

## A LEXON LASTCHECK:

# Mediation – Family Law

BEFORE YOU CONDUCT A FAMILY LAW MEDIATION, MAKE SURE:

For Use From 1 September 2011

CHECKED



### Mediation Agreement

Have you explained the terms of the mediation agreement to your client?  
Has your client signed the mediation agreement?



### Cost

Have you advised your client of the cost of mediation?  
Have you obtained your client's share of the cost of mediation?



### Purpose

Have you advised your client of the purpose of mediation? E.g:  
(a) not to win, but to resolve the matter;  
(b) to have control over the outcome;  
(c) to save time, cost, risk or stress.



### Mediator

Have you advised your client of the mediator's role?  
(a) to facilitate negotiations;  
(b) to ensure a level playing field;  
(c) to encourage both parties to compromise to resolve matter;  
(d) to provide options to resolve matter.



### Process

Have you advised your client of the mediation process?  
(a) opening statement;  
(b) private meetings with the mediator;  
(c) choice of separate rooms or same room as spouse/partner?  
(d) mediation is without prejudice;  
(e) client can't be forced to settle;  
(f) client should make genuine effort to resolve matter.  
Have you advised your client of the client's involvement in the mediation process?  
(a) client can speak personally; or  
(b) client can elect to speak through lawyer.



### Assets and Liabilities

Have you:  
(a) prepared a list of assets, liabilities and financial resources?  
(b) obtained estimates of value from client for each asset and liability?  
(c) obtained valuations of any asset, if necessary?  
(d) carried out disclosure or discovery prior to mediation, if necessary?



### Preliminary Assessment

Have you obtained instructions on:  
(a) initial contributions by the parties?  
(b) contributions under section 79 of the *Family Law Act* or with respect to de facto relationships, section 90SM(4) of the *Family Law Act*?  
(c) relevant material facts under section 75(2) of the *Family Law Act* or in respect of de facto relationships, section 90SF(3) of the *Family Law Act*?

**Have you provided your client with a written preliminary assessment?**

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YES	NO
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# HAVE YOU CONSIDERED THESE ISSUES?



## Alternative Outcomes

Have you given your client a BATNA (Best Alternative outcome to Negotiated Agreement)?

Have you given your client a WATNA (Worst Alternative outcome to Negotiated Agreement)?

In giving a BATNA or WATNA take into account:

- (a) your client's costs to achieve each outcome/costs of trial;
- (b) possibility of costs order in favour of your client or against client;
- (c) time (delay to trial);
- (d) lost opportunity – pending outcome; and
- (e) risk of appeal (i.e. delay, costs, further costs orders, further risk, possible stay of orders).



## Offers

Have you obtained instructions (do you have evidence?) and calculated the following offers?

- (a) best outcome offer;
- (b) target offer;
- (c) bottom line offer.

Have you obtained instructions in relation to offers at mediation? (i.e. who is making opening offer, open high – settle soft, open medium – remain firm, open low – settle hard)



## Position Statement

Have you prepared a position statement?

The position statement should contain:

- (a) Length of relationship;
- (b) Particulars of any children;
- (c) Chronology of relevant issues/events;
- (d) Initial contributions by both parties;
- (e) Particulars of gifts/inheritances;
- (f) Particulars of contributions under section 79/section 90SF(3);
- (g) Particulars of relevant facts under section 75(2)/section 90SF(3).

Have you exchanged your position statement with the other party (preferably two days prior to mediation)?



## Documenting Agreement

How do you propose to document any agreement reached?

- (a) Heads of Agreement;
- (b) Consent Orders;
- (c) Binding Financial Agreement;
- (d) Combination of the above;

Regarding Heads of Agreement, have you advised your client that:

- (a) it is not binding;
- (b) it may be used for a costs order; and
- (c) it only becomes binding when Orders of the Court are made in similar terms or a Binding Financial Agreement is signed by both parties and complies with the requirements of the *Family Law Act*?



## Outcome

Have you written a letter to the client summarising the negotiations at mediation and the outcome?

If matter is complete and you are not acting further, is it confirmed in writing?

### CHECKED

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