

HOW FAMILY LAW PRACTITIONERS CAN STOP WORRYING AND LEARN TO LOVE MEDIATION¹

by Jane Morley, Q.C.²

I. Introduction

A. The Complaint about Mediation

How many family law practitioners have made one or all of these statements?

“Mediation is just the flavour of the month. It’s popularity will pass. The tried and true civil litigation process will still be there as the ultimate way to resolve family law disputes.”

“My client does not need to go to mediation. I’m a good negotiator. I can get a better agreement for my client than he can get in mediation.”

“Mediation is all right in some cases but not in this one because . . .

. . . my client needs me to protect her interests.”

. . . we haven’t had discoveries yet. You cannot settle without a full exchange of information.”

. . . the other party is irrational and has unreal expectations.”

. . . the parties are too far apart. Mediation only works when the parties are close to a settlement.”

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² Jane Morley, Q.C. Chartered mediator, practiced civil litigation, with a focus on family, personal injury, and labour and employment law, for over 20 years in Victoria before focusing her practice on being a neutral in various alternative dispute resolution processes. She is on the B.C. Mediator Roster and is the Chair of the Jericho Individual Compensation Panel. She is currently the Chair of the Law Foundation of British Columbia.

B. The Premises and Purposes of this Paper

This paper is not intended to preach to the unconverted. All of the above statements have some kernel of validity. The author does not believe that mediation is a panacea for all the ills of the civil litigation process.

This paper is, however, based on the proposition that mediation, as a process for resolving family law disputes, is here to stay. It can no longer be dismissed as a passing fad. The issue to be addressed by family law practitioners is not whether mediation is a good or bad thing, but how practitioners can make mediation a useful tool to serve the interests of their clients.

To make use of mediation as a tool, family law practitioners need to understand mediation and how it can be used. This paper will:

- (1) define mediation, and compare and contrast it with the civil litigation process;
- (2) consider why mediation is increasingly being used and why it will endure as a process for resolving disputes;
- (3) examine possible variations in the mediation process, in particular, the mediation model traditionally used in family law disputes, and a lawyer assisted mediation model; and
- (4) suggest roles for family law practitioners in the mediation process.

In the course of the paper, some of the assumptions underlying the negative statements family law practitioners make about mediation will be questioned. The goal of the paper is to encourage family practitioners to stop worrying and learn to love mediation.

II. Understanding Mediation from the Perspective of the Family Law Practitioner

A. What is Mediation?

Mediation means different things to different people.

For the purposes of this paper, *mediation* will be used to denote *a process for dispute resolution involving a neutral third party whose role it is to assist the parties to the dispute to agree to their own resolution of the dispute, rather than having a third party impose a resolution.*

The essentials of this definition are:

- (1) the involvement of a neutral third party which distinguishes mediation from negotiation; and

- (2) the role of that neutral third party to assist the parties in their negotiations, rather than impose a resolution, which distinguishes mediation from arbitration or court hearings.

B. Mediation and the Civil Litigation Process: Similarities and Differences

Family law practitioners know and understand the civil litigation process and their role in it. The goals and underlying principles that determine the advocating lawyers' role in the civil litigation process are in many respects similar to the goals and underlying principles of mediation. A compare and contrast analysis of the civil litigation process and lawyers' role in it with the mediation process is set out below to assist family law practitioners to gain insight into the mediation process. Understanding the similarities should help family law practitioners feel less alienated by mediation. Recognizing and valuing the differences should give family law practitioners the basis for advising their clients when to choose mediation and sorting out how they can best assist their clients through the process.

1. Goals

The goal of the litigation process if it is taken to its conclusion is to determine a just outcome to the parties' dispute, consistent with the applicable law. Success in the litigation process is defined in terms of achievement of a right or just resolution. The goal of the advocate in the litigation process, however, is not Justice, at least not directly. That is left for the process itself and the judge to achieve. The advocating lawyer's goal is to obtain a resolution of the dispute that is in the interests of her client.

Similar to the advocating lawyer's goal, the goal of mediation is measured by the satisfaction of interests. A successful mediation results in an agreement that better satisfies the interests of all parties to the dispute than the alternative of having a judge decide. The difference is that for the advocating lawyer, success is defined solely in terms of furthering the interests of the client, only one party to the litigation. Mediation aims to further the interests of all parties to the dispute.

2. How the Remedy of Going to Court Fits Into the Process

Litigation can, and often does, end with a negotiated agreement and no judgment from the court. If negotiations break down, however, the litigation continues and does not end until a final judgment is obtained. The end of mediation comes either when a negotiated agreement has been reached or when one or other of the parties decides to end negotiations and pursue the alternative of a judge determined resolution.

Contrary to common assumption, the goal of mediation, at least as it is defined in this paper, is not to get an agreement at all costs. If an agreement is reached that does not

satisfy the long-term interests of one or more of the parties, the mediation has failed. If no agreement is reached in mediation, the process has not accomplished its goal. On the other hand, it has not necessarily been a failure as it often will have assisted one or both of the parties to define the issues, to exchange relevant information, to clarify their own interests, and to explore possible outcomes.

It is true that some mediators are ideologically committed to resolving disputes outside of court. This is, in part, based on the perspective that the alternative of court is so inherently against the interests of the disputing parties that it can almost never be a reasonable alternative. But the blanket assumption that mediators are devoted to an agreement at all costs is not accurate. It is rather like the view that lawyers create obstacles to out-of-court settlements that would be in their client's real interests. A mediator who allows the process to sacrifice the interests of one party for the sake of getting an agreement is as negligent as a lawyer who sacrifices the best interests of her client by failing to fully canvass the possibility of a negotiated settlement.

Family law practitioners, better than most, understand the downside of taking a client's dispute to court. Giving clients' reality checks about what can and cannot be accomplished by a judge imposed resolution to a matrimonial dispute is a common role played by the family law practitioner.

Similarly, the assessment of the downside as well as the upside for each party going to court is a crucial part of the mediation process. This assessment is known in mediation circles as considering the WATNA and the BATNA (the Worst Alternative to a Negotiated Agreement and the Best Alternative to a Negotiated Agreement).

Mediation that does not thoroughly canvass the upside for each party of going to court is a flawed process, especially in the context of family law disputes. Often the parties to a family law dispute are looking for certainty and finality in any resolution of the dispute. An agreement that does not take into account the law's perspective on what is a fair separation agreement cannot offer that certainty and finality.

The assessment of the WATNA and the BATNA in a family law mediation cannot be effectively done without input from a lawyer looking at the proposed resolutions to the dispute solely from the point of view of the interest of each party to the dispute independently. This crucial role of the family law practitioner is a primary reason for bringing the parties' lawyers into the mediation process at an early stage and having the lawyers present during the final negotiations.

3. Who Decides on the Resolution of the Dispute

If the litigation process runs its full course, the judge decides on the resolution of the dispute. In the mediation process, the parties decide. For lawyers, the notion that the

client decides is not difficult to accept. After all, lawyers take their instructions from clients not the other way around, and in the majority of cases in which settlement is reached outside of court, the client decides.

On the other hand, there is something of a different approach in mediation to the involvement of the parties in the decision-making process. Mediation assumes that ultimately the parties to the dispute know best what their interests are. Lawyers, on the other hand, are there to give advice to their client. There often is an underlying assumption that the lawyer knows best. The client can, of course, choose to ignore the lawyer's advice but the implication is that the client would be foolish to do so. Getting used to the idea that client's have valuable input into the process of working out a negotiated agreement that meets their interests is perhaps one of the bigger obstacles to lawyers' learning to love mediation. It is by understanding that clients' interests are very personal to them and are not exclusively legal in nature that lawyers can adapt to the idea that a process with more direct involvement of the client in the negotiations has advantages over one that excludes clients from the negotiation process.

4. A Problem Solving Approach to a Dispute

Good advocating lawyers take a problem-solving approach to their clients' disputes. They listen to the circumstances of the dispute as presented by the clients. They define the legal issues inherent in the dispute. They gather more information relevant to the dispute. They explore creatively the resolutions within the context of the law. They advise the clients as to strategies for a successful outcome. The client gives instructions. The lawyer takes the agreed upon steps to resolve the issues to the benefit of the clients. This almost always involves the lawyer in some effort to negotiate a settlement. If negotiation does not work, a judge is asked to determine a resolution for the parties. Both in the negotiations and in the adjudication process, the lawyers attempt to put forward the clients' perspective, in a clear and persuasive manner, both on what are the relevant facts and on how the problem should be solved.

Mediation takes a similar problem-solving approach to a dispute. Up to a point, the steps are the same. The parties' perspectives to the dispute are reported and listened to. The issues inherent in the dispute are defined. Information relevant to the dispute is gathered and exchanged. Consideration is given to creative resolutions. The various resolutions are weighed individually by the parties and measured against the parties' definition of success. The parties negotiate. If they cannot negotiate an agreement, the alternative is for a judge to impose a resolution. A key part of the process is the clear articulation by the parties, and their lawyers if present, of that party's perspective.

The similarity is the problem-solving approach. The difference is that the litigation process is based on the assumption that the best outcome will flow if each party pursues their own interests separately from the interests of the other. The assumption of the civil

litigation process is that ultimately, the just result is obtained by the clash of differing perspectives on the same issue. The assumption of mediation, in contrast, is that collaboration rather than confrontation will result in a better outcome.

5. The Importance of Basing the Outcome on Valid Information

Our common law civil litigation process is based on the evolution of legal principles rooted in the factual circumstances of particular cases. A just decision by a judge depends on a full airing of the facts of the particular case to be adjudicated.

Lawyers love facts. The more relevant facts they know, the better able they are to advise their clients and to work towards an outcome in their clients' interests. Pursuit of relevant facts is a major part of the litigator's task. Managing the facts in a way that puts the client's perspective at its best is what lawyers are good at.

Similarly, one of the most important parts of the mediation process is the exchange of valid information. An agreement that is not based on valid information is not a good agreement for the parties. In the case of family law, it is often not a binding agreement.

There is a difference, however, in the approaches to information management in litigation and mediation. In litigation, the judge relies on the lawyers representing opposing interests to get out all the relevant facts. The clash of interests and the opportunity that the process gives to examine for discovery and to examine and cross-examine witnesses at trial, ensures that all relevant facts are provided to the judge as a basis for judgment.

In the litigation process, advocating lawyers want to control information as much as possible. The cardinal sin of cross-examination is to ask a question when you do not know what the answer is. Closed questions to which the answer is "yes" or "no" are favoured as being less likely to result in an answer that causes the examining lawyer to lose control of the information.

In mediation, however, open questions are the preferred method for eliciting information. Open questions are by their nature not controlling. The answers are unknown by the questioner. The goal is to cast a wide net with the hope of catching in that net relevant information that will assist the parties to solve their dispute jointly.

The kind of information sought is also somewhat different in mediation than it is in the litigation context. In litigation, the pursuit is for facts that will assist in the presentation of the client's perspective on the issue in dispute. In mediation, on the other hand, the pursuit is for underlying interests that will broaden the parties' collective understanding of what interests need to be met for a negotiated agreement to be possible and successful.

The mediation approach to obtaining relevant information is not entirely alien to advocates as they need to engage in open questions and the pursuit of underlying interests in obtaining information from their clients. Lawyers who do not ask probing and open-ended questions of their clients will often be surprised somewhere along the line by relevant information they have not accounted for in their strategy. If they do not probe for their client's underlying interests, they may fail in their goal of obtaining a result that furthers the client's interests.

The difference in mediation is that the lawyer participating in mediation needs to school himself to ask questions of the other party and listen to the answer, not with a view to controlling or disputing the information in the answer, but with a genuine curiosity about the other party's interests and a desire to understand them fully.

6. The Importance of Being Heard

One of the essential aspects of natural justice is the right to be heard on an issue of interest to the individual. The importance of being heard is similarly a key to the success of mediation.

Being heard in both the litigation process and in mediation is an end in itself. The litigation process is based on the proposition that only if the differing perspectives of the parties to a dispute are heard fully can a just resolution be determined.

We know, however, that one of the main sources of dissatisfaction on the part of litigants is that they do not feel heard in the litigation process. In contrast, the satisfaction rate is high among parties who mediate often because they do feel heard in the mediation process. If a party feels his perspective is heard, he is often prepared to listen to the other party's perspective and to accommodate that perspective in a settlement.

Lawyers involved in mediation are often very good at explaining their client's perspective. This can be very helpful in allowing the party to feel heard. The more difficult task for the lawyer involved in a mediation, however, is listening to the other party's perspective and making certain that the other party also feels heard. In litigation, the lawyer advocate can leave that concern to the other party's lawyer and to the judge. In the mediation process, making the other party feel heard is a key element to the success of the process and is a joint responsibility of the parties and their lawyers if they are present.

7. Summary

The underlying focus of mediation on furthering interests can be easily accepted and understood by the family law practitioner. The difficulty an advocating lawyer has in understanding and effectively working with the mediation process is in adapting to the

idea of the importance of recognizing and taking into account all party's interests, not just the interests of the advocating lawyer's client.

III. Why is Mediation Here to Stay?

A. The Traditions of Mediation

Until relatively recently, "mediation" as a label for a process of dispute resolution has been used mostly in the collective bargaining arena. In that context, the mediator is called into an intractable dispute to pressure the parties in the dispute to a resolution to avoid a strike or lock-out. The primary method used by the mediator to this end is to conjure up the negative alternatives of failing to reach an agreement. Often, in those circumstances, the mediator plays a tough, almost coercive role, not shying away from expressing his opinion of what the parties should do. The power of the mediator to bring about a resolution comes from the respect which the parties have for the mediator, and sometimes, the authority that the mediator has to make recommendations in the event that the parties do not reach their own agreement.

Until recently, the use of mediation in the litigation process has been mainly confined to family law. In family law, mediation has had a quite different tradition than mediation in collective bargaining disputes. Often family law mediators were not lawyers. Their training and inclination has led to the use of a very different model for mediation in family disputes. In the traditional family law mediation, the mediator played no persuasive, let alone adjudicative, role at all.

This kind of mediation has often been considered "soft" by litigators. Non-lawyer mediators have been viewed with suspicion as not really understanding the issues and as being too committed to an agreement at the expense of the weaker party. Lawyer mediators have from time to time been dismissed as somewhat marginal, having opted out of the cut and thrust of "real" law. This somewhat negative view of mediation, as being soft, has had a retardant effect on the general acceptance of mediation in litigation generally, and in highly litigated family law cases in particular.

B. The Increasing Use of Mediation

Despite a rather slow start, however, mediation is currently bursting out all over. The use of mediation in litigated cases has increased and its status within the civil justice system has significantly improved. The growth of mediation has to some extent been consumer driven, especially in the family law area. Spouses whose marriages have broken down have chosen mediation over the alternative of an expensive, contentious divorce proceeding, often for the children's sake, as well as their own. Consumers of legal services in other areas of law have given impetus to the widespread use of mediation as

an effective way to negotiate an out-of-court settlement. ICBC discovered that legal fees and the number of personal injury claims going to trial could be significantly reduced by the use of mediation. Business people have preferred to avoid the delays and enormous costs of lengthy trials, and the risks attendant upon going to court, in favour of a more expeditious means of solving a dispute in which they have more control over the resolution.

On the supply side, the number of people, including lawyers, seeking to turn themselves into mediators has grown exponentially. Burnt out litigators looking for an alternative to the litigation process which too often did not serve the interests of their clients, and business oriented practitioners with an eye to future markets, have been taking CLE mediation courses in large numbers. The supply of qualified lawyer mediators has outstripped the demand, but some of those qualified mediators have aggressively worked at increasing that demand.

Recently, mediation has become almost mainstream. The Canadian Bar Association Task Force on Civil Justice Reform has recommended its more wide spread use, endorsing it as one of a number of alternatives to trial that civil litigants should be offered in the litigation process. The British Columbia government, after toying with the idea of mandatory mediation, introduced the Notice to Mediate in motor vehicle personal injury litigation and is currently expanding its use on many fronts.

A sign of the times is that more recently litigators who have no ambitions to become mediators are taking CLE mediation courses. Perhaps they are seeing the writing on the wall and they want to make certain they have the skills to advocate for their clients in this new milieu.

Some skepticism remains, and there are those who are waiting to say, "I told you so!" when mediation is discovered to be just a passing phase. On the other hand, along with the negative experiences that have confirmed the skeptics' prejudices, lawyers have had positive experiences in which they have observed mediation work, and have had happier clients at the end of the day.

Success breeds success. The more mediation is used the more likely it will be used again.

C. Reasons Inherent in Mediation for its Increasing Use

The most obvious reason mediation will be an enduring phenomena is because it works. Here are some reasons why mediation works.

- (1) The way mediations are conducted is flexible which allows the parties to fashion a process to suit their particular needs.

- (2) Mediation facilitates better communications between disputing parties which assists them in exchanging important information upon which to base a workable resolution.
- (3) Mediation focuses on satisfying the parties' interests, rather than on justifying their positions.
- (4) Mediation encourages a joint problem-solving approach which maximizes the collective creative energy of the parties and directs that energy towards a resolution that works.
- (5) Mediated agreements are more likely to be complied with because the parties to the agreement have bought into the resolution.
- (6) Mediation allows for the development of trust between parties that can be important if the relationship is to continue beyond the particular dispute to be resolved and if that relationship has significantly broken down as a result of the dispute.
- (7) Mediation helps parties develop communications and negotiation skills that serve to improve future communications and negotiations.

D. A Broader Context for the Increasing Use of Mediation

Mediation is likely to be an enduring phenomenon not just because it is popular or it has been endorsed by the justice system establishment or even because it is an inherently effective process. The increasing popularity of mediation can also be seen as a reflection of some underlying societal changes. When a change in the way society does things results from a fundamental change in culture of that society, that change is likely to be more than a passing phase.

1. The Decreasing Authority of the State

In our society, the authority of the state is no longer accepted as it once was. This decrease in the state's authority with its citizens is both the cause and the effect of increasing chaos in the organization of the state. Order within the state requires some level of acceptance of the state's authority to arrange that order. The breakdown of the state's authority results in increasing chaos in the lives of its citizens. This increase of chaos in turn reduces the citizens' willingness to accept the state's authority. If the state is not capable of providing order, then the rationale for accepting the state's authority dissipates. Private individuals and businesses who require some level of order to function, increasingly cannot look to the state to deliver that order. Instead, they begin to rely on themselves to organize their own order in the chaos.

2. Mediation: A Private Way to Bring Order to a Chaotic Environment

The relevance of this societal dynamic to the increasing popularity of mediation is this. The court system is the means of dispute resolution offered by the state to its citizens.

The court system, in part because of increased costs and lack of certainty in outcome, has not brought order to the citizen's affairs which is its promise. In many cases, it is seen by litigants as increasing the chaos in their lives. Any family law practitioner can give countless examples of this phenomenon.

Mediation is a means for parties to regain control over the process of dispute resolution so that they can reduce the chaos in their lives and order their affairs in a way that works for them. From this perspective, the increased use of mediation is a reflection of a decreasing trust in the state to order the affairs of its citizens.

Human beings need some level of order in their lives to function effectively. Order and stability is even more important for children to allow their healthy development to adulthood. The responsibility which parents feel to provide an ordered, stable environment for their children is a particular reason for the use of mediation in family law.

IV. Variations in the Mediation Process for Use in a Family Law File

A. The Flexibility of the Mediation Process

Flexibility in how the mediation is conducted, allowing parties to design a process to suit their particular needs, is the first reason given above for why mediation works. This assertion may be contrary to the assumption of many family law practitioners.

Traditionally, in family law, mediation has had a set look, and parties' counsel has not seen it as a process they could influence. Instead of going to lawyers, the spouses in the throes of a matrimonial break-up go to a mediator who works with them, to the exclusion of lawyers, with the goal of arriving at a separation agreement. Lawyers have been involved, if at all, at the end of the process to give Independent Legal Advice, after the agreement has been accomplished. Family law litigators were more often involved in the role of helping to clean up the mess of a mediated separation agreement that went awry.

In fact, this mediation model is only one way a mediation can be conducted. Variations in the mediation process are almost infinite. In particular, the role of lawyers in the process can vary. In order to provide good advice to disputing parties, lawyers need to know what variations are possible and what the different mediation models look like.

B. The Mediation Abacus

That the mediation process can have many variations is illustrated by the mediation abacus concept developed by the Bond University, Dispute Resolution Centre in Queensland, Australia. The abacus sets out 22 variables: for example, no lawyers present/lawyers necessarily present; private meetings during process/no private meetings

during process; no solutions suggested/solutions suggested; mediator can change to arbitrator role/mediator must stay in single role.

The creators of the mediation abacus idea suggest a number of factors which influence the variables on each rung of the abacus. These factors include: cost, time available to parties, degree of hostility, educational/sophistication levels of parties. The variety of permutations and combinations of the mediation abacus are viewed as positive in that interventions by a mediator can be at varying stages in the dispute resolution process for varying purposes. Mediators are enjoined to modify their interventions to meet the changing characteristics of each case. This same advice can appropriately be given to lawyers who have clients involved in mediation.

C. Mediation Models

There are varying models of mediation which tend to be used in different areas of law. They can be placed on a continuum representing the degree of intervention of the mediator in the process of its outcome.

- (1) Closer to the interventionist end of the spectrum, short of med/arb, is the *compromise mediation model* in which parties are encouraged to compromise at a central point between the parties' positional demands. This model tends to have been the favoured approach in collective bargaining. The mediator who functions well in this model is one who has the respect of the parties and can determine their "bottom lines" and pressure them to a compromise.
- (2) On the other end of the spectrum is the *therapeutic mediation model* in which the goal is less to reach an agreement and more to deal with underlying causes of the parties' dispute in the hope of improving the parties' relationship. The mediator who functions well in this model is one skilled in therapeutic techniques and understanding the psychological underpinnings of conflict. Often this kind of mediation model is favoured in what are essentially non-legal disputes such as intact family disputes.
- (3) Somewhere in the middle of these two extremes is the *interest-based, problem-solving mediation model* in which positions are avoided and resolutions are worked out in terms of the parties' underlying needs and interests. This is the model which is taught in the CLE mediation courses and is central to the family law mediation tradition for resolving issues on marriage break-up.
- (4) A variation on this interest-based model, but closer to the compromise mediation model is the *evaluative mediation model*. The mediation can still be seen as concerned with the parties' interests but in this model, those interests are defined primarily in relation to the alternative of going to court. The parties engage in a risk analysis and come up with a compromise because the compromise is in their interests rather than risking the outcome of having their dispute adjudicated. In the evaluative mediation model, parties want the mediator to be fairly interventionist in expressing his views of the parties' risk in going to court or to arbitration. Mediators with substantive knowledge of the range of likely court outcomes function well in this model. This model is often preferred in personal

injury disputes, but is increasingly being used in matrimonial property and spousal support disputes.

V. The Traditional “Family Mediation Model” Without Lawyers Present

There is good reason why the family law tradition of mediation has favoured an interest-based, problem-solving model in which parties participate without their lawyers present. The traditional family mediation model will continue to be used. Family law practitioners need to understand what this process is like in order to advise their clients as to its use.

A. What Does the Traditional Family Mediation Model Look Like?

The traditional family mediation model looks something like this.

- (1) The mediation sessions take place without the parties’ lawyers present.
- (2) The mediation usually takes place over a number of sessions, each session lasting a couple of hours. There is not a sense of urgency as the mediation needs to proceed at a pace that works for all participants.
- (3) The mediations has the flavour of a joint problem-solving exercise.
- (4) In the mediation sessions, the parties:
 - (a) define the issues between them;
 - (b) exchange relevant information;
 - (c) work at understanding and acknowledging each other’s perspectives; and
 - (d) explore possible resolutions.
- (5) Between sessions, the parties:
 - (a) ponder what has been said at each session;
 - (b) gather further information which may have been revealed as relevant in the mediation sessions;
 - (c) try out proposed resolutions on others who might have a stake in the outcome; and
 - (d) get independent legal or other advice if necessary with which to assess the proposed resolutions.
- (6) The mediator rarely meets separately with the parties, unless the mediator deems separate meetings necessary to overcome a block in the negotiations.
- (7) The parties are not pressured to reach a compromise agreement. An agreement is finalized only when it is tested as being the best way to meet both parties’ interests.

B. The Role of Counsel in the Traditional Family Mediation Model

The role of the family law practitioner in this process is first to judge when it might be an effective way to resolve the dispute presented by his client. The following are some suggestions of when this model works well for clients in family law disputes:

- (1) When children are involved. We know that children suffer adverse effects when their parents' marriage breaks down. Those effects can be ameliorated by the parents showing they are capable of working out disputes together rather than in an adversarial process.
- (2) When communications over parenting issues are poor because of trust issues, mediation can be an important way to restore trust and develop better communications. (Improved communications are an important by-product of mediation and are especially important when there will inevitably be issues to negotiate about in the future.)
- (3) When the client has expressed the goal of maintaining a reasonable relationship with the spouse after the terms of the separation have been resolved. (Statements written in lawyers' letters, or worse in affidavits, are not conducive to maintaining civilities in the relationship between spouses involved in a matrimonial break-up.)
- (4) When there are no obvious, significant power imbalances, in particular, no domestic violence.
- (5) When the issue at stake does not justify the expense of involving lawyers too extensively.
- (6) When the dispute does not lend itself to satisfactory determination in court, for example, access issues.
- (7) When the dispute does not involve complex legal issues and risk assessments of what might happen in court.

Not only are lawyers costly, they are also task oriented, and somewhat impatient to reach a resolution. If there are other important goals to the mediation than reaching an agreement consistent with the legal entitlement of the parties, then the traditional family mediation model is a good alternative to working exclusively through lawyers and taking the dispute to court.

Even if lawyers do not participate directly in mediation sessions, they can help prepare their clients. They can give important legal information, assist in the identification of legal issues, guide the clients in collecting and organizing relevant information, although all of these are tasks that a well-qualified mediator can and does undertake.

What mediators, even if they are knowledgeable in family law, cannot easily do is to provide a detailed risk assessment regarding a court outcome, and estimate costs and timelines of the court alternative: put another way, to clarify the parties' BATNA's (Best Alternative to a Negotiate Agreement) and WATNA's (Worst Alternative to a Negotiate Agreement). This role is best fulfilled by the lawyer whose job it is to look at the dispute solely from the point of view of her client.

VI. Mediation with Lawyers Present

A. What Does a Mediation with Lawyers Present Look Like?

Mediations with lawyers present are sometimes referred to as “lawyer assisted mediations.” These mediations are more formal and directed than the traditional family mediation model. They often involve a more evaluative approach. The lawyer assisted mediation model looks something like this.

- (1) Lawyers are present at the mediation sessions.
- (2) Often the goal is to reach an agreement in one session, even if that session takes many hours. They almost always take, at least, four hours, and often all day.
- (3) A date is set enough in advance to allow thorough preparation and exchange of information prior to the mediation. Thorough preparation and full prior exchange of information are essential to resolving the dispute in one day. Sometimes a two-step mediation works well. On the first day issues are defined and necessary information for settlement exchanged or identified. On the second day, the focus is on negotiating a settlement, and the assumption is that all the necessary information for an agreement is available.
- (4) Prior to the mediation, the mediator may meet with the parties in advance for the purposes of establishing a rapport, gaining insights and coaching the parties in how to make the mediation work.
- (5) The parties’ lawyers are asked to prepare a one or two page outline of the issues from their clients’ perspectives. After the preliminary process issues are dealt with, the issues in the dispute are defined, with the parties’ lawyers taking the lead.
- (6) The parties express their respective perspectives on the different issues, necessary information is put on the table, and questions are asked to clarify the facts and to bring out underlying interests.
- (7) At some point in the process, the lawyers share their risk assessments of the alternative of having the dispute arbitrated; the differing perspectives on both parties’ BATNA’s and WATNA’s are explored. (Theoretically, both lawyers’ assessments should be the same; they never are.)
- (8) Once there has been a full exchange of perspectives and information, the mediation turns into a brainstorming session in which the advantages and disadvantages of various resolutions are canvassed. The gap between the parties is clarified and joint efforts are made to reduce the gap.
- (9) Almost always, at some point, the gap between the parties becomes clear and the question arises as to how to bridge the last gap. Usually, at this stage, the mediation is conducted with the parties in separate rooms. The mediator goes back and forth between the rooms to help the parties come to a compromise resolution.

B. Why the Lawyer Assisted Mediation Model May Sometimes be the Best Way to Resolve Family Law Disputes

1. Reasons for Having Lawyers Present at Mediations

Having lawyers present at the mediation has the following advantages.

- (1) Because of their training and experience, lawyers are likely to be more skilled in negotiations than their clients, and can effectively assist their clients in the negotiation process.
- (2) If the issues of law are complex and the outcome of great importance to the parties, having lawyers present to advise the parties and to assist them in making an informed risk assessment is a necessary ingredient to reaching an effective agreement.

2. Why Mediation Rather than Negotiating Through Lawyers

Lawyers are experts in negotiations. Why do they require the assistance of a mediator or a mediation session with parties present to resolve a dispute? Here are some of the reasons why using a mediator to assist in final negotiations may be helpful.

- (1) A formal mediation process focuses busy people on negotiating a resolution before the last moment. Lawyers may be good at negotiations but the exigencies of practice often mean that they do not get around to negotiating until the very last minute when they are faced with the alternative of a lengthy and, for their client, potentially risky hearing.
- (2) Getting all those individuals necessary to reach an agreement in the same room decreases the risk of communications problems creating an obstacle to an agreement.
- (3) Investing time and money in a mediation process creates a momentum towards settlement.
- (4) Lawyers negotiating in the absence of their clients often miss some unexpressed, underlying interest of the client which will come out in a mediation session.
- (5) Hearing the other side's perspective directly often tempers the lawyer's certainty of victory in court and leads to advice to the client which makes the client more amenable to settlement.
- (6) It is easier for a lawyer to articulate the downside risk of arbitration for the party that is not her client. Parties expect their own lawyer to be the champion of their cause not its nay-sayer. Hearing the other lawyer's risk assessment often helps convince a party of the risks of going to court.
- (7) Actually listening to the other party's perspective and having one's own perspective heard, often allows the parties to back off from mutually inconsistent positional stances.
- (8) Having a third party act as a conduit for communications can often be helpful in getting over that last gap.

VII. Conclusions

This paper has covered a wide variety of topics in a somewhat cursory manner. There is much more to be said about the nature of mediation, about its strengths and its weaknesses, about the underlying societal currents which have led to its increasing popularity, about the variety of mediation processes possible, and about how lawyers can make mediation work for their clients.

The stated intention of the paper is to encourage family practitioners to stop focusing on the negatives of mediation and to assist them in learning how to make mediation work for their clients. To this end, the paper concludes by returning to the typical negative comments of lawyers about mediation that were set out at the beginning of the paper, and offers some comments that flow from the ideas presented in the paper.

“Mediation is just the flavour of the month. It’s popularity will pass. The tried and true civil litigation process will still be there as the ultimate way to resolve family law disputes.” Yes, the civil litigation process will be with us for a long time to come as the ultimate way to resolve family disputes. But mediation as an effective alternative means is here to stay because it is responsive to the needs of the parties and to underlying societal trends.

“My client does not need to go to mediation. I’m a good negotiator. I can get a better agreement for my client than he can get in mediation.” Lawyers are good negotiators and for that reason they can play a useful role in assisting their clients to negotiate an agreement in their interests in the mediation process. But clients not lawyers have special knowledge of what their interests are, especially their non-legal interests. Having clients play a direct role in the negotiating process makes it more likely that the clients’ interests are in the forefront of the process that the client feels heard, and that the client buys in to the resolution to the dispute.

“Mediation is all right in some cases but not in this one because .

..

. . . my client needs me to protect her interests.”

Yes, but the mediation process if it is working properly will not allow the party’s interests to be sacrificed to the goal of an agreement at all costs. If the power imbalance between the parties is significant, this is when the lawyer assisted mediation model should be considered.

. . . we haven’t had discoveries yet. You cannot settle without a full exchange of information.”

Mediation can be a very efficient and effective way of exchanging information.

. . . the other party is irrational and has unreal expectations.” Often apparent irrationality is a symptom of the party’s frustration at not being heard. Mediation provides the opportunity to be heard. Apparent irrationality can also be nothing more than ineffective articulation of underlying interests. The mediator’s role is to assist the party in getting beyond irrational statements to effectively articulate his interests. If a party has unreal expectations, the mediation process is designed to inject reality into the negotiating process. Hearing both parties’ lawyers give realistic risk assessments of going to court is one of the ways of getting the parties to consider their interests in a negotiated agreement.

. . . the parties are too far apart. Mediation only works when the parties are close to a settlement.” If the parties are close to settlement, then mediation may not be necessary. A resolution can often be negotiated between counsel. Mediation is really useful, however, when the problem of resolving the dispute to anyone’s satisfaction seems intractable. The files lawyers should be taking to mediation are the big, ugly, out of control files.

So this is the final word for how family law practitioners can learn to love mediation. Mediation is not a threat to a better way of resolving family law disputes, the tried and true methods of family law litigation. On the contrary, mediation is a complementary way to proceed in a changing societal environment in which clients want to have more control over the dispute resolution process and its outcomes. For family law practitioners, mediation brings the promise of getting those big, ugly files that take away from the enjoyment of life, off that hated pile and puts the problem of what process to follow to resolve the problem in the lap of the mediator.

Don’t worry! Be happy! Learn to love mediation.