

Family

Advocacy in mediation — a strange brew | AJ Jakubowska

By **AJ Jakubowska**

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(May 5, 2022, 2:13 PM EDT) -- We might be forgiven for forgetting from time to time the actual role of a family mediator; after all, two parties to a dispute are coming to a third party to try and resolve it, just like court, is it not? We often select our mediators for their perceived powers of persuasion, their skill in assessing the parties' BATNA (best alternative to a negotiated agreement) and navigating their positions and interests to get to a common finish line. Supporters of classic mediation as the only model will bristle at the idea that evaluative/directive mediation has any place in family dispute resolution (FDR) but it is a practical option used by many these days.

All that said, the bottom line is that the mediator is not a decider of anything. A mediator is a facilitator, a broker, perhaps a persuader on the benefits of settlement. No more, no less. There is no need to convince him or her of anything in the hope of receiving a more favourable result.

Such lapses in memory may be responsible for the way we sometimes draft our mediation briefs — as pieces of written advocacy. I have seen them in my work as a mediator. I daresay I ventured into those pastures myself before taking on that role — strong language advocating one party's position; blaming the other for past transgressions, including infidelity; even threatening a court proceeding or arbitration if the matter does not settle in mediation. I have even seen briefs whose language would be too strong for a conference in the Case Management system, let alone a proposed dialogue in FDR. These "If we cannot settle" threats may even create a power imbalance in some instances.

Now imagine you represent a client who has been skeptical about mediation but whom you managed to convince to give it a try. Your client's reluctance to take the leap into FDR has several sources and includes, importantly, their disbelief that the other side will be prepared to set aside their weapons and come to the negotiating table in a truce. You ask them to keep an open mind. You tell them in mediation the parties present their positions in voices that are meant to invite further dialogue, not light fires.

And then you receive the other side's mediation brief. Your client is aghast and sees it as confirmation of their worst fears. Suddenly, a process you believed was capable of settling a long-standing dispute is once again being viewed by your client as no more than a waste of time and money. "You see, I told you, they still want to fight!"

Postulating on the motives of authors of what I call "positional mediation briefs," perhaps a strong stance, including in a brief, was the only way they could persuade their client to come to the negotiating table in the first place. Perhaps they are singing for their supper. Maybe it is simply habit and they have no "off" switch for their strongly persuasive approach. Again, as champions for our clients first and foremost, we may be pre-conditioned to think that putting their best foot forward is always the only approach.

In my view, a positional mediation brief can actually undercut the effectiveness of mediation, for both sides. If your client has approved such a brief for delivery to the mediator and the other side, they may have an unrealistic view of the mediation process and how it actually unfolds.

On the other hand, if you explained to your client that mediation is about an effort to reach consensus by keeping the dialogue factual, focused, structured and goal-driven, then such a brief from the other side may erode or at least undercut your client's confidence in the process and perhaps even your advice.

My suggestions for an effective mediation brief are as follows:

1. Include a list of the issues from your client's perspective. If the other party has additional items they want to address, you might consider commenting on those as well.
2. Provide sufficient factual information to enable the mediator to understand the context for the parties' positions.
3. Consider including a paragraph or two about your client's overall goals — what they are hoping to achieve through settlement and what is driving them — touching on interests and not just positions.
4. Stay away from blaming. The mediator is not interested in looking under the sheets. Attaching to the brief six letters asking for disclosure before it was provided makes no sense — the mediator is interested in looking forward, not back and importantly, he or she has no power to "punish" anyone for any shortcomings, real or perceived.
5. Do the "what would I?" test — ask yourself "If I were the mediator, what factual information would I want, about my client, their positions and interests, to be able to understand the dispute?"
6. Consider how your client's brief will be received by the other party. Will it be perceived as an invitation to compromise? Remember: early impressions matter.
7. Do not pitch and if you feel you must, pitch softly. Mediation is not about pitching. It is about sitting at a negotiating table in the context of a truce. In order to give the dialogue any chance of success, do not come to the table holding a weapon; worse yet, pointing it at the other side. They may very well leave or at least clam up.

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