

3-1-2002

Loss aversion and risk taking in mediation

Barbara Wilson

Recommended Citation

Wilson, Barbara (2002) "Loss aversion and risk taking in mediation," *ADR Bulletin*: Vol. 4: No. 9, Article 3.
Available at: <http://epublications.bond.edu.au/adr/vol4/iss9/3>

This Article is brought to you by epublications@bond. It has been accepted for inclusion in ADR Bulletin by an authorized administrator of epublications@bond. For more information, please contact [Bond University's Repository Coordinator](#).



ADR challenges in family disputes

Loss aversion and risk taking in mediation

Barbara Wilson

'Facing the reality of loss is often a key part of the mediation process, and it is essential that the mediator recognises such transitions and is able to deal with them, while not inappropriately extending the mediation boundaries.'

Issues of loss

At the heart of every family mediation is the issue of loss. Every family mediator deals with their clients' losses, whether perceived or actual. Most people in mediation are already acutely aware of having their lives wrenched apart by the ending of their relationship, especially those who are left behind by their former partner.

Marital or relationship breakdown usually incurs loss at every level — financial (for example, contributing to the end of a business relationship and/or a marked decrease in the standard of living previously enjoyed), family and other relationships (for example, close ties with children and significant others may be affected; children may lose contact with parents who leave or, at best, only enjoy intermittent contact with them which is often hampered by ongoing adult arguments), social status and health (it can trigger the onset of reactive depression).

Fisher and Ury's landmark book *Getting to Yes*¹ urges the use of principled negotiation and the possibility of integrative solutions. However, although mediators try hard to maximise outcomes for both clients, the reality is that family mediation, however skilled, cannot redress the fundamental losses with which both former partners have to come to terms; neither, of course, can litigation.

In the UK, unfortunately, the sworn court document, Form E Financial Statement (Lord Chancellor's Department), that parties must complete in pursuance of ancillary relief proceedings, contains language that may serve to emphasise the polarity of the issues and encourage bipartisan views of the matrimonial assets.

Financial settlements entail parties having to accept outcomes that are usually based on the premise that their wealth is communally, not individually, owned, and

therefore may be divided unequally between them. The oppositional language of Form E (for example, in Part 2, Financial Details 2.1 'Give details of *your* interest in the matrimonial home' (emphasis added)) may exacerbate an ultimate sense of loss in clients who, for instance, offset pensions against the equity in their former homes and are left without tangible assets as a result.

Clients may be in therapy or counselling in order to help them cope with the trauma they are experiencing, and mediators cannot ignore the emotional and psychological elements that are commonly displayed in mediation and may influence its progress. Facing the reality of loss is often a key part of the mediation process, and it is essential that the mediator recognises such transitions and is able to deal with them while not inappropriately extending the mediation boundaries.

For example, a mediation between a reasonably solvent couple went fairly well when the endowments and savings were discussed but became much more difficult when the parties came to divide the holiday souvenirs. The usual route in such situations is to see if trade offs are possible, exploring with the parties what they might each agree that the other person retain. However, this will only work if there is 'give and take' or, alternatively, if the parties will both accept a monetary value being assigned to the items and factored into the financial settlement. The latter may result in resolution but does not always make the person relinquishing or trading something feel compensated for what they have lost.

Sentimental items often cannot be meaningfully valued. Prized objects may be the most difficult issues to deal with in mediation and can sometimes be the cause of intractable stalemates. It is vital not to underestimate people's feelings about ►



► pets, plants, photographs and memorabilia. Those belongings are objects of attachment and are often highly symbolic or dear to the people concerned. Mediators are unwise not to deal with such important matters as they arise. Indeed, those belongings may need to be negotiated in more detail than some of the substantive assets such as houses and investments.

Dealing with such issues sensitively and appropriately can be the key to other matters falling into place and the mediation being satisfactorily concluded. Clients need to feel that they have been listened to and their concerns have been addressed. The mediator can assist by openly acknowledging the concessions each has made to achieve agreement (if this is the case).

If the parties cannot arrive at mutually acceptable decisions regarding contested items, the mediator may help them reflect on the alternatives to negotiation, as long as this is not done in a way that puts pressure on them to remain in mediation. The mediator may offer reminders concerning the applicable financial dispute resolution procedures, and the concept of proportionality. This may enable clients to review their positions.

Intangible and tangible issues

Zubek, Pruitt, Peirce, McGillicuddy and Syna² reviewed the work of several researchers who have examined how issues such as self-presentation, security, recognition, values and morals may influence negotiation. They also quote from Lewicki and Litterer's text *Negotiation*,³ where they suggest that there are tangible and intangible issues in negotiations. Tangible issues usually relate to matters regarding children, property and finance. Intangible issues include less obvious topics, including those belongings listed above, that may be stubbornly intrinsic to the conflict and, if not resolved, cause negotiations to founder. Lewicki and Litterer also state that:

Intangible issues are rarely placed on the formal agenda; and, even when recognised, may be difficult to prioritise and discuss and hence, may be placed on the back burner.

Yet they are often more important than the tangible issues in a case.⁴

Clients may or may not be explicit about what their intangible issues are. The mediator's task lies in listening to the subtext of the discussion and picking up any clues either person offers. It is not usually appropriate to attempt to list these issues as though they were goods or chattels — often what is at stake is so sensitive and subtle that great skill is needed to ensure that concerns are recognised, but not emphasised to the point of causing embarrassment or power imbalances. Intangibles may extend to the sensitive area of one party seeking an apology from the other person, which can powerfully diffuse conflict, but needs to be handled in a way that avoids blame or attempts to unravel the couple's past.⁵ People do offer apologies in the course of mediation and opportunities to incorporate such gestures should not be overlooked, as long as they are managed appropriately and disempower neither party. It is not the task of the mediator to elicit apologies, but the mediator should be prepared to deal with such exchanges if they arise.

Intangible matters may also concern clients' struggles to make sense of what has happened to them, their attempts to secure survival at a time when they feel their world is disintegrating and a need to feel that matters between them and the other person have been dealt with equitably. Central to an understanding of this dynamic in mediation is the theory of loss aversion.

Loss aversion

Loss aversion is well understood in the fields of international relations, portfolio investment, insurance and marketing. It recognises that people generally seem to prefer to avoid losses rather than accumulate gains ('a bird in the hand is worth two in the bush' — a framing that suggests that the certain is preferable to the uncertain). Concessions by one person are commonly seen as triumphs for the other ('one man's loss is another man's gain'). But if the potential outcome of taking risks is positively postulated, people seem more inclined to take them ('you have to speculate to accumulate' — a framing that

suggests the potential for gain as a result of risk taking).

Loss aversion is problematic in the mediation process, as all successful negotiations involve an element of risk taking and giving ground. Most applications to the court are concerned with the acquisition, sharing or retention of assets. Mediators, however, often notice that negotiating parties are equally concerned about balancing what they are losing against what they are gaining. They are rightly also watchful of the losses sustained and concessions made by the other person.

These considerations within mediation, including the importance attached to intangible assets, demonstrate how clients weigh potential outcomes and option choices against what they feel to be fair and equitable.

An example

In a recent 'all issues' mediation a difficult child contact issue was identified at the beginning. The wife complained that child maintenance payments had been erratic, and this was contributing to their initial impasse over asset division. The husband conceded that he had created problems for his wife by withholding moneys. He, however, was concerned that a number of contact visits had been cancelled and that if he did set up a direct debit there would be no guarantee that he would see the children. The wife admitted that stopping contact had been difficult for both the children and their father, but said she had no certainty that he would pay maintenance if she facilitated contact.

Risk taking reframed

Mediation involved understanding that both parents' aversion to risk made each unwilling to make the first move, regardless of the fact that their children's welfare was at stake on both counts. Trust had obviously been breached and each was afraid of further losses. Both knew their behaviour was inappropriate and they had become stuck in a negative interaction, which they were unable to change without assistance. The mediator enabled them to take a ►



'Recognising the clients' aversion to loss, assisting them to take considered risks and helping them both to achieve optimal gains relative to their circumstances are fundamental mediation tasks. Identifying loss and risk aversion and finding ways of dealing with them creatively will enhance the mediator's expertise and improve client satisfaction with the mediation process.'

► calculated, positively framed risk — the father paid a number of instalments by post dated cheques, the mother ensured that contact resumed based on those payments being cleared. Both parents returned to complete their mediation some weeks later, after overcoming their previous difficulty — the father had progressed to paying maintenance by direct debit and the mother had ensured that regular contact resumed.

Whatever the legality or morality of such situations, the concept of loss aversion, together with positively framing the potential benefits of risk taking for each parent, proved the key to resolving this issue. Reframing is a core mediation skill. In this case, the mediator assisted the parties to see the benefits of mutual concession making in order to maximise gains, both to themselves in the first instance and, as a spin off, to each other. Although such trade offs seem self-evident to onlookers, negotiations can founder unless some way of executing them is devised. The mediation process enables those who are locked in conflict to take risks without an initial loss of face and within a consensual strategy. Reaching a negotiated settlement in order to avoid the potential costs of contested proceedings is, of course, the most universal application of risk aversion in mediation.

Conclusion

The late US General George Smith Patton (Junior) once counselled, 'Take calculated

risks. That is quite different from being rash.'⁶ Recognising the clients' aversion to loss, assisting them to take considered risks and helping them both to achieve optimal gains relative to their circumstances are fundamental mediation tasks. Identifying loss and risk aversion and finding ways of dealing with them creatively will enhance the mediator's expertise and improve client satisfaction with the mediation process. ●

Barbara Wilson, Mediator and Professional Practice Consultant, UK.

Ms Wilson can be contacted at: Barbara.Wilson@btinternet.com.

Endnotes

1. Fisher and Ury *Getting to Yes* (2nd ed) Penguin Books USA Inc New York 1991 p 11.
2. 'Disputant and mediator behaviors affecting short term success in mediation' (September 1992) 36(3) *Journal of Conflict Resolution* at 546-72.
3. R D Irwin *Negotiation* Homewood Illinois 1985.
4. Lewicki and Litterer *Negotiation* (3rd ed) Irwin Magraw-Hill 1999 at p 278.
5. Schneider explores this topic in depth in 'What it means to be sorry: the power of apology in mediation' (Spring 2000) 17(3) *Mediation Quarterly* at 265-80.
6. J Bartlett (ed) *Familiar quotations* (1A th ed) Little Brown and Company 1968 at p 987.