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Happy New Year? You've Got to be Kidding

Do Mediators Always Suggest Mediation?

A Dozen Dilemmas That Can Make Mediation Counter-Productive

by Andy Flink and JoAnne Donner

As mediators, we are frequently asked how a mediation session works. By the time we finish discussing this process with your clients, everyone has the same response…..mediation is a terrific alternative to litigation, and when two people are embroiled in conflict, it's their best option. But is mediation always a good idea when parties are in dispute? Every so often, deciding to sit down at the table can be a bad idea or an ill-timed misstep.

If both sides are openly willing to talk, why would there be a situation that, after anywhere from one hour to ten hours, everyone wonders why they bothered to meet in the first place? Here are a dozen reasons why mediation can be unproductive, why it may be time to re-examine strategies before starting negotiations, or when it may be best not to meet at all until circumstances change.

1. **Missing Information**. Rarely is a case resolved in mediation where there is a lack of discovery or incomplete, unverified financial information. There is already mistrust in the room; this simply adds to it.
2. **Lack of respect.** Knowing how to conduct yourself in a mediation session is important. We tell mediation coaching clients to pause and consider *everything* the other side is asking for and offering. If for no other reason than to appear that you are being respectful and considerate of their position, whether or not you really are. Parties in mediation have a tendency to "show their hand" through body language, tipping off the other side that respect is merely a song by Aretha Franklin.
3. **Unrealistic expectations.** "I get everything and you get nothing." Once we mediated a case where the plaintiff demanded a 90/10 split as equitable division because "he was the one who worked all the time." This kind of rigid, extreme thinking is not unusual but can send negotiations into the no-settlement zone.
4. **Bad timing.** Fortunately, courts send domestic cases through the mediation process. Unfortunately, it might be before discovery has even begun or before your clients are emotionally ready to consider settlement.
5. **It's a fishing expedition.** The other side shows up for the sole purpose of learning everything they can about what the other side's position is and why. They have no intention of settling and are manipulating the mediation process only for their own benefit.
6. **Subject-matter expertise.** When a personal injury lawyer represents a client in divorce mediation, it may not work very well. Typically, there is no substitute for experience and expertise in a specialized niche.
7. **A missing party.** Virtual communication technology is impressive, but when one party is 3,000 miles away in Seattle and the mediation session is in Atlanta, phone or Skype doesn't always reveal subtle cognitive or behavioral clues. It may be difficult to know what the long-distance party is really thinking, since much of what mediators look for are not only verbal cues, but nuanced, physical ones as well.
8. **Schedule conflicts.** The disputing parties and counsel are seven hours into a mediation moving towards a resolution when suddenly one of the parties declares they have a prior commitment. While they had plenty of opportunity to reveal this information earlier in the day they chose not to, sending the mediation into a tailspin.
9. **Lack of motivation.** A party prefers to maintain the status quo and strongly resists settlement. Sometimes this occurs where leverage is solely on one side of the table, or where one party has "everything to gain" and "nothing to lose" by keeping financial and emotional circumstances the way they are for as long as possible.

10. **Polarity or a desire for vengeance.** Rarely do couples in divorce mediation get to divorce at the same time for the same reasons. One party may feel a need for the other party to "pay dearly," whether or not this serves their best interests. When vengeance is a prime motivator, the ability to be fair and reasonable is dramatically compromised.

11. **Inflexibility.** Regardless of the truth, one party sees the facts in a completely different way than the other. If one party's parents funded the purchase of the marital home, they may insist that they are entitled to 100 percent of that asset with no consideration paid to the facts, the law, or equitable division. Parties' perceptions become their reality and, frequently, no matter what the facts are they refuse to alter their position.

12. **History of high-conflict.** Relationships that have been controlled by antagonism, intimidation, emotional abuse, or domestic violence, can make mediation the wrong choice. While mediators are trained to effectively address power imbalances, when one party's emotional or cognitive competencies are significantly impaired due to past abuse, a suitable and durable outcome is unlikely.

Mediation can be a demanding and dynamic process. Attaining a satisfactory settlement requires the expert coordination of a myriad of facts, figures, emotions, and negotiation strategies. Controlling the fall-out from "a dozen dilemmas" can create a mediation experience that meets your needs and your client's needs as opposed to creating an unwanted scenario that sabotages desired results. ***FLR***

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