BAR BULLETIN

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This is a reprint from the King County Bar Association Bar Bulletin

December 2015

Achieving Workable – and Just — ADR Results in Family Law

By Hon. Deborah Fleck (Ret.)

Mediation is the ADR vehicle most commonly used in family law cases, although arbitration is gaining ground, at least with issues arising out of permanent parenting plans. Most frequently, mediation results in a final settlement — often after a marathon session. A long session or a follow-up session is not surprising, given the sheer number of issues — factual, legal, emotional and financial — that need to be addressed and involve the most important issues in the lives of the family members.

When the parties reach their own agreement, it should be one that is practical, workable and addresses the needs and abilities of both parties. Are there ways to improve both the process and the results of mediation? With minor tweaks, there are. But what does it take?

The keys to a successful family law mediation are open communication and information sharing, adequate preparation, and proper timing. Often, the simple opportunity for a party to be heard — to speak to a retired judge — is a necessary step in moving forward to settlement.

Open communication — with the opposing party and with the mediator. Prior to court rule requirements to participate in ADR and prior to modern technology, family law attorneys regularly communicated by telephone and through written proposals. This is still very good practice.

Yet, with court-mandated ADR, the paradoxical result is often that the parties have not exchanged positions or proposals until the mediation itself, which frequently occurs close to trial. Sometimes attorneys have not discussed the mediation process itself with their clients or do not have the documents they need to resolve the case.

Instead, use an "old school" implement — pick up the telephone early in the case. Make yourself available by telephone as well. The working relationship you develop by actually speaking with reasonable opposing counsel can save time and money in the end. While it may seem that sending off emails, reviewing responses, and issuing follow-up emails is most efficient and also makes a record, in the end it often takes *more* time and creates further conflict and entrenchment.

Once discovery is reasonably complete, and the parties have had sufficient time to begin addressing the emotional and financial upheaval of a separation, you are able to develop creative potential solutions with your client. Exchanging mediation letters with legal issues defined and important documents attached far in advance of mediation allows both sides to be prepared to address opposing legal positions, to resolve some factual disputes, and to agree on character and valuation of some assets, in advance of mediation.

This can streamline the mediation process itself and increase the likelihood of resolution on mediation day. Many mediators make a pre-mediation call, where the attorneys can provide information that is often helpful to the mediator in finessing through trouble spots.

Preparation — worth the effort. An attorney who is well prepared for mediation has not wasted time — if the case doesn't settle, it is well on the road for trial. If it does settle, as most cases do, the mediation process saves time, money and emotional stress for the parties. They will have reached a solution, often creatively structured, in ways that could not occur at trial.

Attorneys who are well versed in the details of their case are able to quickly analyze offers, make counter-proposals and advise their clients. Simply put, the benefit of thorough preparation is hard to overstate.

Proper timing and mediator selection. Family law cases have their own emotional timeline, distinct from other types of litigation. In many cases, it takes several months for one party to reach a stage of partial equilibrium, a new norm. It is not helpful to attempt to settle family law cases before both parties have reached that comfort level. The process of emotional adjustment simply must take place.

But when the clients are emotionally ready and both sides have enough information regarding the facts and the law, successful mediation avoids the financial and emotional costs of trial and allows the clients to eliminate the risks of trial and move on with their lives.

When attorneys have worked together for several months, using the telephone as well as more modern technology, they are able to identify a mediator with the listening skills, depth of knowledge, temperament and creativity to help the parties achieve resolution. If children are at issue, they are able to create a parenting plan that is workable, practical and in the best interest of their children.

They can identify a mediator who will help them achieve a result with adequate assets as well as liquidity for both parties in higher-asset cases. They can engineer necessary protections where substance abuse, physical abuse or mental health issues are involved. And they will have the ability to identify the correct timing for the greatest likelihood of a successful mediation, given their in-depth knowledge of their client and any barriers to resolution.

By focusing on what is just and equitable for both parties, in the best interests of children, rather than the rights of the parents, and by being creative problem solvers who actively listen, attorneys and the mediator can be agents to achieve a compromise solution that is acceptable — one that meets the needs and abilities of both parties. ■

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