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Family

The curious case of mediation resistance | AJ Jakubowska

By **AJ Jakubowska**

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(March 30, 2022, 10:41 AM EDT) -- Over the last 12 months, I have kept a curious and watchful eye on the family dispute resolution (FDR) landscape to see if the seeds planted by the amendments to our family law legislation were beginning to bear fruit. Many of us, members of the bench and bar, and FDR professionals, have hoped for years now that mediation would one day become the default method of resolving most family law disputes. I see some progress, even in the face of the unprecedented curveballs thrown at all of us by the pandemic, affecting our everyday practice of law and, importantly, the delivery of family justice.

Yet, I continue to encounter colleagues at the bar who are, frankly, mediation resistant. Some remain unclear on what mediation actually is and how it unfolds in practice. I am always encouraged by opportunities to answer questions about the process, particularly from new lawyers. Others still view litigation as the default, apparently unconcerned about the directive language of our legislation. Here are some examples of their responses to mediation requests:

1. "*This case is not suitable for mediation*" — Setting aside those involving domestic violence and obviously meriting very special and careful attention, most other family law cases are suitable for mediation. Not every mediator can mediate every case. Some issues require particular experience or expertise on the mediator's part, but we have a veritable sea of FDR professionals to choose from by this point. From my perspective, this is a disingenuous excuse. Counsel who co-operate in selecting the right mediator, who prepare their clients for a genuine dialogue, and who keep an open mind to creative solutions can make virtually any case suitable for mediation.

2. "*This case is too complex for mediation*" — Built into this statement is an underlying, albeit erroneous, belief that family mediators cannot match the judiciary in intellect, creativity or sophistication. FDR professionals come with as broad a range of experience and skill as do members of the judiciary. If you, a family law lawyer, are perpetuating the view that complex cases can only be resolved in court then you are doing your client a disservice. In practical terms alone, a mediator is very likely to have more time and opportunity to do the "onion peeling" required to truly get to the root cause of a complex dispute, delving into not only the parties' positions but also their interests. Mediation also offers many more possible outcomes because the settlement can be created with the participation of the parties themselves, giving them important buy-in as to arrangements they and their children will live with for a long time to come.

3. "*My client does not believe in mediation*" — If you, a family law lawyer, find yourself in this situation then you need to do the often hard but necessary work of educating your client on the merits and long-term benefits of the process. If your client responds better to a stick rather than a carrot, then show them the language of the relevant legislation and explain they might face a disapproving judge if the answer to the question: "Have the parties tried mediation?" is no, and your client's resistance is the reason. Or are you in fact the one who does not believe in mediation? Do you not believe in the process itself, or are you concerned your cases might

actually settle faster, affecting your bottom line?

4. "*If the mediation fails, it will be wasted money*" — That is like saying marriage is pointless because divorce is a possibility and that would mean money wasted on the honeymoon. The very potential that a mediated settlement might end or pre-empt a prolonged war between a couple, with great impact on their children, is well worth the cost of even trying the process. You can optimize chances for success by selecting your mediator thoughtfully and based on their unique skill and expertise. Working co-operatively with the other side, both on preparations and at the session itself, can also make a world of difference — you can actually prime your client's view of the process, through your own actions and approaches — predisposing them to the idea of settlement. Often, telling a client about the cost of the alternative, namely litigation, helps them weigh the pros and cons more realistically.

5. "*My client needs to hear from a judge*" — That is a tough one, I grant you, but is your client prepared to wait to hear from that hypothetical judge in their imaginary scenario, and is that judge actually going to say and do what your client expects? Here again, we have a job to do — to set realistic expectations and to talk with our clients directly and openly about the good and the bad of litigation, not forgetting to mention the costs and the psychological impact on all concerned as they wait for a resolution.

We need to work on a new and automatic word association in the public sphere. The word "separation" should immediately link with the word "mediation," replacing "court" in the minds of the public. We are making progress, but a lot of work remains ahead.

AJ Jakubowska is a family law lawyer, family mediator and SANE SPLIT podcaster. She practises in Newmarket, Ont.

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