



## TEN TIPS FOR A SUCCESSFUL MEDIATION

BY SUSAN M. FALL

One of the things I enjoy most about mediating cases with other attorneys is the opportunity to watch my colleagues at work. There is nothing more satisfying than spending an afternoon with two attorneys and their clients and concluding mediation with a resolution that is better than any one of us could have arrived at on our own. Something clicks, the clients are satisfied and ready to move forward, they've treated each other with respect and the attorneys are reminded of what they like about the work they do.

I've learned more from other lawyers about effective negotiation and mediation than I ever learned in a class or from my own divorce practice. The following are just a few of the tips I've learned along the way that will make a successful mediation more likely.

1. **Be prepared.** You already know this, but sometimes it helps to be reminded. Be prepared to answer questions and back up your claims. If you say there is \$100,000 in the bank account, have the statement ready in case the other side questions it.
2. **Prepare a written mediation proposal.** I like to start thinking about a case before I meet with the parties and their attorneys. Giving the mediator a summary of the important facts and your position will save time at mediation and will give the mediator an opportunity to think about how best to approach the case.
3. **Be mindful of what you put in your mediation statement.** Your mediation statement is your opportunity to communicate with the mediator, your opposing counsel and the opposing party. It's your opportunity to set the tone of the mediation. Writing it to satisfy an angry client by detailing all of his spouse's bad acts will only put the other party and her attorney on the defensive. When an attorney feels she cannot show her client the other side's mediation statement, a valuable opportunity is lost.
4. **Meet with your client in advance of mediation to discuss mediation.** Clients who know what to expect, who understand that mediation is different than a hearing, that the purpose of mediation isn't to persuade someone of the rightness of their position but to reach a resolution, seem to be happier with the outcome than those who show up expecting their attorney to win the battle and end up leaving with a compromise.
5. **Don't be afraid to make recommendations to your client.** My friend Joe VanderHorst once said, "Clients don't come to us for options; they come to us for decisions." Sometimes, it's not enough to lay out options and say, "It's up to you." Often, when a person is faced with a divorce, his confidence is at an all-time low. He wants to know he is making a smart decision. He wants to know what you think. Don't be afraid to tell him.
6. **Don't argue with the mediator in front of your client.** It's ok to let me know if you think I'm way off on something. However, if you are arguing with me just to show your client you're fighting for him, stop. It will only make it more difficult for you to get him to come around to the reasonable resolution we were discussing in the first place and could ultimately damage your credibility with him.
7. **Don't argue with the other side.** You and your opposing counsel know each other's positions. Arguing with the other side is a waste of time. Regardless of your opponent's behavior, continue to make it clear, through your demeanor and your words, that you are there to settle the case – not to argue.
8. **Mediation should be a zinger-free zone.** Some attorneys can't resist firing off a few zingers about the opposing party while we're discussing a case. "Oh, he didn't get his paystubs to you? He was probably too busy sleeping with his girlfriend." "She wants her engagement ring? Why, so she can sell it and spend the money on her boyfriend?" This doesn't accomplish anything good for your client. It just annoys the opposing attorney and puts her on the defensive. By the time you reach mediation, your opponent knows, probably better than anyone, what her client's weaknesses are. Reminding her with jabs is annoying and a waste of time.
9. **Sometimes it helps to acknowledge your client isn't a saint.** We've all had them - clients who are angry, won't listen to you and refuse to agree to anything reasonable. Acknowledging your client is difficult separates you from your unreasonable client. It's important for your

opponent to know he's dealing with a reasonable attorney whose client is taking an unreasonable position, rather than an unreasonable attorney with an unreasonable client. Once everyone knows what they're dealing with you can get down to business and settle the case.

10. **Generally, focus on the big picture first.** Once the parties reach an agreement on the big things, they are almost certain to reach an agreement on the fine details. Parents who have already agreed on a parenting schedule aren't likely to let the agreement fall apart because they can't decide if the children will be exchanged at 5:00 or 6:00 on Friday. Parties who have reached an agreement on the division of personal property aren't going to go back to square one because they can't agree on a date and time for someone to pick up his belongings. Once you've got the big things covered, it will be easy to reach agreement on the small things.

Negotiation is a skill as well as an art. Not all of us are naturally good at it, but we can certainly learn many of the tools. It never hurts to brush up on your negotiation skills. Attend a negotiation seminar. Dust off your copy of *Getting to Yes*. Your client is looking to you for direction in navigating unfamiliar and frightening terrain. Set an example by being a good negotiator yourself. With a little preparation and the right approach to mediation, you'll achieve a good outcome, a satisfied client and the added bonus of enjoying your work.

#### About the Author

*Susan Fall has practiced family law since 1985. More recently, she has practiced exclusively as a divorce and family mediator. Her office is in Kalamazoo.*