

Why Do Mediations Fail? Perspectives, Concerns, and Advice from Mediators

by
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Abstract

Commentators largely acknowledge that the benefits of mediation can carry great weight in the field of family law. In this emotionally volatile field, mediation offers a cost-effective means to avoid preparing for and taking a case to trial, a cost generally magnified by the generally slow pace of litigation—“the law’s delay,” as lamented by Hamlet. Yet every family law attorney will eventually participate in a mediation that can only be described as an

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The authors wish to express their sincere thanks to the following mediators who spoke with them in preparing this article: Judge Steve Rosen (Ret.), Judge Cynthia Wright (Ret.), Judge Douglas Beach (Ret.), Commissioner Jacqueline Jeskie (Ret.), Christina Corwin (Esq.), Jonathan Levine (Esq.), David Hazel (Esq.), Richard West (Esq.), Jonathan Marks (Esq.), Teresa McNally (Esq.), Amber Barber (Esq.), Michael Schilawski (Esq.), Kenneth Altshuler (Esq.). Each of these mediators offered an array of personal perspectives that do not align precisely with anyone else’s views. The opinions in this article are those of the authors, not any of the aforementioned mediators unless they are specifically quoted in the text.

unmitigated disaster. This article contains the results of interviews with various mediators from across the country, many of whom are AAML members, to inquire about what they see from attorneys, what works, what does not, and their personal preferences for how to best prepare for mediation. This article is meant to consolidate these mediators' opinions and offer strategies to help attorneys put their best foot forward at mediation.

Introduction

Hope for the best and be prepared for the worst is an apt phrase for family law mediations. These negotiations often take place in the midst of “a volatile and emotional atmosphere.”¹ It makes sense, then, that there is a literature speaking to the efficacy of these mediations and how to approach them.² Commentators largely acknowledge that the benefits of mediation can carry great weight in the field of family law.³ The *family*, and more specifically the enterprise of marriage, is a cornerstone of American society

¹ BOUNDS OF ADVOCACY: AMERICAN ACADEMY OF MATRIMONIAL LAWYERS GOALS FOR FAMILY LAWYERS iii (2012) [hereinafter BOUNDS OF ADVOCACY].

² See, e.g., JOHN M. HAYNES, THE FUNDAMENTALS OF FAMILY MEDIATION (1994); LYNN E. MACBETH, THE ART OF FAMILY MEDIATION: THEORY AND PRACTICE (2d ed. 2014); Eric R. Galton, *Mediating with Children: Two Lawyers' Views*, 3 DISP. RESOL. MAG. 5 (1996); Susan W. Harrell, *The Mediation Experience of Family Law Attorneys*, 20 NOVA L. REV. 479 (1995); Tanya M. Marcum et al., *Reframing the Mediation Lens: The Call for a Situational Style of Mediation*, 36 S. ILL. L.J. 317 (2012); Jane C. Murphy & Robert Robinson, *Domestic Violence and Mediation: Responding to the Challenges of Crafting Effective Screens*, 39 FAM. L.Q. 53 (2005); Margaret Ryznar, *Mediating Divorces*, 89 MISS. L.J. 85 (2019).

³ See Ulrich Boettger, *Efficiency Versus Party Empowerment - Against a Good-Faith Requirement in Mandatory Mediation*, 23 REV. LITIG. 1, 7 (2004) Bill Ezzell, *Inside the Minds of America's Family Law Courts: The Psychology of Mediation Versus Litigation in Domestic Disputes*, 25 LAW & PSYCHOL. REV. 119, 127–28 (2011); Susan W. Harrell, *The Mediation Experience of Family Law Attorneys*, 20 NOVA L. REV. 479, 480 (1995); Jennifer A. Kolbusz, *Alternative Dispute Resolution*, 23 J. AM. ACAD. MATRIM. LAW. 403, 403 (2011); Ryznar, *supra* note 2, at 90; Holly A. Streeter-Schaefer, Note, *A Look at Court Mandated Civil Mediation*, 49 DRAKE L. REV. 367, 378 (2001); see also Mary Kay Kisthardt, *The Use of Mediation and Arbitration for Resolving Family Law Conflicts: What Lawyers Think About Them*, 14 J. AM. ACAD. MATRIM. LAW. 353, 371 (1997) (“Respondents saw the ability to more adequately address the emotional aspects of dissolution as mediation’s greatest strength.”).

that legislators have always sought to preserve.⁴ The demise of a marriage often reverberates in ways that seriously and adversely affect not only the spouses (and their children, if they have any), but also their community and others in their orbit.⁵ “Few human problems are as emotional, complicated or seem so important as those problems people bring to matrimonial lawyers.”⁶ Although today the prospect of divorce is more accepted than in generations past,⁷ this does not make the situation any less scary or easier to process.

Acceptance of mediation across all civil fields has been on the rise since the 1970s.⁸ Courts saddled with back-breaking dockets naturally welcomed the emergence of mediation to lighten their load, and many litigants relished having an escape hatch to avoid trial.⁹ Mediation offers a cost-effective means to avoid preparing for and taking a case to trial,¹⁰ a cost generally magnified by the generally slow pace of litigation — “the law’s delay,” as lamented by Hamlet.¹¹ And, perhaps above all else, the parties in mediation are more focused on resolution as opposed to *winning*.¹² Such a shift in mentality is particularly good for family law matters, which

⁴ See, e.g., *Gray v. Gray*, 782–83 (Ala. 1849); *In re Marriage of Dawley*, 551 P.2d 323, 333 (Cal. 1976); *Van v. Zahorik*, 575 N.W.2d 566, 570 (Mich. Ct. App. 1997); *Neilson v. Neilson*, 780 P.2d 1264, 1269 (Utah Ct. App. 1989); *Fricke v. Fricke*, 42 N.W.2d 500, 503 (Wis. 1950) (Brown, J., dissenting).

⁵ See BOUNDS OF ADVOCACY, *supra* note 1, at iii–iv; see also Walter E. Oberer, *Trial by Ambush or Avalanche? The Discovery Debacle*, 1987 J. DISP. RESOL. 1, 2 (discussing the impact of the litigation on other family members and “lasting bitterness” of it all).

⁶ See BOUNDS OF ADVOCACY, *supra* note 1, at iv.

⁷ Christopher Lasch, *Divorce and the Family in America*, ATLANTIC (Nov. 1966), <https://www.theatlantic.com/past/docs/politics/family/divorce.htm> (“The fact that divorce is no longer novel or shocking merely testifies further, presumably, to the decay of the old order, the attitudes and institutions of an earlier time, which now evoke mingled nostalgia and contempt.”).

⁸ Harold Baer, Jr., *Mediation—Now Is the Time*, 21 LITIG. 5 (1995); Boettger, *supra* note 3, at 5–6.

⁹ See Baer, Jr., *supra* note 8, at 6 (“Even in the hard-to-crack world of commercial litigation, mediation is on the rise.”).

¹⁰ Howard J. Aibel, *Mediation Works . . . Opting for Interest-Based Solutions to a Range of Business Needs*, 51 DISP. RESOL. J. 24, 26 (1996).

¹¹ WILLIAM SHAKESPEARE, *HAMLET, PRINCE OF DENMARK*, act 3, sc.1.

¹² See 57 AM. JUR. 2D *Trials* § 555, *Mediations as a Trial Alternative: Effective Use of the ADR Rules*.

are so emotion-laden, fact-intensive,¹³ and discretionary¹⁴ that predicting the outcome of trial is a fool's errand. Mediation therefore reduces cost, time spent litigating, and the risk of going to trial, and offers the parties the ability to find creative solutions to their disputes.¹⁵

But there is a seamy underbelly to divorce mediation.¹⁶ Commentators have long raised concerns over power imbalances spilling over into settlement negotiations, with the economically and socially advantaged spouse (usually the husband) exerting influence over the other in ways that render the mediation process pointless: "[d]ivorce mediation's seductive marketing rhetoric masks a political agenda: entrenchment."¹⁷ Any history of domestic violence between the spouses only exacerbates these issues, especially if they are still living under the same roof at the time of mediation.¹⁸ Pro se spouses need mediators to be vigilant in staving off inequitable outcomes,¹⁹ though practically there is only so much the mediator can do.²⁰ And it is important to remember that mediation only has a chance of success if *both* parties are willing to proceed in good faith and sincerely settle their disputes.²¹

¹³ See *Smith v. Jones*, 868 N.E.2d 629, 632 (Mass. Ct. App. 2007) (observing that family law matters "are highly fact specific and reflect the inevitable and infinite complexities of family formation, maintenance, and dissolution.").

¹⁴ See *In re Marriage of Featherston*, 675 S.W.3d 330, 334 (Tex. App. 2023).

¹⁵ See *Smith v. Sprint Commc'ns Co. L.P.*, No. 99 C 3844, 2003 WL 103010, at *1 (N.D. Ill., Jan. 10, 2003) ("A settlement can include relief that would not flow from a judgment after trial."); cf. Saul Levmore & Frank Fagan, *Semi-Confidential Settlements in Civil, Criminal, and Sexual Assault Cases*, 103 CORNELL L. REV. 311, 312 (2018) (observing how "settlements and private arbitration proceedings can save costs, and so long as they are reached in the shadow of the law, they can accomplish most of what law aims to do").

¹⁶ See, e.g., Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992); Steven T. Knuppel, Comment, *Promise and Problems in Divorce Mediation*, 1991 J. DISP. RESOL. 127.

¹⁷ See Bryan, *supra*, note 16, at 441, 453 n.37, 454.

¹⁸ Dennis P. Saccuzzo, *Controversies in Divorce Mediation*, 79 N.D.L. REV. 425, 428 (2003).

¹⁹ Knuppel, *supra* note 16, at 131.

²⁰ Saccuzzo, *supra* note 18, at 435.

²¹ See, e.g., Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1549–50 (1991) ("[M]andatory mediation provides neither a more just nor a more humane alternative to the adversarial system of adjudication of custody . . .").

Mediation has its perks, though it is neither blemish-free nor a palliative for everyone.²² So, with all that in mind, there are steps attorneys can take to increase their chances for success at mediation. The authors spoke with various mediators across the country to gather insight into what they see about attorneys' practices in mediation, what practices are successful and which are not, and their personal preferences for how to best prepare for mediation. Distilling these interviews into pieces of advice was quite challenging—the mediators interviewed offered a wide range of opinions and practices tips. Some matters were pretty much universally agreed upon; others not so much. The following analysis summarizes the primary points from these discussions.

I. Selecting the Right Mediator

While it may seem like an obvious point, selection of an appropriate mediator is critically important. Not all mediators are created equal, partly because mediators require substantive knowledge of an array of topics in order to competently scrutinize family law disputes. Any practicing attorney in this arena knows all too well how divorce and other domestic matters bleed into other fields of law.²³ Taxes, estate planning, business and corporate matters, real estate, immigration, reproductive rights, constitutional liberty interests, addiction and counseling—all of these things are fair game.²⁴ The AAML Bounds of Advocacy alludes to this when it provides that “[n]o lawyer should act as

²² It does not help that the general public is still unfamiliar with the mechanics of mediation or what it entails for their case—as are some attorneys, for that matter. See Teresa V. Carey, *Credentialing for Mediators – To Be or Not to Be?*, 30 U.S.F. L. REV. 635, 636 (1996).

²³ See Barbara Glesner Fines & Cathy Madsen, *Caring too Little, Caring too Much: Competence and the Family Law Attorney*, 75 UMKC L. REV. 965, 968 (2006) (“[B]ecause family status impacts so many rights and responsibilities in society (e.g., taxation, bankruptcy, tort liability), the attorney representing families must be well versed in a broad range of law.”); Martha Minow, *Forming Underneath Everything that Grows: Toward a History of Family Law*, 1985 Wis. L. REV. 819, 819 (noting that family law is “‘underneath’ other legal fields in the sense that its rules about roles and duties between men and women, parents and children, families and strangers historically and conceptually underlie other rules about employment and commerce, education and welfare, and perhaps the governance of the state.”).

²⁴ See Fines & Madsen, *supra* note 23, at 969.

the mediator of marital disputes without adequate education, training or experience.”²⁵ So, because “[f]amily attorneys must be interdisciplinary,”²⁶ it makes sense to find an interdisciplinary mediator as well, one who can both comprehend sprawling issues *and* offer appropriate commentary that propels the mediation forward.²⁷

A mediator’s training can be a pivotal part of what makes them successful. Some jurisdictions do not require any formal training to be a mediator,²⁸ allowing anyone to be a mediator, including religious leaders, psychologists, and even teachers.²⁹ That is not ideal. Multiple mediators we interviewed on the West Coast specifically endorsed The Conflict Lab, a forty-hour mediation training hosted by Selena Schultz.³⁰ Others were well aware of the AAML Bounds of Advocacy’s chapter on mediation and its contents. Whatever training they have received, these mediators balance their role as a mediator with their personal and professional experiences. Like judges, mediators are not a *tabula rasa*.³¹ Knowing these mediators’ background, reputation, and training can make all the difference.

Some lawyers prefer mediators they think they can outsmart; after all, if the lawyer is overzealous in their position, why retain a mediator who can intelligibly push back?³² Retired judges with family law experience can be invaluable— “[d]ivorce, separation, and parental responsibility cases often . . . require[e] a family court judge to have familiarity with theories and research in disciplines

²⁵ BOUNDS OF ADVOCACY, *supra* note 1, at 59.

²⁶ *Id.*

²⁷ See MACBETH, *supra* note 2, at 69; see also BOUNDS OF ADVOCACY, *supra* note 1, at 60 (“A matrimonial lawyer may be a better mediator because the lawyer may be in the best position to understand the likely outcome of litigation and is best able to ensure the understanding and validity of a mediated agreement.”).

²⁸ See Catherine M. Venzon, *Dangerous Trends in Matrimonial and Family Law*, ASPATORE, 2013 WL 941377, at *3 (Apr. 2013).

²⁹ See, e.g., Carey, *supra* note 22, at 635.

³⁰ THE CONFLICT LAB, <https://www.theconflictlab.com/> (last visited Mar. 28, 2024).

³¹ Bryan, *supra*, note 16, at 503 n.259 (“Strict neutrality is a human impossibility. . . . Mediators inevitably bring with them their social class, ethnicity and ideologies.”).

³² Interview with Michael Schilawski, mediator in Raleigh, North Carolina, via Zoom (Jan. 10, 2024) (notes on file with authors).

such as social work, psychology, and dispute resolution”³³—but not necessary. There is always the risk that the retired judge will act less like a neutral facilitator and more like someone still donning their robe.³⁴ Lawyers should not presume that a former judge will necessarily be better than an attorney without experience on the bench. Above all else, it is important to select a mediator who is proactive and good at directing the mediation.

II. A Good Mediation Letter

A mediation letter can serve as a truncated trial brief. It outlines points of disagreement, provides relevant background material, explains the requested relief, and in some instances advances legal analysis. The letter may—but need not—veer into argumentation. At a minimum it frames the issues: “the more clearly the mediator distinguishes between the problem and the process, the easier it is for her to manage the negotiations.”³⁵ Exhibits to the mediation letter may include financial statements, appraisals, prior court orders and motions filed, and other pertinent documents that give the mediator a sense of the litigation to date.

Not a lot has been written on mediation letters,³⁶ probably because they are not a standard requirement. Many mediators do not request a mediation letter, let alone a lengthy one.³⁷ Some counties (or even cities within the same county) have a shared belief that a mediation letter is unnecessary, choosing instead to

³³ Natalie Anne Knowlton, *The Modern Family Court Judge: Knowledge, Qualities & Skills for Success*, INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM (Oct. 21, 2014), <https://iaals.du.edu/publications/modern-family-court-judge-knowledge-qualities-skills-success>.

³⁴ See Ellen E. Deason, *Beyond “Managerial Judges”: Appropriate Roles in Settlement*, 78 OHIO ST. L.J. 73, 109 n.188 (2017).

³⁵ HAYNES, *supra* note 2, at 173 (“[The mediator] controls the process, thereby neutralizing how the problem is defined and resolved.”).

³⁶ Passing references appear with little, if any, elaboration. See, e.g., Penny Brooker & Anthony Lavers, *Mediation Outcomes: Lawyers’ Experience with Commercial and Construction Mediation in the United Kingdom*, 5 PEPP. DISP. RESOL. L.J. 161, 204 (2005) (“Mediation letters were sometimes being used to “bluff” the opponents about their intentions and this was producing tactical responses.”).

³⁷ One mediator we spoke with, Michael Schilawski, does not typically request materials beforehand because he “likes to have the client see the look on [his] face when they tell [him] their stories.” Schilawski interview, *supra* note 32.

enter the mediation without sharing any information with the mediator or the other side. We believe, however, that it is good practice to write a letter for several reasons. The letters allow attorneys to make their case for the very first time and see how a neutral, third-party observer will react to the requested relief. And in some ways a mediation letter is more beneficial to the client than it is for the mediator. Compared to mediators who are presumably well-versed in the law, helpful letters inform the client of what their case looks like on paper. Two common reasons why mediations fail include the client being unprepared for mediation, or the case simply not being ready for mediation.³⁸ An exchange of mediations letters can inform clients about the strengths and—maybe more importantly—weaknesses of their case. To that end, a client who doesn't understand their case's weaknesses may have an overinflated sense of righteousness which, in turn, means they will be less inclined to move from their position; why would they move if they believe their stance is completely on the mark?

By the same token, both parties submitting a mediation letter allows attorneys to see how their case stacks up against the other side's evidence and presentation. This is where the parties' risk tolerance comes into play. In other civil matters, a settlement often arises when a risk of liability becomes so great that the defendant is unwilling to bear the risk of an adverse judgment, regardless of how small the probability.³⁹ That is not the case in family law, a field filled with nebulous concepts like equity and the "best interests" standard for children. Given the wide discretion courts are afforded in ruling on these concepts, identifying one's chances at trial is extremely difficult. However, family law also contains more concrete principles like tracing analyses and disputes over the validity of prenuptial agreements (subject to and governed by contract principles) that are ripe for fluid negotiations. Generally, as parties to a mediation continue to process their case over the course of the mediation day, their tolerance for risk diminishes—for many, this will be the longest they have maintained focus on their case, meaning that, conversely, it is the longest they have thought about the other side's case. To that end, an exchange of good mediation letters plants a seed for future negotiations.

³⁸ See *infra* note 62 and accompanying text.

³⁹ Cf. *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014) (discussing settlements in class actions).

Submitting a mediation letter also makes the day more efficient. When parties enter mediation without providing any information beforehand, the first back-and-forths between the mediator and each room are largely spent trying to figure out what everyone wants or what the core disagreements are. In other words, everyone is spending a lot of money just trying to get to square one. That said, a mediation letter does not need to be an extremely comprehensive document. Mediators we spoke with indicated that a solid letter need not be more than three to five pages in length excluding exhibits. A rendition of the bare-bones facts (e.g., date of separation) and then an emphasis on disputed issues (e.g., are there competing appraisals?) are the primary points of interest for the mediator, because focusing on these items allows the mediator to address the crux of the case early in the day and, accordingly, begin managing expectations. However, many of the mediators volunteered that they will always read all the materials provided, no matter the length. If that means someone feels that they need twenty-three pages to make sure the mediator is cognizant of everything important, then it seems like most mediators will read all of the submitted material.

So while a mediation letter is a net positive, there are some things attorneys should avoid. To begin, there is no need to dig into every wrong or slight that occurred during the marriage, nor is there reason to depict the other party as Attila the Hun incarnate. Taking a flamethrower into the mediation raises the risk of torching any possible common ground, especially if the mediation letter is hyper-aggressive and the other side thinks one is taking below-the-belt punches.⁴⁰ Likewise, the mediators interviewed suggested to avoid making the narrative overly emotional to gain sympathy with the mediator. Mediators serve as objective neutrals, so parties are not going to “win” the mediation by attacking the other side from the jump. Unless this is a truly exceptional case, the mediator (and eventually the judge, if mediation proves unsuccessful) does not want either spouse’s voluminous recounting of every detail of the marriage. Ordinarily, relevant facts are those closest to the present.

⁴⁰ See HAYNES, *supra* note 2, at 11 (“Participants in a dispute usually frame the problem in a way that blames the other and denies personal responsibility for the problem.”).

III. Developing Connections with the Mediator and Parties

It is hard for a mediation letter to truly capture the dynamics of the marriage. That is, the mediator cannot get a real sense of what the parties are like as individuals just looking at pre-mediation materials. And this is especially so when these parties are represented by good attorneys who, through their mediation letter, present their client in a positive light and sidestep any ugliness on their client's part. So while the mediation letter can introduce the mediator to the case, the heart of any mediation centers upon a mediator speaking with the party directly.⁴¹ More specifically, the mediator needs to be able to *listen* to the party and hear them speak for themselves.⁴²

Developing a rapport with the mediator is vital and can take time. Consider how slow mediation can feel. The thought *what is taking so long in the other room* is one that pervades most mediations. And those early sessions with the mediator can seem painfully long. Some mediators will take a long time with each party upon their first interaction, getting the client's thoughts and trying to understand the way they are mentally working through the idea of a settlement.⁴³ These mediators, though conscious of time being spent in the room with just one person, want that spouse to feel heard. "In order for the mediator to be in sync with the parties and to be present in the mediation, the mediator must be listening and attentive to every single sound in the room."⁴⁴ The reality is that the mediator is going to have a better understanding of the case and the parties (after just a couple hours) than the trial judge who reads hundreds of pages of briefs every day, and reviewed the mediation brief just before the trial.

That initial encounter is critical for two intertwined reasons: first, it acts as something of a substitute for the notion that they

⁴¹ See Nina R. Meierding, *Managing the Communication Process in Mediation*, in *DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS* 225 (Jay Folberg et al. eds., 2004).

⁴² See *infra* discussion in text at notes 46-48.

⁴³ HAYNES, *supra* note 2, at 174 (explaining how mediators must identify whether the client is approaching the case inductively or deductively).

⁴⁴ MACBETH, *supra* note 2, at 69.

want their day in court;⁴⁵ and second, it builds trust between the mediator and the spouse.⁴⁶ If the spouse does not believe they are being heard, confidence wanes.⁴⁷ Generally people who have spoken their mind and feel that they have been heard are more willing to move toward the middle. Thus, after explaining the nuts-and-bolts of mediation and forecasting how the day is going to go, mediators tend to let the spouse talk about whatever they want to talk about for a reasonable length of time. They allow this even if much of what the spouse says is not very helpful or relevant. As a retired judge who serves as a mediator said during an interview: “If I jump in after a few moments and say, ‘well that’s not a relevant issue,’ or ‘there’s nothing I can do about that, so let’s talk about something we can work on,’ then I know I’m going to lose this person and not have their confidence.”⁴⁸ When the client truly feels that the mediator cares and understands their situation, things tend to fall into place.

Try not to get in the way of the client who needs to speak their mind. Strong, smart litigators who are used to advocating on their clients’ behalf may be tempted to jump in quickly and often to help facilitate the negotiations.⁴⁹ Sometimes there is merit to this: some clients simply have unrealistic demands, and others do not have the language or ability to express what they want in terms of a legal outcome.⁵⁰ But, on the whole, it is best for attorneys to resist the urge to step in until the mediator asks something of them.⁵¹ Some attorneys are exceptionally good at letting their

⁴⁵ See 1 BARBARA ASHLEY PHILLIPS, *ALTERNATIVE DISPUTE RESOLUTION PRACTICE GUIDE* § 24:5 (2023) (“Clients often experience mediation . . . as having their day in court.”); cf. *In re Smith*, 524 B.R. 689, 704 (S.D. Tex. Bankr. 2015) (noting that some “parties are opposed to mediation because they want their day in court as soon as possible”).

⁴⁶ MACBETH, *supra* note 2, at 400; Lydia Nussbaum, *Mediator Burnout*, 34 OHIO ST. J. ON DISP. RESOL. 171, 192–93 (2019).

⁴⁷ Meierding, *supra* note 41, at 225 (“Some divorce mediators believe that effective communication occurs when parties are able to fully express their hurt, anger, frustrations, and other feelings to one another in a safe environment . . .”).

⁴⁸ Interview with Hon. Steve Rosen (Retired), mediator in Seattle, Washington, via Zoom (Dec. 17, 2023) (notes on file with authors).

⁴⁹ See Meierding, *supra* note 41, at 237.

⁵⁰ HAYNES, *supra* note 2, at 176 (“Clients tend to articulate what they *don’t* want easier than they state unequivocally what they *do* want.”).

⁵¹ We say “on the whole” because a few of the mediators with whom we spoke see no problem with the attorney doing the talking; one even prefers it.

client drive the discussion, and these attorneys listen very acutely not just to what the other room is offering, but also to how their client is reacting.⁵² This in turn allows the mediator to get to the heart of what is important to the client. “To feel comfortable, the parties must feel that the mediator cares about their concerns.”⁵³ In short, less argumentation and more listening are key to successful mediations.

We also asked mediators about parties having other people in the room with them except their attorney. Some people need a support system with them, like a friend or family member. Sometimes they even have a financial advisor with them. The consensus seems to be that this is not conducive to settlement. Although some people may really need some support, as in the case of a domestic violence victim who is terrified of the other spouse,⁵⁴ one mediator remarked on how a party needing additional people in the room does not bode well for serious negotiation because it signifies that this spouse struggles to make important decisions. The mediator therefore has to build a rapport with not just the party, but also that party’s entourage.

The attorney needs to determine whether having someone else in the room will help settle the case, or if it will just get in the way. Financial experts, for example, may be of great benefit in helping the party understand the logistics of their expenses, but they become a nuisance when they step over the lawyer and give opinions on what their client should agree to. Moreover, it is important not to have a situation where third parties come and go throughout the day—e.g., don’t wait until 3 p.m. for Uncle Angus to show up and offer his opinion. Those people (usually cocksure parents or grandparents) who come out of the woodwork have not been present throughout day and cannot understand all the emotions and thought processes that led to this point. Their two cents will normally be unhelpful and probably cause the client to backslide. (This not to say that these other family members’ opinions

⁵² Cf. Meierding, *supra* note 41, at 235 (“While parties are apparently listening to each other, they may also be planning their own response or rebuttal and therefore listening only in a peripheral way.”).

⁵³ Coye Conner, Jr., *Trust Building in Mediation*, 2019 *ADVANCED FAM. L.* 71.

⁵⁴ See Thomas Luchs, *Is Your Client a Good Candidate for Mediation? Screen Early, Screen Often, and Screen for Domestic Violence*, 28 *J. AM. ACAD. MATRIM. LAW.* 455, 461 (2016).

are silly or unimportant, just that they are likely not grounded in any relevant legal points of view and their advice is often based on incomplete information.) If someone else is going to be there with your client, they should be there from the beginning; and if they have to leave, then they should not come back.

IV. Make a Reasonable First Offer

Pretty much every mediator rolls their eyes at the outlandish first offers people make. It is true that, “[d]espite the conciliatory tone of mediation, the relationship[] between parties to a dispute remain[s] adversarial until the dispute is resolved.”⁵⁵ Still, these cases are already emotionally charged, so why pour kerosene on the flame? The whole point of coming to mediation is to at least try to settle the case. Absurdly one-sided offers—offers that the offering party knows will fall flat, but merely give them room to move toward the middle—only serve to shock and alienate the other party.⁵⁶ The fact of the matter is “[m]ost mediation clients have a sense of what they can expect to gain in court and, if the expectation is realistic, are unlikely to settle for less in mediation.”⁵⁷ Like an inflammatory mediation letter, unrealistic first offers can affect the rest of the day’s negotiations. Indeed, one study out of the Norwegian School of Economics found that “[t]he number of rounds that a negotiation takes to complete in the experiment is significantly correlated with the first offer.”⁵⁸

⁵⁵ Eileen A. Scallen, *Relational & Informational Privileges & the Case of the Mysterious Mediation Privilege*, 38 LOY. L.A. L. REV. 537, 590 (2004).

⁵⁶ See Joel Levine, *The Seven Deadly Sins of Mediation*, 42 LITIG. 36, 40 (Winter 2016).

⁵⁷ HAYNES, *supra* note 2, at 157.

⁵⁸ Sigbjørn Birkeland, *Negotiation Under Possible Third-Party Resolution*, 56 J.L. & ECON. 281, 291 (2013). For this experiment, business school students were tasked with bargaining for a division “of a sum of money created through individually produced output.” *Id.* at 282. “The game studied is based on the alternating-offer bargaining protocol extended to include the outside option of using a third party to make a final decision.” *Id.* The researchers gleaned that the first offer signals the level of aggressiveness being employed, and “could therefore have a strong impact on the efficiency of negotiations.” *Id.* at 291. Perhaps more important for purposes of this article is the observation that “[t]he introduction of a third party induces the parties to make first offers that are more strongly related to their relative production,” suggesting “that there are more first offers closer to an offer based on the proportionality principle in this treatment.”

Remember that these are not settlement demands akin to personal injury cases or tort actions. A simple monetary figure to make someone whole is rarely a possibility in family law disputes. An initial offer should be thoughtful and predicated on the goals and objectives the client has not only in the immediate aftermath of the divorce, but also in the years to come. Of course, the offer should not be the *final* offer, but it should probably be at the far end of the bargaining range—i.e., this is the ideal proposal within the range of outcomes the client can live with. The client needs to know the attorney is advocating for them, so it is important for the attorney to leave room to move toward the middle.

Another obvious point is this: make a first offer. It does not do any good to show up without advancing some type of proposal. Sending the mediator and opposing party a proposal gives everyone something to work from and prepare for. This is true even if it is an outlandish offer, because “the first offer locks in the maximum or minimum settlement” proposals from each side.⁵⁹ At the very least, it gives the mediator a sense of how the client is viewing settlement talks.

V. Know the Facts of Your Case—*All* of Them

Mediation is like jazz, in that it welcomes creative and improvisational ideas during the performance; but even jazz musicians need to rehearse and study and do the necessary legwork before the gig. To that end, lack of attorney preparedness is probably the most cited reason as to why mediations fail. “It’s quickly and easily apparent when [an attorney] is not prepared for mediation.”⁶⁰ Either in the mediation letter or in the first meeting, each attorney should furnish the mediator with basic case facts—e.g., the relative size of the estate, each party’s net monthly income, what are the specific issues that need to be addressed, etc. This may seem like common sense, but apparently it is not. According to the

Id. (The so-called “proportionality principle” is identified in the experiment as one of three “salient fairness principles,” allocating the joint production according to the individuals’ relative production. *Id.* at 285.)

⁵⁹ Harold I. Abramson, *Problem-Solving Advocacy in Mediations*, 59(3) *DISP. RESOL. J.* 56, 58 (2004).

⁶⁰ Interview with David Hazel, mediator in Yakima, Washington, via Zoom (Jan. 4, 2024) (notes on file with authors).

mediators we interviewed, it was surprising how many attorneys arrive at mediation thinking they could wing it and get the case settled.⁶¹ Similarly, mediators sometimes deal with attorneys who do not know the applicable law. This puts the mediator in a bind, not wanting to embarrass the attorney, but not wanting to turn a blind eye to the attorney's nescience.

Another glaring problem mediators regularly come across is a lack of documentation to substantiate each party's position. Missing or poorly assembled documentation—such as income records, appraisals, a financial declaration, or an asset spreadsheet—hamper discussions and make the mediator's job all the harder. An asset spreadsheet in particular is a vital component to a divorce mediation. It does not need to be fancy, just *something* from which the mediator can work. Similarly, it also helps to come into the mediation with drafts of proposed settlement agreements. Having a drafted custody order or property settlement agreement saves time and also makes clear to the mediator and other side the attorney's exact starting position.

All this ties in with another point: to be certain the case is ready for mediation. Obviously if there is still discovery that needs to be done, then it is not yet the time to be scheduling costly alternative dispute resolution. *Why would you come in without an appraisal if the home value is disputed?*, asked one mediator with whom we spoke.⁶² Or if there are significant discrepancies in each side's spreadsheets, then the attorneys might still need to sort out certain details. That said, mediation should not be a means to conducting back-door discovery, asking the other side for documentation they should already have and understand. That kind of conduct borders on bad faith and implies some ulterior motive aside from settlement. Some of the mediators with whom we spoke say that they see this conduct of discovery in the guise of mediation regularly. We get the sense that mediators find this particularly irksome. It is a huge waste of time that contributes to

⁶¹ See, e.g., *Spradlin v. Richard*, 572 Fed. Appx. 420, 428–29 (6th Cir. 2014); *Corp. for Character v. Fed. Trade Comm'n*, No. 2:11-cv-00419, 2018 WL 3539830, at *7 (D. Utah July 23, 2018); *Attorney Grievance Comm'n of Md. v. Steinberg*, 910 A.2d 429, 435 (Md. Ct. App. 2006).

⁶² Interview with Richard West, mediator in Orlando, Florida, via Zoom (Jan. 4, 2024) (notes on file with authors).

unconscionable first offers.⁶³ One mediator is comfortable with multi-day mediations, because that way the first day can be effectively set aside for the parties to exchange financial documents, and the next day(s) can actually focus on settlement talks.⁶⁴

To be clear, not all cases can be mediated. Multiple mediators noted that relocation cases are practically dead on arrival—*what is the middle ground (both figuratively and literally) when mom is moving to Texas and dad is staying in Iowa?* It would be naïve to think that every embattled spouse is eager to break bread and cede ground on important aspects of their divorce.⁶⁵ Likewise, even the most informed and rational client can always walk away from a mediation without resolution, no questions asked. But to effectively give advice on whether to avoid mediation or pursue it, the attorney needs to have a firm handle on the case. Litigators need to weigh the global aspects of the case; and, in doing so, they must convey to their client the pros and cons of mediation as it relates to the unique facts of their situation.

VI. Being Flexible Is a Sign of Good Faith

Good faith is a hard thing to define in the family mediation setting.⁶⁶ “[P]ersonal attendance by parties with authorization to settle, preparation and exchange of requested documents, engaging in discussions, making no misrepresentations, and remaining at the mediation for a reasonable time are minimal participation obligations” for those engaging in a good faith mediation.⁶⁷ But the personal nature of domestic law complicates things. Can we say that a mother’s treachery positions on a custody arrangement are made in bad faith simply because of her history with the children?

⁶³ HAYNES, *supra* note 2, at 160 (“Clear data make it more difficult for either party to open with unreasonable positions, since the parameters of the bargaining are established in the data gathering and setting stage of the negotiations.”).

⁶⁴ Schilawski interview, *supra* note 32.

⁶⁵ Fines & Madsen, *supra* note 23, at 968 (“The ‘stakes’ in family disputes may be economic, but the economics are imbued with fundamental psychological layers. . .”).

⁶⁶ Hazel interview, *supra* note 60 (“Ask ten lawyers to define good faith and you’ll get ten different answers.”).

⁶⁷ Maureen A. Westin, *Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good Faith Participation, Autonomy, and Confidentiality*, 76 IND. L.J. 591, 628 (2001).

Or what about a spouse who wants to hold onto a home, regardless of whether they fully grasp how exactly to pay the mortgage? Maybe one spouse's financial acumen is far and away superior to the other's, and the complexity of the estate makes it hard for either party to even conceive of a pragmatic offer; is that bad faith? One cannot simply look at the offer being made in a vacuum.

Fortunately, all of the mediators with whom we talked said they rarely see bad faith on anyone's part. It's hard to go through a divorce. It's hard to go through the litigation process. Some people may want a pound of flesh, but even they probably just want to be done.⁶⁸ Mediation gives them a guaranteed result. Trial does not.

So when people make (what they perceive to be) a perfectly reasonable offer at mediation, only for the other side to counter with something totally different, it is easy to think the other side is operating in bad faith—that is in all likelihood perception becoming reality. These parties are trying to make decisions and compromise with someone they no longer trust, often after years of dejection and struggle. Naturally, they are going against their instincts, which have been honed over time, *not* to trust the other. Attorneys cannot force their clients to have confidence in one another, nor can they convince clients that the other side is taking a good faith position. All that, however, can be minimized with an air of openness and preparation: “Give me two spouses who can't stand each other and two lawyers who can't stand each other and, if the two lawyers diligently prepared their case and diligently prepared their clients, the odds are overwhelming the mediation will result in a perfectly reasonable [settlement] agreement.”⁶⁹ The interviews with mediators revealed two signs of bad faith: (1) when one person is unprepared to seriously discuss the merits of the

⁶⁸ See Gregory M. Bistram, *Steps to Constructing a Litigation Policy*, ASPATORE, at *14 (2009) (“Almost all clients hate litigation. It is a process they cannot control, it is expensive, and hoped for ‘wins,’ even if attained, must usually be reduced by the cost of ‘achieving the victory.’”); see also 1 ROBERT J. CALDWELL, *HANDLING BUSINESS TORT CASES* § 1:1 (noting that, at least in the business litigation setting, most clients dread litigation and do not relish participation in court proceedings).

⁶⁹ Hazel interview, *supra* note 60; see also *id.* (“Successful mediation is entirely dependent upon thorough preparation by all, including the mediator.”).

case or dig into the issues;⁷⁰ and, relatedly (2) when one party outright refuses to discuss an important aspect of the case.

The larger point here is that, bereft of bad faith stifling a potential settlement, both the attorney and their client need to trudge forward with the mediation even when resolution seems bleak. One of the biggest mistakes is stopping negotiations when it seems like frustrations are boiling over. This is where the attorneys need to trust that the mediator is making progress in each room. It takes time for parties to work through the expectations of the other room. So when one side digs their heels in on something, this is where a good mediator—a mediator carefully selected, as discussed above—gently tries to level out the playing field, usually by providing more information about what could happen at trial. If Spouse A says, *the court is no doubt going to rule my way*, the mediator might see this as the perfect opportunity to say, *well, actually, a judge could also do X, or Y, or Z*. Attorneys can also ask the mediator what they think their chances are at trial of receiving a particular outcome, and seasoned mediators will help provide evaluative input to help everyone reach an informed decision.

It is important for attorneys to manage expectations beforehand to prepare clients to keep an open mind. The Buddha might as well have been a mediator when he taught that “the root of suffering is attachment,” because everyone will need to adjust their mindset as information comes in throughout the day. It is also important for attorneys to not be rigid or afraid to deviate from their initial positions. If the mediator asks, *is that a position you think a court is going to take at trial?* and the attorney and their client both say yes, the mediation is probably not going to go well if that position is utterly unreasonable. Refusing to budge from an initial position at mediation will only get the attorney so far. The attorney is not there to convince the mediator that their side’s position is correct; on the contrary, the mediator is paid a lot of money to remain neutral and help the parties adjust their expectations.⁷¹

VII. The Importance of Collegiality

Many of the preceding sections overlap with one another in straightforward ways. Be candid, be open and flexible, be efficient,

⁷⁰ See *supra* Section V.

⁷¹ See HAYNES, *supra* note 2, at 7.

be knowledgeable, etc. But, to some extent, those attributes are contingent upon there being collegiality between the attorneys and spouses. Litigators inhabit an adversarial system, and family law in particular can bring out the parties' more unsavory attributes.⁷² Those hard feelings do not disappear just because they agree to mediate.⁷³ It follows that when one side's mediation materials cast a pall over the proceedings by attacking the other side, the mediator then has to deal with the substance of the dispute *and* play peacemaker. Really looking to settle means setting aside those character attacks to the extent possible. Yes, that is easier said than done, but doing so augurs well for the clients' relationship post-divorce.⁷⁴

Focusing on points of agreement—rather than sharply arguing why the other's positions are fatuous or ill-advised—pays dividends down the road. It is true that there is an initial intensity to divorce, one in which anger and sadness can be driving factors for people at the outset. After enough time passes, most people eventually become (at least a little) sympathetic to their spouse's future. Commonalities brought these spouses together in the first place, after all. (Even with challenging custody disputes, pretty much every parent agrees on wanting what is best for their children.⁷⁵) The prospect of leaving the other spouse in dire straits is far less appealing than a more equitable outcome.⁷⁶

⁷² See *Minich v. Cnty. of Jefferson*, 919 A.2d 356, 359 (Pa. Commw. Ct. 2007) (“Divorce brings out the worst in every individual; anxiety, emotion, anger, and revenge run rampant.”); *Hernandez v. Alonso*, No. 70675, 2017 WL 6055429, at *4 (Nev. Ct. App. Nov. 16, 2017) (Tao, J., concurring) (“Divorce and custody negotiations can be amicable and smooth. But they can also devolve into contentious, bitter, petty, emotionally and financially draining, exhausting, prolonged wars of attrition . . .”).

⁷³ See Roger L. Carter, *Oh, Ye of Little (Good) Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations*, 2002 J. DISP. RESOL. 367, 367–68.

⁷⁴ Gregg Hermann, *ADR and Family Law*, 14 DISP. RESOL. MAG. 37, 37 (Summer 2008) (“In family law, unlike most other areas of law, when the guns stop firing and the smoke settles, frequently the warring parties still have to live with each other—not literally, but metaphorically.”).

⁷⁵ KAREN BONNELL, *THE CO-PARENTING HANDBOOK* 31 (2017).

⁷⁶ Cf. HAYNES, *supra* note 2, at 13 (“When talking about the future there are no complaints or recriminations. We can complain about yesterday’s weather, but we can’t complain about tomorrow’s.”).

Remember also the familiar statistic about how something like 98% of civil cases settle.⁷⁷ The actual number is hard to pinpoint,⁷⁸ but the point is this: if the vast majority of these cases settle, there is no need to be nasty, at least not in this setting. This is especially so because many of the most respected mediators in your area have earned a positive reputation because they are good at what they do. There is usually a trickle-down effect in which the lawyer's combative demeanor impacts their client's attitude toward the process. With that in mind, we close with the AAML Bounds of Advocacy, which lays out the shifting outlook professionals have toward more collaborative practices:

The traditional view of the matrimonial lawyer (a view still held by many practitioners) is of the "zealous advocate" whose only job is to win. However, the emphasis on zealous representation of individual clients in criminal and some civil cases is not always appropriate in family law matters. Public opinion (both within and outside the AAML) has increasingly supported other models of lawyering and goals of conflict resolution in appropriate cases. A counseling, problem-solving approach for people in need of help in resolving difficult issues and conflicts within the family is one model

Matrimonial lawyers should recognize the effect that their words and actions have on their clients' attitudes about the justice system, not just on the "legal outcome" of their cases. . . . Clients look to attorneys' words and deeds for how they should behave while involved in the legal system. Even when involved in a highly contested matter, divorce attorneys should strive to promote civility and good behavior by the client towards the parties, other lawyers and the court.⁷⁹

⁷⁷ See Jessica Feinberg, *Multi-Parent Custody*, 108 MINN. L. REV. 1489, 1526 (2024) ("Whether through mediation or other methods, settlement is reached in over ninety percent of child custody cases.").

⁷⁸ Marc Galanter & Mia Cahill, *Most Cases Settle: Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1339–40 (1994) (caveating the oft-cited statistics about cases settling).

⁷⁹ See BOUNDS OF ADVOCACY, *supra* note 1, at v–vi.