

# MAKING THE MOST OF MEDIATION

BY SUSAN FALL



Divorce practice gets busy and, even though you might be well-prepared for mediation, you might not have found the time to adequately prepare your client. No matter how prepared you are, your chances of settlement are diminished when your client doesn't know what to expect. The following is information I wish every party had before mediation. If you find it helpful, feel free to edit and use it.

## Making the Most of Mediation

Mediation is a process in which you, your attorney, your spouse and your spouse's attorney will meet with a neutral third person (the mediator) to resolve the issues in your divorce case. The mediator is usually an attorney who has many years of experience in family law and has received special training in mediating divorce disputes. Of all the events and court appearances that may take place in your case, mediation is the most important because it is your opportunity to avoid a trial and put an end to the dispute while still having some control over the outcome of your case. Mediation saves time, money and, perhaps most important, the emotional cost of litigating your divorce.

You will be your attorney's most valuable partner at mediation and the better prepared you are, the more successful the experience will be. Here are a few things you can do to achieve a mediation result you're happy with:

1. **Understand the Mediator's Role.** The mediator does not represent either party. He or she is a neutral person who may use a variety of methods to help you and your spouse resolve the issues in your case. The mediator may spend time talking to the attorneys without the parties present, talking to a party and his or her attorney alone, talking to both parties and both attorneys at the same time, or a combination of all of the above. The mediator will structure conversations in whatever way he or she thinks will be most effective to help you reach a settlement. Let your attorney know if you would be uncomfortable sitting in the same room as your spouse.
2. **Understand the Logistics.** Mediation may take place over several hours and it's important that you are as physically comfortable and as relaxed as you can be. Bring water and a snack. There may be a lot of down time while the mediator is talking to the attorneys or to your spouse and his or her attorney. Bring a book or work to do. Bring a sweater.
3. **Get your head in the right place.** This is the time to get very realistic about what outcomes you can reasonably expect. Even if you are devastated by the divorce it is time to accept that there really is no way to compensate you for the hurt you are feeling. Or, you may be the one who wants out and you don't think your spouse deserves alimony, half your pension, or whatever your attorney is telling you he or she will probably receive. While the circumstances of your divorce are unique to you, it is unlikely they are so unique that they will justify a deviation from well-established law. Generally, in the end a divorce is a lot like a business dissolution. You add up the assets, subtract the debt and divide what's left. If there is a disparity in your incomes, the higher earner will probably end up paying child support and/or alimony. There is a range of fairly predictable outcomes in most divorces. Ask your attorney what that range is in your case and prepare yourself to accept a settlement that falls somewhere within it.
4. **Prepare to negotiate.** Negotiation is a skill some professionals spend their entire careers developing. Skillful negotiation doesn't just happen. It takes thought and preparation. Mediation can get bogged down when someone is unable to distinguish between most important, moderately important, and not particularly important issues and gives equal weight to everything. Spend some time thinking about what is most important to you and what you can give up. Read a book on negotiation.
5. **Preparation is the key to a successful mediation.** When the parties to a mediation don't have the information they need to make informed decisions the mediation is likely to end with no settlement. If you haven't yet answered the other side's discovery requests, get it done before mediation, whether or not your answers are due. If there is information you need from your spouse before you are comfortable reaching an agreement, let your attorney know or ask your spouse for it. On the day of mediation, show up

with bank statements, 401(K) statements, pay stubs, w-2s and income tax returns. If there is a retirement plan or account that was partially earned before the marriage, be prepared to show the balance in the account at the time of the marriage. If there is a pension that was earned in part before the marriage, be prepared to establish the premarital service credits. If you want credit for the down-payment you made with money earned before the marriage, be prepared with your paper trail. If you want an inheritance excluded from the marital estate, have documents establishing the date and the amount of the inheritance. If you know that you and your spouse don't agree on the value of an asset, such as your house, get an appraisal. In other words, be prepared with documentation for every claim you are making. Do not expect anyone to take your word for it.

6. **Understand your attorney's role at mediation.** You may be surprised that when you go to mediation, the same attorney who has been empathizing with you and supporting you and your positions may now be encouraging you to concede some things you thought she would be fighting for. Your attorney's role at mediation is not to pound the table and argue. Your attorney's role is to protect your interests, advise you, and to collaborate with you, your spouse, your spouse's attorney, and the mediator, to arrive at a fair resolution that best meets the needs of your family. No one will leave mediation feeling like they've won. If you can leave mediation with a feeling that your settlement is "good enough," your mediation

was a success. If you are considering a possible settlement and your attorney can't guarantee you the outcome will be more favorable to you if you go to trial, it is time to give serious consideration to that settlement proposal.

7. **Be prepared to settle your case.** The goal of mediation is to settle your case, which means you may be asked to sign a settlement agreement or put an agreement on the record at the end of the day. Once you have a binding settlement the dispute is over. The attorneys will still have some administrative things to attend to but, because you have reached an agreement, there should be nothing left to fight about. Be prepared to put an end to your divorce.

Divorce is expensive. It takes a toll on every area of your life—your finances, your mental health, and your physical health. Your family's life is up in the air while your divorce is pending. Mediation will be your best opportunity to play a role in structuring a settlement that works for you. If you give it the thought and attention it deserves your mediation should be a success.

#### **About the Author**

*Susan Fall has practiced Family Law since 1985 and has served as a family mediator since 1998. For the last 8 years her practice has focused exclusively on family mediation. Her office is in Kalamazoo.*