BUDGET CUTS LEAD TO DYSFUNCTIONAL FAMILY LAW DEPARTMENTS
By Franklin R. Garfield

As a result of budget cuts, courthouse closures and staff reductions, the family law departments of the Los Angeles Superior Court have become increasingly dysfunctional. Many divorcing couples now prefer to do their talking directly or through counsel under the auspices of a mediator than to go to Court and let a judge decide. Under these circumstances, the lawyers who represent those parties must help their clients negotiate a deal they can both live with. The following practice pointers may be useful to family lawyers who participate in the mediation process directly.

1. *Be realistic about the purpose of mediation.* In general, mediation is a more efficient and economical road to the same place the parties would end up if they went to trial. The parties sometimes believe that they have no obligation to follow California law in mediation. As an abstract proposition, that is correct. If the parties agree, they can ignore California law. The problem: As a practical matter, one party usually likes California law just fine and is unwilling to disregard it.
2. *Help the parties put aside their feelings and notions of fairness.* Absent an agreement to the contrary, California law is controlling. The parties' feelings and notions of fairness are mostly irrelevant. The parties have usually shared their feelings with each other and anyone else who will listen on dozens of occasions; sharing them with the mediator is unlikely to advance the analysis. Along the same lines, everyone wants to be fair – or at least everyone says so. But fairness is a subjective concept. Unless the parties have the same notion of fairness, they are stuck with California law – whether or not they think it is fair.
3. *Evaluate the strengths and weaknesses of the parties' positions.* On the one hand, each

lawyer can assure his or her client that if the parties end up in trial, he or she will present all of the evidence that supports the client's version of the facts and make every argument that might convince the judge. On the other hand, the client needs to know whether his or her position is a slam-dunk, more likely than not to prevail, a 50-50 proposition, arguable but unlikely to prevail, barely plausible, or a dead-bang loser.

4. *Explain how contested issues are likely to be resolved in Court.* In the beginning of the case, each attorney tends to analyze the issues based only on his or her client's version of the facts. As the case develops, those facts often turn out to be incomplete or incorrect. Once the parties have exchanged disclosure documents and conducted whatever formal or informal discovery they deem appropriate, the attorneys should have a pretty good handle on all the facts of the case, not just those facts that support their clients' positions.

The mediator's proper role is to provide the parties with legal information and guidance. If the parties are at loggerheads over the issue of spousal support, for example, it is appropriate for the mediator to explain that the DissoMaster computer program can be used as a tool, that the amount of guideline spousal support commonly ordered *pendente lite* is too high for permanent spousal support, that the amount determined by using the so-called "B" factor is too low, and that many divorcing spouses agree to split the difference. While the mediator cannot predict what a trial judge will decide, the mediator can note that many bench officers, public and private, either split the difference or discount the guideline amount by somewhere between 10% and 20% depending on all pertinent circumstances.

5. *Confirm that the parties are open to settlement.* If both parties want to settle, the parties are likely to negotiate a deal. If one party is just going through the motions, or has an

undisclosed agenda, or simply cannot sign off on a settlement that feels like committing financial suicide, the mediation will fail.

This is the reason that "mandatory mediation" is a flawed concept. If the parties are interested in resolving their situation by agreement, they will welcome the opportunity to participate in mediation. If they aren't, mediation is probably a waste of time. The Court can mandate mediation, but it cannot mandate settlement.

6. *Select the mediator carefully.* The mediator can become part of the problem in several ways.

Does the mediator have a cumbersome process? Many mediators study the history of the case, schedule private meetings with each side before the first mediation session, encourage the parties to prepare opening statements, and recommend other expensive warmups.

In the service of efficiency and economy, other mediators begin where the parties are today.

Does the mediator have an agenda of his or her own, such as allowing the parties to be heard, improving the parties' communications, or even transforming their relationship?

Understandably, the parties may need to tell their stories (sometimes under the guise of giving the mediator some background) or to vent. If telling the mediator the story of the marriage or venting will help a party focus on the issues to be resolved, most mediators are willing to listen, but it is usually obvious to everyone except the parties that this is unproductive. The mediator's job is to resolve disputes.

Turning the mediation process over to the parties – on the theory that it is "their

mediation" – misses the point: If the parties wanted to do it themselves, they wouldn't have hired lawyers; if their lawyers were able to settle the case on their own, they wouldn't need a mediator.

7. *Consider a premediation telephone conference between the mediator and the attorneys to discuss procedural issues.* The lawyers are familiar with the dynamics of the case. The mediator is not. A telephone conference provides an opportunity to bring the mediator up to speed and to adapt the mediation process as necessary to meet the parties' needs and serve the lawyers' purposes.

8. *Utilize the mediator's expertise.* If one of the parties is resistant to accepting the reality of his or her situation, let the mediator know. In many instances, when a client has received an unwelcome analysis of a particular issue from his or her attorney, and then gets the same analysis from a mediator, it starts to sink in.

The parties should pay attention to what a disinterested neutral has to say – not because the mediator is any smarter than the parties' attorneys – but because the parties' attorneys look at things from their clients' points of view and disagree. A mediator is more likely to look at things from the point of view of a bench officer, also a disinterested neutral. Another way to put this: The mediator's analysis often provides a reliable preview of how the trial judge will see the case.

For example, it may be a fine line, but there is a line between predicting how a hypothetical trial judge might resolve an issue with respect to the date of separation and providing the parties with information and guidance along these lines: The date of separation occurs when one party informs the other that the marriage is over, and there is no subsequent conduct that is inconsistent with that statement; separating physically and

filing a Petition for Dissolution of Marriage may constitute evidence that the parties have separated, but are not conclusive; and eight of the nine appellate cases that have considered the issue have picked the later date. (The one exception is distinguishable: The facts were not in dispute, merely the legal standard to be applied.)

9. *Identify the goal.* Do the parties want to end up with a handshake deal or a signed settlement agreement? Ultimately, the case can only be resolved with a written agreement; however, many lawyers will not let their client sign any document during the course of a mediation session. Ideally, the lawyers will have a shared understanding of the desired outcome; if not, they should know that before the mediation gets underway.

10. *Avoid confidential mediation briefs.* They create a situation in which the mediator is the only person in the room who knows everything – at least officially. In most instances, there is no confidential information in a confidential mediation brief. Information labeled "confidential" is often information that is known to all, but which the other party would consider one-sided, demeaning or provocative (*e.g.,* alcoholism, drug use, sex addiction).

In a sizable percentage of mediated cases, the parties have lawyers of record, the case has been litigated to a certain extent – at least through an initial Request for Order – and both the parties and the lawyers are active participants in the mediation process. Under these circumstances, lawyers must employ different skills than the ones that may serve them well in Court.

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