Making Mediation Work For You
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1. Mediation Education:

At some point - early in your career if possible - it will be very beneficial to attend an extended course in mediation. I attended a week long program at the Straus Institute For Dispute Resolution at Pepperdine Law School. Although I had served as a judge pro-tem for many years and presided over many ADR conferences, and thought I had a very successful track record, the mediation course opened my eyes to the many different skills and approaches that I was overlooking. While one approach may work just fine with certain parties, it may be the opposite of what is effective in another mediation. I had already attended a few short CLE mediation programs before taking the extended program, however, most of them regarded procedural and ethical issues involved with mediation. The forty-hour mediation program is a hands on program where top mediators from around the country teach a variety of skills, and you practice those skills hands-on throughout the week. I cannot say enough about attending such a comprehensive program, not just to learn skills to be an effective mediator, but to maximize your ability as an attorney to help your clients satisfy their underlying concerns and to obtain the best results during mediation.

2. Types of Mediators / Styles:

You may not know a great deal about your mediator prior to the mediation. However, it is helpful to understand the different types of mediation styles in order to assist your client with being fully prepared for what is to come. Hopefully you will choose a mediator that not only has the ability to provide a skilled analysis *when the time is ripe*, but also has the facilitative skills to get your client to the finish line.

"Pure" mediators generally take a facilitative approach only, and attempt to help the parties resolve the issues without providing any opinions regarding the facts or legal

issues. Some of these mediators, although they may have good facilitative skills, have little to no experience in family law, or have not practiced for many years. Such mediators may not have the ability to provide an informed opinion if such is warranted at some point in the litigation. On the other side of the spectrum, some mediators (most notably those who never attended a comprehensive mediation course) may have an overly evaluative approach, and may attempt to force settlements without first establishing any rapport or trust with the clients.

Four basic grids:

1. Narrow -generally interested in application of the law. “Just the facts ma’am”.
2. Broad - Interested in everything, dynamics, personalities. Interested in future dynamics of working together.
3. Facilitative - No opinion provided. Lots of questions. Lots of what ifs. Guides the parties to a resolution without providing a legal or factual opinion or analysis.
4. Evaluative - More of a judicial type of mediator. Provides opinions on the issues and facts. More likely to try to force an agreement.

Best approach:

The most successful approach is generally a mixture of a broad and facilitative approach, followed by more narrow questions and a “quasi” evaluative approach as the mediation gets further in the process, and if and when such approach is helpful or necessary. Such is an evolving application, whereby the mediator (with the help of the attorneys) continues to explore the best approach for each client. Different styles may be best for different clients during the same mediation.

It is important for the mediator not to rush to the evaluative grid too quickly. If you do this before you have established a rapport / trust with the client (and his/her

attorney), it's hard to turn back without appearing as though you have preconceived opinions. The mediator should build rapport and trust with both the clients and the attorneys. Thus, as a general rule, a mediator should start off broad and facilitative before narrow and evaluative. It is possible (and often most beneficial) if a mediator can lead the clients to a mutually satisfactory result without having to provide his/her evaluation. However, it is my opinion that the best family law mediators have the knowledge and background necessary to provide evaluative feedback if and when the time is appropriate.

A good mediator will spend some time finding out what makes the clients tick. What is most important to them? Why it is important to them? What are they willing to risk? What are they not willing to risk? What can be done to meet those concerns? Are there alternative ways that such concerns can be met? Can the pie be expanded? (i.e. is the issue so narrow that only one party can win?). A good mediator will ask questions and provide feedback in a manner that will help the clients have a more reasonable view of where the other party is coming from. Such approach is counterintuitive to a "litigation mode". The litigation mode fits within the evaluative grid. As the attorney, many of us want to head straight to the evaluative mode. However, if the mediator has not yet earned the trust of your client, this is not necessarily what your client needs to reach a consensus with the other party. A good mediator will steer the ship away from 'bad negotiations' and take it or leave it tactics. A good mediator will not generally challenge the attorney, but will rather make the attorney his/her partner in finding alternative and reasonable solutions. A good mediator will maintain the attorney's credibility with his/her client even if the mediator eventually provides suggestions or analysis that may differ from that of the attorney.

The bottom line is to cautiously let the mediator do their magic in the facilitative mode before getting impatient and trying to force the mediator to render opinions (or agree with your position) regarding the legal and factual issues. If possible, the mediator can move to a "quasi" evaluative mode by merely asking questions and presenting

scenarios, and discussing the fact that the opposing party 'could potentially' succeed on an issue without actually providing his or her ultimate opinion.

3. Preparing For Mediation.

Mediation Memorandum.

Even the best mediators cannot help but make on-going evaluations of the facts and law applicable to the case in the back of their mind even if they do not communicate such impressions or opinions. Such underlying impressions or opinions 'may' sometimes set the mode for which side the mediator pushes harder. Similar to a joint pretrial statement which is provided to the Court, providing a detailed and persuasive mediation memorandum can get you off to an advantageous start during the mediation. This includes citations to evidence, including deposition pages, as well as legal authorities.

Disclosure / Discovery:

It is not uncommon that one of the parties has superior knowledge regarding community assets and debts than the other party. Lack of disclosure and/or discovery can be an impediment to a successful mediation.

Unless both parties are equally knowledgeable regarding their assets and debts, business dynamics, etc., it is important to complete fundamental discovery and disclosure before advancing to mediation unless the exchange of such information is contemplated as part of the mediation (i.e. where it is done in stages). At the same time, be prepared to come to agreements absent full documentary disclosure if warranted. Sometimes the inclusion of party avowals may be acceptable if one of the parties has superior knowledge of the community assets (i.e. "Wife represents that all of the community property assets

and interests have been disclosed and are identified specifically herein, and agrees that if she failed to disclose any such assets that were within her knowledge, and such are later discovered, such undisclosed assets shall be awarded to Husband").

Preparing The Client:

It is important to prepare and educate the client that mediation is not litigation. The attorney should educate the client prior to mediation regarding the benefits of settlement during mediation. The attorney should help the mediator get the client to 'buy into' the process.

Prior to the mediation, the attorney and client should discuss the client's top priorities, and what are lessor priorities. This is not something that should be discovered for the first time in the heat of discussion during the mediation. Similar to litigation, there is more to just showing up and seeing what happens. The most successful attorneys have a game plan going into the mediation and know what is most important to the client, and what concessions the client is most likely to allow.

4. Advantages To Mediation / Settlement:

These are a few of the advantages to settlement / mediation that you may want to discuss with your clients in advance of and during the mediation.

(1) Stop The Cost of Litigation. This is of course a no-brainer, however, do not just stop with telling your client that litigation is expensive. Discuss the various stages of litigation and what the costs could be, i.e. temporary orders, written discovery, depositions, expert costs, pretrial statements, testimony outlines, exhibits, trial, post-trial motions, possible appeals, etc. And if your client is the wealthier party, remember to remind him of the ongoing possibility of paying the other party's attorney's fees (which

will continue to go higher and higher).

(2) Put An End To The Emotional Toil. It goes without saying that divorce and family law litigation is often one of the most emotional and negative experiences of a person's life. It is not just the litigation itself, but the negative communications and heightened reactions between the parties during the litigation. This is of course exacerbated when attorneys continue to correspond with each other with various accusations made by their clients, not to mention negative claims made in pleadings, motions, etc. to the Court. Listening to opposing counsel tell the judge what he/she thinks about your client, what your client has allegedly done etc., is not something that is soon forgotten and will continue to infuriate your client until the litigation is over (and perhaps much longer).

(3) Spend Your Time Doing Something More Productive. Clients often spend exponentially more time on their case than you as their attorney. If you have spent 100 hours on their case, they have probably spent 300 hours sending emails to you, outlining facts, pulling together documents and exhibits, responding to discovery requests, venting to others, etc.

(4) Settlement Often Provides More Direct Relief. During mediation, through a negotiated agreement, you can often obtain relief much more direct to your client's issues than you will following a trial. For example, if a party owes the other party money, a judgment will generally be unsecured if such judgment is issued by the Court. This can be addressed directly through mediation / negotiations. A trial judge may not have the time to address issues such as the child's homework, the disposition of the grandfather clock, deadlines for things to be accomplished, etc. During trial, one of the parties generally wins on the issue and the other party loses. Neither party generally receives everything he or she desires. Often neither party is happy. Mediation provides a forum to brainstorm resolutions that may focus on each party's priorities, and may be beneficial to

both parties in the end.

(5) There is No Guarantee Of A Well-Reasoned Decision By The Court. Any attorney that can predict and tell their client what the Court will rule is not living in reality (unless they have mind reading powers that most of us do not possess). Litigation in a divorce / family law case is often a "fire fight". Inadequate time is provided for family law cases, which increases the emotions in the Courtroom. The judges have huge caseloads and are overworked. It is obvious that they sometimes do not read (or read carefully) what attorneys spend many hours preparing. Worst yet, judges often come up with their own sense of justice or equity, which may be different than what either party asked for. It is also not uncommon for judges to omit addressing certain issues, which then leaves the parties in a void, leading to further motions and more litigation.

(6) Future Relations With The Other Party / Children. In parenting time / legal decision making cases, the future relations of the parties is as important as any issue in the litigation, if not more so. While not every parent is capable of forgiving and forgetting, most of them have the ability to return to a somewhat amicable relationship. The less blood-letting, the more likely that this will happen. The long term impact on the children cannot be overstated.

(7) The End / Finito / Closing The Chapter / Burying The Hatchet. As we all know, divorce and family law cases can be extended well beyond what you may have initially anticipated. For most clients, they do not relish paying attorney fees every month, producing documents, responding to letters, and getting chastised by opposing counsel for months on end. The idea that the case can be over and done is one of the biggest selling points to mediation.

(8) Privacy Concerns. Having their dirty laundry addressed and re-addressed over and over is never fun for the client. Such privacy concerns are not only restricted to

litigation and the courtroom, but with the power of social media, many parties' issues are highlighted for all of their friends and family to see. There is no guarantee that a party will not continue to share details after litigation, but such issues can be addressed to a certain degree through mediation and a negotiated agreement. In addition, the end to litigation often results in the parties finding much better outlets for their emotions than disparaging the other party on Facebook.

(9) There is a higher chance of compliance with negotiated agreements. Each party has a larger commitment to the result when such results are negotiated in a manner in which voluntary choices are made.

(10) Over 90% of divorce and family law cases 'eventually' settle. Why wait? The longer litigation lasts, and the more hostilities are exchanged, the more obstacles to settlement. In addition, attorney fees often become the tail that wags the dog.

(11) The attorney should reemphasize that it is unlikely the client will be successful regarding each and every issue if the case advances to trial, the monetary and non-monetary costs involved in litigation, and the long term benefits of a successful mediation.

5. Identify The Barriers to Settlement Prior To Mediation If Possible.

Hopefully opposing counsel is somebody that you can have frank discussions with. If possible, try to identify the barriers to settlement prior to mediation. Such barriers may not be just monetary, but may involve perceptions and emotions that can be explored and addressed prior to and during mediation. Such barriers may be a lack of disclosure or perceived lack of disclosure which can be addressed prior to the mediation.

Other barriers may be more difficult, such as when a party (and/or attorney) wants

to “ride the temporary orders”. For example, one of the parties may have limited parenting time, thus the other party has no incentive to settle anytime soon. Another example is the party that wants to ride a temporary spousal maintenance and child support order as long as they can. The sooner the mediator can identify underlying barriers, the better the chances of identifying the best approach to break down or work around such barriers.

6.Pre-Mediation Session / Educating The Mediator Outside of The Law And Facts.

The mediation memorandum should educate the mediator regarding the relevant facts and legal principles. However, this is only the starting point. A good mediator wants to know the underlying reasons why the case has not settled. Such reasons may go well beyond the obvious relevant facts and legal principles. A good mediator will want to explore the “hidden agendas”, fears and emotions at the outset. This is similar to caucusing with the judge prior to an evidentiary hearing. The most effective mediations involve attorneys who are willing to acknowledge their client’s eccentricities, difficulties, etc. at the outset of the mediation. I am not saying that you need to share all of this information in front of opposing counsel, but it can be very helpful to educate the mediator in confidence and in advance of meeting your client so that the mediator can better assess the type of approach that may be most effective with your client. Feel free to provide the mediator with suggestions on how best to effectively communicate with your client, what his / her hot buttons are, etc. If the mediator knows some of your clients’ background before the initial session (other than the basic facts and legal issues), it can help the mediator build the necessary rapport with your client.

7. Pre-Drafted Agreements.

I highly suggest that you take with you your laptop and a pre-drafted marital settlement agreement (and parenting plan if children are involved). Remember that *the*

devil is in the details. Of course it is highly unlikely that your pre-drafted versions will be identical to what is eventually agreed to. This is why you take your laptop with you - so that you can make the necessary revisions as you reach the conclusion of the mediation. Having the base issues that your client wants to address spelled out in advance will minimize the possibility that you overlook something important. It is not uncommon for attorneys to forget specific issues, or even more often, to assume additional terms are 'implicit' from the negotiations and discussions. It follows that you will have an upset client if items are discussed and assumed to be terms, but do not make it into to the mediator's drafted Rule 69 agreement that the parties sign at the eleventh hour.

8. Client Satisfaction

If there are not already enough incentives for your client to settle, keep in mind the benefits that you, as the attorney, receive from a successful mediation. Client satisfaction is generally much higher following a successful mediation as opposed to litigation. The client not only pays substantially less fees, but is more directly involved in the final result. A happy client means more referrals to you. There is also a much lower chance of a bar complaint. How many times do you hear people complaining that their attorney forgot to address an issue during trial, etc.? How many people blame the Court rulings on their attorneys? Unhappy clients often turn to social media, which can negatively affect your marketing efforts. Also keep in mind that it is much less likely that you or your firm will face collection problems. Litigation costs get out of control as the attorneys start preparing for trial. The client retainers are used up, and it is too late to get out of the case. The attorney may think that if he / she gets a good result at trial, the client will eventually pay. Or the attorney may think the other party will be ordered to pay the fees (assuming that they are even collectible). If these are your beliefs, I hope that you have plenty of savings, or that you enjoy working for free.

9. Mediator Serving As The Arbitrator Of Unresolved Issues

Do not overlook the possibility of a mediation / arbitration agreement. As such, the parties agree in advance to use the mediator as an arbitrator in the event that all or a portion of the issues are not resolved. In these cases, it is important for the mediator to at least initially utilize a facilitative approach as a party will be less reluctant to arbitrate if the mediator has already provided his analysis of the facts and law. If your mediator / arbitrator has substantial experience in financial issues, such as business valuation cases, etc., both parties may feel much more secure proceeding to arbitration on unresolved issues as opposed to trying to educate a lesser experienced family law judge who has not been on the bench long enough to understand the intricacies of the laws and facts at issue, especially if trial time is limited. There are pros and cons to agreeing that the mediator arbitrate any unresolved facts. At the same time, there can be substantial cost and time savings.

10. Mediating Without Attorneys.

In cases where clients cannot afford ongoing attorney fees, you may want to consider having the clients mediate without the attorneys. The attorneys can be available telephonically to consult with the clients and the mediator if and when such is necessary. The mediator can help fashion a non-binding understanding of agreements, which can then be addressed with the attorney(s) with the hope that the attorney(s) will support such agreement, and that such can then be confirmed in writing. I have done this several times with success, and with very positive feedback from the attorneys.

11. Twenty-Nine Do's And Don'ts For Attorneys Attending Mediation:

(1) Properly prepare yourself. Know the facts and the law. Just because it's mediation and not trial does not mean that you should take it lightly. The client needs to

have confidence that you know the facts and the law if he/she is going to follow your advice. In the same regard, you will be more effective at selling your client's case if you know the intricate details.

(2) Prepare your client in advance of the mediation. Explore their priorities in advance of the mediation. Explain the potential benefits of settlement as described in Section 4, including finality, monetary savings, emotional savings, time saving, etc. Discuss what the next steps you anticipate in the litigation if the case does not settle so that the client has a realistic view of what may happen (and the anticipated costs) if you don't settle. If your client has superior financial resources, continue to remind him/her of the additional risk of not only paying his/her fees, but also at least a portion of the other party's fees.

(3) Should you have a joint mediation session, or separate caucusing? I generally prefer at least starting with separate caucusing order to establish a rapport with each client, but there can be times and places that joint sessions are helpful (more often with property and debt issues than parenting issues).

(4) Should you provide opening statements during a joint mediation session? This is a judgment call. If you and opposing counsel desire to present an opening statement, agree in advance that you will keep it professional and non-disparaging. Some attorneys feel that a "dose of reality" is necessary. However, such dose of reality is best presented by a skilled mediator over time, and after establishing a rapport with the clients, not from the opposing attorney in a mediation setting.

(5) Make the mediator your partner, not your opponent. This does not mean that you blindly let your client agree to unreasonable terms. But assuming that you have retained a skilled mediator, cautiously let the mediator do his/her "magic".

(6) Let your client know that the mediator's job is to sometimes play devil's advocate. It doesn't mean he/she is taking sides since the mediator will be doing this with both parties.

(7) Talk to the mediator in advance of your separate session and discuss how best the mediator may establish a rapport with your client. Help the mediator in his / her facilitative role.

(8) Attorneys naturally want to go right to the 'evaluative stage'. However, this may not be effective with your client. Allow, and if possible, assist the mediator with his / her attempts to establish rapport and trust with your client.

(9) Think through the opening offer - is it within the range of reasonableness? If you provide an insulting offer off the bat, it may set the stage for the entire mediation, and the other party may be reluctant to act in a reasonable manner. This is especially important in a short mediation scheduled for a ½ day. It may take the mediator substantial time to get things back on track if you derail the process with a bad faith offer. A good mediator will help you devise the best methods of selling your offers without giving away the fort.

(10) In the same regard, avoid making unreasonable / bad faith counter-offers. Ask yourself, how is that offer going to help settle the case? Remember the saying "dangle the meat low enough for the dog to jump"

(11) Avoid "tit for tat". Let the mediator steer the ship away from bad negotiation behaviors.

(12) Avoid articulating "bottom line" offers. If you hit rock bottom, phrase your response in a non-threatening way - such as your client cannot simply go any further

today on the issue. Phrasing an offer as a "bottom line" is an aggressive model that invites an aggressive and unyielding response.

(13) In the same regard, do not draw lines in the sand. They do not work in relationships, and they do not work in mediation. They only invite the same type of reaction.

(14) Avoid big egos and posturing. Posturing is not negotiating. It is difficult to find a reasonable solution if you and client are feeding off of each other's negative energy. Attorneys should be part of the solution (within reason), not an intentional barrier to settlement.

(15) When you / your client articulates an offer, provide your reasoning. Sell your offer to the mediator. Give the mediator ammunition to sell such offer to the other side, or to help close the gap.

(16) Be careful with splitting the difference (distributive bargaining) unless the mediator feels that this will result in success. This sometimes leads to splitting the split. It's hard to put it in reverse if it does not work. Moreover, splitting the difference is a method has does not have an independent rationale basis. The mediator can better explore a split as a hypothetical (i.e. presented as the mediator's idea) - i.e. "what if I can get the other side to split the difference, is that something you would be open to?".

(17) If your client does have a bottom line, do not provide it too early. If the other side has emotional or other barriers to settlement, they may need to go through the process of having a neutral person (i.e. the mediator) listen to their concerns, fears, etc. before they are prepared to accept even a reasonable offer. If you provide the bottom line right off the bat, there is nowhere to go.

(18) Feel free to excuse the mediator in order to strategize in private with your client. If you are worried that your client may blurt out his/her acceptance to something that you think he or she will regret later, excuse the mediator and talk with the client in private. I like to make sure that I have fully discussed the pros and cons of agreeing to a specific term with the client prior to informing the mediator.

(19) In the same regard, I inform my clients that if they are not absolutely positive that they are satisfied with a specific term, to talk to me about it in private before informing the mediator that the term is acceptable. Educate your client to listen and stay open minded during discussions, but not to specifically agree without your confirmation. Once the cat is out of the bag, it is hard to get it back in. In other words, I like to be the mouthpiece regarding what terms are agreed to and are not agreed to.

(20) Similarly, you should instruct your client not to dismiss a counteroffer without discussing it with you first.

(21) Make strategic concessions. If you take a hardcore approach to each and every issue, your client will likely follow your lead and will not be open minded to settlement. In the same regard, you will be inviting the other party (and counsel) to be equally obstinate.

(22) Be creative and open minded. Look for what the real ‘drivers’ are. It may be more than money, parenting time, etc.

(23) Ask your client if his / her position on an issue is going to be something that will be important in the future? Is the issue really important to your client, or does he or she just want to win? Is it a power struggle? Does your client agree that the issue is more important to the other party?

(24) Remember, positions are not interests. Continue to work to identify your client's interests and the other parties' interests. An interest is a want. A position is one way to satisfy the want. Look for alternate ways to satisfy the wants.

Example - Father is very busy with work, travels a great deal, and needs to use child care often during his parenting time. Yet he still wants equal parenting time. Why? In this example, Father wants to be respected as a parent. Father does not want to feel as though he is the inferior parent. Help the mediator look for different ways to identify Father as an important part of the children's lives while recognizing the realistic barriers to equal parenting time. The opposite strategy of trying to convince Father and his counsel that he should take less parenting time because he is not as important or other negative input will back fire every time.

(25) Ask questions regarding the other parties' positions (or have the mediator ask such questions if he/she has not yet done so). Why is this important to him/her? Ask questions regarding your own client's positions. Why is this important to your client? It is easier to find a natural or creative solution when you ask why. <u>It also makes it difficult for the other party to say no when you provide alternatives that would reasonably satisfy the stated concerns</u>.

(26) Remember - It's never just about the money.

- power, control
- justice, vindication
- last word
- saving face
- fear
- fill in the blanks ....

(27) Help the mediator steer the clients away from mind reading - "he wants more

parenting time because he doesn't want to pay child support".

(28) If you reach an agreement, don't leave the mediation without confirming it in writing. And better yet, bring your laptop with a pre-drafted property settlement agreement and parenting plan with you.

(29) And most important - Be patient, and coach your clients to be patient. Mediation is often a 'process'. Clients who agree to terms under stress end up being unhappy clients, and guess who gets the blame?