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MARCH MASTERY
a month of intensive cpd learning

Mastering Mediation and Negotiation: Strategies for Family Practitioners

DEBRA PARKER

PARKER COLES CURTIS

CLAIRE NAIDU

CLAIRE NAIDU & CO

RENEE TOY

LISTEN, TALK, RESOLVE

VINCENTS
every angle.



Welcome & Introduction

“Effective mediation and negotiation are cornerstones of successful family law practice, offering clients a path to resolution without prolonged litigation. This session provides actionable tips and advanced strategies to enhance your skills in these critical areas. Explore techniques for managing high-conflict situations, building rapport with opposing parties, and crafting creative solutions tailored to family law disputes. Whether you’re working with clients on parenting issues, support, or property division, this session will empower you to achieve better outcomes while fostering cooperation and reducing stress for all involved.”

- Acknowledgement
- What we’ll do today in this session

Why mediate?

- The statistics
- Required to! - Parenting and pre-action
- Foster a broader range of solutions
- Create a safe space for victim survivors of Family Violence to negotiate out of the Court process
- Can be faster and less expensive
- The process may lead to more empowerment and less of a win/lose outcome.
- Confidential
- More stickability
- Respectfully end relationships

Which mediator should I propose and select for my client?

- AMDRAS – what is it and what does it mean for my preferred mediators?
- “Accredited Mediators NMAS” will become “Accredited Mediators AMDRAS”
- New levels of Mediator: Accredited Mediator, Advanced Mediator and Leading Mediator accreditation levels.
- Mandatory Practice Hours will change - 20 to 40 hours per annum
- Mandatory CPD hours will change – 25 hours for each level per annum
- Changes effective from 1 July 2025 | New accreditation and training commence this year.
- Find out more at www.msb.org.au

The importance of selecting the right mediator for the parties and for your client's dispute

1. FDRP Accredited
2. Accredited AMDRAS (formerly MSB)
 - Family Dispute resolution?
 - Settlement mediation?
 - Shuttle mediation?
 - Conciliation?
 - Facilitative mediation?
 - Evaluative mediation?
 - Transformative mediation?
 - Collaborative Law?
 - Expert determination? - on a particular issue

What is a lawyer's role in mediation?

The lawyer's role in a mediation is just as varied as the many Dispute Resolution processes that are available.

- Offer advice and negotiation support while leaving final decision-making responsibility to the client
- Match the dispute with the right process by considering the nature of the conflict and the underlying causes
- Work with your client to ascertain what their interests are
- Be aware of Family Violence issues and develop ways to deal with that dynamic during the mediation
- Prepare for the process; advise about confidentiality
- Obtain any expert advice required beforehand eg. accountant; or Super Trustee procedural fairness
- Prepare the client for the process and set expectations for what will happen; discuss parameters and strategy beforehand
- Advise of the responsibility to negotiate in good faith and make a genuine effort
- Create expectations regarding offers and when they might be made and not to react immediately
- Assist the client during the process, including assisting the client to maintain an assertive stance; or reality testing unreasonable positions
- Empathise with emotional responses and be content to work through them with the client.
- Be aware of the power dynamics at play and support the client including being prepared to inform the mediator of the need for private meetings between client and lawyer
- Be prepared to write up the agreement; consent orders and ACO.

Negotiation

Some strategies:

- Interest-based negotiation | Identify parties' interests. What does your client really want out of this? What is important to them – money; settlement?
- Broaden your awareness and skills and learn to work with conflict; work with differences and power imbalances and work with different intelligences ; eg logical and emotional.
- What to do when you reach an impasse?
- Think creatively and try to invent some options for mutual gain.

"Getting to Yes" Fisher and Ury 1981

"Negotiation: Strategy Style and Skills" Alexander; Howieson and Fox 3rd edition

"Never split the difference - negotiating as if your life depended on it" Voss 2016

Reducing stress for yourself (as the lawyer)

- Prepare
 - Prepare for the mediation, but don't overburden yourself
 - Give yourself as much lead time as possible to prepare your mediation documents and circulate
- Focus on the issues that matter
- Have a plan but remain adaptable and flexible
- Set boundaries with clients
- Manage your own expectations
- Use breaks as required for yourself and your client
- Debrief and release



Crafting Creative Solutions in a mediation

How?

- Know your own hand of cards – and the other party’s too!
- Take the time to identify the interests and fears of each party.
- Be open minded and curious about what is important to both.

Why?

This shifts the focus from being purely transactional and concessions driven or “rights-based” / “position-based” to an “interest-based” negotiation – much more interesting and rewarding! And a much more elegant way to negotiate. (Positional negotiators tend to try to overbear the other party and seek to “claim value” demanding concession.)

Crafting Creative Solutions in a mediation

What does identifying interests and fears achieve?

Identifying a party's desires and interests increases the number of items over which you can negotiate constructively – it “enlarges the pie” rather than simply dividing up the existing pie to a zero-sum, because what is critically important to one party might not be important at all to the other – or less so. It “creates value” rather than “claiming value” This opens up more creative options and settlement possibilities, especially if you can identify common interests.

In reality in family law mediation practice, parties nearly always shift from being initially positional, then moving to interest-based and then often positional again towards the end just before agreement is reached. Be flexible! This is constructive negotiation! The key is to generate several options with various interests of importance and moving the pieces of the puzzle around until consensus is reached so people can say Yes - I can live with that.

What do you do if you reach an impasse in a mediation?

- Be prepared to work with your client and robustly reality test: do they want to walk away? If so what is their best alternative to a negotiated agreement and work that through with them – explore with them what that future might like look. Litigation? Legal costs?
- Explore with them and the mediator whether:
 - there are extra “sweeteners” that can be introduced to close the deal?
 - you can revisit some of the earlier components and mix them up in the settlement package to bring the negotiations back on track?
 - you can reframe the offer so that it becomes multiple final offers – i.e. different alternative packages structured in different ways eg different time frames or staggered payments?
 - Be creative!
- Ask yourself whether there are different ways to change the process? Ask a support person if they could go for a walk; ask for a conversation with the lawyers only and the mediator and discuss the impasse and the consequences of not settling; ask to speak to the mediator and your client privately and workshop the issues causing impasse; suggest a short lunch break or walk; suggest the parties each prepare a “final offer” and then work hard to try to bridge that last gap.
- Always critically reflect afterwards on how the mediation ran, and think about how you can use what you learn in that mediation, to build in more success in the next. We never stop learning!

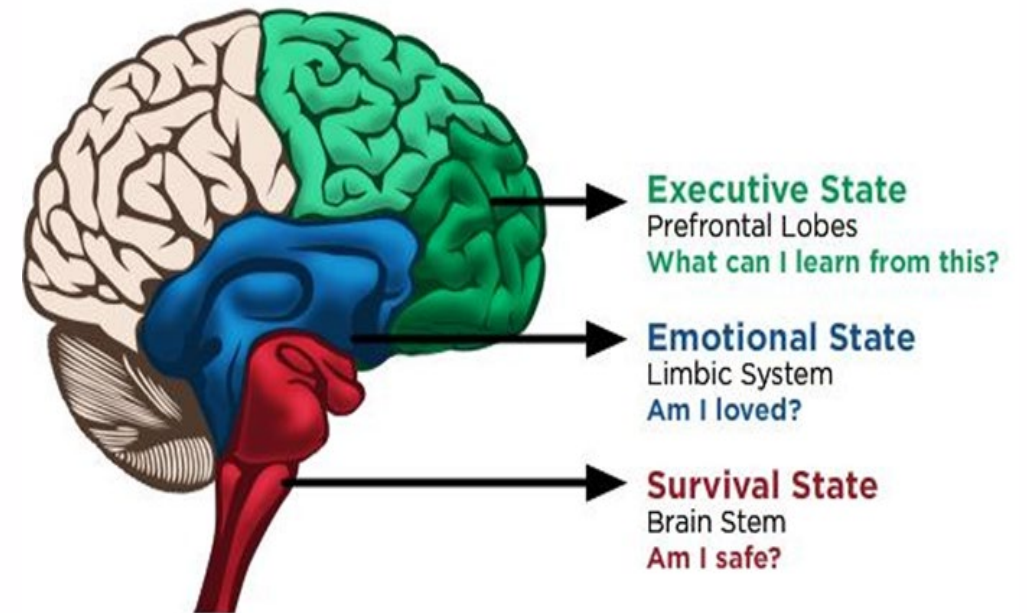
Understanding Stress

Mediation & Stress

Mediation may be experienced as stressful for those involved. Even for those who have been involved in mediations on a regular basis, there can be uncertainty as to how things will progress as every matter is different and those involved are different.

Stress is natural response to a threat or challenge. It is distinguished from anxiety as anxiety may be without a clear trigger. Both are responses but typically stress is caused by an external trigger.

For example, you may experience stress when you think about or look at a particular file on your desk. That matter may trigger a response. Whereas there may be anxiety experienced where the worries or concerns do not go away, even in the absence of a stressor.



Conscious Discipline Brain State Model

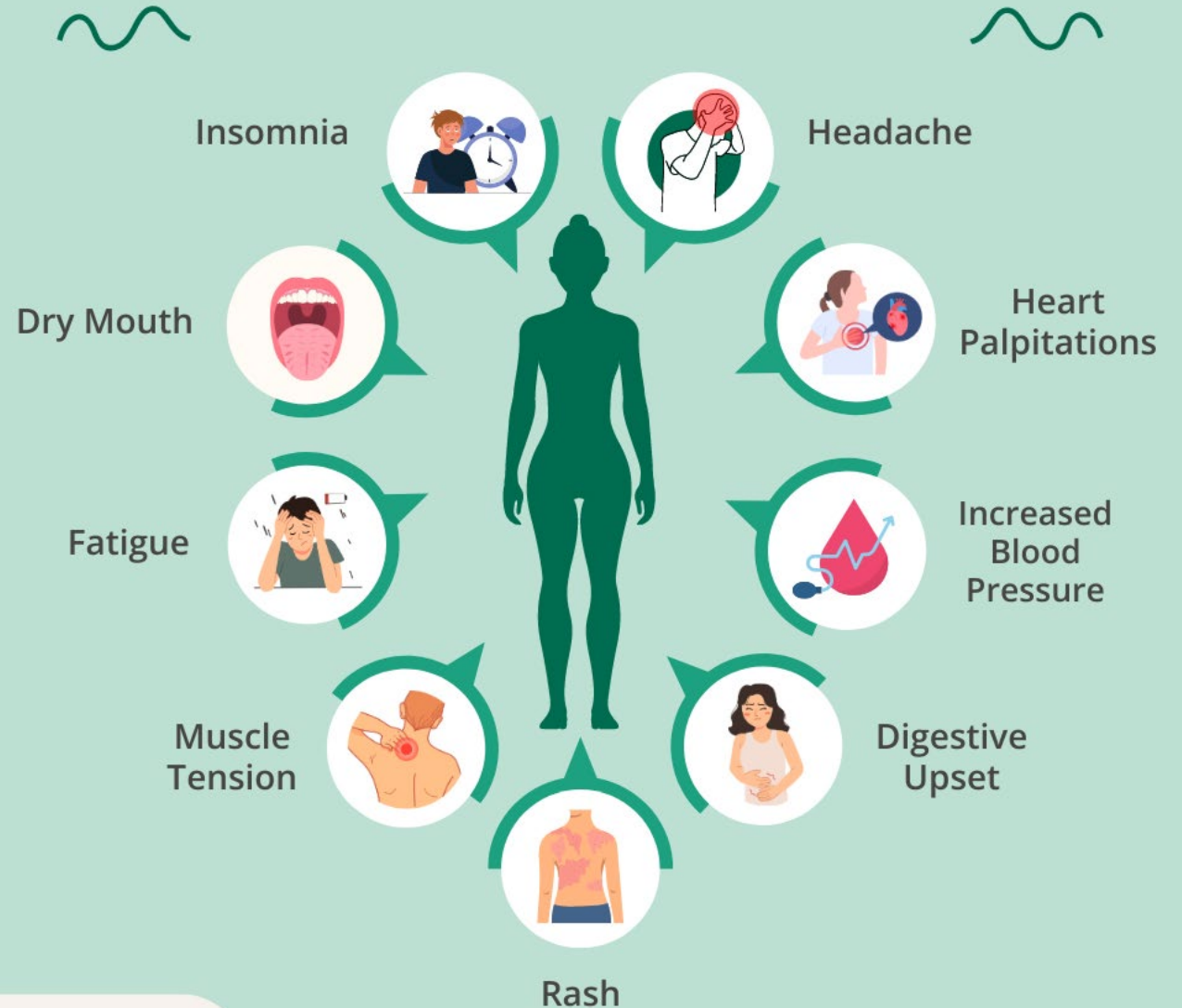
Effects of Stress

Common effects of stress

On your body	On your mood	On your behavior
Headache	Anxiety	Overeating or undereating
Muscle tension or pain	Restlessness	Angry outbursts
Chest pain	Lack of motivation or focus	Drug or alcohol misuse
Fatigue	Memory problems	Tobacco use
Change in sex drive	Feeling overwhelmed	Avoiding friends and staying at home
Stomach upset	Grumpiness or anger	Exercising less often
Sleep problems	Sadness or depression	
Getting sick easier due to a weaker immune system		

References: Stress Management <https://www.mayoclinic.org/healthy-lifestyle/stress-management/in-depth/stress-symptoms/art-20050987> and The Most Common Symptoms of Stress, and How They Affect You in the Short and Long Term <https://www.everydayhealth.com/stress/guide/symptoms/>

How Stress Affects the Body



The Advantages and Techniques of Reducing Stress for your Clients

- Educated and set expectations
- Frame the Process
- Keep communication clear
- Legal terms and implications
- Check in periodically – ask questions
- Reminding of the bigger picture
- Understanding what they know assists them with reducing stress
- Manage breaks
- Clients are more open to being a part of creative solutions



Challenging behaviours or “High conflict” personalities

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What to look for:

- All or nothing thinking
- Blame others
- Engage in all-or-nothing thinking
- Avoid responsibility
- Display unmanaged or intense emotions
- Use threats or other extreme behaviors

Avoid overreacting to intense emotions

Provide clear boundaries and be prepared to say “no”

Use EAR statements and listen (Empathy, attention, respect)

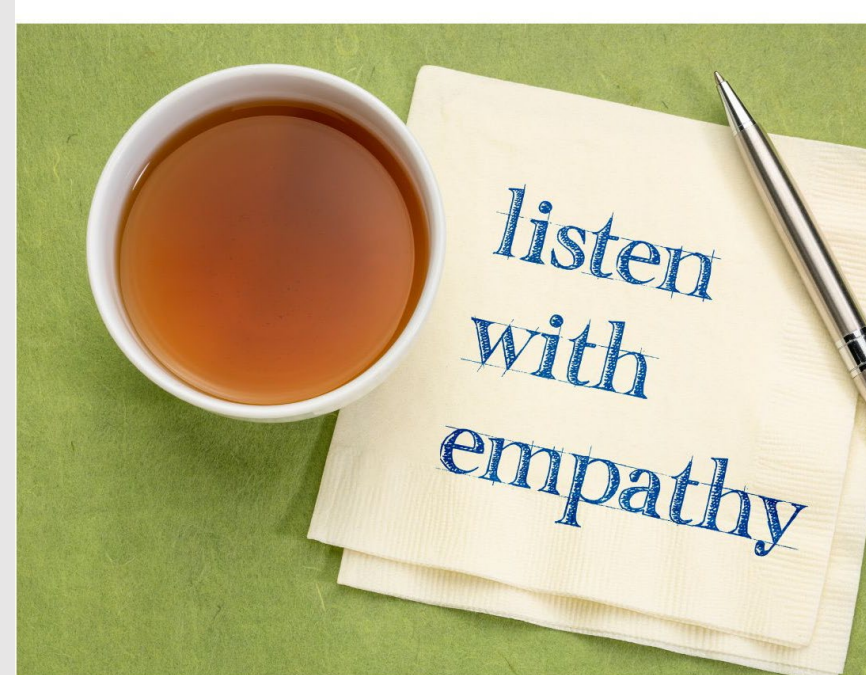
Provide structure and focus on tasks

Communicate consequences for poor behaviour

Strategies to manage emotions

- E - Empathy
- A - Attention
- R - Respect

- L - Listen
- A - Acknowledge
- R - Reframe
- S - Summarise
- Q - Question



Listen first...

References:

Bill Eddy - <https://highconflictinstitute.com/high-conflict-strategies/ear-statements-can-calm-clients-and-anyone/>

Linda Kochanski, <https://gpdtraining.com.au/>

IT'S **NOT**
ABOUT
THE
NAIL



What emotions are happening during a mediation?

Emotions that anyone BRINGS IN to the mediation

HISTORICAL emotions (historical emotional experiences, whether relevant or not)

Emotional experiences DURING the mediation

People OBSERVING or RESPONDING to either their own or another person's emotions during a mediation



What are we bringing to the mediation?

Reference:
Working with Emotions, Conflict Management Academy
<https://www.conflictmanagementacademy.com/wwonline/>

But I'm not a therapist...

Everyone who wants to work with couples needs to understand the depth and range of losses that the parties experience. For all our focus on the future, we need to acknowledge, whether with words, gestures, or silence, that we stand with them in their pain even as we are helping them move beyond it.

Reference:

*R Barbieri, "A Song of Loss for Divorce Mediators" (June 2014)
From M Brandon, L Fisher, F De Biasi, "Mediating with Families", 4th Ed,
2018 (since published in 5th Edition)*



So how should we be managing emotions?

More strategies

- Prepare your client for emotional experiences that you know will show up
- ENCOURAGE or DISCOURAGE emotions
- Allow people to 'vent' (in private or in joint)
- HELP parties regulate their emotions when they become heightened:
 - Do they need to take a break?
 - Do they need a drink of water?
 - Do they need a walk outside?
 - Do they need a tissue?
 - Do they need a private session?
 - Do they need a task?
- Model calm behaviour



Red: Life Threat – Freeze
Immobility Response

Yellow: Danger – Fight/Flight
Mobilization, Self-Protection

Green: Safe – Relaxed
Socially engaged, Rest and Digest

Reference:

Working with Emotions, Conflict Management Academy
<https://www.conflictmanagementacademy.com/wwe-online>

Be on the look out for...

- Your own emotions
 - Do you work well with the other solicitor?
 - Are you comfortable with emotions?
 - What emotions come up for you about the client / situation?
 - The emotions of the other solicitor and mediator
- Family violence: control; safety (physical and emotional); trauma
- Diagnosed mental health conditions
- Neurodiversity
- Who has power in the room
- Support people
- Opportunities for Rapport Building

Rapport

- With Lawyers
- With Clients
- With Self-represented Litigants
- With Mediators

Rapport fosters trust, strengthens relationships, and creates a positive environment for communication, collaboration, and ultimately, achieving mutually beneficial outcomes.

1. **Be Authentic** – Be open, honest, and vulnerable.
2. **Be Engaging** – Actively engage; be aware of body language.
3. **Practice Active Listening** – Stay in the moment and empathise.
4. **Calibrate Rapport** – Adjust based on who you're speaking to.
5. **Find Common Ground** – Focus on shared interests and experiences.
6. **Read the Room**– Understand the environment and its culture.
7. **Be Genuine** – Don't be afraid to be yourself.



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Law Society of the Australian Capital Territory

Phone 02 6274 0333 | memberconnect@actlawsociety.asn.au

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