

Matrimonial Law

Coaching Divorce Clients For Mediation Negotiations

BY STEVEN M. RABINOWITZ

Divorcing couples are increasingly turning to mediation to resolve the issues in their divorces. Some family lawyers see this as a threat—an encroachment upon their turf, a challenge to their primacy. Others see mediation as a convenient way station for cases that are too small to justify, much less support, significant legal expense. To them, mediation is a process separate and apart from what lawyers do.

But a growing number of family lawyers are coming to appreciate that although they frequently operate from the sidelines in divorce mediation—since most, if not all, of the mediation sessions are conducted without counsel at the table—they nevertheless have a vital role to play and can add real value to the mediation process.

In addition to the typical counsel

lawyers provide divorce clients in mediation—explaining the relevant legal and factual issues, helping them assess settlement options, and reviewing the final terms drafted by the mediator—there is another more challenging, engaging and nuanced role to perform: that of negotiation coach. Since mediation is fundamentally a refereed negotiation—with the mediator wearing the stripes—clients who obtain the best results are often the ones with the best coaches in their corners.

Most family lawyers have some appreciation for this coaching role, but it tends to be a limited one. They spend just a short time with their clients before mediation, perhaps an hour or so, during which they perform the basic tasks of explaining the relevant legal and factual issues, outlining the mediation process, and considering settlement options. Lawyers who fully embrace the role of negotiation coach, however, perform tasks and provide services that are far more subtle, involved and complex.



Most essentially, these lawyers understand—and more importantly help their clients understand—that mediation is negotiation, not trial. In the emotionally charged arena of divorce, where clients and lawyers alike tend to cling to an adversarial mindset, it is fundamental to a successful mediation that the adversarial blinders come off and that clients, primed by their lawyers and then guided by the mediator, open their eyes to the possibility for cooperation and collaboration.

This is not to say that lawyers should coach their clients to adopt

some sort of let's-all-hold-hands-and-sing-Kumbaya approach. That is a recipe for disaster. Rather, as negotiation theory teaches—and as both practical experience and empirical evidence confirm—the best outcomes in negotiation and, hence, mediation, come when the parties find a balance between asserting their own interests and appreciating the interests of the person across the table.¹ Training clients to manage this tension between *assertiveness* and *empathy*—which should not be confused with deal-killing *aggressiveness* or overly-accommodating *sympathy*—ought to inform everything lawyers do as they coach clients through the mediation process. How, then, is this framework practically applied?

Approach to Negotiation

Before the modern era of negotiation practice—ushered in some 30 years ago by *Getting to Yes*, the seminal work of Roger Fischer and William Ury, who promoted a win-win versus a winner-take-all approach—negotiation coaches emphasized strategy, particularly tactical ploys and leverage points, as a means to bend the other side's will to the negotiator's own. But today, negotiation experts appreciate that these strategies, even when they hold some efficacy, rarely produce the best results.

When negotiation is approached as a test of wills, opportunities for joint gain and creative solutions to seemingly intractable differences are likely to be missed. This is especially true in divorce, where emotions run high and distrust higher. Preparing clients to manage their emotions, express themselves cogently, and develop the capacity to genuinely and astutely listen to their soon-to-be former spouses (what one client liked to

call her “wasband”) gives them the skills and the mindset needed to contend with the challenges of divorce mediation.

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As with training an athlete for sport, the first step for the lawyer/coach is to assess the client's strengths and weaknesses as a negotiator, starting with his or her overall approach to negotiation. Behaviors in negotiation—and, indeed, in all conflict—range from cooperative, sometimes to the point of utter capitulation; to assertive, which at its extreme, manifests as complete intransigence. Within this range, five types emerge: the avoider, the accommodator, the competitor, the compromiser, and the collaborator.² To assess where a client falls on this spectrum, lawyers must explore how that client typically deals with conflict, particularly with his or her spouse.

Avoider. The avoider is low on both the assertive and cooperative scale. This is typified by the disempowered client who chooses mediation hoping that the mediator will dictate the end result so he doesn't have to engage in negotiation. In another, less obvious manifestation, consider the monied spouse, who similarly hoping to avoid conflict, rushes to put forth what she perceives as a generous financial proposal, thinking

her spouse will seize upon it and spare her any haggling. Of course, because he so distrusts the source, the spouse rejects the offer out of hand, even if it is objectively fair.³

Accommodator. Accommodators are willing to engage in negotiation, but they too readily give in. High on cooperation, but low on assertiveness, they believe that the path to a divorce settlement lies in finding ways to satisfy their spouse, neglecting their own interests in the process.

Competitor. Competitors, of course, are high on assertiveness and low on cooperation. They see every conflict, including mediation, as a chance to prove their dominance. This could be a wife who won't permit her husband any part of decision-making for her child (in the competitor's mind, it is never *their* child, only *his* or *hers*). Or it could be a husband, who tells his lawyer that he knows just what buttons to push or threats to make that will force his wife to crumble.

Compromiser. Compromisers, as the term suggests, fall right in the middle of both the assertive and cooperative spectrum. They are the ones who are inclined to split the difference in order to get the deal done. But because they tend to see only the midpoint as a way to resolve conflict, they often leave value on the table when they could obtain it for themselves.

Collaborator. Collaborators approach negotiation quite differently and far better than the others. Being both assertive and cooperative in equally strong measure, collaborators come to mediation with a distinct advantage. Not afraid of conflict, they are willing to clearly and unequivocally stand up for what matters to them most. Yet they are also prepared to hear what the other

person wants and to work towards integrating those needs with their own. The integrative results they achieve defy the old saw that a good negotiation outcome is one where both sides emerge equally unsatisfied—these negotiators achieve results that satisfy both themselves *and* the other side.

Collaborative clients rarely arrive fully formed at the lawyer's doorstep, particularly in divorce, when collaborating with one's spouse is usually the furthest thing from a client's mind (and even further from his or her heart). But because collaboration works—and, in any event, is the approach mediators are likely to favor—it is the lawyer/coach's job to help the avoiders, accommodators, competitors and compromisers develop a more collaborative approach to negotiating within the mediation process.

As will be discussed, collaboration by definition involves considering the other side's viewpoint. But preparing clients to be collaborative should begin with guiding them toward greater clarity about their own perspectives and needs. That is, lest clients—particularly the more avoidant or accommodating ones—confuse collaboration with capitulation, it is important to first develop their capacity to be assertive. Clients have to know what they want and be unafraid to ask for it.

Making Choices

To reach this point, however, clients first have to appreciate the choices they face when mediating their divorces. The lawyer/coach must start by educating the client about the various issues that will be addressed during the mediation concerning equitable distribution, spousal and child support, and parenting

arrangements. Each of these topics, along with their myriad sub-topics, should be thoroughly explored with the client so that he or she understands the choices to be made.

Once armed with this information, many clients, particularly the competitive ones, will be quick to stake out positions on each issue. But here is where the lawyer, as coach, must step in to slow them down, for a good negotiator, as clients must learn to be in mediation, appreciates that the interests underlying those positions are more important than the positions themselves.

When lawyers explore interests, they are discovering, and, in turn, helping their clients discover not just what they want, but why they want it. This is critical for three reasons. First, when clients thoroughly understand their needs and motivations, they are better able to prioritize them. This, of course, is a necessary step when preparing clients for the bargaining that will invariably take place in mediation. Second, armed with this understanding, clients will acquire greater confidence and, hence, will be much more comfortable expressing their interests in the mediation; that is, they will naturally be more assertive. Third, and most importantly, when clients focus on their interests, they are less likely to rigidly stake out positions, and will be more open to finding alternatives that satisfy their needs.

When working with clients to explore their interests and develop their positions, lawyers must help them understand both their best and worst alternatives to reaching a mediated resolution.⁴ In the context of divorce, this means educating clients about possible outcomes they might face in court and giving them realistic assessments of those outcomes.

Since one of the fundamental goals when preparing clients for mediation is to guide them away from a purely adversarial mindset, it is important to help them understand both the strengths *and* weaknesses of the various positions they might take. Offering them assurances of certain victory and filling them with false bravado will only serve to harden their positions and constrain their negotiations. To promote clients' capacity to compromise—in the highest and best sense of that word, not as a weak-willed collapse to the middle—it is critical for them to appreciate that if they cannot reach a mediated agreement, they would face a range of outcomes in court, not a certain result. More practically, since the mediator is likely to emphasize litigation risk, clients should be prepared to meet this challenge armed with their own informed assessment of this risk.

Emotions

When preparing clients for mediation, what they want and why they want it is only part of the story. The rest of the story, often the most important part, lies in the emotions surrounding the mediation. Even with the mediator serving as referee, negotiating with one's spouse can be fraught with emotion and may affect the client's sense of self and even self-worth.⁵

Lawyers often shy away from emotions and rarely venture into subjects so seemingly touchy-feely as self-image. But emotion plays a critical role in negotiation—at times right on the surface, and always below. Similarly, what an outcome may say, rightly or more often wrongly, about a client's sense of self can profoundly influence the choices clients make at the mediation table.

Helping clients explore these emotions and self-image concerns before they are at that table will give them an advantage in the mediation, since it will help them remain focused and in control. This does not mean that the lawyer's role is to play armchair psychiatrist. Rather, like a good coach training a tennis player to keep his cool on the court, it means helping clients be more aware of what may stir their emotions or affect their self-image, thus clouding their judgment.

Identifying these trigger points in advance naturally makes them less potent during the mediation. Similarly, the work the lawyer does to help clients be more clear and confident will make them less emotionally volatile. Still, emotions will be stirred, so lawyers must train clients how to manage them in the moment.

This means arming them with strategies for calming themselves, such as using humor to diffuse emotionally charged moments; confronting tactics solely intended to provoke; or simply calling for a break. Clients should be reminded that the mediator is a resource if negotiations get too hot. They can ask the mediator to caucus privately or to control a spouse's provocative behavior. And since it is often the aggressive tactics of a spouse—interrupting, blaming, name-calling—that can push emotional buttons, clients should be taught to press the mediator to establish ground rules to ensure a more civil and less emotionally

charged process. Indeed, negotiations over process, particularly at the outset of mediation, are often just as important as the negotiations that will later take place over substance.

Acknowledging Perspective

Having prepared the client to clearly understand and articulate his or her interests, appreciate the range of possible outcomes, and manage the emotions that may bubble up at the mediation table, the lawyer must now turn to the most challenging and important aspect of client coaching—training the client to look beyond his or her own interests to appreciate and acknowledge the other side's perspective.

This task is difficult because at first clients may find this disempowering. They have retained their lawyers to act as their champions, not to prod them to see things from the other side's perspective. Yet the lawyer/coach's role is to help clients see that by understanding where their spouses are coming from, they will be better able to advance their own interests.

With the same care and attention brought to exploring the client's own interests and options, the lawyer must work with the client to explore his or her spouse's likely concerns and desires. When clients can make this shift in perspective—while of course not relinquishing their own point of view—they can begin to see things within a more objective framework and thus

strike deals, with the help of the mediator, that make sense.

Conclusion

Coaching divorce clients to perform their best in mediation is challenging because it requires lawyers to take on a very different role from the one they are accustomed to. In divorce litigation and even divorce settlement, lawyers play the primary role—more akin to star-athlete than coach. But when clients choose to mediate, they need their lawyers to be more than advocates; they also need them to provide the emotional support, together with the practical and psychological skills, necessary to prevail when they are on their own at the mediation table.

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1. See Andrea Kupfer Schneider, "Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style," 7 *Harvard Negotiation L. Rev.* 143 (Spring 2002); Robert H. Mnookin, Scott R. Peppet and Andrew S. Tulumello, *Beyond Winning: Negotiating to Create Value in Deals and Disputes* (2000).

2. Ralph H. Kilman and Kenneth W. Thomas, "The Thomas-Kilmann Conflict Mode Instrument," in *Conflict Resolution Technology*, 57-64 (D. W. Cole ed., 1983)

3. Negotiation theorists call this predictable phenomenon *reactive devaluation*. Lee Ross and Constance Stitinger, "Barriers to conflict resolution," 7 *Negotiation Journal* 4, 389-404 (1991).

4. In the parlance of negotiation theorists, this is known as BATNA and WATNA—Best/Worst Alternatives to a Negotiated Agreement. See Roger Fisher and William L. Ury, *Getting to Yes* (1981).

5. For an excellent discussion of these emotional and identity issues in negotiation, see Douglas Stone, Bruce Patton, Sheila Heen and Roger Fisher, *Difficult Conversations* (2010).

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