Suggestions for lawyers taking family law cases to mediation

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It's usually a relief when opposing counsel agrees to take a file to mediation. Not only do you gain more control over the outcome under less pressure, you get to shrug off a lot of the anxiety litigation provokes, at least for the time being. However, going to mediation doesn't mean that your job is done. You're still your client's advocate and inadequate preparation will jeopardize the chances of settlement. You also need to support the mediation process itself, which will require you to walk a fine balance between supporting your client and supporting the resolution everyone wishes to achieve.

This short note offers some suggestions for counsel taking family law files to mediation. It's far from encyclopedic but highlights some of the stumbling blocks to settlement I encounter most frequently as mediator.

I. Before the meeting

Timing. Please, please, please don't wait too long to decide that the moment is right to take a case to mediation. Yes, time is sometimes required to deal with urgent preliminary matters, move the parties past their initial reactions to the breakdown of their relationship, and get things settled down. Certainly there are also times when you must wait until both parties are emotionally able to consider settlement. However, the number of cases that don't reach the negotiation table until four or more years have passed is astonishing. It's especially shocking when you consider the amount of legal fees and filing fees incurred over that period compared to the $2,000 to $3,000 charged to the client as their half of the mediator's fee.

Disclosure and discovery. This seems an elementary point, but rational compromise requires each party to understand the nature of the bargain they're making, the risks they're assuming and the value they may be leaving on the table. Deals can sometimes be done without adequate disclosure, for sure, but the "deal" most people are looking for is a durable settlement that will stand the test of time and remain relatively immune to attack for nondisclosure, misrepresentation and unconscionability. Come to the table with up-to-date corporate financial statements, current income statements and tax returns, and completed parenting assessments, pension valuations, property valuations and company valuations.

Prepare yourself. Before you enter the meeting room, be sure you know your case. Know where to find critical documents in your piles of boxes and binders, familiarize yourself with the essential facts of the case, and understand the history of any proceedings following separation. Be prepared to speak knowledgeably about the case and your client's position. If an issue hangs

on a point of law, know the applicable law and prepare yourself to provide a persuasive explanation about how the law supports your client's position on the issue.

Prepare the mediator. Preliminary planning meetings between counsel and the mediator are useful for giving the mediator an outline of the issues, a suggestion of the interpersonal dynamics between the parties, and an idea about where the stress points likely lie. Be sure to let the mediator know if there is a history of family violence or coercive control, as that will impact the mediator's planning and suggest alternative approaches such as shuttle mediation or remote mediation, and discuss how the views and preferences of any children will be heard. Ask the mediator what, if any, documents they would like to have in advance of the mediation; parenting assessments, financial statements and income tax returns are usually helpful and will shorten the length of the mediation by allowing the mediator to digest complex information ahead of time.

Prepare your client. Give the client an explanation of the mediation process and their role in that process, and let them know that they'll likely be doing more of the talking than you will. Describe the mediation space and likely seating arrangements, breakouts and caucusing, as well as the mediator and the approach they typically take. Make sure the client understands that compromise is the name of the game, and that they must be prepared to look at the big picture and consider the benefits of settlement for themself and their family as a whole.

Briefs. Briefs aren't always helpful, especially when the issues and facts are relatively straightforward; be warned that briefs can entrench clients in their positions when what's really needed is flexibility and the capacity to consider creative alternatives. (In fact, I usually discourage counsel from preparing briefs.) They can be useful, however, when the facts or law are unusually complicated. If you must prepare a brief, do your best to describe the facts without insult and imprecation, remembering that everyone will have the chance to read your brief, and avoid adopting a strident or righteous tone. Rise above the conflict.

II. During the meeting

Advocacy. You are your client's advocate at mediation just as you are their advocate in court. While your job is to support your client and help them achieve their best possible outcome, you must be more than a flag-waving jingoist if a resolution is to be achieved. This requires that you purposefully adopt a more ecumenical approach and consider the overall balance of fairness to both parties, which is likely how the mediator will be approaching the dispute. Be the sober voice of reason.

Govern yourself. Family law disputes concern intensely personal and intensely important subject matter. This understandably impacts the parties' emotional state and their objectivity; these are a few of the reasons you're representing them. However, be vigilant against absorbing the client's ire and urgency, which is harder than it sounds as a strong capacity for empathy is one of the hallmarks of a good family law lawyer. Maintain your composure. Tamp down whatever animus you may feel towards opposing counsel as well.

Persuading the other party. Your power to influence the other party's thinking – because it's not just the client who has to be willing to accept a trade-off – is significantly enhanced when, as the sober voice of reason, you acknowledge the strength of the circumstances supporting the opposing party's position, and admit when they have made a good point about an issue or suggested a reasonable proposal. None of this requires you to abandon your role as advocate, although it may have a tempering effect on your client's expectations of the outcome.

Persuading the mediator. Most mediators who are family law lawyers take an evaluative approach, which is likely why they're retained in the first place, and aim for a settlement they believe lies within the range of likely results at trial, based on their understanding of the law. Maintaining a purposefully non-partisan approach to the law and the facts may help you shift the mediator's view of the likely results and therefore the nature of the solutions the mediator proposes and encourages. Again, you're not being asked to abandon your role as advocate, but you should leave your weaker legal arguments at the door and refrain from dwelling overlong on petty or painful events from the past.

Persuading your client. Settlement requires compromise, and compromise requires both courage on the part of the client as well as the hope that a less than ideal agreement will nonetheless prove tolerable in the future. Most of your efforts to shift your client's position will occur while caucusing with the client, for fear of undermining your client in joint session, and involve discussion of the benefits and drawbacks of a particular proposal, not to mention the costs and risks of resolving the matter at trial. The mediator will appreciate your assistance. Reinforcing untenable and improbable positions is unhelpful and will decrease the likelihood of resolution through mediation.

After settlement. Before leaving the meeting, it may be helpful to ensure that there is a common record of the terms on which any of the issues were resolved to avoid future disagreement and the possible collapse of the settlement. Although no one is going to have the time or patience to wait while the mediator drafts a proper separation agreement, where the level of conflict is high, ask the mediator to prepare an abbreviated memorandum of agreement for everyone to sign before leaving the meeting. As a faster, less formal alternative, the mediator may instead record an oral summary of the terms of settlement while everyone listens, using something like the iPhone Voice Memos app, and then ask the parties to orally confirm their consent; for remote mediations, a video recording can be made.

III. After the meeting

Support the settlement. The moment the parties leave the mediation room, they inevitably begin to reflect on the settlement, focusing on the terms they think are most personally disadvantageous. You can deflect much of this by making sure the client has a global appreciation of the advantages and disadvantages of the proposed settlement in caucus. However, you may also have to support the deal in the course of a fraught telephone call the next day. Remind the client of the benefits of resolving the dispute generally and reinforce the gains that offset the sacrifices; when all else fails, you may have to inform the client that,

despite their reconsideration, a binding, enforceable settlement has been reached and they're stuck with the deal that's been done. However, mistakes do happen. There are times when an overlooked but important fact materially affects the fairness of the settlement or a critical calculation is incorrect. In situations like this, reach out to opposing counsel and the mediator as soon as the problem is discovered. A further mediation session may solve the problem.

Fulfil the settlement. There are inevitably a series of documents to be drafted and transactions to be completed after a successful mediation. It may help to prepare a list of these steps for the client, and then chivvy your client to ensure that they are taken in a timely manner. Foot-dragging often prompts parties to contact the mediator for information or help when the mediator considers their contract complete and the file closed.

Continuations. If a mediation has been adjourned to continue at a later date, it's important to complete any homework that's been assigned as promptly as possible. Common tasks include completing outstanding financial disclosure, confirming financing, arranging for a valuation, and getting a views of the child report. Delay risks squandering whatever good faith and rapport was established before the adjournment. Maintain the momentum toward settlement.