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Five Strategies to Get a Better Deal in Mediation

Tilt the process in your favor in a divorce or a dispute with a broker or business partner



Beth Pickenpough, seen here with her daughter, went through mediation as part of her divorce. *PHOTO: JASON ARTHURS FOR THE WALL STREET JOURNAL*

By
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Mediation is all about compromise. But there are ways to tilt the process in your favor.

Divorcing spouses often turn to mediation as a way to resolve their differences. Hiring a mediator can save you thousands of dollars in legal fees—and even more if a judgment goes against you. And some states require divorcing couples to explore mediation first.

Mediation is also an option in some disputes between investors and stockbrokers, an employer and a former employee, business partners parting ways or parties to a commercial contract.

The key is to know your priorities and look for tactical advantages at the same time you are seeking common ground. Choosing the right mediator, gathering detailed financial information and, in some cases, showing empathy at an opportune moment can boost the odds of a favorable outcome, experts say.

You can represent yourself in mediation, but it is probably wise to hire a lawyer. There is limited data on how frequently mediation is used or how much in assets or property is handled through mediation.

Mediation often begins with a joint session, in which each party makes an opening statement. That is typically followed by separate meetings in which each side can make a case to the mediator in confidence. Often the mediator practices “shuttle diplomacy,” moving between two rooms and communicating competing needs and concerns. The two sides can also come together periodically.

The process is voluntary. Either party can drop out at any time, for any reason, and no settlement can be imposed. So be prepared to walk away if things aren’t going the way you would like. And have a backup plan, which may include a lawsuit, or the threat of one.

Mediators don’t assign blame—they strike a deal that the parties can live with. Still, some clients who start mediation in good faith pivot to tougher tactics, and some lawyers approach mediation like a trial. The following five steps can help in a range of potential situations.

Prepare emotionally. Hire skilled lawyers and advisers, and rely on friends for support and perspective. “Even if you normally are financially savvy, it is difficult, if not impossible, to be emotional and logical at the same time,” says Beth Pickenpaugh, 51 years old, a financial adviser in New Bern, N.C., who went through mediation during her divorce. “You will need to spend time face to face with your soon-to-be ex on a regular basis during a very stressful time.”

In mediation, people can speak more freely than if they were answering questions under oath at trial. One consequence is that the other side may say something that is inaccurate or mean-spirited in hopes of gaining an edge.

Cheryl Lynn Hepfer, a lawyer in Bethesda, Md., and past president of the American Academy of Matrimonial Lawyers, recommends that clients see a therapist before mediation for training in how to articulate their feelings in a constructive manner. The training can help them keep calm if the other side tries to say something that is designed to antagonize.

Dolly Hernandez, a Miami divorce lawyer, sometimes suggests that a client remain in a separate room during his soon-to-be ex's opening statement to avoid hearing remarks that might weaken his resolve.

"He doesn't need to hear that he's a liar again," she says.

Follow the money. Before entering mediation, you should gather any relevant financial information, including bank statements, tax returns, brokerage-account information and a list of other assets and liabilities.

Having that information at your fingertips can come in handy. For example, say one spouse claims her \$100,000 inheritance isn't a marital asset. If her husband can produce a document that shows the money was held in a joint bank account—and that money earned during the marriage was deposited into that account—it could be an important bargaining chip, says Ms. Hernandez.

"Having a firm grasp of the family's finances and its sources can help you understand by law what each spouse is entitled to, save you time and better prepare you for a future settlement negotiation," says Elaine King Fuentes, a Miami financial planner.

Choose the mediator carefully. Mediators are supposed to be impartial. But, like judges and arbitrators, they are human beings with opinions and biases, says John Lawrence Allen, a New York lawyer who specializes in broker fraud. "Interview and consider several mediators," says Ms. Pickenpugh. "Get personal recommendations for mediators from lawyers you trust."

Investors are generally required to pursue grievances against a broker in binding arbitration, which is overseen by the Financial Industry Regulatory Authority, the industry's self-regulating body. But investors can opt to try mediation, either through Finra or independently.

If the other side, whether it be a brokerage firm or your ex-spouse, suggests a certain mediator, make sure he or she has experience handling your type of case and try to find out whether previous clients in your situation were satisfied with the mediator.

For example, Mr. Allen says, ask yourself: "Do they tend to be pro-investor or pro-brokerage firm, or are they fair and reasonable?"

If there is concern about potential bias, come up with a list of different candidates who you think will be fairer, so you're not immediately at a disadvantage, he says.

Show empathy. In some cases, particularly involving ruptured personal relationships, it can also be useful to show your feelings in a way that might not feel appropriate in a courtroom.

Lili Vasileff, a collaborative-divorce practitioner in Greenwich, Conn., says that during a difficult recent mediation, her client's husband refused to give her the couple's house, despite her concessions on spousal support and several rounds of tense negotiation.

During a coffee break, she says, her client unexpectedly walked over, put her hand on her ex-husband's shoulder and thanked him for being a good provider. The husband's face softened and the couple hammered out a deal.

"Often it's not just about the money. The other side might want to hear your thanks or an apology," **Ms. Vasileff** says.

Have a backup plan. Mediation doesn't always work, no matter how well prepared the two sides are or how well they present their cases.

If that happens, you need a Plan B, which often means going to arbitration or to court. It can be useful, therefore, to hire a lawyer who has experience in other arenas.

Trey Bergman, a lawyer and mediator in Houston, recently oversaw a case involving a dispute among heirs over a \$6 million estate. The two sides were so far apart that one side would have had to make a major concession to reach a settlement, so they opted instead to go to court, he says.

The lesson, according to Mr. Bergman: “Be prepared to walk away.”

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