

Information in Mediation: Why, How, When, How Much?

by

Tony Gee and Jane Picton - Mediators, Family Court, Melbourne, Victoria

Introduction

The Melbourne Family Court Mediation Section opened in January 1992, based on amendments to the Family Law Act. The Director, Dianne Gibson, had developed a framework for a model of mediation that required the initial attendance of separated couples at an information session. The mediation team, along with the Director, formulated the content of the session, which has continued although with modification. The writers, who have been with the unit since its inception, are convinced that an information session pitched at the right level and containing the relevant information is extraordinarily empowering for the attendees.

This paper covers what the information should include; why information provision is so imperative; how it can be presented; and when to provide it.

Our view of mediation is similar to that of Girdner (1986) who considers negotiation to essentially involve a relational dimension as well as a topical or practical dimension.

In family mediation where the focus is on issues surrounding separation and divorce, these two dimensions may be seen as:

1. negotiating agreements to do with parenting arrangements as well as property and finances; and
2. assisting with the restructuring of relationships which inevitably occurs after separation where it is not only the marital relationship that changes but also relationships with children. If there are young children and contact will be ongoing over a long period of time, this dimension is extremely important.

Many mediators would also add a third dimension: the well-being of each person.

Separation, and subsequent events, brings about a great deal of change in people's sense of self. The 'self' that begins mediation is often different to the 'self' that concludes. Mediation provides the opportunity to talk through emotional issues, to clarify concerns about the children and/or about the property and to recognise and form agreements. It can also provide the sense of concluding the last of joint business and an acceptance of the realities of the separation and divorce and a ritual for closure and moving on with life (Gold, 1984). This often means the completion of a shift to a different way of relating: from the intimate marital or de facto relationship to a parenting or business-like relationship (Ricci, 1980).

While it could be argued that this is not the goal of mediation, and that individual well-being and the restructuring of relationships is the province of counselling or therapy, it is clear that such outcomes occur as a *consequence* of the mediation process and the *way* in which issues are resolved (Bordow, 1994; Love, Maloney and Fisher, 1995).

In fact, some mediators explicitly offer therapeutic interventions so the lines drawn between agreement focus, and a focus on relationships and well-being, are extremely fluid. It may have as much to do with the goal of participants and their contract with the mediator as clearly-defined inherent differences in interventions.

Before discussing the answers to what, why, how and when, it is important to explain where the information session fits in with the other parts of the service offered to separating or separated couples. We view the information session as an intervention in its own right, but one that is part of an entire process which includes the information session, an individual intake/assessment interview, and subsequent mediation sessions.

While we focus specifically on the information session in this paper, we believe the provision of information occurs throughout the entire mediation process. From initial enquiry through to completed mediation, there is an aim to prepare, inform, and educate both participants about mediation and dispute resolution (Gibson, 1992). The aim is also to encourage participants to “join” with the service in a collaborative process to assist them to resolve their separation issues. In order to undertake this task, it is important they are clear about the Section’s expectations of them and the role of the mediators in the process (Gee, Picton et al, 1994).

What Information?

The selection of what to include in an information presentation is important. In the Melbourne Mediation Section, participants are prepared to a certain extent when they phone for an appointment, since the purpose of the information session is explained and their initial questions answered. Their booking for the session is confirmed by mail and their ex-partner written to and invited to the same session. Enclosed with the letters is a brochure describing and explaining the service, so there is some information imparted at this very early stage. They are made aware of the practical arrangements; that is, the length of the session, where it will be held and that there will be a choice of whether they wish to be seen for the intake/assessment interview following the session.

The information provided in the session falls under six broad headings:

1. the mediation process and steps
2. escalation of disputes
3. the impact of separation and the grieving process
4. suitability for the service
5. the issues often presenting in mediation
6. alternative services

1. *The mediation process and steps*

The definition of mediation (based on Folberg and Taylor, 1984) is provided at the beginning of the session (overhead slides are used), followed by the steps or stages in the mediation model, i.e. the information session, intake interviews and the stages in the sessions. The latter is explained as steps which include:

- the compiling of an agenda or list of issues for discussion;
- the obtaining of some background information;
- the concentration on needs or interests;
- the raising of ideas or options; and
- the assessment of them prior to negotiating and attempting to find solutions which fit the couple's individual and family needs.

2. *Escalation of disputes*

In attempting to explain what evolves following a separation, an illustrative diagram is developed by one of the presenters on the whiteboard. This demonstrates how a couple often draws away from the central core of the relationship with miscommunication, or no communication, resulting in misunderstandings and mistrust. These often seriously affect the couple's ability to resolve any issue connected with their former relationship. The situation of one partner's perspective being accepted and supported by family, friends and legal advisor is explained as a common occurrence in separation. Understanding what is happening or has happened to them is important.

3. *The impact of separation and the grieving process*

Separation as a grieving process is explained in some detail in the session. Although nearly all attendees will be aware of the intense emotion they are or have been experiencing, often they are unaware of the progression; unaware that it is the normal experience and unaware that their partner or ex-partner is or has been experiencing a practically identical pathway. In order to illustrate the fact that partners of a separated relationship do not usually experience the emotional stages at the same time, the section has devised a diagram to clearly illustrate this. This diagram often has an enormous impact of enlightenment on their emotional experiences: it helps them to identify themselves and their ex-partner. It 'mutualises' or draws them together in wishing to resolve a common problem which they previously believed was theirs alone.

4. *Suitability for the service*

Suitability is explained as both participants being willing to enter meaningful negotiations and being able to represent themselves. In order for this to be possible, there needs to be a reasonable balance of power between them. Factors which could affect these two conditions are set out in the Family Law Act and reiterated in the session. These include:

- alcohol and drug abuse
- debilitating psychiatric disorders

- overwhelming emotions due to separation
- history of broken agreements
- when mediation is used as a delaying tactic
- family violence
- continuing dominance of one partner
- child sexual abuse

These factors are carefully assessed with individual participants at the intake interview. Explanation of these factors in clear language in the group prepares attendees for the intake interviews which usually take place after the session, where these and other issues are explored individually and in depth. Additionally, it enables the participants to consider whether or not mediation could assist them.

5. *Presenting issues*

This segment is divided into two parts: children and property/finance; details are given about what issues are usually included in these headings. This tells participants what can be raised in mediation for discussion and resolution. Great emphasis is laid on the fact that needs and interests are considered important in mediation.

6. *Alternative services*

Alternatives to mediation are explained in the session in part to stress the choice factor and for prospective clients to be clear about what other avenues are open to them apart from mediation.

It is important to provide the right information so couples may make an informed choice about using the service. Commitment to mediate with each other and the service could not be expected without this information. Additionally, it is important for them to have an understanding of their personal separation feelings and the influences which can affect them during this vulnerable time in their lives. Leading up to and following separation, couples of necessity place a great deal of emotional energy into the differences of the conflict. Understanding these influences better, and the possibility of easing the pain by redirecting their energy into resolution rather than fuelling their differences, is often an educating and relieving experience.

In describing these areas, the information sessions *invites* participants to consider whether they wish to proceed to the next step. This further emphasises that mediation is voluntary and involves choice and commitment to this process.

Sometimes attendees will decide they do not wish or need to proceed further, either because they feel unable to use the service or the timing is not appropriate. In some cases, participants, having listened to the information, believe they are able to resolve their issues themselves but may return if this proves too difficult.

Why?

- Why provide information in mediation?
- What are the reasons, and what does providing information achieve?

We believe the answer lies not in any one statement but is contained within a number of statements or key points. These may also be considered as basic assumptions about mediation. It may be useful to step back for a moment and consider these points.

Key Points

1. People generally wish to live co-operatively, with some sense of harmony with those around them.
2. People have an inherent capacity to resolve their own disputes.
3. This capacity may have been disabled or overwhelmed. Mediation is a process that re-focusses and enables people to resolve their disputes in their own way.
4. Disputes in separating families are multi-layered. Participants' needs or interests in disputes involve substantive, procedural and psychological/emotional issues (Moore, 1989). Generally, all three must be addressed in some way for resolution to occur.
5. There is a great difference between outcome and resolution. Outcome is often solely focussed on substantive issues, leaving any underlying issues untouched. Resolution includes an outcome of substantive issues, but recognises the need to deal with procedural and psychological/emotional issues in some manner as well.
6. The likelihood of a resolution is greatly increased where there is commitment by both participants to a resolution, as well as to the process by which it will occur.
7. Commitment involves choice, and this should, as far as can be ensured, be informed choice.
8. Informed choices can only be made based upon an adequate knowledge base. In family mediation this needs to include information/education or knowledge about the multi-layers of the dispute.
9. The knowledge base should therefore deal not only with the negotiation process and its alternatives but also recognise substantive, emotional and psychological dynamics.

Kopp (1971) identifies three different ways we acquire knowledge:

1. rationally: by thinking, debating, arguing things through logically. If the thinking is consistent and "fits" with the logical world, it will be accepted.

2. empirically: by relying on one's own perception, by the validity of one's experiences or by repeated experiments that confirm the data.
3. intuitively: intuitive knowledge is not necessarily rational or based upon the physical senses. This is a sense of "aha", a kind of breakthrough where the full picture is suddenly grasped. Intuitive knowledge is often grasped through metaphor, through stories that enable persons to grasp the "multiple meanings that may all co-exist".

While people use all three ways to gather knowledge, it tends to be the last that is most powerful. It is also the area that has traditionally been overlooked in systems that operate mainly on rational-based thinking. Intuitive knowledge is essential, however, to provide the opportunity for people to develop insight and understanding into their situations.

Two "umbrella" concepts, mutuality and empowerment, that embody much of the above thinking are important to consider further:

1. ***Mutuality***

When providing information in mediation, whether describing dispute dynamics, the separation process or considering commitment and informed choice, it must be remembered that we are dealing with *interactions* between the participants.

All ongoing discussions and negotiations, involve a 'self' as well as an 'other'.

Relations can be viewed as involving a mutual construction of meaning, a shared view of the world which develops over time essentially through conversations and shared experiences between partners (Berger and Kellner, 1970).

Generally, difficulties in communication and changing perceptions of the relationship leading up to separation mark a sort of de-construction of shared meaning. The eventual separation itself often marks a point where, by definition, common understanding, common goals and shared meaning are no longer shared (Vaughan, 1986). Certainly one partner, and therefore the relationship, is heading in very different directions.

Mediation often marks the point of transition in this process of de-construction. It may be the beginning of a re-construction process where the relationship is re-negotiated in a sense and, as stated earlier, can often signify a coming to terms with the realities of the separation and subsequent changes and a shift to a parenting or more business-like relationship.

The provision of knowledge about the separation process, about disputes and their escalation, about common 'maps' or reference points for understanding that these are interactive processes, are all part of the mutualising of the situation, and help firmly establish a basis for mutualising the problem and the subsequent mediated resolution.

2. *Empowerment*

The main reason for providing information/education in mediation is that it is empowering: this is what distinguishes mediation from other decision-making processes such as arbitration and judicial decisions.

All forums provide outcomes. However, is outcome enough?

In decision-making, there are relational as well as substantive dimensions; it is the relational dimension, especially in family mediation, that is essential to the resolution of the dispute and the ongoing relationship within the family.

Knowledge and learning are in themselves empowering. Knowledge that assists mutual understanding of what participants are experiencing, that emphasises informed choice, control of decision-making, the capacity to deal with relational as well as substantive issues in a way that is relevant to both participants and promotes dignity, respect and well-being, all make for the empowering nature of mediation.

How?

We believe provision of information to prospective users of a service needs to encompass the general principles of adult learning.

Kolb (in Thorpe, Edwards and Hanson 1993:155) stated that "learning is the process whereby knowledge is created through the transformation of experience". He describes a learning cycle which involves four stages: the first is "concrete experience" which includes learning from reading, life experience and formal education through school, etc; the second is "reflective observation" which involves reflecting on the experience gained in the first stage and thinking about the significance of that experience; the third is "abstract conceptualisation" when the new learning is tried out in thought and practice. The final link in the cycle is the inclusion of this new knowledge into the concrete experience, and so it continues throughout the individual's life.

This approach to learning theory is from an experience perspective, and some believe it to be too simple. Brookfield (1986:31) summarises the principles of other adult learning theorists (Gibb, Miller, Kidd, Brundage and Mackeracher, Smith, Darkenwald and Merriam) as:

- that adults learn throughout their lives in diverse styles
- that they prefer learning to be problem-centred and meaningful to their life situations
- that they want learning outcomes to have some immediacy of application
- that past experiences affect their current learning
- that effective learning is linked to the adult's subscription to a self-concept of himself or herself as a learner
- that adults exhibit a tendency towards self-directedness in their learning.

Smith (in Brookfield, pp.30-31) provides further valuable thoughts about adult learning:

“Adults learn best when they feel the need to learn and when they have a sense of responsibility for what, why and how they learn. Adults use experience as a resource in learning so that the learning content and process must bear a perceived and meaningful relationship to past experience. What is to be learned should be related to the individual’s developmental changes and life tasks.”

Information provision needs to consider these important elements if it is to be successful in its task: that is, of giving prospective clients enough relevant information to choose whether to use the service and if they do choose it, how to use it effectively and what assistance to expect to reach their goals.

Habermas (Welton, in Merriam, 1993:85) lists four essential criteria which need to be present in effective learning situations:

1. Speech should not be ambiguous, confused or nonsensical
2. It should be sincere
3. It should be appropriate
4. It should be truthful

Smith (Brookfield, 1986:31) adds that adults “learn best in an atmosphere that is non-threatening and supportive of experimentation and in which different learning styles are recognised”.

Therefore, there are two sides to information provision: (i) to consider the receiver of that information; and (ii) how the provider gives that information. Both sides need to be in tune with one another to make the exercise valuable for the person in need of a service and place him or her in a position of being able to choose.

The Family Court’s mediation information services attempt to be guided by these adult learning principles. The sessions give people some framework in which to fit themselves and their partners in respect of their emotional and practical experiences. Often we are putting into words what they already have been feeling and living through; this enables them to proceed along whatever track they select.

Mediation information sessions are held weekly and last for 40 to 50 minutes. The group room is small, comfortable and provides an environment which assists the presentation. Usually six to eight couples are booked in and are asked to give their names to the receptionist on arrival and then gather in the waiting area prior to being invited to enter the group room. The presenting mediators welcome and show them into the room before the start. The information is usually presented by two mediators with a gender and professional mix. An overhead projector for slides and a large whiteboard are used for this information presentation so that there can be a variety in the method of relaying the crucial information.

When?

Timing plays an extremely important part in information provision.

We believe that for participants to make informed choices, to clarify their expectations and engage in a process, they must have access to the necessary information to make these decisions prior to actually beginning mediation.

In some models of practice, information is provided in written form or via a telephone interview or during the course of an initial preliminary session. In the model we practice, we have found that providing the material publicly, with mediation “couples” both present in a group prior to any commitment to mediate, has a powerful impact. In many respects, the information session provides an *invitation to resolution*; one which participants may accept, and commit to, based upon an informed choice.

Timing must also be considered in terms of each person’s ability to take in and understand the information. For example, **where** each person is in relation to the separation process, the disputes and the other person is a significant factor.

Early intervention is recognised as having a great bearing on whether a situation will resolve. However, too early an intervention may find one participant still overwhelmed by grief or anger or a host of emotions, and unable to take in information or negotiate in a purposeful manner.

On the other hand, too late an intervention may find the dispute having escalated past a point of negotiable return, with both participants thoroughly entrenched in their positions and essentially requiring an independent decision-maker.

Information providers therefore need to recognise when the information is most appropriate, and assist participants to recognise and choose the most appropriate timing for them.

Summary

Mediation as a negotiation process intrinsically involves a relational as well as a topical dimension. In family mediation, this translates as a focus on substantive agreements as well as the changes in relationships that separation brings. The well-being of each participant and those affected by the mediation is also extremely important.

Information provision in mediation needs to assist participants in their understanding of these aspects, and provide a learning opportunity to resolve matters. Principles of adult learning play an important role in the way this can occur.

While information provision and learning continues throughout the entire mediation process, it is felt that a distinct information session before participants begin mediation provides an *invitation* to mediate, emphasising informed choice, commitment and participants’ collaborative role in the process.

We believe this is fundamentally an empowering process which is essentially the goal of mediation.

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Inter-generational Input Into the Mediation Process

by

Philippa Harrison - Mediator, Relationships Australia, Western Australia

(For reasons of confidentiality, since the facts of this case study were so extraordinary as to make the case readily identifiable, the FAMCON '95 Committee, in consultation with the author, have decided details of the case study ought not be included in these Conference Proceedings. No details will therefore be printed here other than sufficient reference to the case should any readers or delegates at the conference be interested enough to enquire further. The author would welcome any requests for further information, which will then be handled appropriately).

This paper is a case study of a family mediation deciding the placement of an infant. It is believed a review of the issues which arose, the structure of the mediation and the use of external supervision, warrant an examination of what can be learned from that process.

Assessment of Suitability for Mediation

The issues which appeared to require consideration could be placed in two major categories: considerations about the likely mediation process; and the administrative tasks which needed to be accomplished to prepare effectively for the mediation.

Throughout the process, the Family Mediation Services team meetings were valuable in tracking the process. The countervailing forces of all the people involved were noted as important factors. The fact that some of the major players were unknown to each other was seen as a factor indicating it may be difficult to build trust within the process. Finally, our awareness of where the varying layers of power may lie within the family and the parties' motivating forces were noted as issues to be tracked throughout the process.

Procedure

It was clear that this matter would be best served by a co-mediation team. A cross-discipline team was nominated.

In contrast to our normal process, very little information was provided to the clients initially. This was based upon the importance of beginning to gain some insight into participants' views without their being influenced in any way.

Three mediation sessions were held, with combinations of the ten family members involved.

The first mediation involved four family members. The mediation commenced with the mediators stressing the importance of treating each other's concerns with respect. All four participants worked constructively and clearly. **The second mediation** involved four more family members. **The third mediation** involved another group of four family members.

Supervision

The value of supervision in undertaking a mediation of this nature just cannot be overstated. The ability to debrief in a manner which is personally supportive and professionally challenging is, I believe, imperative to providing the best possible service to clients. Not only does it provide the mediators with assistance in being objective about their work, but it also promotes a professional response to any deficits in their handling of the process.

In the review of this session, the difficulty of over lengthy, though necessary, caucus sessions was discussed. Importantly, my focus on neutrality was shown to have fallen into a slight over-compensation which may not have promoted the optimum degree of equal time for the parties.

Most importantly a clear plan was developed to deal with the re-emerging value issues. The value issues, together with the known practical advantages, would be listed on the whiteboard. It appeared necessary to record an agreement that these elements were different and their effect immeasurable. In the final session, the mediators would be far more directive in the procedure of the session. The focus of the sessions would be upon the parties' differences.

Conclusion

I believe one of the greatest benefits of the family entering into the mediation process was that tenuous family connections were protected and conflict did not arise in a way which diminished the infant's essential support network.

Any new undertaking can be improved with hindsight, and the major alteration I would make to our process would be to give a clearer indication to the clients of how difficult it is to work with the issues relevant to a child placement: issues which strike at the very core of our beliefs and decisions about our lives. I would more openly stress that it may be appropriate for them to seek support and to arrange a forum appropriate for them to debrief.

Acknowledgments

In closing, I would like to acknowledge my co-mediator Helen Shurven, my supervisors Diana Downs-Stoney and Susan Brill. Their input and support were intrinsic to the success of this mediation. Finally, I would like to acknowledge all our mediation clients and especially those who commit their energy to the welfare of their families as wholeheartedly as this family.

Same Sex Mediations

by

Associate Professor Hilary Astor - Faculty of Law, Sydney University

The homophobia of the formal justice system has caused gay men and lesbians to find informal methods of resolving their disputes for some considerable time. Recently, mediation has been "marketed" as a good way to resolve disputes between lesbians and gay men. Relationships Australia (N.S.W.), for instance, has recently been advertising its mediation services in the lesbian and gay press. There is increasing mediator interest in mediation of disputes between same sex couples. However, there is, as yet, very little published material on the subject which can inform the practitioner. I have found no Australian published material, and would be very interested to receive copies or details of any unpublished material of which readers are aware.¹

This paper seeks to make a beginning in filling the gap in the literature for the reflective Australian practitioner. It is not a "how to do it" paper. Those who are mediating same-sex disputes and reflecting on their practice are better placed to do that. This paper takes the approach of seeking to inform practice by analysing the issues and the literature and presenting them in (what is intended to be) an accessible and informative manner. The perspective taken is that of lesbians and gay men and the issue examined is the circumstances in which mediation may be a useful and appropriate mechanism for resolving disputes in same-sex relationships.

This paper will not look at disputes between lesbians and heterosexuals or gay men and heterosexuals. Such disputes raise different (although related) issues. For example, in any dispute between a lesbian or gay man and a heterosexual where sexuality is an issue (or could be made an issue) the lesbian or gay man will almost always be powerfully disadvantaged by the privilege that the homophobia of the formal justice system accords to the heterosexual. These issues deserve separate treatment and are not dealt with here.

Advantages of Mediation for Same Sex Disputes

Lesbians and gay men have potentially the same broad range of disputes as anyone else. Disputes attendant upon the ending of relationships will involve the same disputes over property and children as heterosexual relationships. Business partnerships may also raise disputes between lesbian or gay business partners. Indeed, given the percentage of lesbians and gay men in the population, potentially any dispute could involve a lesbian or gay man in dispute with another lesbian or gay man.

Mediation could be employed to resolve disputes between employer and employee, or landlord and tenant, or neighbours, for example, when those disputes involve only

¹ The bibliography at the end of this paper includes the few directly relevant published papers I have been able to find, e.g. Bryant 1992, Englehart and Triantafillou, 1987. Robson, 1992, Townley, 1992.

lesbians or gay men. Even though such disputes may not come to mediation neatly labelled "same sex dispute", the sexuality of the parties may be relevant.

Mediation has a number of advantages for lesbians or gay men. These include the same advantages it has for the heterosexual population (Astor and Chinkin, 1992, pp.30-58). If the dispute is successfully resolved there, mediation can provide an inexpensive and speedy method of resolving disputes. It is less formal and therefore more approachable and accessible than litigation. It may provide a more consensual, flexible method of dealing with a dispute.

In addition to these general advantages, mediation also has a number of particular advantages for lesbians or gay men. It can avoid the homophobia of the formal justice system, avoid the imposition of legal rules which may be inappropriate for lesbian or gay relationships and allow privacy for parties who do not wish to risk being outed by resorting to a more public procedure. These are significant benefits:

1. *Avoiding the homophobia of the formal justice system*

An extremely important potential advantage of mediation is that it allows the parties to avoid the homophobia of the formal justice system. It is very easy to find examples of legal rules which are offensive to, discriminate against, or exclude lesbians or gay men.

Until recently, the Tasmanian Criminal Code criminalised sexual activity between gay men. Arguably it also criminalised lesbian sex. Tasmania has not amended its criminal code, but the law has been changed as a result of international legal action and Federal Government intervention (Morgan, 1994). Although sex is not the beginning and end, or even necessarily the defining feature, of lesbian or gay relationships (as many heterosexuals appear to believe) nevertheless it is not encouraging of trust in the legal system if one's sexual activities constitute criminal offences.

The Anti-Discrimination Board of New South Wales examined instances of discrimination in the law against people in gay and lesbian relationships in 1994. It found twenty-eight instances. In the context of this paper, it is worth mentioning that one of these instances is that lesbian or gay couples must take disputes about their property to the Equity Division of the Supreme Court. The federal Family Law Act 1975 applies to married partners (and lesbian or gay couples cannot marry) and the De Facto Relationships Act 1984 N.S.W. applies only to heterosexual partners.² Although the Family Court of Australia can deal with disputes about children between lesbians or between gay men, many would hesitate before resorting to that court. Determination of the fitness of lesbian or gay partners is achieved by reference to a "handy check list" of questions (*In the Marriage of L* (1983) FLC 91-353). This includes such gems as "Whether a homosexual parent would show the same love and responsibility as a heterosexual parent" (Millbank, 1992).

² For a full discussion of these issues see Lesbian and Gay Legal Rights Service (LGLRS) *The Bride Wore Pink*, 1994.

It would be a simple matter to take up many pages in enumerating further examples of homophobia in the legal system - in the content and interpretation of legal rules or the attitudes of those who apply them. However, suffice it to say that the formal justice system is not a hospitable environment for lesbians or gay men. The level of homophobia in society is more than well reflected in the content of legal rules, the absence of legal protection for lesbian or gays, and the attitudes and practices of those who work in the system.

2. *Avoiding legal regimes which are inappropriate to lesbian or gay relationships*

Mediation allows the parties to decide what values and assumptions they shall employ in resolving their dispute. The parties are not constrained by legal rules and have as much freedom to negotiate as they wish, within certain ethical limits. This may be especially important to lesbian or gay partners because the law so frequently does not acknowledge lesbian or gay relationships or provide a framework for the resolution of disputes. If it does, that framework may not be appropriate. If property matters between lesbian or gay partners are litigated, they must be decided in the Supreme Court without the benefit of conciliation or mediation facilities and according to principles of equity and trusts. The parties may have regarded their relationship as involving mutual financial obligations which are not appropriately reflected by calculating property distribution on the basis of equity and trusts principles (Bryant, 1992). Alternatively, lesbians whose relationship is informed by feminist critiques of the family and rejection of traditional gender roles may be strongly opposed to the imposition of assumptions related to marriage on their relationship (Boyd, 1994).

The discussion paper *The Bride Wore Pink* (1994) reflects the differences of opinion amongst lesbian or gays about the imposition of legal rules developed in the context of heterosexual relationships onto gay and lesbian lives. It notes that:

“ . . . the established system of relationships has developed out of, and in response to, the inequality of partners within heterosexual relationships and is subsequently flawed.” (p.3)

However:

“ All lesbian or gays will not be united on the best option for reform. Marriage to some is the ultimate recognition. To others, it is meaningless. For some, registered partnerships hold promise for a legal recognition which we define. To others, a registered partnership is a second rate marriage.” (p.6)

When society excludes lesbian or gay relationships from established legal frameworks for relationships, or is inappropriate to those relationships, lesbians or gay men must find alternative understandings about their relationships and find acceptable ways of dealing with the end of those relationships. Mediation may give lesbian or gay partners the freedom to resolve disputes based on their own understandings about the nature of their relationship and the consequences which will flow from those understandings.

3. *Privacy*

Mediation does not necessarily involve 'coming out' to anyone but the mediator. For many lesbians or gay men, the fear of discovery of their sexuality by employers, workmates, family, or others, is a strong deterrent to using the formal justice system. This fear is a result of societal homophobia and the discrimination suffered by lesbians or gay men. A 1994 report by Gay Men and Lesbians Against Discrimination (G.L.A.D.) demonstrated a high level of violence against gay men and lesbians, as well as discrimination in employment, education and the provision of goods and services. The Anti-Discrimination Board's report on discrimination against lesbians also details the high level and pervasive nature of discrimination. There is, not surprisingly, a strong correlation between being open about sexuality and being on the receiving end of discriminatory behaviour.

Using the formal justice system makes it difficult to conceal sexuality. If a matter is resolved quickly by lawyers/lawyer negotiation, privacy may be relatively easy to maintain. However, if litigation is threatened, more and more people will inevitably learn of the dispute and its nature as the case progresses. It is likely to become harder and harder for the parties to conceal (from employers, family and friends) the reason their financial and emotional resources and time are in such demand. The parties' need for emotional and other support will increase. However, seeking such support can involve 'coming out', and lesbians or gay men may fear the result will be rejection and increased stress rather than the support needed. If the matter goes to a hearing, that hearing is likely to be public and may even receive attention from the press, depending on the nature of the proceedings.

Cautionary Tales

The advantages of using mediation for lesbians or gay men are substantial. Does this mean that mediation will always be an appropriate option? Are there any dangers in the use of mediation? Are there situations when it will not be appropriate? What issues will lesbians or gay men bear in mind when they consider mediation and what can mediators learn from this?

1. *Does mediation avoid the homophobia of the formal justice system?*

Avoiding the homophobia of the formal justice system may be important for lesbian or gays in disputes. However, we need to think carefully about the extent to which mediation can achieve this aim. It has become a platitude that in mediation, parties bargain in the shadow of the law. They may have had legal advice concerning the rules and procedures which apply if they use the formal justice system and about the likely outcome of litigation. This advice may have revealed the deficiencies of the law for lesbians or gay men, but will it be entirely irrelevant in mediation?

The rules and procedures of the formal justice system can be entirely irrelevant if both (or all) parties in mediation agree that they are to be irrelevant. However, what looks homophobic, objectionable or irrelevant at the beginning of a relationship may take on an entirely different appearance at the end of the

relationship. Even if they were united in criticism of the law during the relationship, when the parties approach mediation they may no longer be in agreement about the rules or assumptions which should be applied to the resolution of their dispute. This may be especially likely if resorting to litigation will benefit one party over the other. One obvious example would be a dispute over custody of a child between two lesbians where one was the biological mother of the child. The fact that one is the biological mother may have been seen by both as being irrelevant at the time of conception when the parties took a joint decision to parent a child. However, at the end of a relationship when it would give the biological mother a legal advantage, it may not seem to her to be so irrelevant. The legal advantage translates into an advantage in mediation also, since she can terminate the mediation if it is not going as she wishes and resort to the courts.

Mediation is only insulated from the shadow of the law to the extent that the parties choose to make it insulated. Lesbians and gay men may begin a relationship with understandings about the values which will operate in those relationships - whether they are business or personal. However, the time that people need a mediator is the time when the relationship is in trouble. They may not then be as enthusiastic about their original understandings as they were at the beginning. Ruthann Robson (1992), writing about the effect of law on lesbian lives, argues that lesbians should avoid "domestication" by which she means "the circumscription of lesbian lives and possibilities by the unthinking adoption of legal categories and protection". She looked to the possibility of a "feral future" in which lesbians create and live by lesbian values. However, appealing and important though this idea may be, it is asking a lot of two human beings to develop a critique of the legal rules, agree to apply their own ethics or standards, reach some consensus about what these are and maintain it over time, including in the face of the distress attendant upon the ending of a relationship. The reality, when lesbians or gay men approach mediation, is likely to be much more confused and lacking in consensus.

These issues create an interesting challenge for the mediator. In disputes between lesbians or gay men, it is important to keep the homophobia of the law in mind and ensure that parties and mediator all understand the values against which the dispute is to be resolved. Maintenance of balance of power between the parties becomes more complex. A weaker party cannot necessarily be referred to legal advice to ensure he or she knows what a just or fair outcome might be. What is just and fair for lesbians or gay men may have nothing to do with the law, and the mediation may need to confront competing ideas of fairness without the fall-back position of legal rules and precedents. Of course, the values and assumptions of some lesbians or gay men about the nature of their relationships may not, in fact, be very different from the values of people in heterosexual relationships (Boyd, 1994). The key issue is that mediator cannot simply map the assumptions relevant to heterosexual relationships onto lesbian or gay relationships.

2. *Who are the mediators?*

In teaching mediation, I give my students a mediation role-play which involves two gay men in a relationship and a business partnership. In the facts the students are given, the dispute about the business and the breakdown in the relationship are

Despite the similarities, however, there are important differences. It has been suggested, for example, that lesbians' accounts of violence may place greater emphasis on the positive aspects of relationships (Mahoney, 1991). However, this example illustrates well the difficulties of drawing conclusions in this area. Mahoney suggests that this greater emphasis on positive aspects of lesbian relationships where there was violence may be a function of the fact that the editors of these published accounts chose to include more of the positive parts of the stories. This may well be correct in that lesbians (as editors or writers) may feel the need to affirm positive aspects of lesbian relationships in the face of social attitudes which doubt their existence or significance.

A significant difference must be that violence in heterosexual relationships is supported by the history and reality of women's subordination. Whilst this is hardly irrelevant to lesbians or gay men, there are different pressures on lesbian and gay relationships. First, the homophobic environment may make it very difficult for lesbians or gay men to remove themselves from a relationship where there is violence. There may be greater fear of the consequences of going to the formal justice system to deal with the violence or the consequences of terminating the relationship - for instance, fear of losing custody of children. The perpetrator may threaten the target with outing if she leaves. Resources for the support of women who are the target of violence may not respond to lesbians who seek help (Morrow, 1989, Renzetti, 1989). There may be an absence of resources to help gay men. The lesbian community has been known to respond with denial that there is a problem; with fear that acknowledgement of the problem will increase homophobia (especially the characterisation of lesbians as sick and lesbian relationships as dysfunctional); with hostility towards the target if she takes action to protect herself by taking action such as calling the police or taking another lesbian to court (Lobel, Morrow, 1989, Renzetti, 1989).

It has been hypothesised that one cause of violence in lesbian relationships is that the perpetrator internalises societal disapproval of same sex relationships and projects this disapproval onto her partner, manifesting this in violence (Leeder, 1988). It has also been argued that the pressure of conducting a relationship in a homophobic environment result in relationships which are particularly intense closed systems. These relationships may be susceptible to tension around the dependency and autonomy of the partners. The perpetrator is likely to be the more dependent of the two and to be less powerful in terms of resources, education and intelligence. The violence is an attempt to equalise power between the parties (Renzetti, 1989). These conclusions are drawn, however, from very limited research and from studies of violence in lesbian relationships. They may not be applicable to gay male relationships.

What consequences do these factors have for mediation? How should mediators deal with the issue of violence in lesbian and gay relationships? In some ways mediators need to act in the same way as they do in relation to heterosexual relationships. It is just as necessary to test the willingness and capacity to mediate and to check carefully and appropriately for violence in the relationship. It is important that the mediator not be reticent to explore and deal with violence in lesbian and gay relationships. This is particularly important in view of the fact that the denial which is almost always present in relation to violence may be

enhanced in lesbian and gay relationships by the pressure of homophobia. Whilst acknowledging the similarities and the dynamics of control in relationships where there is violence, nevertheless, mediators should not make assumptions that they will find exactly the same dynamics in lesbian and gay relationships as are present in heterosexual relationships.

It is also important to recognise that pressure to use mediation, even where there is violence which affects capacity to negotiate, may be even greater for lesbian and gay couples because of the absence of tolerable alternatives. Issues of providing for the safety of the target of violence and of making appropriate referrals are also different and need to be explored and considered by mediation providers.

4. *The mediation closet*

Resolving disputes in the confidential environment of mediation may be important and advantageous for the individuals involved. However, it is questionable whether the resolution of disputes in mediation is a general good for the lesbian and gay community, particularly if it is widely used. Mediation takes place in private and confidentiality is usually protected by agreement or statute. When mediation is used the homophobia of society and the legal system is not thereby challenged, the rules are not changed and those who administer the system are not educated. The existence, identity and needs of lesbians or gay men are put into a new closet - the mediation closet.

Of course, it would be misleading to present the choice for lesbians or gay men as "mediate or litigate". Lesbians and gay men have been finding ways to resolve their disputes and avoid the courts for centuries. For some, mediation may provide a better quality of dispute resolution than supported or unsupported negotiation or "lumping it". Litigation would not have provided a remedy or would have been unacceptable anyway. The criticism of the mediation closet is also an argument which it is easier to run as an academic than as a practitioner. I am not faced with clients insisting that mediation is the only possible method of dealing with this dispute because they cannot resolve it themselves and 'coming out' will ruin their life.

However, I wish to persist with the argument because there are interests beyond the concerns of the individual and because the problems caused by the privacy of mediation are not irrelevant to individuals. One of the likely reasons that a lesbian or gay man may be in mediation is the homophobia of the legal system, which does not provide an acceptable framework for dealing with disputes in lesbian and gay relationships and which applies offensive and discriminatory provisions. Challenging the legal system can improve the quality of life for lesbians and gays and is perceived by many to be an important site of struggle (L.G.L.R.S., 1994).

Litigation can play an important part in challenging homophobia. The courage and tenacity of people like Nick Toonen and the Tasmanian Gay and Lesbian Rights Group provides an excellent example. Toonen successfully challenged the provisions of the Tasmanian Criminal Code (which made gay male sex a criminal offence) before the United Nations Human Rights Commission. The decision has publicised the problem, raised the level of debate, educated many individuals

(including those in positions of power), decriminalised gay sex in Tasmania and had a broad potential impact in many countries beyond Australia (Morgan, 1994).

The confidential mediation of substantial numbers of disputes can create problems. Under the Anti-Discrimination Act 1977 N.S.W., many disputes go to conciliation and are thus dealt with confidentially. This includes disputes involving discrimination against lesbians or gay men, including disputes about discrimination against people with HIV/AIDS. The confidential nature of these conciliation conferences gave the gay community the impression that nothing was being done to deal with the high level of discrimination, especially in relation to HIV/AIDS. The relationship between the Board and the community was extremely conflicted for a significant period of time, and energy needed to deal with the problem was diverted by that conflict. Litigation could have exposed the level and nature of discrimination against people living with HIV/AIDS and educated and deterred those who might otherwise discriminate. It would at least have informed the community about the utility (or lack of it) of the existing legal provisions. I am, of course, not being critical of individual decisions to use conciliation. Not surprisingly, many people living with HIV/AIDS feel they have better things to do with their lives than to litigate. I simply point to one effect of the conciliation of substantial numbers of disputes.

Mediation of “same-sex” disputes means that lesbian and gay relationships are privatised. People need not notice the lesbian and gay relationships around them. There are no statistics, few reported cases, little publicity and the fuel for social and legal change is dampened. What should mediators do about this? Sending clients to litigate because lesbian and gay relationships need the publicity is hardly a viable option. However, mediators should be prepared to discuss these issues with clients who wish to discuss them, or be able to act as a good referral agency.

They should also publicise their work with lesbian and gay couples. Within the limits of confidentiality, agencies should produce information about the amount and nature of the work they do and the issues raised by that work. They should develop the strong community links to inform their own work and to inform the community about the pros and cons of mediation. To provide a mediation service for lesbians and gays and to be covert about it would be to become part of the problem of prejudice in our society rather than part of the solution.

Conclusions

If lesbians or gay men are to be a “market” for mediators, then mediators must consider carefully the needs of those communities. Given the homophobia of the legal system outlined above, mediation is likely to be an important and attractive option for lesbians or gay men. It is therefore important that mediators develop their understanding and practice in this area. This must include further research, conference papers, articles, etc. The reflections of practitioners in this emerging area are extremely important.

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Parenting Plans: Their Use in Mediation

WORKSHOP

by

Patrina Duffy and Michael Courtney - Mediators, Sydney, New South Wales

Workshop Summary

This workshop aims to briefly give the background to the current relevance of parenting plans, explain what a parenting plan is, and specifically introduce the Relationships Australia (New South Wales) Parenting Plan and allow participants the opportunity to critique the document.

Background

One of the problems with the current Family Law Act is the terminology of court orders regarding children, and the perceptions that arise. Custody, in particular, for many implies ownership, with the idea that the “good” parent wins the children while the parent who “loses” has a much lesser say in their upbringing. In mediation, most or all of us would have had experience of the emotions of the non-custodial parent when faced with the very real view that he or she (and it is usually he) is losing involvement with his children.

Parenting Plans

Parenting plans are a means for both parents to be actively involved in making decisions about how to share responsibility for their children’s well-being and upbringing. A parenting plan is simply a written agreement that sets out both parents’ commitment to the care, welfare and development of their child or children.

This agreement can take many forms:

- it can be a legal document, either partially covered by consent orders or more fully covered by a Child Agreement.
- it can be a mediated agreement specifically dealing with parenting arrangements, or that part of a property/financial/parenting agreement which deals with parenting arrangements.
- as in any mediated agreement, the parties decide whether to make it legally binding.
- it can be an agreement reached at counselling.
- it can be the parents’ own written agreement as to how they will raise their children, arrived at from their own discussions.

Examples of Parenting Plans

Many formal parenting plans are in existence, and the variety and scope is wide. For example:

- A court-registered U.S. Child Agreement may detail arrangements regarding residence, access, responsibility regarding the children's activities. It may also cover arrangements for communication between parents regarding the children's education, health, graduation etc, and arrange for a conflict resolution process if dispute arises.
- An Australian Child Agreement (court-registered) may include parents' expectations for their children and undertakings to each other regarding the principles in accordance with which they wish their children to be raised. It may also list specific arrangements regarding residence, access, financial and emotional support, and dispute resolution.
- Another type of plan requires the parents to choose relevant sections in formulating their agreement. It may have a broad generic outline and then an accompanying multiple choice section. It may also say that parents can create an alternative arrangement if the options listed do not suit. This type of plan generally points out that the sample does not include all possible or desirable language which could be used and that any language which is inserted should be examined carefully to ensure that it is consistent with the best interests of the children involved. It may also include an agreement regarding alternatives if any disputes arise regarding the decisions made.
- A similar type of "fill in" plan may be extremely detailed regarding behaviours by each parent, as well as express arrangements regarding parenting - allowing for review as the children's needs change. This type of plan generally has a limited amount of flexibility and adaptability.

The Relationships Australia (N.S.W.) Parenting Plan

The plan presented today was developed from a variety of Australian and overseas samples such as the above, and sought to incorporate what were seen as the best of their features.

As the charter of Relationships Australia (N.S.W.) is *to enhance the quality of family and personal relationships*, the Relationships Australia (N.S.W.) Parenting Plan was written with a view that it be used not only with separating couples, but that it should have wider application. It can be used to assist with any parenting relationship, and is suitable for parents who are not separating but who want to make decisions about the future of their children. Further, it is envisaged it can be used as a learning tool in schools and colleges.

It is in the form of a booklet with the plan that parents complete as appropriate. The booklet is a resource for parents and those who are working with them: for example, mediators, counsellors or solicitors. There are explanations for each section, and suggestions for when to re-evaluate the plan - such as towards the end of each

How Long Has This Problem Been Pushing You Around?

WORKSHOP

by

*Laurel Downey - Therapist/Mediator, "Matters", Watsonia, Victoria.
Michael White - Therapist, Dulwich Centre, Adelaide, South Australia*

This workshop in advanced techniques of counselling and family therapy for use in conflict resolution is based on the work of Laurel Downey and Michael White. The *Matters* program, at Watsonia in Victoria is funded by the Attorney-General as an Adolescent Mediation and Family Therapy Service.

The workshop will examine certain ideas, philosophies and ways of life for their use in conflict resolution. Others (White, 1995) have named these things - Externalising, Unique Outcomes, Non-Pathologising, Non-Blaming.

Our skills as mediators help people to sit together and negotiate solutions to their difficulties.

What ingredients enable mediation to work easily:

- *forum*
- *framework*
- *respect*
- *validating viewpoints*
- *fair process*

Are those ingredients suitable only for low-level conflict? Are additional ideas necessary for higher levels of conflict?

How do we help people move from a stuck position?

- *from defensiveness and competition to co-operation and willingness*

- *remove emotional obstacles*
- *work through emotions*
- *time*
- *re-frame*
- *acknowledge*
- *express emotions*

Asking questions with a particular emphasis on:

- *externalising*
- *unique outcomes*
- *non-pathologising*
- *non-blaming*

can help people move or get unstuck.

These are not *techniques* to be applied to people. These are *philosophies*, ways of thinking, ways of being that are informed by what has been called (O'Hanlon, 1994) the Third Wave of Psychotherapy - Narrative Therapy (White, 1995).

FIRST WAVE:

- *psychotherapy, Freud . . .*
- *pathology focus*
- *problem located in the individual*

SECOND WAVE

- *systemic therapy*
- *problem located in small systems (family, couple relationships)*
- *solution generated by therapist*

THIRD WAVE

- *person is not the problem; the problem is the problem*
- *meaning is constructed*
- *attend to larger systems - culture, politics of discourses*
- *feminist influenced - central position of power*
- *competence-based view of person, solution is in the person*

Richard Chasin and Margaret Herzig (1988) noted:

"An adolescent with a habit of lying and stealing sits between his worried parents. He is 'problem-saturated' . . . in deep trouble with a grim future. Australian family therapist, Michael White, poses numerous questions to the boy to help him stand back from his problems and consider the impact of those problems on his life. He asks not about how and why the boy misbehaves, but about how the boy's problems oppress him in daily life and limit his future. During the session, White is on the lookout for exceptions to the boy's troubled behaviour, occasions when the boy might have misbehaved but didn't. By the end of the session, the boy has begun to take responsibility for his conduct. He and his parents see exceptions to the problem-saturated description with which they began, not the least of which is the boy's honesty with White.

A young boy with fears of monsters draws his monsters, puts them in a box and tames them. White comments on the boy's ability to keep the monsters still and quiet. White takes the box from the boy to see if he will be as good as the boy at handling the monsters. He isn't. The boy saves him. Again, an exception to the problem is revealed. The boy is an expert at controlling monsters.

A young housewife feels inadequate and depressed. She cannot perform her drudgery with a smile. White helps her to see her strengths, exceptions to her self-description and to understand that she has been "subjugated to cultural specifications for personhood", specifications that include oppressive expectations and roles for women. She no longer feels inadequate but joins the battles against this subjugation and begins to experience victory."

Richard Chasin invited Michael White, Australian family therapist, to employ these and other techniques in an interview of five adults concerned with avoiding nuclear war. There had been a history of frustrating and unproductive dialogue.

White's plan was as follows:

- *Externalise the problem*
- *Help people become aware of how the problem oppresses them*
- *Search for exceptions to problem-saturated description*
- *Use these exceptions to launch and nurture a new description*
- *Help people begin to develop new ideas about themselves and their future*

White showed little concern for the debate between the two groups. Their unproductive and ritualised debate was the problem that needed to be externalised. They needed to explore the impact of this frustrating dialogue on their lives. He began the interview with the question, "What are the advantages of your having effective conversations with each other?"

EXTERNALISE THE PROBLEM

- *collaborate*
- *non-pathologising - separate the person from the problem*
- *not labelling - undermines belief in possibility of change.
(Beware - people may not feel understood if they are "de-labelled": they may not feel the seriousness of their problem has been acknowledged)*
- *ruthless curiosity*

Examples: How is the problem (arguing, going to Court . . .) affecting your life?
What is it (blame, anger . . .) doing to your relationship(s) with . . . ?

Help people become aware of how the problem oppresses them

- attribute negative intentions

Examples: How is this problem pushing you around?
Does this problem ever have you saying or doing things against your better judgment?

SEARCH FOR EXCEPTIONS TO PROBLEM-SATURATED STORY

- *person has control over the problem, as there are times when it does not happen*
- *resolution is possible, allows hope to enter*
- *ruthlessly, relentlessly positive*
- *evaluate exceptions - are these preferred ways of being, ideas, beliefs . . .*

Examples: *Would you say this is a positive or negative development?*
Have you successfully resolved a conflict like this in the past?
- *What strategies did you use?*
- *Does discussion help or hinder the resolution process?*
- *Does discussion make you more or less confused?*

USE THESE EXCEPTIONS TO LAUNCH AND NURTURE A NEW STORY

- *meaning is constructed*

Examples: *What does this tell you about how you really want things to be?*
What does this tell you about the sort of person you are?

HELP PEOPLE BEGIN TO DEVELOP NEW IDEAS ABOUT THEMSELVES AND THEIR FUTURE

- *alternative story*
- *re-authoring*

Examples: *How did you take that step?*
What do you think are the foundations for that step?
What had to happen for those first signs of change to occur?

Dominant stories

Each person experiencing the same event will have a different perception or story about what happened. Over time, each of us builds a story about ourselves and our lives based on our experiences and our perceptions of events which are coloured or constructed by our past experiences and current emotions. This can be described as our dominant story. For example, I am a shy/depressed/inadequate person. However, this may not be the whole story.

- Others may have information about us that if we knew we would see ourselves differently.
- Others may have told us too many times who we are and we believe them rather than ourselves.

- We may remember or forget important events depending on how they fit, e.g. we may forget trauma which remains buried inside us but is still active, influencing thoughts, feelings and behaviour, or we may remember trauma to the extent that it blocks out other good things which we have done or experienced.

It is easy to be trapped in our stories about ourselves and see the past from the story's perspective and imagine the future under its sway.

Many of the people we see in mediation are under the sway of a dominant story either about themselves or their relationships. They are being "pushed around" by the problem or their dominant story.

Issues to consider further

- What could some of these dominant stories be of the people who come to see us?
- What are some of the problems pushing them around?
- What are some of the ways we pathologise the people who come to see us?
- What obstacles could there be in bringing these ideas into a mediation process?
- What advantages could there be in bringing these ideas into a mediation process?

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A Place For Shuttle Negotiation

WORKSHOP

by

Bernadette Rogers - Law Society of Queensland
Philip Theobald - Barrister/Mediator, A.I.F.L.A.M., Brisbane, Queensland

Purpose

This paper is to accompany a workshop designed to examine the use and misuse of shuttle negotiation in contemporary family dispute resolution.

Mediation

Although there are a number of definitions of "mediation", for the purpose of this paper we will look at mediation in its simplest form as *facilitated negotiation*.

Research suggests that mediation works best in those cases where there are moderate levels of conflict, a reasonable quantity of resources to divide, the parties themselves are amenable to the idea of mediation, and there is a high motivation to reach settlement.¹

If we accept that these factors provide the ideal situation for a mediated resolution of family conflict, it follows that couples who meet these criteria are likely to be amenable to mediating in the one room and effectively negotiating with each other. Experienced mediators are aware of the process that takes place during mediation by which parties commence by talking to each other through their mediator, and on many occasions, end up negotiating directly with each other with the mediator playing a declining role as the events progress.

However, in cases where there is a very high level of conflict and the parties still desire to reach a settlement through mediation rather than litigation or some other form of resolution, there may be room for a form of shuttle negotiation. In our experience, shuttle negotiation can either be the sole means of carrying out the mediation or it can develop as a technique to be used after the mediation has begun in the traditional manner.

If the parties do not ever meet and all one has is facilitated negotiation, it is possible to argue that it is so far from what we know as mediation that it is really a different form of dispute resolution in itself. However, the term "mediation" has developed an expanded meaning and certainly the Norwegian mediators who carried out a lengthy series of shuttle negotiations between Palestinian and Israeli representatives, which led to at least the beginnings of a settlement of that dispute, regarded what they were doing as a form of mediation.

¹ Kressel, Kenneth (1987) *American Journal of Family Therapy*.

Shuttle negotiation

Shuttle negotiation may be defined as a process whereby a mediator acts as a conduit between disputing parties by transferring messages from one to the other for the purpose of facilitating a negotiated settlement.

Many mediation courses provide training in the conduct of private meetings or caucuses within the framework of a traditional mediation. These meetings, as taught, do not involve the mediator conveying messages from one party to the other.

Trainers recognise the potential for private meetings to become a catalyst to change the mediation to a process of shuttle negotiation, and warn students against this tendency. We have noticed there is a particular tendency amongst lawyer trainees to revert to shuttle negotiation often in a misguided attempt to break impasses simply because of previous life-experience as negotiators or because they are not sufficiently skilled to work with the conflict in joint session.

Use of shuttle negotiation

Shuttle negotiation is used in many different circumstances:

- the parties cannot, or will not, communicate with one another or remain in each other's presence to hear what the other has to say
- it becomes necessary to isolate a party who has become obsessive or entrenched; the conflict level in the room is not conducive to negotiation
- the mediator feels more comfortable and in control with the parties in separate rooms

Anecdotally, males frequently seek to be in a separate room for what appears to be strategic reasons, which often involve maintaining a positioning bargaining situation rather than being confronted with an interest-based situation. Females will usually seek separate rooms when they feel threatened or overpowered by their partner. Lawyers occasionally want to keep the parties apart as they personally feel more comfortable in that situation.

There is almost no literature dealing with shuttle negotiation as a form of mediation. This may be because it is not recognised as a form of mediation, but with the move towards compulsory alternative dispute resolution in Court systems throughout the country, mediators will increasingly be faced with the situation where parties simply refuse to be in the same room. There will also be situations where mediators see it as undesirable for the parties to be in the same room, in order to avoid the possibility of emotional abuse or even physical abuse. There are many who argue that in these circumstances, mediation cannot take place. However, there are situations where the disputing parties do need practical arrangements made.

One of the virtues of shuttle negotiation is that the parties don't need to be in the same building if the right communication equipment is available, but our experience is that frequently the parties are in the same building, separated either by distance on one floor or they are placed on different floors of the same building.

There are many risks with shuttle negotiation. By its very nature, it means the parties are engaged in positional bargaining. It is virtually impossible, as a mediator, to convey interests accurately between parties to enable interest-based discussions to take place. The parties neither see nor hear each other, and this creates great difficulty as there is none of the impulse towards mutual give and take which often develops during a joint mediation session.

Difficulties

The difficulties for the mediator include:

- establishing trust in each party
- ensuring that messages from each party are conveyed accurately to the other
- ensuring that messages are conveyed in a way that will render them acceptable to the other party
- avoiding the unwitting giving of offence to another party
- maintaining patience in provocative situations
- maintaining an even-handed approach, and
- avoiding the perception in either or both parties that they are being manipulated.

Shuttle negotiation means leaving parties alone for periods of time while messages are conveyed. This creates the possibility that the party left alone can be suspicious about what is happening in the other room. It also enables the party left alone to re-think proposals and position, and it frequently happens when the mediator returns that the whole ball game has changed.

There is a distinct possibility that a message will not be conveyed accurately, and the response will compound the error: an attempt by the mediator to point out the benefits or virtues in a proposal may be seen as simply proof the mediator is accepting the other party's position.

Shuttle negotiation, by physically separating the parties, also separates them psychologically. They choose to conceal information, justify their entrenched position and claim rather than create value. Shuttle negotiation does not assist the parties to develop dispute-resolution skills of their own, nor can it really be described as therapeutic in that the parties are not able to communicate directly with one another. Indeed, it may be seen as validating a decision by one party not to be in the same room as the other. The possibility of developing an ongoing relationship or problem-solving model for future use is virtually non-existent.

That is not to say that shuttle negotiation does not work. It can work when the parties are motivated towards resolving the matter in dispute, and particularly where the issue in dispute is relatively simple.

Alternatives to shuttle negotiation

Although shuttle negotiation is a valid form of dispute resolution, there are alternatives which may be preferable. One of the purposes of the workshop is to attempt to develop alternatives, but suggestions include:

- ***Greater preparation for the negotiation sessions:*** This could involve individual private sessions with the parties in an attempt to establish the situation where they would be capable of working together in the one room. It is our experience that in a number of cases where one party has initially refused to be in the same room, with discussion and preparation, they have agreed to at least give it a go. Once discussions commenced, then a traditional mediation can take place.
- ***One document strategy:*** In this, each party is requested to prepare an opening statement for presentation to the other side. The mediator will then prepare and present a draft document that appears to meet the needs of both parties. Both parties can discuss and suggest changes to the document which is again taken away and modified by the mediator. This will happen a number of times until agreement can be reached. This requires a great deal of preparation and care. If it is done properly, it can lay the foundation for a successful round of negotiations and avoid the risks of the mediator being seen from the beginning as partisan.
- ***Use of another form of alternative dispute resolution:*** It may simply be that counselling or arbitration are preferable alternatives to mediation or shuttle negotiation. Counselling can explore more deeply the relationship of the parties whilst arbitration removes the decision-making responsibility from the parties.
- ***Involve legal representatives or support people*** in the mediation.
- ***Agree before the mediation on a rigidly defined process*** that operates on strict ground rules with a fixed agenda and allows plenty of opportunities for breaks.
- ***Use of a skilled mediator*** who has a greater range of alternatives to draw on will reduce the likelihood of relying on shuttle negotiation.

In conclusion, we can say that shuttle negotiation involves yet another set of skills for a mediator. Preparation for a shuttle negotiation needs to be thorough, and the negotiator requires an ability to be accurate, ingenious, adaptable and incredibly patient.

Adolescents as Mediators

WORKSHOP

by

*David Syme - Director of The Resolution Centre,
Canberra, Australian Capital Territory*

(and his adolescent panel members)

The Resolution Centre is a community mediation service which was formally opened as a generalist service in 1990.

In 1991, it established its youth mediation program, funded by the A.C.T. Government in response to the recommendations made in the Burdekin Report on youth homelessness.

The youth mediation program ensures that community mediation is relevant and accessible to young people through specialist intake processes, innovative programs and training, selection and consultative processes which ensure equitable outcomes for young people.

Disputes dealt with through the youth mediation program include:

- parent-adolescent conflict
- gang disputes
- shared accommodation
- housing
- victim-offender
- students and schools
- access/custody issues where parents are separated
- a range of other issues affecting young people.

The program trains and employs young people (from 14 years and older) as mediators.

A co-mediation model is used to enable mediators to be matched to the parties. In a parent-adolescent mediation, one mediator would be close to the age of the adolescent and the other close to the age of the parents. In peer disputes, both mediators would be young.

The use of young mediators as equal partners within a community mediation program, along with extensive intake and preparation procedures, have been shown to significantly affect outcomes for young people in disputes. These strategies ensure that the neutrality, acceptability and quality of mediation is maintained for ALL parties.

The experiences of the Centre in involving young people as mediators include:

- recruitment is initially quite difficult: a snowballing effect takes place so that more and more young people become interested over time.
- there is need for constant recruitment since young people get older, so the pool of adolescent mediators is constantly diminishing.
- it is generally better to have the young mediators the same gender and close in age to (but not younger than) the young person involved in the mediation.
- it is absolutely vital to have an extensive and effective intake process especially in parent-adolescent disputes: face-to-face intake interviews prepare all parties for mediation, help them think about negotiating with the other person, screen unsuitable matters or unwilling parties and enable referral and follow up.

Older and younger mediators often have quite different perceptions of the dispute, and pick up on different issues. Older parties and mediators tend to define their disputes in abstract terms like “responsibility”, whereas younger parties and mediators will often define them in more concrete and practical terms like “going out”. However, mediators do not report any greater feelings of alignment with the party from their own age group. Sometimes the opposite applies.

Training young people as mediators indicates that age is NOT a factor in mediation ability. Young people from all age groups are able to complete mediation training and reach the competencies required of a mediator at least as quickly as older groups. Often young people are at an advantage because of the lack of “baggage” brought into the training by previous training in another field.

Although some preliminary training in separate age groups may be useful, it is important to run “mixed-age” groups for mediator training proper. Part of being effective in dealing with diverse disputes - and particularly inter-generational disputes - is the ability to relate respectfully to people from all ages. Involving young people in mediator training serves an additional effect of ensuring that older mediators do not patronise, rescue or browbeat young people!

Training young people actually enhances the trainers’ ability to provide training at all age groups. The distinction between pedagogy and adult learning is not necessarily as pronounced as would have been thought. All age groups respond positively to interactive, participative and stimulating training. “Concentration span” is not an issue in such circumstances.

It is vital to ensure that young mediators are - and are perceived as - of equal status within the service. This often means questioning a whole range of standard procedures - such as meeting times and processes, transport, catering, language, training styles, publicity, consultation methods and so on. (Originally, the youth mediation program had a separate name and separate publicity. However, integrated publicity and a common name were introduced in 1994 to avoid the perception of a big “parent” body and a little “youth” body attached to it).

As with other access and equity issues, it is likely that services may need to go through phases in developing a youth mediation focus.

1. Assumption of equality + ignorance and neglect

In this phase, young people are assumed to be equal and able to participate, but the service is unaware of the special disadvantages faced by young people in accessing services.

2. Acknowledgment of difference + development of "special" services.

In this phase, special needs are identified and specific provision is made for meeting those needs, on the basis that groups are not truly equal in their ability to access services.

3. Assumption of equality + respecting and acknowledging difference + integrated service delivery.

In this phase, special programs are main-streamed on the basis they represent good practice generally in ensuring that services are relevant and appropriate for all sectors in the community.

Accreditation in Mediation

PANEL DISCUSSION

(reported by Jenny Lord - Mediation Manager, Family Life)

Susan Gribben - Relationships Australia, Victoria

Ruth Charlton - Law Society of New South Wales

Philip Theobald - Barrister/Mediator - A.I.F.L.A.M., Brisbane, Queensland

Wendy Faulkes - Community Justice Centre, Sydney, New South Wales

The issue of accreditation in mediation is an interesting one, and the panel members raised some important issues for our consideration. These are highlighted in more detail below.

Ruth Charlton the first speaker, had the following view:

The discussion of this matter is very timely, with the advent of so many professional mediation services including court-annexed schemes and statutory mediation schemes. It is now possible for a mediator to be employed full-time in this profession.

Relying on consumer protection laws does not seem to be adequate. Members of the public have a right to know they are getting an experienced and accredited mediator. Currently, anyone who wishes to do so, can set himself or herself up in business as a mediator.

It is interesting that when the New South Wales Law Reform Commission conducted research into the need for accreditation of mediators some years ago, the finding was that accreditation was not warranted. With the upsurge in mediation since then, the Commission would probably take a different view today.

It is important for us to assist lay or community trained mediators who were the pioneers in the field, and give them the status they deserve. Community mediators need to be considered in any discussion on accreditation. We must make sure the field remains open to them.

Philip Theobald, the second speaker, and like Ruth Charlton, a lawyer/mediator, had a different perspective:

We are presently, as mediators, going through a phase of professionalisation. If one looks at the history of professions, there is a notable tendency to use accreditation as a device to create a gateway for entry into the profession.

Gateways have a number of effects. To the consumer, the most visible effect is that they limit the number of professionals and therefore the supply of services. This means that service-providers who are accredited are able to charge more than those who are not accredited.

In some professions the creation of gateways has become an art form, in that governments have been persuaded to prohibit those who have not passed through the gateway from offering a service similar to those who have.

Of course, the counter-argument is that those who are good at providing a service should be entitled to be recognised and should therefore be able to charge more than those who are inexperienced or lacking in skill and who therefore cannot offer the same degree of expertise.

Mediation, properly performed, requires the exercise of a complex group of skills, and the use of those skills can be improved with the knowledge of what, for want of a better phrase, one could call mediation theory.

The Federal Government proposes, in its Family Law Reform Bill No. 1 to allow private mediators to be part of the primary dispute resolution process. It proposes to require that a private mediator provide consumer information so that parties, utilising the services of such a person, will know details of both training and experience.

In the event that private mediation becomes a popular form of dispute resolution, then the material contained in the consumer information will also become extremely important.

In a country as diverse as Australia it is impossible to have uniform standards that apply in both large metropolitan areas like Sydney and Melbourne, and rural or decentralised communities. The creation of professional bodies designed to suit the needs and circumstances of different mediators is, I suggest, a more appropriate alternative than attempting to create uniform standards throughout the country.

It will be important for mediators to be able to say that they belong to a recognised professional body, have met the training requirements of that professional body, and comply with the rules of that body. One can envisage that rules would incorporate both ethical rules and rules relating to the maintenance of standards.

I envisage that it will be the Association that in effect will give credibility to the mediator rather than the mediator obtaining credibility by passing through a uniform gateway.

Wendy Faulkes was the third speaker:

In looking for an answer to the question of accreditation there seems to be a disturbing tendency to seek, or expect, a simple answer. It is by no means a simple question.

Market Place

One suggestion is the ultimate in deregulation: let the market-place decide, and ineffective mediators will fall by the wayside.

Whilst this may be reasonable in some well-established professions, the market-place is not yet sufficiently aware about what to expect from a mediator to enable educated decisions to be made.

Accredit the Training Courses

This is a simplistic option - assuming we had agreement on what constitutes adequate training. It does not address the issue of "minimum or excellence" - the most probable outcome being acceptance of and encouragement to the lowest common denominator.

This option also neglects the importance of continuing training, improving standards, gaining and analysing experience and/or any sense of supervision. It assumes that "once trained, always trained", a notion that has been discredited in most professions.

Establish Accrediting Bodies

This option has not received serious consideration at this time, and the issues particular to it have not been explored at all. It is a growing trend in some tertiary education fields.

Accredit the Agency

This option could be developed on the schools or health (hospitals) model, and has some merit. It could encompass consideration of the training, supervision, procedural and physical environments.

Once established, it is probably simpler for the bureaucrats/accrediting body to administer, but there is a very real danger it would stifle innovation and would operate to exclude new players.

Conclusion:

It may be that a mix of all the above is appropriate to cater for the diverse needs of service users, mediators, the agencies and government. It would seem to me to be foolish to hastily tie ourselves to one option which would inevitably act to protect one group and exclude others.

Ultimately, the community must be able to demand a reasonable equation between privileges and benefits and responsibilities.

If agencies or mediators are receiving public money and/or protection, they must be prepared to articulate the standard of their product. It is conceivable that when that is established, the service-user can obtain access to normal consumer-protection mechanisms.

Susan Gribben, another lawyer, was the final speaker:

The word always conjures for me images of professional regulation and control which somehow seem antithetical to the whole idea of mediation. I have struggled with this for over ten years. The questions for me are:

- what does it mean?
- who is it for?
- who does it to whom?
- how is it done?
- how long does it last?
- is it an infectious disease or strengthening medicine?

I have to say that the words "standards", "competencies" and "National Training Agenda" also produce similar negative vibrations.

It is all so much work, such costly endeavour and the end products can often be meaningless, lowest common denominators and/or inflexible detailed rules and regulations which are of equally little use - more honoured in the breach.

So I have declared my bias. My first question always is: Who is this for? Will it produce higher quality services, more responsive to the range of client needs? If it is primarily for the practitioners, forget it!

What do clients need? They need to be able to make an informed choice about mediation and their mediator. They need to know what qualifications and experience the mediator has, and what quality-assurance mechanisms are in place.

The less choice they have and the less information they have, the more vital it is that there are standards and some method of ensuring they are met. Thus, I would have a problem about court referral to private practitioners unless there was some system in place. Employers of mediators and funders of mediation services (for example, government) are also consumers of mediation and therefore stake holders: they want to know that the mediators they employ or fund will be able to provide effective services. Accreditation of mediators is one way of ensuring this.

Approval of organisations to provide services is another, and is my preference.

My next set of problems are harder ones:

Who should accredit and whom: Employers' accreditation?
 Government?
 Professional association?

Are we talking about accreditation for -

- mediators
- family mediators
- lawyers as mediators
- family lawyers as family mediators
- other professionals as family mediators

At a mediation conference a year or so ago in Melbourne, I asked the question "is mediation going to be a separate profession?" The answer is still not clear: my feeling at this conference is that whatever may develop for mediation generally, family mediation is becoming a profession for some, that is that a significant group will write "family mediator" on their tax return. I welcome this trend.

However, what will the emergence of this group mean for accreditation and for standards? What will the graduation of significant numbers from various university diploma courses mean? The situation is still changing. Any work done can still only be provisional.

We have discussed earlier the formation of a national association of family mediators. Should an association confine its role to educating and promoting standards, or should membership in various categories be dependent on reaching and maintaining certain standards relating to qualifications, experience, ethical behaviour, continuing practice and professional development?

I am not opposed to this second development in time, but would like to begin with the former. However, I would oppose any attempt to prevent anyone from mediating because they were not a paid-up member in the appropriate category.

I also do not favour any government regulation or accreditation of mediators. I think the appropriate way for government to intervene if it must, is to say: "This is what we require of those organisations we fund" - for example, court and certain community-based organisations.

To conclude, I want to say something about immunity. I do not believe that any mediator or counsellor should have immunity from being sued: it is not just a question of concern about private mediators. Basic rights of consumer protection, that is, their capacity to sue as for malpractice, should be preserved.

The confidentiality of mediation, currently protected absolutely under the Family Law Act for counsellors and mediators, needs to be limited to allow evidence to be given in mediation malpractice cases, and we need to debate further the circumstances in which we report to authorities serious crimes and safety risks, and whether we should be able to give evidence in any subsequent court proceedings, criminal or civil.

Summary of Conference Future Issues and Directions

by

*Rod Young - Mediator/Executive Director
Health Services Association of New South Wales*

The Conference was, I felt, a terrific experience with a program that was very interesting and informative. The Committee did a wonderful job and we need to thank them for all their hard work and effort, which went a long way to making this conference such a success.

Comments from those who attended the conference show how far mediation has come. It was felt that "we are now dealing with the second generation of mediators" and perhaps Hilary Astor's comment that we have matured, learnt, listened and dealt with more of the concerns people had previously about mediation was accurate. It is worth thinking about.

Jay Folberg presented to the Conference a range of greeting cards he acquired in America for separating and divorcing couples. Perhaps a mediation version could be developed with a prize given from the organising committee? Copyright would need to be discussed with Hallmark. I am attaching my suggestion. Delegates could submit any other suggestions to the Conference Organizing Committee.

This conference raised many issues. The first is *Professionalisation*. How many of you here today are lawyers? Social scientists? Educators/teachers? Other professionals? Community mediators? Community mediators are in the minority, it seems.

I would like to suggest that four years ago the numbers would have been the reverse. It will be interesting to see what the impact of this change in the number of professionals will be in the future. Does it mean the death knell for community mediators? I hope not. Mediation needs both, and there are excellent community mediators.

The second issue is that of *Territory*. The Attorney-General and the Chief Justice yesterday spoke of extending Family Court mediation services. The Chief Justice also spoke of planned co-operation and avoidance of competition with agencies. Without in any way implying a criticism of the Family Court, let's look at the reality.

The Family Court service is free, and legal practitioner mediators are finding that clients for whom they have provided a paid mediation service are dissatisfied - and indeed can be very angry - that their solicitors had not informed them about the free Court service. Where legal practitioners and agencies are providing mediation services to Family Court clients and the Court has commenced a mediation service, there is and will continue to be, severe pressure on the medium-to-long-term viability of the agencies, as well as lack of growth of *mediation* by legal practitioners.

The Family Court has the kudos, status, official sanction and, generally, the respect of the community. When a free mediation service is added to the Court, we must understand the likelihood that the Family Court may be the only game in town within a few years. Is this a good thing? I don't have the answer but we need to be aware of the possible outcomes. Do we want to maintain diversity? Yesterday Professor Folberg suggested we do.

The third issue to be considered is one of *Agencies*. In this city there are four agencies:

Centacare
Relationships Australia (N.S.W.)
Unifam
Community Justice Centres

It is my prediction these services will have to come much closer together perhaps with a single intake officer, agreed common procedures and an agreed panel of mediators.

The fourth issue is *Community Education*. The Attorney-General acknowledged yesterday that an issue for family mediation is the lack of knowledge and understanding by the community about mediation. We ALL need to take a role in using every opportunity to inform, cajole and support people to use mediation when appropriate.

The fifth issue is that of *Accreditation/Certification*. The Attorney-General yesterday stated that the Family Services Council will be looking at standards of mediation practice and mediator quality.

Professor Folberg stated that he preferred certification and accreditation. I am sure we would all agree accreditation leads to a licence to practise, and limits the access to a given licensed group of people.

When discussing standards we must also consider the maintenance of quality. How do we do it? The program shows I am from the Health Industry. More medical colleges these days have either instituted or are moving towards minimum annual activity to maintain accreditation to practice.

For example, the College of Obstetricians and Gynaecologists suggests that obstetricians should perform thirty to fifty deliveries per annum to maintain accreditation. Is this form of standard-setting appropriate to mediation? I know I lose my mediation skills, comfort and adequacy when I do not mediate regularly. How many of us here would reach a minimum standard if such a number were set?

Issue number six is that of an *Academy of Family Mediators*. Amongst conference members attending a meeting, there was a unanimous decision to form a national body.

My last issue, number seven, deals with *Training*. There are dangers in training too many mediators. We need to be careful we do not continue to train people with the expectation they will find work, and especially that we do not schedule too many courses which are meant more as a money-spinning activity than a response to need.

In summary, those of us who have been involved in mediation for some time and have attended a number of these conferences have been surprised - pleasantly - by the common directions of this conference. We have practitioners here from across the country from most services, organisations and agencies, the Family Court and legal practitioners. The concerns that unite us all are around:

- co-mediation
- the necessity for intake
- how to deal with domestic violence
- the difficulty of balancing power
- ethical issues
- the neutrality of the mediator
- use of legal advice to ensure parties are informed of rights and obligations
- ongoing training
- the formation of a national body
- examining how to set standards
- the question of should we accredit or certify

Finally, *maturity* I think is the message we should take away from this conference. Mediation is no longer a fringe activity. It is very much mainstream and I believe this conference has fully demonstrated that.

AN INVITATION

PLEASE JOIN ME AT THE MEDIATOR
I'VE BEEN LOOKING IN THE REALTOR
PERHAPS WE CAN AVOID THE CONFLICT
THAT PROTRACTED LITIGATION MAY INFLICT

THE MEDIATOR SAID BRING WINE AND A LOAF OF BREAD
THEY WILL HELP US SOLVE OUR PROBLEM
PROVIDED THEY ARE FED

SO LET'S MEDIATE THIS PROPERTY MATTER
AND AVOID THIS EMOTIONAL CLATTER

Conference Evaluation

by

Linda Fisher - Chair of the FAMCON '95 Committee

FAMCON '95 was the third national conference on family mediation. There were, however, no written evaluations of the previous two national conferences held in Adelaide and Perth to guide the Committee in putting together this conference. Decisions were made and directions taken on content, format and presenters largely on the basis of what was felt by all committee members to meet our needs in presenting *Mediation Throughout the Family Life Cycle*.

One decision was that it was imperative for future conference committees to have an evaluation by delegates to this important third national gathering of family mediators.

The evaluation forms were placed in the satchels of all participants. They were completed by 48 participants. Members of the FAMCON '95 Committee deliberately did not complete an evaluation form so that results could be seen to be objective.

The **overall rating** given to the conference exceeded the Committee's expectations, with 84% of respondents rating it *good to excellent*:

(*very poor*: 2%; *poor*: 4%; *50/50*: 10%; *good*: 54%; *excellent*: 30%).

The conference content was judged as good to excellent by 73% of respondents:

(*very poor*: 2%; *poor*: 5%; *50/50*: 20%; *good*: 55%; *excellent*: 18%).

Typical of the comments made about the conference was the participant who stated that it was felt that "the turning point had come for mediation; unity and common directions were apparent". It seemed that although some respondents stated that more time needed to be spent on parent/adolescent and peer mediation, there was also recognition that "divorce mediation was a good focus for those mediators, but that the wider focus of the conference and acknowledgment of other areas of family mediation (parent/adolescent, peer and Koori) was good for the whole industry".

In relation to the content, respondents commented that "most papers were of a high standard, with a couple only average", that some presenters were "boring and not interactive", and that "many of the matters covered were not new, challenging or at a demanding level". However, some **papers and presenters** were mentioned by several respondents as being of excellent quality, and these deserve special mention:

- Hilary Astor's research paper on *Same Sex Mediations*
- Ruth Charlton's research paper on *Mediating Wills and Estates: Family Provision Act Disputes*

- Dianne Gibson's practice paper on *Empowering the Empowerers*
- Joanna Kalowski's research paper on *Cross-cultural Issues in Family Mediation*
- Linda Kochanski's practice paper on *De Facto Property Mediations*
- Fred Stern's practice paper on *Peer Mediation*

Some **workshops**, too, were highlighted by several respondents as being particularly worthwhile:

- Sue Walden's *Parent-Adolescent Mediation: Living with Agreements*
- Patrina Duffy's and Michael Courtney's *Parenting Plans: Their Use in Mediation*
- Linda Fisher's *Ethical Issues in Mediation*
- Bernadette Rogers' and Philip Theobald's *A Place for Shuttle Negotiation*
- David Syme's and his panel members' *Adolescents as Mediators*

All the **panel discussions** were mentioned as outstanding in raising important issues:

- *Changes to the Family Law Act: What will they mean for Mediators?* with John Pollard, Margaret Ross, David Gorrie and Dale Bagshaw
- *Mediator Management: Models of Supervision* with Linda Fisher, Dianne Gibson, Susan Gribben and Bernadette Rogers
- *Domestic Violence and Child Abuse Issues - Strategies and Reporting Obligations for Mediators* with Dale Bagshaw, Nihal Danis, Mary Perkin and Clive Price
- *Accreditation in Mediation* with Susan Gribben, Ruth Charlton, Philip Theobald and Wendy Faulkes

The **opening speakers**, The Honourable Michael Lavarch, Federal Attorney-General, The Honourable Chief Justice Alastair Nicholson, and Professor Jay Folberg, were all complimented on their addresses, with one participant noting that "all the bigwig keynotes had big, positive things to say". Professor Folberg's opening address, in particular, was classed as "brilliant and stimulating".

Comments on Professor Jay Folberg's workshop on Advanced Techniques in Family Mediation were less enthusiastic, many respondents noting that the workshop "was neither advanced or interactive; it was pitched too low for most participants". It was suggested that "a different format might have worked to draw on his experience and training of the attendees". Whilst the Committee acknowledges the frustration felt by participants at not receiving training at the level they had hoped for, perhaps it is the case that - in the words of one participant - "disappointment with Professor Folberg is balanced by the thought that Oz mediation is at the advanced level."

In any discussion on the use of “overseas experts”, there is always the dilemma, acknowledged by another participant, that “although local Australian content and issues should remain the focus, I believe that an overseas key speaker is still very important for mediation’s profile at home and internationally”.

The other issue was that of **time**. Many respondents stated that longer time was needed for “panels dealing with controversial issues/development of issues such as violence”, and for “papers to allow questions and discussion afterwards” because participants were “not able to discuss and explore some of the very interesting issues raised”. The dilemma faced by the members of the Committee was twofold: first, should the conference concentrate on a narrow focus - say divorce mediation - and treat it in depth, or should it provide a smorgasbord to allow practitioners to choose; and secondly, should the Committee say “no” to the very large number of our peers who had offered to share their ideas and experience with us? Our choice - for this conference - was to opt for the smorgasbord, and to accept the majority of papers and workshops offered to us.

In stating what was most valuable about the conference, one respondent summarised perfectly that we had endeavoured to provide “exposure to current information and experience, direction about where mediation is going, attitudes about ‘turf’ issues, overview of family mediation in Australia, and a good representation of who is mediating and what they are mediating, and why they are mediating”.

In reply to the respondents who commented along the lines that there could have been “more mediation practice issues and less law focus”, “more panel discussions on hot potato issues”, “more parent/adolescent and other family mediation”, “more controversial areas/theories/concerns”, “fewer research papers and more workshops”, and “a greater mix of practice and theory”, the Committee can only say that we worked with what we were given: had more of our peers suggested other workshops, papers on other forms of family mediation, and discussion on other controversial issues, the Committee would have been delighted to consider the suggestions.

It does, however, raise important issues for future conferences. Respondents commented that the **valuable things gained from the conference** included the papers on *Peer Mediation*, *Mediating Wills and Estates*, and *Same Sex Mediations*; the workshops on *Ethical Issues in Mediation*, *Parenting Plans: Their Use in Mediation*, and *Adolescents as Mediators*; and the panel discussion on what one respondent called “the perennial question of *Accreditation*”, the panel discussion on *Mediator Management: Models of Supervision* and that on *Domestic Violence and Child Abuse Issues*. These could certainly be expanded in any future conference.

Other suggestions for the future were:

- Separate panel discussion on child abuse
- New forms of A.D.R. in family law - practice of and theoretical considerations; for example: med-arb, early neutral evaluation, evaluative mediation
- Workshops on dealing with violence in families (parent/adolescent, adult children/elderly parents)

- Comparison between different schemes, especially interstate, to see what works and what doesn't
- Some focus on the needs of private mediators
- Inclusion of the needs of schools/refuges or other services (for example, funeral homes and family life event needs) for mediation

The **most valuable things** gained from the conference, however, were the “networking, the sharing of experiences and comparisons with other like-minded people, re-establishing old contacts, making new avenues/contacts/associations”. These were mentioned by the majority of respondents. Several respondents also commented on the “opportunity to learn, to pause and re-fuel, to have enthusiasm regenerated”, the “mix of backgrounds” and “the high level of representation of interstate people”, the opportunity to meet “experts in the field, ‘names’, the main players with so much talent”, the opportunity also “to ‘suss out’ and purchase a variety of resource materials”, and finally, the “exposure to the large forum, the perspective gained, and the affirmation that we are ‘doing it right’ ”.

Interestingly, a number of respondents also mentioned the informal discussion around the proposed formation of a National Association of Family Mediators as being particularly valuable.

The **overall administration and organisation** was almost universally acclaimed by the respondents, as was the **location and venue**. Some respondents were, however, upset because they “were not able to have their first choice at sessions and workshops”, that “the food and service at dinner was not good”, that a “print-out of participants’ names and addresses should have been provided at the start to facilitate easy networking”, and that although the location was “very suitable, comfortable and stylish”, the “quality of the hotel administration and its effectiveness left much to be desired”. Obviously, if the Committee was in the position of organising another conference in Sydney, these concerns would be taken into account.

For other conference organisers of future “FAMCONs”, however, it is worth noting that plentiful, tasty food seemed important to the majority of respondents, and that the location of the hotel near a beach, even though in mid-winter and though inconvenient to some participants, was definitely seen overall as a “plus”.

Some respondents raised the issue that the “conference papers should have been provided free of charge at the end of the conference” or “included in the cost when setting the fee for the conference”. By way of explanation from the Committee: it was decided it was best to set the conference fee as low as possible to enable the maximum number of people to attend, and to allow participants the choice of whether or not to pay an additional amount for the papers. We believe the strategy worked, in that we were faced with the unenviable task of refusing registrations from people once our maximum of 200 participants had been reached. In setting the fee for these Papers, the Committee has not at any time tried to make a profit on the conference, but has endeavoured to allow access both to the conference and to the Papers to as large a group as possible.

The **conference dinner** was seen as a “little expensive” and many comments were made about the inadequacy of the catering for that night. Jean Kittson, however, was lauded as an “excellent choice” who saw “family mediation as more than just separating couples”.

It would seem that although a conference dinner is seen as an attractive option for participants, care needs to be taken to select an appropriate speaker who can deliver a humorous yet thought-provoking address; care needs also to be taken to ensure that participants do not feel that such an occasion is a “rip off”.

The FAMCON '95 Committee is, on the whole, well satisfied with its efforts in putting together *Mediation Throughout the Family Life Cycle*. The committee members feel we have achieved our aims in bringing together such a diverse, talented, committed group of practitioners from around Australia and New Zealand to meet, talk, exchange views, relax, learn, and enjoy each other's company. We hope this conference evaluation will assist the organisers of the next national conference on family mediation, which according to preliminary information seems likely to be held in Melbourne in 1997.

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