

DOMESTIC MEDIATIONS—A SLIGHTLY DIFFERENT ANIMAL

Of the two most prevalently utilized forms of mediation in Indiana (namely personal injury disputes and domestic disputes) domestic disputes are infinitely more complex and at the same time infinitely simpler than personal injury disputes. They are infinitely more complex because, unlike personal injury disputes, they are rarely solely about money. At the same time, they are infinitely simpler because they are rarely solely about money. It is my purpose in this paper to explore the paradox of these two statements and at the same time to provide some practical suggestions to help you in dealing with this paradox.

I. The Complexity of Domestic Disputes Presents a Challenge

Domestic disputes are rarely single issue disputes. To begin with, “domestic disputes” typically entail one of three distinct types of disputes: Dissolution of marriage disputes, post-dissolution disputes and paternity disputes. If the dispute involves the dissolution of a marriage, there are two distinct branches of these disputes: Married couples with children and married couples without children. If there are children of the marriage, the mediator is immediately faced with a myriad of issues to be resolved. With whom will the children reside after the dissolution? If there is more than one child, will they all live with the same parent? Who will have custody of the children (this is not necessarily the same question as the preceding two questions)? Will the parties share joint legal custody or will one party have sole custody? What parenting time schedule will the parties employ? On the financial side of children, how will the financial needs of the children be met? Will one side pay “child support” to the other? Will the parties split

the costs of extracurricular activities for the children? If so, will it be on an equal basis or on a pro rata basis? Who will receive the tax benefit of the children each year? Who will provide insurance for the children?

All marriages, whether with children or without, must address the division of assets. The division of assets raises a multitude of issues to be addressed in the mediation. What are the assets that need to be divided? Are the assets liquid or non-liquid? Do the parties agree on the value of the assets? Do the parties both want to retain the same items for themselves or are they in agreement on who should receive which items? If the only asset which exists between the parties is debt, who, if either party, is best able to service that debt?

These are but a few of the issues which the mediator must address in seeking to resolve a dissolution of marriage dispute. In a paternity dispute, the mediator is faced with the same issues that arise in a dissolution of marriage dispute plus one more: What should be the last name of the child? In theory, in a post-dissolution dispute, the division of assets is eliminated from the equation. The mediation is supposed to focus solely upon child related issues. In practice, there is a lingering psychological component which often runs through the course of the mediation due to the fact that one party or the other believes that they were “robbed” in the original divorce and therefore the other side “owes them” some special consideration in the post-dissolution negotiations.

II. The Complexity of Domestic Disputes Presents an Opportunity

The complexity of domestic disputes presents not only a challenge for the mediator but also an opportunity. Unlike a personal injury disputes where the issue is generally only “how much one-sided is willing pay to the other,” the multiple issues

which make up a domestic dispute provide innumerable possibilities for resolution. It is rare that all issues are of equal importance to the disputing parties. One party may be most concerned about retaining the marital residence whereas the other party seeks to protect their pension. In another case, the Mother may be most concerned about having “custody” of the children whereas the Father may not care about the label attached to his relationship with his children. The Father may only wish to insure frequent and meaningful contact with his children.

A successful domestic mediator must be prepared to use these varying levels of importance to his or her advantage. The mediator must discern as quickly and efficiently as possible the interests of each party and the mediator must be prepared to mix and match the interests of each party into a comprehensive whole. How does a domestic mediator go about this task?

A. Thru the Opening Statement

In domestic mediations, the opening statement is one of the most valuable instruments available to the mediator in obtaining a successful result. Although I believe that this is also true in civil mediations, the importance of a good opening statement in a domestic mediation cannot be over emphasized.

In a domestic mediation, the parties generally approach the mediator with a great deal of suspicion. This is generally their first exposure to mediation. Prior to this time, the divorce process has most likely than one of deceit, distrust, and rancor. The parties are used to a cast of characters in the legal system who were best characterized as “if you’re not for me you’re against me.” Accordingly, it is vital that the mediator take the

opportunity afforded to them in their opening statement to give the parties a clear picture of three things:

- i. The identity of the mediator;
- ii. The neutrality of the process;
- iii. This dispute is their dispute and the ultimate resolution of it is in their hands.

It is essential that the parties get a sense of who you are as mediator during your opening statement. This is accomplished not only by your words but by the manner in which you present yourself. To properly impart this to the parties you must first examine yourself (before your first mediation and continuing on with each successive mediation) to determine what style best fits your personality. For me, I find that a casual friendly style generally works best. Through my words and actions in the opening statement I try to make the parties feel comfortable and relaxed with me as a person. The friendly approach may not fit your personality. You may feel most comfortable with a more formal, authoritative approach. Regardless of your approach, it must fit your personality. It cannot be fake or forced. Very few of us are such good actors that we can keep up a phony facade, under stress throughout the course of the entire mediation. Be yourself.

I also try, whenever possible, to impart to the parties that I know where they're coming from because I have similar life experiences. As an example, if the dispute involves parenting styles or the cost of raising children, I try to work into my presentation the fact that I have three children of my own. When the parties believe that you have

experience in an area, they're much more likely to later, during the course of the mediation, listen to suggested solutions to their dispute.

It is equally important in the opening statement that you explain the process to them so that they are convinced that you, and the process, are entirely neutral. As long as either party harbors doubts as to the neutrality of the mediator, resolution of the dispute will remain elusive. Even if you decide to set forth in detail in a written document the "rules of mediation" (as many practicing mediators do although I do not) prior to the commencement of the mediation I still believe that it is vital that the parties hear you verbally enumerate the "rules" and set forth the process which will follow over the course of the mediation in your opening statement. This enumeration gives the parties yet another opportunity to become comfortable with you and your style and to get in the proper mind-set for the mediation.

Finally, it is essential that you provide the parties with a sense of empowerment at the beginning of the mediation process through your opening statement. The structure of most domestic disputes is such that the parties generally feel powerless. They often feel that matters have spiraled totally out of their control. By letting the parties know that they are ultimately in control of the final agreement, it provides them with a hope at a time that they are often hopeless. The mediator can give them a reason to believe that resolution of their case is possible. This hope is a powerful tool toward obtaining a final resolution of the dispute.

B. Through Evaluation of the Parties

A good mediator begins evaluating each party the moment they walked into his/her office. Due to the often emotional nature of domestic mediations it is particularly

important that the mediator develop their ability to “size up” the parties and the dynamic between the parties as early in the mediation process as possible. Do the parties arrive together and talk comfortably with each other in your waiting room or do they come separately and barely acknowledge the existence of the other party as they sit at opposite ends of your waiting room? Is the participant “all business” or are they relaxed and casual? Does the party barely utter two words and let his or her lawyer do all the talking or does she/he clearly make their interests known to you?

Work hard to decipher all of the cues, both verbal and nonverbal, which each party presents to you in order to more efficiently unravel the puzzle which is their domestic dispute. If you fail to properly analyze the situation, you will find yourself stepping into a mine field which, if not carefully navigated, can blow apart your opportunity for success.

C. Identification of the Interests of Each Party

As previously mentioned, just as it is vital to properly evaluate each of the parties, so too is it vital to properly identify their individual interests. This can be accomplished in various ways.

The most direct manner in which to identify their interests is to ask them. This may seem obvious but often times it is easier said than done. Our legal system is often used by individual lawyers to frustrate the clear distillation of their client’s true interests. Certain lawyers seem to believe that by concealing the interests of their client that they can gain an advantage in the negotiation process. It is part of your job as mediator to navigate your way through the obstacles which are placed into your path in order to discern the very heart of the individual’s true concerns and interests.

When concealment of a party's interests is a problem in a mediation, I find that there is no substitute for speaking with that individual and their attorney at length in private caucus. In private, the parties and their attorneys are generally less reticent to disclose their true interests. Sometimes certain attorneys still believe that they can gain some tactical advantage by hiding their game plan from the mediator even in private session. In these instances, the longer that you explore various possible solutions with each of the parties, the more difficult it is for them to conceal their true interests.

D. By Knowing Family Law

It is essential in domestic disputes that the mediator have a firm grasp on family law and the workings of the legal system in family law disputes. Although you, as the mediator, cannot give legal advice, it is difficult, if not impossible to assist the parties in formulating a solution to their problem which will meet the approval of the Court (unlike civil disputes, all domestic mediation agreements must be approved by the Court in order for them to be enforceable) if you do not have a firm grasp of all aspects of family law.

Although the parties' individual attorneys can be helpful in this regard they are often too close to the situation to be willing to explore neutral options that can meet their client's needs/interests and at the same time not destroy the other party. Too often attorneys take a scorched earth policy into the mediation. They fail to see the proverbial forest for the trees. It is your job (in a respectful manner. Often in a manner that they do not realize that you have even done so.) to remind them that it isn't about winning or losing but rather it is about meeting their client's interests both in the present and long-term.

E. Flexible Thinking

Although the ability to remain flexible throughout the course of each mediation is an important skill for all mediators, it is particularly important throughout the course of a domestic mediation due to the general unpredictability of the parties and the multitude of variables mentioned previously.

When impasse arises over one issue be prepared to switch to another issue. Sometimes changing the subject and emphasizing some issues that you can make progress on will allow the party to rethink their previous position. If he/she can see tangible results in other areas that they may lose if they remain intransigent on the first issue which was in impasse they are more likely to compromise in order to keep their other gains..

Secondly, by being flexible and being willing to suggest creative solutions the parties and their attorneys are likely to appreciate the hard work that you are putting into their case. Getting the attorney on “your side” by coming up with multiple possible solutions can go a long way toward resolution of the dispute.

Being flexible is particularly important right up to the end of the mediation. It is not unusual in a domestic mediation to reach a “settlement” and then, by the time that you have typed up the agreement to have one or the other party think of one or two other items that they “forgot” to discuss and which they now want to negotiate. This can be an honest omission by the party or it can be a tactic designed to get one more concession from the other side. In either event it is a hurdle which must be addressed. You cannot let your personal frustration get in the way of continuing to work through to the end. If you stop being creative at that point, your “agreement” that you have worked so hard to achieve is likely to go up in flames.

III. Mediation With Pro Se Parties

Pro Se mediations in domestic disputes (one or both parties) are quite common but such mediations must be undertaken with caution. You must, I repeat, must never provide legal advise for either party. You are the mediator, not the lawyer for one or both of the parties. You must never forget that. You will live to regret it if you cross that line. It may not come back to bite you in any particular case but eventually it will. As I explain to the Pro Se parties in my mediations, once I start giving legal advise, I stop being legal. By definition, a lawyer's job is to represent someone and the lawyer must take someone's side. That is contrary to the role of the mediator. Therefore you must not go there.

With that said, the question then arises: Where is the line between providing information and giving legal advise? I have attached two ethical opinions from (one from Illinois and the other from Utah) which deal with this very issue. To date, there is no opinion in Indiana detailing this issue but I anticipate that it is coming.

It is my opinion that the line is crossed when anyone of the following occurs:

1. You provide the parties with your opinion as to what the judge will do in any given situation. I believe that you can provide the parties with guidance as to how you have seen other parties, faced with similar dilemmas do to resolve their dispute. I do not believe that you can tell them that they "should" take one course of action or another.
2. You should not draft a final decree nor a waiver of final hearing. These are legal documents. They cannot be construed as merely "writing up" the agreement of the parties.

I do believe that you can write up the Mediated Settlement Agreement. Although there can be some disagreement as to whether or not you should put a caption on the Agreement, it is my opinion that merely putting the caption upon the Agreement does not put you in a position of acting as an attorney in the matter. The document still cannot be filed with the Court without other accompanying legal documents

Mediation of domestic disputes involving Pro Se individuals is an area of mediation practice which is in flux. You should keep a wary eye on the advance sheets with regard to this issue in the coming years.

IV. Family Law Arbitration

Finally, I want to mention briefly the new Family Law Arbitration Act (I.C.34-57-5-1 et. al.) which just went into effect on July 1. I have also attached a copy of said Act to this article. It remains to be seen as to whether domestic arbitration will have any measurable impact upon domestic practice and ADR in Indiana.