TIPS AND TRAPS IN MEDIATION – from the perspective of a mediator and senior counsel – Elise Schopper-Brigel and Karen Henry, West Coast Family Law Centre.

TIPS

1. Prepare yourself and your client for the mediation

* Counsel and clients who are well prepared are more confident, and achieve better outcomes, so know your case and your mediator.
* Think through & develop your theory of the case in terms of what is your goal and what settlement documents will best reflect that goal. A consent order, Minutes of Settlement, Separation Agreement and who prepares it? Be prepared with one of those settlement documents including a mediation brief.
* Involve your client in preparation of the mediation brief and other materials that will be shared with the mediator and other parties, as if you were going to trial.
* Gather key documents to prove excluded property claims, inheritances, gifts, etc. To be successful on these issues as good lawyers, you need evidence so your mediator can review the file in advance and become familiar with the issues.
* Have you arranged for the appropriate appraisals/valuations/reports?

If there is a family residence, you will most likely need a house appraisal, pensions may require valuations, businesses require valuations or a Views of the Child report - all of which need to be set up well in advance of the mediation.

* Help your client understand the difference between interests and positions, and be able to identify their own interests, and the likely interests of the opposing party.
* Set realistic client’s expectations and continue to manage them on an ongoing basis including a discussion of best case/worst case scenarios.
* Discuss with your client the benefits of mediation as lower cost, less stress more control, quicker vs litigation.
* Make your client aware of the likely costs, steps and timelines of court.
* Prepare your client to make proposals and counter-proposals.
* Determine your client’s level of computer literacy - if it could impede or facilitate the process.
* Give guidelines for attending in person or online (see attached).
* Get your client familiar with software and tools likely to be used at mediation, e.g., DivorceMate (input of data, lump sum, restructuring, net disposable income) and a Scott schedule (or spreadsheet of assets and debts).
* Advise client how an agreement will be written up – e.g., Memorandum of Understanding, Minutes of Settlement drafted by mediator, followed by Separation agreement drafted by counsel OR Agreement drafted by mediator.

2. Support your client during the mediation

* Attend the pre-mediation intake session. Lengths can vary. Have your client ready with best case/worst case legal advice, for ex., what would your best day/worst day look like and at what point does it make sense to settle and not likely to be that your clients gets 100% and the other party gets 0 %!
* Intake sessions can be used to set up experts, if appropriate with assistance of mediator. Alert mediator to helpful points including emotional trigger issues and the other party’s history of decision-making process or if other counsel is difficult or combative (see below).
* With difficult counsel, you may conclude from your intake session that an additional initial session without clients, only counsel & the mediator would be helpful.
* Make sure all relevant information is available as of date of mediation.
* Be careful not to denigrate other party or it could serve to set a negative tone for the mediation that is not conducive to settlement.
* Be organized. Use binders to organize material. You and your client will be more confident.
* Consider length of time your client can mediate – particularly if there is pressure to mediate until a deal is done. Long mediations lead to settlor’s remorse (and strain relationships with clients).
* Help your client form and re-form realistic expectations of the process and likely range of settlement options.
* Make your client familiar with the written Agreement to Mediate, how an agenda is made, the usual agenda for a mediation, etc. (See sample mediation agenda attached).
* Consider your skill set: If you excel at drafting, offer to draft an agreement OR if you find it easy to make divorce order applications, offer to do so, as a deal sweetener.

3. Advance your client’s case

* Be familiar with the applicable current case law – and be ready to talk about it.
* Find areas of agreement – where resolutions can be reached easily, to build momentum.
* Prepare a neutral mediation brief without using argument to obtain the advantage of setting the framework.
* Be the lawyer who gives really good information for the parties’ plans to move ahead, for ex., a draft parenting schedule

4. Work well with the mediator and opposing counsel

* Neutrality - prepare neutral documents – e.g., summary of each spouse’s expenses from the Financial Statements. Simplify facts to one page if possible.
* Be open to the mediator’s suggestions – they have likely seen the issues before.
* Involve the mediator in lawyer-only or client-only break-out sessions where helpful.
* To avoid arguing about terms of settlement after the mediation, try to settle as many terms in writing as reasonable during the mediation.
* Understand and be clear about what you want and convey it to the mediator and counsel neutrally without acrimony or a cross examination.

5. Respond to aggressive counsel or opposing counsel.

* Disarm with curiosity and kindness. Ask neutral, open-ended questions of the other party. Find one or more issues on which your client can be generous. The generosity will be noticed and should be acknowledged by the other spouse.
* Drill down with questions. What is the heart of the dispute? Probably emotional.
* Re-frame aggressive statements.
* Don’t be afraid to call up mediator in advance of mediation and inform them (in a neutral way) about a difficult issue.
* If the other lawyer is difficult or combative, get the mediator involved from beginning of the process to get the attention of the other lawyer.
* During the mediation, ask the mediator for a break – and discuss how to improve the tone of mediation.
* Ask mediator to ask the other lawyer the tough questions.
* Consider how to respond to surprises (e.g., extra demands from the opposing just when the parties are very close to settlement).
* Read the wonderful materials of Bill Eddy of the High Conflict Institute ([www.highconflictinsitute.com](http://www.highconflictinsitute.com)) on responding to high conflict people, including the use of E.A.R. (Empathy, Attention and Respect) and responding to proposals (Yes, No or I’ll think about it). (See the E.A.R. sheet attached.)

TRAPS:

* Avoid falling into a gladiator role - overly aggressive language and posturing just delays serious settlement discussions;
* Overly identifying with your client. Don’t get hooked by their narrative! You can be certain that the other party has an equally compelling narrative!
* Believing your client 100%. Even if your client is trying to be truthful about everything, there are different memories and understandings of past events.
* You are responsible for the process, not the outcome (M. Lomax).
* Don’t work harder than your client! (Stu Webb, founder of Collaborative Family Law)
* Not following our suggestions!