dollars, judicial discretion concerning how this sum will be divided becomes less predictable (particularly in different geographical areas of Australia).34

Thirdly, particularly if assets are offshore and in complex company and trust structures, the cost of discovery, valuation and litigation escalates dramatically. There is also the concern that if the case reaches litigation, the judge will not understand the complex and conflicting evidence on valuation, size of the pool of assets and financial resources. For the person seeking disclosure and valuations (usually the wife) the
expense and delay of mediation are minor matters, worth a try, given the major campaigns and delays which lie ahead.

Lawyers may recommend mediation for a subversive reason - that is, to discover information and psychological weaknesses during the mediation sessions which may then be used to bolster the adversary campaign. Even though actual conversations which occur during mediation sessions cannot usually be produced in evidence,\(^\text{35}\)

Family Law Rules O. 17.


“prejudicial” comments may be made which give the other spouse tactical and evidentiary clues. For example, one spouse may discuss his/her depression, difficulties in handling a child, pressure from relatives, declining business profits or employment opportunities. Such honesty may be exploited when these discussions are related back to the lawyer acting for the other spouse.

B. Two Way Street - Lessons for Lawyers from the Mediation Process

Here is a possible threefold prognosis for the mediation movement. First, a considerable number of mediators will be funded by governments seeking inexpensive ways to resolve disputed for the poor and middle class. Arguably, this direction of the mediation movement will be largely discredited in ten years time (for a variety of reasons) or will at least move away from the classical mediation model.

Secondly, a small group of specialist mediators will emerge and be successful in certain specialist fields such as disputes between management - employees; builders and clients; government and local environmental lobby groups; international traders; and family members.

Thirdly, the research and skills of the mediation - negotiation movements will have gradual effect on schools and university courses, on management styles and on behaviour within many groups including the legal profession. Arguably, the negotiating behaviour of lawyers will be refined and sophisticated over several generations. These changes will probably only be noticeable in particular pockets of the profession. The legal profession continues to be notorious in all western democracies including Australia for its obsessive conformity and resistance to internal change.\(^\text{36}\) Why change while there are customers queuing at the door?

36 Ante n. 16.

Although the mediation movement is multifaceted, as a generalisation mediators have developed the theory and skills of:

- Planning strategies to manage conflict.
- Establishing positive emotional climates for negotiation. Listening
- Interviewing
- Use of visual aids to communication
- Distributing “impartial” educational material to disputants. Responding to highly conflicted disputes.
Discovering and reframing the interests of disputing couples. Bringing side-tracked disputes back onto track.

Use of language and helpful questions to uncover hidden interests. Developing strategies to generate options for settlement.

Working in teams across disciplines and genders (co-mediation). De-briefing and educational self-reflection.37

These particular negotiation and conflict management skills and theories have been developed to a level of sophistication which far exceeds those of competent family lawyers. Competent mediators can usually explain what process they are using, why they are using it and what are the alternative strategies available. Generally, family lawyers are far less self aware of what is happening and how many alternatives are available. This has taken place because:

- of market pressures. Mediators must offer services which are specialised and “unique”.
- of the social science background of many mediators. They are accustomed to debriefing, educational supervision and the study of communication skills.


- of the market monopoly and doorkeeping role of family lawyers over family disputes. As other doorkeepers to family disputes emerge (eg counsellors, mediators, counter staff, legal aid officers, educational literature) particularly for the poor and middle class in Australia, then more references will take place to mediators without coming under the formal or habitual control of the legal profession.38

During simulations in mediation training courses conducted for lawyers, invariably lawyers are struck by how much they have to unlearn and learn in relation to habits of thinking, planning and language. It is the writer's experience that lawyers revel in the new skills -though to repeat, lawyers find it difficult to foster and nurture those new skills back in the dominant legal culture.

**D. Straws in the Wind - A Few Signs of Change**

There are signs that the emphasis upon self-reflection, theory and interpersonal skills present in the mediation or “dispute management” movement are having some effect in corners of the litigation process, particularly amongst some family lawyers. For example:

Two law firms in Toronto, Canada have employed full time counsellors over the last twelve years. These counsellors are present at all major intake interviews as co-advisers to develop possible problem solving strategies for clients and their children.

A number of (family) lawyers in Australia have undertaken intense mediation skills courses, particularly the training programs of the Centre for Dispute Resolution from Colorado, and more recently from the Centre for Dispute Resolution from Bond University. Every such lawyer to whom the writer has spoken has undergone a virtual conversion experience in relation to approaches to dispute resolution and interpersonal relationships. However many are then frustrated by the mediation bottleneck (“all dressed up with nowhere to go” - “waiting for the mediation clients”). Moreover, they
comment that the new behaviour patterns which are encouraged in one profession are not readily integrated within the traditional litigotiation behaviour of the legal profession.

In snowballing (and conformist) fashion, there is an increasing interest amongst lawyers in continuing legal education programs on interviewing, communication and negotiating skills.

Some lawyers are beginning to use visual aids (whiteboards, diagrams) to clarify and “objectivise” issues for themselves and their clients.

Specialised family lawyers are increasingly attempting to give a degree of systematic and dispassionate education to their clients concerning lawyer behaviour, client emotions, court process, counsellor behaviour, Registrar behaviour by handing out books\(^{39}\) examples of reported cases,\(^{40}\) videos on court process or mediation,\(^{41}\) in-house handbooks\(^{42}\) and extracts from legislation.

Some specialised family lawyers have in their repertoire the regular use of planned and

structured negotiations at round table conference.


Eg. Custody Film Australia 1987; John Haynes, Not When She's Around 1986.

Eg. Henry Davis York, Sydney; Power and Power, Brisbane; Barker Gosling, Melbourne.

Eg. Westgarth Middletons & Clayton Utz, Sydney; Barker Gosling, Melbourne.

Some law schools are offering courses and promoting research on both “The Legal Profession” and “N.I.C.” or “I.N.C.” (Interviewing, Negotiating and Counselling).\(^{44}\)

An increasing amount of critical self-examination is gradually occurring within certain sections of the legal profession. This is mainly because of market pressures,\(^{45}\) the power of outside investigative bodies,\(^{46}\) and the embryo research of “outsider” sociologists who are reporting upon the demythologised behaviour of (family) lawyers.\(^{47}\)

This writer believes that these gradual improvements to the theories and skills relating to dispute management by the legal profession will be painful and will cause conflict. Nevertheless there are hopeful signs. They augur the possibility of more systematic, sophisticated and less defensive approaches for the .legal profession to serve clients passing through or emeshed in (family) disputes.

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R. Abel; M. Galanter, Weisbrot ante n. 16.

In Australia, notably the Trade Practices Commission has power to investigate business monopolies under the Trade Practices Act 1974 (Cth).
Dispute Management- Further Reading

(See generally R. Tomasic, The Sociology of Law (1985) and bibliography; also B. Millers, “Mediation in Family Law: A Select Bibliography” Bibliography No. 16 Family Court of Australia Feb 1987)


