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Family

Come to family mediation with bridge-building tools | AJ Jakubowska

By **AJ Jakubowska**

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(February 2, 2023, 11:27 AM EST) -- Selling the idea of mediation to family law clients can be a challenge. Reasons for skepticism or even resistance cited by people facing relationship-related disputes include the following, perennial nuggets: "It will be a waste of time because the other side is not reasonable" or "We are already in court and a judge can make a decision so why should I spend money on another process?"

Frequently recurring themes are concerns about wasting time and money. In this piece, I muse on how to minimize chances that your client's initial skepticism will become a self-fulfilling prophecy.

Let us assume you were able to convince your client that family mediation is worth a try. You have pitched to them all the laudable short- and long-term benefits of settling in a mediated context. They appear to have made at least a temporary mental shift from fighting mode to truce mode.

Now the parties to the dispute need to engage and to have a dialogue, and I use the word "engage" in its most pacific sense. Hopefully, with the assistance of the mediator, they will do so in a structured, organized and measured way. It is trite to say that without dialogue, progress and eventual settlement simply will not happen. Rather than talk at each other, the parties should be prepared to talk to one another, through their counsel if necessary.

By "dialogue," I am not referring to verbal exchanges alone. Those may or may not be possible, depending on the circumstances of the dispute being mediated.

I am talking about two-way communication in general (or multi-way if there are more than two parties) that necessarily involves a dynamic exchange of information, positions, explanations of interests and, importantly, proposals of terms on which the parties are prepared to settle. When two people sit across from one another and simply restate their best (or litigation) positions over and over again, the river of dispute between them continues to flow and there is no prospect for bridge-building.

I present three common scenarios for your consideration:

> **1. Offers made before mediation** — The mediator's job is considerably simpler, and he or she is better able to hit the ground running, if the Mediation Briefs provided before the first mediation session include offers already made by the parties. This tells the mediator that the lawyers have already done some of the heavy lifting required as preliminary steps to the engagement I spoke of above. Each side can see the delta and so can the mediator.
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> It has been my experience that this scenario has the greatest prospect of resulting in a settlement. The parties have already wrapped their heads around the idea of compromise and of stepping away from their "best" positions to achieve consensus and resolution.
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> **2. Offers made at mediation** — I will say that in my mediation practice, this is the most common scenario. Many people still think overtures at dialogue are a sign of weakness, and that includes some lawyers. For this and other reasons, no proposals are made in advance, but

each party is prepared to make an offer and to negotiate at mediation either because they have invested money in the process and want to give it a reasonable shot, and/or because they have already spent most of their savings on court and this is their "last chance to come out alive," so to speak.

Here, the pace at which the proposals are exchanged varies from case to case. No one wants to negotiate against themselves and that is understandable. Low-ball offers are common and can slow down the process but even those can create some momentum. In this scenario, the lawyers and the mediator can truly assist by highlighting the significant benefits of settling promptly and cost-effectively. I strongly favour closed mediation because in my experience, parties are more willing to "let their hair down" and negotiate with a greater degree of engagement in that context.

3. "I can't get my client there" — It is 12:15 p.m. The mediation session started at 10 a.m. Party A takes a leap and makes an offer within the first 15 minutes. The mediator conveys the offer to Party B and their lawyer. At 12:15 p.m., Party B's lawyer asks to speak to the mediator. "We don't have a counter-offer. I am doing my best, but I just can't get my client there, not yet." In the meantime, the other side literally sits around waiting, frustrated and wondering with increasing alarm whether coming to family mediation was "worth it" in the first place.

Even if Party A does make an offer after lunch, the remainder of the full-day session may not be enough to address any issues requiring further onion-peeling and negotiation. Party B may now be too frustrated to return for another session. A twist on this scenario is a party whose offer, for a good part of the mediation session, is their litigation position.

I am not chiding counsel, I really am not. I have walked in those shoes before, as lawyer for a client who is emotional, angry, aggrieved and keen on getting a pound of proverbial flesh. But I now see the issue from a mediator's wider lens and I appreciate better how this single element of the process can crater chances of success.

Building a bridge, including in mediation, requires tools. Those tools include offers of settlement. My suggestion is that you have your client make a proposal early, before the mediation session if possible. At the very least, each party should be prepared by their lawyer in advance that without engagement and dialogue, settlement cannot happen. At mediation, the parties communicate through offers. If your client is not prepared to make an offer, the mediator cannot help, no matter how committed, creative or experienced they might be.

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