

Even failed mediations can be beneficial



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In family law, mediation is often pursued up to a few days prior to a trial should the matter progress that far. Usually, the mediation is closed and, as such, nothing said in it will be admissible at trial.

So, what are the ways in which preparing for and participating in a mediation session can help your client's position for a trial?

In my experience, a mediation that does not resolve a dispute can still be helpful to a client's case. The unsuccessful mediation can help refine your arguments before re-appearing before a judge.

In advance of the mediation, each party prepares and submits a brief outlining their views of the case. While these briefs cannot be submitted as evidence in court, they provide insight into the case, and both counsel are likely to use those arguments at trial, subject to certain changes based on the outcome of the mediation.

Chances are, if a lawyer believes he or she has a sound theory of the case, and a mediator they hold in high regard is able to identify the potential flaws in the arguments, then counsel will be in a better position heading toward trial. The mediator will highlight the strengths and weaknesses of the case, for both sides, which should assist the parties in developing expectations about what a reasonable resolution might look like.

A mediator's advice, whether through explicit or implicit direction, can also invite lawyers to think about what information they might be missing, which may result in counsel calling a certain witness, or seeking out expert opinions.

Throughout a mediation session, a lawyer is looking to discover what resonates with the mediator and what does not. After the mediation is over, arguments can be re-evaluated



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Andrew Feldstein,
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and re-focused, as required, to try and put one's client in the most advantageous position.

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Often, the offers made are drafted with the expectation that they will be rejected. However, after mediation, the chances of

drafting and presenting an offer more likely to be accepted increase dramatically because both sides are more cognizant of the persuasiveness of their clients' positions.

Both sides could refine their offers to reflect the recommendations of the mediator. In fact, in certain situations, it may be advisable to directly reference the mediator's recommendations in terms of the offer as, in the eyes of the court, this will

demonstrate reasonable litigation behaviour at the time to argue costs.

Making a more reasonable offer at the very least can have favourable cost outcomes, if it does not otherwise assist in the resolution of the matter at hand. For example, if we are dealing with equalization of net family property and the parties were over \$500,000 apart on what they believed the appropriate settlement to be after a thorough mediation session and review of the facts, perhaps the parties' offers will bridge that gap.

Finally, a lengthy mediation session is helpful for both lawyers and clients because an impartial mediator can present the parties with a realistic perspective on their prospect for success. Judges at a case conference, for example, have a much more limited time frame to review the materials of the parties and provide recommendations when the parties are present in court. Even the time

involved in a settlement conference pales in comparison to the time that can be made available through mediation.

In Newmarket, Ont., for example, the court is so backed up that settlement conference judges have allotted only one hour to deal with any particular matter (unless you are fortunate and the judge has more available time on the day of the conference). In mediation, on the other hand, you may get eight or nine hours. This gives the opportunity to be heard, which is important to the clients, who may not otherwise feel they have had a chance to access justice.

At the same time, a long mediation session can serve as a wakeup call for a client with unrealistic expectations. The opinions of mediators are well-informed and well-reasoned, which assists lawyers in managing client expectations. ■

Andrew Feldstein runs one of the largest family law firms in the Greater Toronto Area.

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