



The Role of the Spouse in Mediation

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Winston Churchill once said, "My most brilliant achievement was my ability to be able to persuade my wife to marry me." As much as I agree with him, I never thought I could relate his prophetic statement to the mediation process. But there's a tool that is available to most mediation processes and is more often than not completely overlooked: The spouse as a decision maker.

Today's mediation landscape has become increasingly more complex in terms of what it takes to bring a dispute to a reasoned resolution. A mediator's "bag of tricks" now, more than ever, needs to include every available tool that might be useful in bringing the parties to settlement. A concerned and thoughtful spouse may be such a tool.

Let's look at a hypothetical situation involving a wrongful termination lawsuit: The plaintiff, a highly educated and experienced engineer, files a lawsuit against a former employer, alleging he was terminated wrongfully, without just legal cause and based on ethnic and racial discrimination. The employer's defense is that the plaintiff was abusive and threatening in the workplace, has a long history of such behavior, and that termination was therefore completely justified based on clear-cut company policy forbidding such behavior. The case is very hotly contested and there is a great deal of emotion and animosity, especially on the side of the plaintiff.

To complicate matters, by the time the case is in mediation, the plaintiff has unsuccessfully opposed a motion to withdraw by his attorney, and decides to represent himself instead. His difficulties with his former lawyer, a highly experienced employment specialist, only serve to increase the tension surrounding the case. The potential of a significant lien claim by his attorney adds another level of conflict to the dispute.

The plaintiff is angry at both his former employer and his former attorney, worried about his reputation in the industry and his future in his chosen career, and very firm in his belief that he is a victim of serious racial animosity, prejudice and discrimination, and as such deserves compensation.

Days before the mediation, the mediator receives a letter brief from the plaintiff, outlining how he has been wronged and detailing his "entitlements." On the same day the mediator receives a brief from the former employer outlining its defenses and an anticipated motion for summary judgment. The parties are miles apart and very set in their respective positions. Needless to say, there is not much optimism in the air when the mediation is convened.

To the mediator's surprise, the plaintiff brings his wife with him to the mediation. She is very articulate, engaged in the debate and is a strong advocate for her husband. The mediator is at first worried that her presence could doom the mediation. As a result, a decision is made not to have a joint opening session, based upon a concern that emotions would derail the process. However, as the mediation unfolds, in the back and forth of caucuses, it becomes apparent that she has terrific active listening skills and is ardently devoted to the best interests of her husband and their young family, and that those interests are not necessarily allied to the successful prosecution of the lawsuit or the recovery of large money damages. It becomes clear to all present, including the mediator, that the spouse is the real decision maker, and that factual determinations in the underlying case might be best left unresolved, to protect familial and marital harmony. This dynamic and the rational, reasoned and caring input from the spouse provides the mediator with another extremely helpful, practical and useful tool in his "bag of tricks."

All good mediators spend as much time as they can attempting to gain the trust of the parties, and their counsel. All at once, a pleasant surprise emerges from our hypothetical, which is fact and witness intensive with very strong and difficult legal issues. There is a second facilitator in the room, one who has instant credibility with the plaintiff, and one who in the matter of only a few minutes of conversation, conveys to the mediator what her interests, and thus her husband's, are. It is not about money as much as it is about closure. Of course there needs to be a monetary component, but the real interest to be satisfied is that of moving forward with their lives and ending the emotional drain of time and energy that the pendency of the lawsuit is creating.

The presence of the plaintiff's spouse gives a wise mediator a very useful tool in dealing with the employer and its counsel. He or she has a very credible "good cop, bad cop" scenario to play out with the defense. The spouse provides a calming influence in the form of a third-party (albeit an interested one) who is removed from the facts of the employment issues in dispute, and who is driven by an agenda that goes beyond the normal scope of the litigation or any damages that could be awarded by a judge or jury.

Of course the situation could be complicated if she is a table pounding, pound of flesh type of person. She is not. As a result, the case settles with a very satisfying final joint session, at which hands are shaken, details are agreed upon and the former attorney for the plaintiff agrees to waive any lien claim in exchange for a promise from the plaintiff not to sue for malpractice. Everyone's interests are taken care of and another year of expensive, time consuming, and emotionally draining litigation is avoided. This likely would not happen absent the presence of the spouse in our hypothetical case.

I certainly recommend to all mediators, especially in emotionally charged cases, that they explore in pre-mediation telephone calls, meetings or correspondence the potential involvement of a spouse or partner. Most of us as mediators demand that the "decision maker" be present at mediation. How many of us think of a spouse or partner as a "decision maker" in this context? My guess is that not enough of us do. I certainly did not until I discussed this hypothetical scenario with several mediation colleagues. I have handled in excess of 500 mediations in the last 15 years, and not one of my standard pre-mediation questions asks about a spouse or partner as being a necessary "decision maker." I have added that question to my checklist and I recommend all mediators do the same.

You too, may find that Mr. Churchill's statement was prophetic.

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