THE BRASS TACKS OF FAMILY MEDIATION

~A primer ~

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…because every manual has an intro…

I first came up with the idea of creating this manual when one of my lawyer-mentees told me, somewhat sheepishly, that she knew very little about family mediation, and for this reason she did not consider it as an option for her files. She had a general, visceral understanding that family mediation is a process involving a dialogue with the assistance of a neutral third party but knew little beyond that. In fact, the words she used were: "*family mediation scares me.*" We spent some time exploring the basics and then she said she wished someone had created a basic manual. So I wrote this one.

This is a primer – a beginner's guide – it covers very basic topics related to family mediation ("FM") and is designed to help you navigate the modality with greater ease. In this manual, I pose questions you may want to ask yourself (and maybe even ask your client) when considering FM as an option. Answering these questions will assist you in making important decisions about various elements of the process.

FM can be a very useful tool for resolving even long-standing disagreements, but one cannot simply "wing it". It is equal parts science and art – for both counsel and the

mediator. Settlement is more likely if you and your client are prepared, and you will be in a better position to prepare both yourself and your client if you understand the process, and are able to navigate your client's questions about it with a degree of confidence.

OUR WORKING HYPOTHETICAL

To give some of the points made here a more practical application, I have created a hypothetical couple, Pat and Sam. You will see references to them at various points in the manual.

Pat and Sam are separated and as a result, need to address various issues, including parenting of their kids.

You act for Pat who was on the receiving end of Sam's decision to end the relationship. Pat was the stay-at-home parent. Sam was the breadwinner.

Pat is very emotional and having trouble coming to terms with the separation. She cries at virtually every meeting with you and from time to time has difficulty focussing. Pat feels betrayed and angry, and she is suspicious of Sam at every step.

Sam is in a completely different headspace having contemplated and then mulled over the decision to leave for some time. From Sam's perspective, finality cannot come soon enough – having taken the step, Sam wants to move on and quickly. Organized and focussed, Sam can come across as controlling and domineering.

Sam's lawyer is roughly your vintage. You have no previous history of files together but you have seen him at professional functions, and you have taken similar CPD programs. You perceive that Sam's lawyer is a more experienced litigator. You are on solid speaking terms, and you believe you can dialogue openly and candidly with one another.

IS FM THE RIGHT DISPUTE RESOLUTION MODALITY FOR YOUR MATTER?

At the risk of stating the obvious, not every family law case is suitable for mediation. When I say this, I refer to considerations other than those relating to power imbalance, Intimate Partner Violence (IPV) and self-determination (and I address those below). In very practical terms, there are family law disputes that require the involvement of family court – a judge, a decision-maker with jurisdiction to make

impactful, enforceable orders, including in urgent circumstances. Unfortunately, some people need judges to make decisions for them and even then, there are those who scoff at any notion of authority, and cause disputes to return to court over and over again, at psychological and financial expense to both parties.

Setting aside for the moment the question of when, in the linear progression of a family law matter, to consider the possibility of family mediation, the central questions to ask are these: can and will this matter move forward without a third-party decision-maker? Does one of the parties (or both) speak only the language of court orders? Is there a possibility that the stronger party will hijack the mediation process, use it to control the other party, and will the process cause harm? Is settlement in the context of family mediation a realistic (not idealistic) possibility or will trying mediation result only in added delay and cost?

If you have a good working relationship with the other counsel, consider these questions with him or her, perhaps in the context of a "without prejudice" phone call or meeting. If you are both supportive of FM as an option, explore the pros and cons together.

A related question is the following: is this the right point in the case to try mediation? In other words, are the parties ready to mediate? Some couples identify together, fairly soon after the separation, that mediation is something they are prepared to try to address all of their outstanding issues. Your client may come to you early in the retainer and tell you that – you and your colleague on the other side can then work toward that goal – make disclosure and prepare materials for meaningful work with a mediator. Other cases are not ready right away and not for some time. In reality, many members of the public still see court as the solution to their problems (in error). Many perceive the idea of sitting down and talking as a sign of weakness. Yet, there often comes a point, in virtually every case, when psychological and financial exhaustion begins to set in, and the participants are more willing to consider ways of ending the fight. As part of your role, you need to consider your client's readiness in this respect. The other side has to be ready as well – and this is something you can explore with Sam's counsel.

If your client, Pat, is still emotional about the separation to the point of crying at every meeting, if she is unable to identify and speak about what is important to her and why, then she may not be ready to mediate. If you have not yet received from Sam all the disclosure you need to crystallize and understand the issues and your client's claims, then you may not be ready to mediate. To bargain fairly and effectively, the parties and their counsel have to be ready to mediate. It is neither time nor cost-

effective to invest in a third-party professional, the mediator, if there is still information/documentation/disclosure missing. There are cases involving parties willing to bargain without having all of the information the court would require to make a decision but at the most basic level, negotiations must be informed negotiations. People need to be able to see and assess the value of all the chips on the table. Otherwise, the bargain runs the risk of being off-balance.

IS FM APPROPRIATE FOR MY MATTER?

It is a foundational principle of mediation that parties must be able to bargain free of pressure and influence, from positions of balance and based on self-determination. Most relationships involve some power imbalance, whether in a family or a business setting. When assessing a matter's suitability for mediation, we are not looking for a perfect absence of imbalance. Rather, we are assessing the parties' respective ability to come to the negotiating table free and able to express what is important to them and why, without pressure or fear of reprisal or retaliation. The subjects of power imbalance and Intimate Partner Violence are complex and crucially important in the context of FM. This primer cannot do them justice but you are strongly encouraged to explore them further by accessing the many resources available on the topic.

The key takeaway here is the following: you will need to turn your mind to the question of whether your client is in a position to bargain freely and confidently in FM. As a mediator, I screen parties for power imbalance because I consider this step essential to my ultimate assessment of the matter's suitability for the process. Not all mediators screen. If they do not, they might expect you to do the screening yourself and/or rely on your judgement in this respect. Not all family law lawyers have receiving training on screening for power imbalance. If you are not comfortable in this area, do not hesitate to ask the mediator to screen your client. I cannot overstate the importance of this essential part of the pre-mediator process.

SELECTING THE MEDIATOR

The choice of mediator for your matter has, from my perspective, profound impact on the likelihood of settlement. I say "the choice" as opposed to "your choice" because the decision will have to be made, necessarily, jointly with the other side. Hopefully, there is an element of collaboration between counsel, as there is in our hypothetical. I have been involved in a number of matters, both as lawyer and

mediator, where counsel were able to make a joint recommendation as to the choice of mediator to their respective clients. This is ideal but it requires a level of confidence from your client as to the *bona fides* of cooperation with the other lawyer.

Where a joint recommendation is not possible, other options are available – including each party putting forward two or three names. If the same name is suggested by both sides, the choice makes itself. If none of the suggested names overlap, a single name can be drawn at random from all of the names, by a neutral person selected by the parties for the task. If there is any level of mistrust between the parties, and there often is, then any name put forward by the other party may be viewed with suspicion, even for a process like FM. Be aware of this and take this fact into consideration.

Here are some questions might ask yourself (and even discuss with the other lawyer) when selecting a mediator for your matter:

1. Is this matter legal-issue intensive? – if so, you might consider a mediator/lawyer in the context of the evaluative/directive mediation model (see below).

2. Are there mental-health and/or clinical issues in this matter? Does anyone have special needs? Is an expert understanding of these issues important for the ultimate resolution, and do any of these issues impact how the mediation process unfolds – if so, you might consider a mental health professional/mediator in the context of the classic/facilitative mediation model (see below).

3. Is this matter a hybrid of 1. and 2.? – if so, you might consider a senior family law lawyer/mediator experienced in cases involving special needs parties or children, and with training in family relations. There are also mediators who mediate in tandem – a mental health professional/mediator handles the parenting issues and the lawyer/mediator deals with the financial issues. That is another viable option.

4. Is your client someone who needs to say their piece and to be heard? Is the mediator's ability to practice active listening and to engage with the party important to your client's confidence in the process and ultimately, willingness to settle? Some people come to FM with a very matter-of-fact attitude and "sharing" with the mediator how they feel is not a priority. For others, that opportunity is very important.

5. What particular skill set are you searching for? Some mediators are known for being detail-oriented. Others excel at managing volumes of information from 30,000 feet. If your matter is evidence intensive and requires an understanding of detailed calculations, there are mediators who shine in this respect. If you are mediating parenting issues for a special needs youngster, and looking to build a parenting plan that will serve as a roadmap for parents for some years to come, you might consider a mental health professional/mediator with expertise on child development and special needs kids.

CLASSIC/FACILITATIVE OR EVALUATIVE/DIRECTIVE?

Many mediation teachers bristle at the idea that a mediator would ever offer an opinion on any of the issues in dispute. Yet evaluative/directive mediation ("EDM") is a viable option for many matters, and this modality is used with increasing frequency in cases involving legal as opposed to factual issues (though not exclusively). How does EDM differ from classic mediation?

One of the underlying and foundational principles of family mediation is that the mediator is involved as a neutral party whose role is to facilitate dialogue and hopefully, settlement. In the facilitative model, the mediator's role is no more than to elicit the parties' positions on the issues, probe the interests behind those positions, and assist with an organized and structured dialogue between the parties of the issues in dispute. The mediator monitors the exchanges and douses any flare-ups – hopefully leading the dialogue between the parties in the direction of potential solutions – importantly, the authors of the solutions are to be the parties themselves with no input from the mediator.

In EDM, the mediator takes an extra step, provided he or she is authorized by the parties in advance to do so – and that is offers opinions on the issues presented for mediation. For example, a seasoned family law lawyer/mediator might comment on the relative strengths and weaknesses of the parties' positions on an issue, based on their experience. Such opinions may take into account any factual and evidentiary considerations, legislative and judicial treatment of the issue at hand, and even whether there are prior cases that "go both ways". If, as a mediator, I am asked by the parties to comment on an issue, I always prepare them that my views may differ from those offered by their counsel. That friendly divergence of views may suggest some risk associated with the issue – as in "*this is not a slam dunk if two reasonable, experienced*

professionals working in the area of family law can have two different takes on it'. Risk usually calls for a sober consideration of settlement, as an alternative to possible loss. The entire point of EDM is to make available to the parties the opinions of another professional, other than the lawyers on both sides, to help them assess risk.

In EDM, the mediator might also comment on potential costs of pursuing an issue, on their experiences with the court system, the impact of delay and the less tangible benefits of finalizing matters, including for the sake of any children. Experienced mediators know that court can be polarizing because often, there is a winner and a loser. An experienced litigator/mediator can alert the parties to the loss of control many litigants experience when they enter the court system. Now decisions about their lives and those of their children are made by a "stranger" – a family court judge. By contrast, settlement in the context of mediation is the product of both parties' work and input – with statistically longer-lasting compliance.

CLOSED OR OPEN?

Most people think of mediation as a confidential process because it involves settlement discussions. Some suggest that people are more likely to bargain in good faith, with their hair down and all the chips on the table so to speak, if they are assured that positions they take in that context will not bind them or be used against them if they do not settle. That is the essence of closed mediation. If the mediation session(s) do not result in settlement, nothing said in or produced in that context can later he repeated or used in any other context, including in court.

While all my mediations are closed, I recognize that there are cases (or issues) that a better suited to open mediation. If the matter is particularly high conflict, for example, and the court is involved in a supervisory capacity while the parties try mediation, it may be important for the court to know the reason(s) mediation ultimately failed. A mediator who conducted open mediation would be able to issue a report summarising how the mediation unfolded and what (or who) ultimately stood in the way of settlement. That would not be an option in closed mediation.

VIRTUAL OR IN PERSON?

Although I was initially skeptical, I now say from practical experience that mediation conducted virtually can be as effective as mediation in person. There is the matter of convenience, of course, and virtual mediation can be particularly helpful when the

parties, their counsel and the mediator are located some distance apart, or where an element of urgency calls for a timely session, possibly in the evening or on a weekend. I have mediated a number of matters on the eve of trial or a motion – being able to connect quickly by Zoom definitely helped us achieve settlement. Yet, virtual mediation is not always advisable or ideal. For example, if your client is unable to find a private space for the duration of the session, in-person mediation may be a better option. Not everyone is equally comfortable with technology. People's access to it can also vary. Some people connect better with others while sitting across from them, as opposed to on a screen.

Pat may not want to be in the same physical space as Sam. She may prefer the "distance" of a virtual setting. She may prefer to be in your office while you both access a Zoom link to mediate but to also be able to confer with you in person when she needs to do so.

AGREEMENT TO MEDIATE

Every mediator requires the parties to sign their version of an agreement, a contract setting out the terms on which the mediation will be proceeding. Here, you will address specifically issues like the format of the sessions, whether the mediation will be open or closed, whether the mediator will facilitate the dialogue only or if opinions will be offered when requested, and financial arrangements, of course.

Do not underestimate the importance of this agreement, for your client and for you. Read it with care and ask questions on any points that are not clear. You are expected to go over the terms with your client, and to explain them in language that is accessible to a member of the public. Most mediators expect certificates of independent legal advice from each lawyer. Do not treat these agreements as simply "standard terms" because while some clauses appear in most agreements to mediate, many are unique to specific mediators. In effect, no two agreements to mediate are exactly the same.

PREPARING YOUR CLIENT FOR FM

Most people are apprehensive about new experiences, and this can include FM. The more time you spend with your client in advance of the session explaining how a typical mediation unfolds, what to expect and prepare for, the more at ease they will

be when entering the process. The less stressed they are, the better they will be able to bargain.

I do find that most first-time participants in FM are unprepared for the pace of the discussions, particularly as these are often slow at the start, and then accelerate in the second part of the session, when actual offers are exchanged. This is not a criticism by any means. It is an observation based on my experience as a mediator. Given all of the ingredients at the negotiating table – emotions, feelings, the law, strategy, distrust, hope, stress, fear and often physical and emotional weariness – it is not uncommon for one or both parties to "hit the wall" at some point in the day. Prepare your client for that and discuss strategies to cope with it.

For each issue in dispute, you might want to consider with your client their BATNA – best alternative to a negotiated agreement. What happens if settlement on an issue is not reached? Will your client do better or worse before the court or an arbitrator? Is their position legally sound? Do they have risk? Chips on the table will move, and you and your client will need to assess what is worth fighting for.

Preparation is particularly important with a client like Pat who will benefit from knowing, for example, that breaks are expected and so are one-on-one sessions with you, to consider offers and options, throughout the day.

MATERIALS FOR THE MEDIATOR

You should ascertain, early in the mediation process, when the parties (and their counsel) are to deliver their respective mediation materials, and if there are any limitations on the format.

Many lawyers submit their clients' Mediation Briefs using the Case Conference or Settlement Conference Brief format (from the Family Law Rules). Others create their own document from scratch. There is no right or wrong approach here ~ from my perspective, the content matters more than form. Some mediators still prefer to have a printed brief, and will charge the cost of printing an electronic version to each party. You might ask about that in advance and print a hard copy for the mediator instead.

Here is what you might consider when planning your client's Brief:

1. Imagine for a moment that you are the mediator facing this dispute. What information/documentation/calculations would help you, in advance of the mediation session, to hit the ground running and go straight into the actual

negotiations? The parties' time and resources are best spent using the mediator's actual skills, not on having them trying to "figure out the case" during the mediation session. Ask: what would I want to see/read before the mediation to really have a grasp of what is at issue?

2. Do not approach your Brief with the "*I'll let the mediator figure that out*" attitude. Do the opposite, in fact. The more practical tools you give him or her in advance of the actual mediation session, the better. Deconstructing the issues to their granular level is helpful to the mediator. SupportMate calculations are a classic example. I have received mediation briefs in the past that raised support issues but did not make reference to potential scenarios; they did not attach SupportMate calculations at all. Is including them essential? No, but it does help. Someone will have to do the calculations. You should. The alternative is that your client pays the mediator to prepare them or that the mediator has only those prepared by the other side. Neither scenario is ideal. Net Family Property Statements are another example. We are now moving into the "essential" territory. I have even seen briefs that included an NFP comparison prepared jointly by counsel — with commentary on their clients' respective positions — a bonus when it comes to the mediator's preparations for the actual negotiations. We mediators are happy to do the ground work but where resources are limited, calculations and scenarios are best prepared at the lawyer level, not to mention that they will give you a firmer grasp on your own client's case.

3. Consider attaching your client's offer(s) to settle but before you do, consider whether the mediation is open or closed. If no formal offers have been made, include in your Brief terms on which your client would be prepared to reach resolution, at least their starting position. Such content helps the mediator understand the "delta" — in other words, how far apart the parties are and on what issues. It helps her crystallize the dispute and, in turn, strategize about the order in which the issues will be tackled and how.

4. Do not forget you are not advocating, strictly speaking. The mediator is not a decision maker. She is a neutral participant in the dialogue — a facilitator of it, based on her unique skills. The language of your Brief should be focused, accessible and designed to maximize chances of settlement. Just like in court materials, finger-pointing, blaming and inflammatory language are not only unhelpful, they might actually douse the embers of potential settlement.

OFFERS/PROPOSALS

Let's set the scene: Pat and Sam have set aside 4 hours with a family mediator. They are now sitting at the negotiating table (in person or virtually) – what's next? Someone needs to make the first offer - is that you?

What I hear first and foremost in response to this question is "*I don't want to negotiate against myself*" or "*Ff the other side wants to show me they are prepared to negotiate in good faith, let them make the first offer*". Fair enough but if each side takes this position and does not make the next move by presenting an offer, we will be wasting the time we have set aside to work together. Someone needs to take the first step.

Some further comments on the concerns I have identified above:

1. "*I don't want to negotiate against myself*"- this is often an expression of your client's fear that the offer they make will be higher than what the other side would be prepared to accept. This is possible but unlikely to happen if you work with your client on making a smart, strategic and informed offer. Do not run- walk. In the early stages of the negotiations, the key is to show willingness to move and to actually make linear progress. With each side taking this approach, the likelihood of growing momentum toward settlement is more likely. Have you ever tried to push a car that ran out of gas? If so, you know that the first push is the hardest and often requires the most effort. Once the car begins to move, every additional effort appears to double or even triple the result. Early mediation negotiations are like that. So give that car the first push. In fact, come to mediation prepared to make the first offer (if proposals are not exchanged in advance).

2. "*If the other side wants to show me they are prepared to negotiate in good faith, let them make the first offer*" -here is what you might consider with your client: the other side has already shown they are willing to negotiate by coming to mediation in the first place. No one schedules a mediation session, and makes the necessary financial investment in the process, on the basis that the parties will just spend the day repeating their last offers, over and over again, or perhaps even restate their litigation positions. The other side's willingness to come to mediation already says volumes. As for good faith, for mediation to result in settlement, each side needs to take a bit of a leap of faith.

Effective negotiating is not easy. It takes courage, strategy and perseverance. It takes patience. It takes leaps of faith from time to time. It's hard work on the part of all involved.

Here's hoping this primer is of assistance to you as you consider FM as an option for your matter. If you have any questions, please contact me directly at aj@jakubowska.ca