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Tips For Settling Your Divorce Case Through Mediation

By Anita Cutrer

In few other areas of law do the parties to a lawsuit share an intimate a knowledge of each other as do those in a divorce case. In addition, in few other areas of law will the parties have an ongoing relationship with each other after the lawsuit is completed. In a car accident case, for example, it is highly unlikely that the parties will have known each other before the case or will see each other after. In a collection action, they certainly will not have a future relationship. Yet in divorce, the parties have had the most intimate contact possible prior to the lawsuit, and if there are children -- regardless of whether the children are minors or adults, the parties will have a future relationship.

As a result, the process of a divorce case tends to be different from that of other cases. Two people who once were (and maybe still are) deeply in love often can grow to hate each other with passion. It is easy for this passion to lead to litigation, and the conduct displayed during the lawsuit may affect the parties' relationship for many years to come.

While settlement of a dispute is certainly no guarantee that the future relationship of the parties will be amicable, a contested trial is guaranteed to be detrimental. Things are said that cannot be unsaid. The ultimate result is likely to be unsatisfactory to both parties. The end of the trial is akin to the final round of a 15-round boxing contest, with both parties exhausted and hanging on for dear life.

The difference between a settlement and a contest boils down to one simple precept: Neither party will get everything he or she wants. Both parties have a "wish list" but they must prioritize their list. In a settlement, each party can negotiate for what is higher on their list, giving up the lower-priority items. Conversely, in a contested trial, the court decides which items on the list the party does or does not get. The court may, either intentionally or unintentionally, award the client the lower-priority items instead of the higher-priority items. In a perfect settlement, both parties get the high-priority items on their lists. Frequently, in a contested trial, neither does.

The following are rules that, while not absolute, apply to the vast majority of family law settlement negotiations.

Rule One: Be Cordial

You may be used to dealing with your spouse by yelling and screaming at each other. But "posturing" is not helpful in a negotiation. This goes for the lawyer too. Many clients ask "Are you really on my side?" when the lawyer is friendly as opposed to posturing or acting aggressively for show. Cordiality, especially by the lawyer, is not disloyalty to the client, but rather an effective means of settlement. It is not a sign of weakness, but strength.

Your lawyer is most likely friends with the opposing lawyer, but this does not keep that lawyer from being a good advocate for you. In most cases, professionalism and civility lend themselves to getting a better deal for you in the long run. As the saying goes: "If you want to get into a wrestling match with a pig, you have to lie down in the mud - and the pig will at least enjoy it."

Rule Two: Do Not Give an Ultimatum or Deadlines

Certainly some issues are more important than others. There may even be issues that are non-negotiable. But stating an issue in the form of an ultimatum stops the negotiating process in its tracks. Which of the following tactics is more likely to elicit a measured response leading to discussions settlement and compromise:

- Approach A: *Here is a settlement proposal. You have 48 hours to accept it, or it is withdrawn.*
- Approach B: *Here is a settlement proposal. It contains what we believe to be reasonable positions on all issues. If you disagree, please provide us with the reasons you disagree and what you think would be reasonable under the circumstances.*

Rule Three: Make Full Disclosure Voluntarily and Freely

Ask yourself: Are you more likely to settle a case where the other side has given you everything you need voluntarily, freely, and openly, or where they stonewall discovery? The answer is obvious. When the other side treats financial information like it was a highly classified government secret, settlement is less likely. This tactic raises the question, "What are they trying to hide?" Mistrust is not conducive to settlement.

If you are the party with access to most or all of the information, it is best that you allow your attorney to give the

information to the other side *before* they ask for it. After all, you know what they will need to settle the case. Your attorney will tell the other side that you are voluntarily providing the information to promote an atmosphere for settlement and to save costs for both parties. He or she will also explain that if there is further information that is only accessible through you, you will be pleased to provide any additional relevant information that you might have inadvertently omitted.

Rule Four: Don't Be afraid of taking the First Step

Many clients feel that taking the first step toward settlement is a sign of weakness. As a result, some cases sit and wait, even though a settlement conference could begin the process of resolution. Timing is essential. To miss the timing because of fear of appearing weak does you no good.

To put it another way, someone has to take the first step, or no case will ever be settled. Viewing this first step as a sign of weakness is an indication of insecurity on your part. Taking the first step is actually a sign of strength: After all, you are so confident in your case that you assume the other side will want to settle, to avoid the embarrassment and cost of eventual defeat in court.

Rule Five: Never Negotiate Backwards

Backwards-negotiating is what occurs when subsequent offers are further away from settlement than previous offers. There are times when facts change that may alter settlement positions. However, assuming no major changes or new discoveries, once a proposal is made, subsequent proposals should be closer to the other side's position, not further away.

Backwards negotiating is not good-faith negotiating because it seeks to punish the other side for rejecting a previous offer. The response of a party who receives a backwards offer should be to stop negotiating. If a proposal is made in good faith, then the rug should not be pulled out from under it.

Rule Six: Never Refuse to Negotiate

True, some cases are harder to settle than others, and some cannot be settled. But you will never know unless you try. Settlement should be attempted in every case, no matter how remote the prospect might seem.

Sometimes, the gap between the positions seems far too wide to "waste" time negotiating. Yet, it is amazing how often the gap narrows dramatically during a negotiations session. Sometimes it is because the gap was there at the beginning only for positioning. Sometimes a party recognizes the weakness of his or her position. The point is, the gap cannot narrow unless there is some communication.

Your attorney understands that you may be reluctant to schedule a negotiations session. It might be helpful to remind them that several years ago, Yitzhak Rabin and Yassir Arafat shook hands on the White House lawn after spending years swearing eternal hostility. When severely criticized in his own country for making peace with his sworn enemy, Rabin replied, "You only need to make peace with your enemies -- you are already at peace with your friends."

Rule Seven: Never Get Angry at a Proposal

If a settlement proposal comes in writing, your attorney will forward that to you immediately. It is not unusual for a client to call the attorney just after reading it, livid at how outrageous the proposal is and how far it is from what the client perceives as fair.

It is true that some proposals are so low or so high as to be insulting. Some ask for the stars, hoping to get the moon. Others misinterpret the parameters of reasonable settlement. Whichever is true, at least there has been an attempt at settlement. Rather than get angry if the proposal is in the stars, then start from the ground up. If the proposal is unreasonable because the other side misunderstands the reality of the situation, then educate the other side. In most cases, any proposal, even a bad one, is better than no proposal at all. At least you will have a starting point.

Rule Eight: Be Prepared

You should work with your attorney to go over an opening proposal, which should leave room for negotiation. You should then educate your attorney as to what movement from the opening proposal is acceptable. Finally, you need to specify the "go to hell" point where litigation is better than accepting the last proposal from the other side. This point is often a moving target, and although it can be discussed ahead of time, it will be truly known only at the instant the judge bangs the gavel and says, "Call the first witness." It is critical that you let your attorney know the parameters for the first two levels.

There are numerous ways to negotiate. In some cases it is with "four-way" meetings, some are through letters, some are through fully drafted proposed Decrees or Orders, and more. Although there are always exceptions, following these rules will create the type of atmosphere that makes a settlement more likely. As with many other

things in life, improving the odds is often the best we can do when we do not have full control over the circumstances. You owe it to yourself to do the best you can.

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