

Preparing Your Client for a Productive Domestic Mediation

By Hon. Gail S. Tusan (Ret.)



Domestic mediations should be contemplated as a helpful vehicle to resolve temporary issues and/or to reach full divorce and child custody agreements. A skilled mediator who specializes in family law matters can help to resolve almost any case, provided you do your critical part in advance and during the mediation to prepare your client and provide the mediator with pertinent information regarding custody, finances and property division.

The Scenario

Congratulations! Well, maybe. You have recently been hired by a new client who is raring to go to war with their spouse. They were referred to you by a former client who spoke very highly of you. Yes, you are flattered and anxious to keep the referral tree fertilized with great results for clients.

After engaging in a lengthy initial discussion with the client—your paralegal could barely keep up with the client’s rapid-fire delivery of anecdotes, expletives, demands and tips for catching the client’s spouse in the act—you finally get a word in as you proceed to educate the client about the divorce process. You briefly mention that somewhere along the way, mediation may be ordered by the court or suggested by you or opposing counsel. The confused look spreading across your client’s face signals the typical misunderstanding among parties when alternative dispute resolution is mentioned.

“Mediation? Why would we do that?”

In response, your paralegal starts to offer the client one of your glossy “FAQs About Family Transitions” trifold, which contains a

brief section about domestic mediations, arbitration and judicially hosted settlement conferences, but you shake your head and proceed to explain the mechanics, benefits and pitfalls of a mediation to the client.

The Strategy

Be prepared and be intentional. When you complete pre-mediation questionnaires provided by the mediator, the information can be very helpful for the neutral in identifying the important issues for your client and where they may be emotionally in terms of the stages of divorce. Bring your Domestic Relations Financial Affidavit (DRFA), valuations/appraisals, up-to-date account statements and other key financial documents with you to the mediation, and make sure your financial expert, if you have retained one, is available should any economic questions arise during the session. Be prepared to discuss any custodial reports or evaluations conducted in the case, and have child support worksheets and parenting plans available on your mobile device or laptop. Come prepared for a work session.

Talk in advance with your client about a practical, feasible custodial arrangement based on everyone’s daily schedules. All of this information must be disclosed and dealt with directly in order for the mediation to proceed in good faith. The mediator will need to see all financial details in order to help the parties reach enforceable agreements regarding financial support and equitable division of property. Be sure you and your client are in agreement on these matters before you show up for mediation.

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Prepare your client for each step of the mediation. You have participated in several mediations, but your client most likely has not. Television court shows tend to emphasize courtroom drama; there likely won't be any of that in a mediation. You know the drill, so share it with your client. The mediator may ask each party to make a brief opening statement. Explain caucusing, in which the mediator will meet with each side separately to build trust, gather information, frame and clarify issues, structure proposals and re-focus your client on productive dialogue and positive results. This is your chance to speak in confidence. Please discourage your client from using the mediation as a venting session or pity party. With your permission, the mediator will share information with the other side. However, it is not appropriate to use the mediator as the carrier pigeon to dump any dirt your side has dredged up on your client's spouse.

Managing expectations is important to the success of mediation.

Showing up to the mediation ready and willing to participate is important. Make sure your client fully understands the stages of litigation. Often, a client will hold out for their day in court, believing that justice will descend from the heavens, but only on their side of the courtroom because they are on the right side of the issues. When impasse threatens, the mediator will point out each step of "heading to court" and the mental and financial cost of doing so. This probably should not be the first time the client receives a reality check.

Each mediation will be as unique as your client and the specific circumstances of the case, despite some of the common features and nuances described above. Divorce and custody disputes are inherently stressful. To avoid the adversarial nature of litigation and the fear of the unknown that is inherent when a judge or jury of 12 strangers will decide your fate, domestic mediation can be just the remedy. When the parties are well prepared for mediation, their counsel and the mediator can effectively create the road map to life after divorce. Congratulations on committing to give mediation your best shot.

Hon. Gail S. Tusan (Ret.) formerly served as chief judge of the Atlanta Judicial Circuit and presided for several years in the Family Division of Fulton County Superior Court. She serves as a mediator/arbitrator/special master with JAMS.