

Successful Mediation in Matrimonial Cases

By Atty. Jocelyn Hurwitz

Busy court dockets, complex cases, and other issues may encourage consideration of private mediation as an option for resolving cases.

As with the settlement of any case, negotiating the settlement of a family case involves some aspects of mediation: you are evaluating the own case, considering its strengths and weaknesses, and evaluating the same aspects of the opposing lawyer's case. Consideration is given to costs and benefits associated with trial and trying to handicap the likelihood of success with regard to each element of the case.

Most family lawyers have participated in court-sponsored mediation in the form of a special masters hearing. This forum is closer to private mediation, because participants are attempting to settle the case and in doing so are trying to convince neutrals (the masters) that their respective positions have merit and would carry the day at trial.

Another form of mediation may be appropriate: private mediation, with hand-picked neutrals who are compensated for their time by the parties to the case.

Why Choose to Privately Mediate?

Sometimes, there is a need to bring a case to conclusion faster than a court sponsored mediation or trial can offer. If so, private mediation may be the best option.

A private mediator may be willing to mediate on weekends, evenings or early in the morning to accommodate the schedules and time constraints of all parties.

As well, private mediation may be a good choice if a case is scheduled for trial in a judicial district where experience has shown that the available judges are not likely to be receptive to the particular arguments of one of the parties.

Consider, as an example, an alimony case involving a short term marriage with no children. Perhaps you have tried similar cases before two of the four available judges in your jurisdiction. Perhaps the client has high expectations for an alimony award and you want to make sure there is a fresh contemplation of that position. Hand picking a neutral mediator could result in a more receptive consideration of the hoped-for alimony award.

There may be evidentiary issues in the case that will prevent presentation of certain evidence at trial. This evidence may be important to a full understanding of the case. Because there are no rules of evidence in mediation, the key information could be heard.

Another reason for opting for private mediation is the client: the client may not make a good witness at trial. The prospect of appearing in open court may be overwhelmingly intimidating for an individual who will be expected to air the “dirty laundry” of the marriage in open court, on the record, with court reporters, clerks, and marshals watching. A small, comfortable conference room probably will result in more effective testimony, in a more conversational exchange with the neutral mediator(s).

Once there has been a decision to mediate with a private, paid neutral, the most important element of preparation will be determining the approach of the particular mediator.

If possible, have the mediator tell you in advance how he or she likes to proceed. Do they want to receive materials in advance (almost always the most beneficial scenario). Do they want the parties to be present at the mediation? If so, what role will they play? What information will assist the neutral(s) in preparing for the mediation?

In a recent case involving a premarital agreement, both counsels provided financial affidavits, position statements, and detailed memoranda regarding the applicable law. The legal memoranda were very helpful to the mediators in preparing for the mediation, evaluating the strengths and weaknesses of each party's case, and deciding how to approach the mediation.

If the client is expected to speak during the mediation, preparing the client with the same care as for a trial is critical.

An often overlooked form of preparation is to adjust the client's expectations. One mediator often tells the parties that if the result leaves both parties "bearably unhappy," it is the right result. Clearly, mediation often results in tradeoffs on both sides. Clients must be prepared and not expect to walk out of the mediation with a "home run."

Getting a sense of where concessions can ultimately be made can help speed the process. As well, the client needs to understand the strengths and weaknesses of his or her case, thereby helping to minimize the likelihood that something the mediator says will come as a surprise.

Lastly, the client must understand the dynamics of the mediation. As with a pretrial conference, it will not help secure a favorable result if the client informs the other side (or even the mediator) that he or she is unwilling to take the case to trial.

Selecting a Neutral

Experience counts when selecting a neutral mediator. The neutral must have familiarity with the type of case. The mediator should practice in the judicial district where the case is pending -- he or she will likely have greater familiarity with the customs and “rules of thumb” of that judicial district.

Of course it is critical to select someone whose judgment you trust but equally important is selecting someone who will give the client a sense of confidence.

Approached correctly, in the right case, mediation can result in a very satisfied client and a good result for all.