

Negotiation and Mediation in Family Law

Richard Maurice

"We cannot negotiate with people who say what's mine is mine and what's yours is negotiable."

President John F. Kennedy, the Berlin Crisis, 25 July 1961.

"My style of deal-making is quite simple and straightforward. I aim very high, and then I just keep pushing and pushing and pushing to get what I'm after."

President Donald Trump (twice impeached current President of the United States)
Trump: The Art of the Deal, 1987

Introduction

This paper comprises two parts, providing guidance for conducting a mediation and outlining techniques for direct negotiation when representing a party at mediation or elsewhere — the best of both worlds.

Many of these techniques, however, apply to negotiations conducted via correspondence. They are applicable to family law proceedings as well as many other types of disputes or litigation.

Part 1 focuses on one-on-one direct negotiation with the “other side”. Part 2 includes a description of the mediator’s role, much of which is relevant to Part 1.

PART 1 – EFFECTIVE NEGOTIATION WHEN ACTING FOR A PARTY

The keys to effective negotiation with your opponent(s) are:

- Thorough preparation
- Be firm but always remain polite
- Remain detached
- Listen to the whole proposal and any supporting arguments
- Apply problem-solving techniques
- Avoid getting bogged down in the merits of the case
- Patience
- Trade a concession only for a concession

- Clear communication of offers
 - Ethics and reliability
 - Implementation
 - Keep your client involved
 - Manage your client during negotiations
 - Sign everyone up on the day
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Thorough Preparation

Negotiating power lies with the person who is best informed and prepared. Good preparation is essential for a successful negotiation. The more prepared you are before entering talks, the more likely it is that the outcome will be acceptable to all parties.

Good preparation involves:

- Being fully briefed on the significant facts and issues. A comprehensive factual chronology is invaluable.
- Analysing the case from a practical perspective by asking:
 - What essential problems does your client need solved?
 - What relief is available from the court based on jurisdiction?
 - What unifying propositions or principles does the case suggest (your case theory)?
 - What arguments will your opponent raise?
 - How will you counter those arguments?

Before any meeting, work through the negotiation process from beginning to end so you are prepared for any contingencies.

In financial cases, the first step is usually to agree on a compromise and simplified balance sheet before substantive discussions commence. Contentious figures are often resolved by adopting a midpoint. Minor assets and liabilities may be ignored if their omission does not prejudice your client. Emphasise to your client that the figures are for negotiation purposes only and assist in cross-checking and reality testing offers.

Be Firm but Always Remain Polite

Successful negotiators are assertive and challenge assumptions. They also understand that most matters are negotiable and exercise restraint to maintain civility.

- Avoid hostility and empty threats.
- Turn down sarcasm — it rarely assists negotiations.
- Analyse the net effect of proposals on your client's entitlements.
- Be flexible rather than dogmatic. There may be alternative pathways to achieve the same outcome.

Remain Detached

A negotiator must remain emotionally detached. Lawyers sometimes become overly invested in their client's case or indignant about the other party's position. Remain calm and avoid displaying frustration or anger. Controlled humour can sometimes assist.

Complex negotiations, particularly in parenting matters, can become emotional. Allowing emotions to dominate, however, only undermines strategic focus.

Listen Carefully

Good negotiators listen attentively. Active listening includes observing body language and tone. Instead of constantly defending their client's position, effective negotiators look for clues and areas of common ground that may facilitate resolution.

Apply Problem-Solving Techniques

Consensus often requires identifying multiple solutions to the same problem. Rather than fixating on a single desired outcome, focus on creative problem solving to maintain forward momentum.

Avoid Getting Bugged Down in the Merits

Shadow-boxing about strengths and weaknesses wastes time. If the other side is negotiating, they must implicitly acknowledge some merit in your case. Avoid prolonged arguments over legal minutiae.

Similarly, excessive "horse trading" can be counterproductive. Where possible, work from areas of common ground and structure offers to reflect shared interests.

Patience

Good negotiators are patient. They work methodically, beginning with common ground and progressing incrementally toward contentious issues. Do not rush as urgency may be interpreted as weakness.

At the same time, be prepared to walk away if progress stalls. The credible possibility of withdrawal can prompt movement — but use this tactic sparingly.

Always consider how your opponent and their client will assess your offer before responding.

Trade a Concession Only for a Concession

Never give something away without receiving something in return. Unilateral concessions weaken your position. Genuine negotiation is always reciprocal.

Avoid “bidding against yourself”, where concessions flow only from one side. This usually produces suboptimal outcomes.

Ultimately, your client can either accept or reject the final offer with a clear understanding of the risks.

Communication of Offers

Skilled negotiators communicate offers clearly and efficiently. Misunderstandings can result in apparent agreement collapsing during documentation.

As a general practice, put proposals in writing and number them clearly (e.g., “Applicant’s Offer #1 with the time it was made”). Precision is important, though drafting need not be overly detailed at the negotiation stage. Do not repeat agreed matters with each offer, just refer back to them each time.

Ethics and Reliability

Ethical conduct promotes trust and effective negotiation. Lawyers must trust that undertakings and representations will be honoured. Offers should only be made if capable of implementation.

Misrepresentation — even by omission — can undermine an agreement and damage your professional reputation. A short-term advantage gained dishonestly carries long-term adverse consequences as lawyers sometimes gossip and have long memories.

Implementation

“There are many a slip ’twixt the cup and the lip.” Agreements can unravel over

implementation details.

Clarify:

- Who makes interim payments
- Timing and method of sale of real estate
- Distribution of proceeds
- Mechanics of superannuation splits

Implementation must be settled before negotiations conclude.

Keep Your Client Involved

Keep your client informed at every stage. Do not exceed your authority. Do not make concessions or express views without instructions.

Managing Your Client During Negotiations

Your client always retains final decision-making authority. Avoid pressuring them to settle. However, you should advise on matters like:

- Whether the proposal falls within the likely range of court outcomes
- Estimated savings in legal costs
- Likely delay to trial
- Cross-examination challenges
- Litigation risks

There is a fine line between advising and pressuring. Stay on the correct side of it.

Sign Everyone Up on the Day

Finality is critical. At court, judges expect Terms of Settlement or Minutes of Orders. Outside court, written confirmation is equally important.

If agreement is reached in a measured and informed way, withdrawal of consent is rare. Prompt documentation prevents second-round negotiations about implementation.

PART 2 – CONDUCTING A MEDIATION AS THE MEDIATOR

Draw Up a Mediation Agreement

Precedents may be obtained from AIFLAM or similar organisations. The agreement should address confidentiality, the mediator's role, indemnity, and fees. Do not commence mediation until signed agreements are returned. Best practice is to confirm bookings only after execution.

Keys to Effective Mediation

- Apply the appropriate style
 - Require position papers
 - Conduct a structured introduction
 - Manage negotiations effectively
 - Secure and document the final agreement
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Styles of Mediation

There are three recognised styles: transformative, evaluative and facilitative.

Transformative mediation is a style of conflict resolution focused on transforming the parties and their relationship rather than just settling a dispute. It empowers individuals to define their own issues, recognize each other's perspectives, and foster mutual understanding, moving from destructive interaction to constructive, respectful communication. In family law matters, this model is often unsuitable due to residual emotional conflict.

Facilitative mediation is a structured, interest-based dispute resolution process where a neutral mediator assists parties in reaching their own voluntary, mutually acceptable agreement. The mediator controls the process using communication techniques like questioning, summarizing, and reframing to help parties explore underlying interests rather than imposing decisions or offering legal opinions. However, it limits the mediator's ability to express evaluative views or to recommend offers and assumes parties can come up with their own solutions usually without legal advice.

Evaluative mediation resembles judicial settlement conferencing. The mediator reality-tests positions and may predict likely judicial outcomes. The process is structured and outcome-focused. It is ideal in family law and other high conflict

disputes.

Having used all 3 models, I prefer the evaluative approach in family law. Research in Australia and overseas supports this preference (see Appendix “A”)

Evaluation must not cross into legal advice; that boundary must be made clear.

Position Papers

Provide guidance to lawyers about a concise position paper which should address:

- Brief background
 - Relief sought
 - Opening offer
 - Simplified **Joint** balance sheet (financial cases)
 - Part VII considerations (parenting matters)
 - Costs notice pursuant to r 12.06 of the FCFCOA Rules
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Introduction and Format

The opening session may be joint or separate. Joint openings allow explanation of the “rules” once. Separate sessions may be required for emotional or safety reasons.

Mediations are increasingly conducted via videoconferencing platforms such as Teams or Zoom. With competent management, outcomes are comparable to face-to-face mediation. Clients are often more relaxed in this environment.

Negotiations as a Mediator

The mediator acts as an honest broker and filter, conveying offers in neutral terms and removing extraneous commentary.

Suggestions about packaging offers may assist, but mediators must avoid appearing to align with either party.

Reaching Agreement

The same principles applicable to direct negotiation apply here. Parties should be signed up on the day wherever possible.

There is substantial overlap between effective negotiation and effective mediation.
Mastery of one enhances competence in the other.

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About the Author

Richard Maurice holds degrees in Law and Economics from Sydney University. He works as a Barrister & Mediator in Family Law financial and parenting matters.

He was admitted in 1984 and worked in private practice as an employed solicitor in a general practice and later for the Federal Attorney General's Office representing disadvantaged clients and as a duty solicitor in the Family Court, in NSW State Children's Courts and in many NSW Local Courts.

In 1988, he was called to the private bar. Since then he practiced mainly in the areas of Family Law, De facto relationships and Child Support, together with Wills and Probate.

He has appeared in a number of significant Family Law cases including seminal cases on Family Law and De Facto property division like *Pierce and Pierce* (1999) FLC 92-844 and *Black v. Black* (1991) DFC ¶ 95-113 and *Jonah & White* [2011] FamCA 221 and more recently *Sand & Sand* [2012] FamCAFC 179 and *Vega and Riggs* [2015] FamCA 797.

He completed the LEADR mediation course on 2006 (taught by Sir Lawrence Street) and a refresher course at the Resolution Institute in 2024. He is a member of the Family Law Section of the Law Council of Australia, is registered with the Civil Mediation Council (UK) and a member of the International Society of Family Law. He is an Australian NMAS Accredited Mediator.

www.endfamilydisputes.com

Important Notice

The content of this publication is intended only to provide a summary and general overview on matters of interest. It is not intended to be comprehensive nor does it constitute legal advice. The author has attempted to ensure that the content is current but he does not guarantee its currency. You should seek legal or other professional advice before acting or relying on anything contained herein.

Appendix A

Some research on different styles of Mediation for conflict resolution

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