

Effective Advocacy in Mediating Complex Equitable Distribution Divorce Cases

By: The Honorable Winship C. Tower (Ret.)

I have successfully mediated many complex equitable distribution (“ED”) divorce cases and have debriefed many of the outstanding family lawyers involved for their feedback on the process. This article contains a compilation of resulting observations and ideas to enhance effective advocacy in mediation of these challenging and interesting cases.

Preparation

Lawyers who elect to use mediation in a complex divorce case are motivated to achieve agreement on an equitable distribution plan in order to avoid a lengthy, expensive trial and an unpredictable determination by a court. To realize the benefits of mediation, thorough preparation is essential because the financial stakes are significant and the issues are multifarious.

Effective advocacy in mediation requires lawyers to be as well versed in the facts and law of their case as if they were in trial. Mediation, like litigation, mandates critical advance groundwork to identify, value, and classify each marital, separate and hybrid asset, as contemplated in Va Code Ann. § 20-107.3.

Equally crucial to a successful mediation is lawyers’ preparation of their clients for the actual day(s) of session. The long and tedious nature of the process should come as no surprise to the parties. They will want to bring something to occupy themselves during the Mediator’s often extensive caucuses with the other side. Counsel should strongly recommend that their clients pack patience and perseverance in their bags. Both the lawyers and their clients must bring to the session a positive attitude and a strong commitment to its success.

Counsel are responsible to insure their clients enter into mediation with realistic expectations. Promising an improbable result is counterproductive. Promising a stake in the outcome of his future, however, empowers the client and furthers his investment in the process.

Confidentiality is an extraordinary advantage to mediation; lawyers must emphasize this to their clients. Privacy is of great importance to clients, as is closure. Clients want to move on with their lives, their investments and their businesses.

Discovery

In my practice, a joint conference call with the lawyers starts the actual mediation process. One of the first orders of business will be the status of discovery.

Informal or formal discovery to identify, value and classify the couple's assets is a pillar to a successful ED mediation. I have handled many complex cases before suit has been filed, but the feasibility of reliance on informal discovery turns on the level of trust between the parties and between counsel. More often, formal discovery will be necessary.

I follow up the joint call with ex parte pre-mediation calls with each lawyer during which I probe to insure that each side is satisfied with the documentation exchanged. It is not productive to schedule the mediation prematurely before each side has adequate information.

The individual calls provide an opportunity for the lawyers to educate the Mediator on case law to be relied upon, any expert's valuation methodology and any critical financial, emotional or personality issues likely to impact the process. At the conclusion of the call, the Mediator should be able to articulate the positions of the client, and the particular areas in which the lawyer is looking for help from the Mediator.

The joint and individual calls will include a discussion of written submissions. The lawyers can best prepare the Mediator by providing a written summary of the case as well as copies of settlement offers, key pleadings, documents and expert reports. A well informed Mediator will then have the means to keep the waters flowing towards resolution. The parties will have more confidence and feel they are getting their money's worth with a knowledgeable Mediator.

Once the mediation commences, counsel and the Mediator have to be equipped to address the various types of assets typically found in a complex ED case. Counsel will lose face with their clients if, in the midst of the mediation, it becomes apparent that neither counsel has sufficient information to address the vesting schedule, for example, of deferred compensation vehicles (incentive stock options, non-qualified stock options, restricted shares, performance units or the like).

Part of the mediation groundwork may be to hire an appropriate expert, whether an accountant, appraiser or forensic economist, to assist in analyzing the value, tax issues, applicable vesting schedules and/or transferability of diverse assets. Counsel may want to arrange for the Mediator to have a pre-mediation conference call with his expert(s).

All expert reports to be used in the mediation should be disclosed. Any plans to have an expert participate during the session should be revealed to opposing counsel and the Mediator. If one side feels blindsided or embarrassed because his expert is not available, this may create a barrier to settlement. Collaborating to choose one or more "joint" experts is ideal but rare, in my experience.

Valuation

Once counsel is satisfied with the information exchanged, I suggest they develop a mutually agreed upon chart format that lists each identifiable asset, even if value, classification or division have not been agreed upon. Working from the same format will make deliberation

more efficient, particularly if the Mediator has it in advance. Any stipulated values, classifications and divisions of assets should be set forth in the chart ahead of the session. Without fail, the values of some assets will be in controversy.

Each side's valuation experts will likely approach differently the valuation of assets, such as second homes, commercial property, closely held businesses, professional practices, and deferred compensation. Even appraisals of the marital home will frequently be at odds.

In this regard, counsel should equip the Mediator with a comprehensive explanation of his expert's methodology, so the Mediator can effectively convey it to the other side during an individual caucus. The Mediator can then work with counsel and the experts to effectuate compromise on valuations for purposes of settlement.

The Mediator may need to employ evaluative techniques, pointing out strengths and weaknesses to each side from a judge's perspective. In a complex ED case, she should have fluency in business valuation issues, such as over-compensation factors, capitalization rates, depreciation schedules, and business expenses. The Mediator should be conversant in income, market and asset valuation approaches, as well as the means of arriving at intrinsic value and discounts for marketability and lack of control. The Mediator's input into discussions of personal goodwill vs enterprise goodwill might induce concessions from one side or another.

Disputes over antique furniture and cars, art and jewelry can blow up a mediation as they present valuation challenges, exacerbated by sentimental value attachments. The parties and lawyers should be able to rely on the Mediator to defuse the emotional component, but effective advocacy also requires that lawyers confront these explosive issues in advance.

Pre-mediation efforts, as well as reasonableness during the mediation, will help resolve valuation disagreements critical to settlement. Education of the Mediator by counsel on their valuation positions is crucial to solid lawyering in ED mediations.

Classification

Not only must each asset be valued, it must be classified as marital, separate or hybrid. Property acquired during the marriage is presumed marital, *but* any claim by either side of separate or hybrid classification should be put on the table upfront in the first joint conference call. I use the ex parte calls to explore the evidentiary basis for any such, often querulous, claims.

I encourage counsel to exchange documentation that traces property alleged to be have been originally or transmuted into separate or hybrid classified property. Also, counsel should apply the *Brandenburg* formula and the *Keeling* analysis to any hybrid property, using their best and worst case application of the facts and the law. This can provide a range from which a compromise on classification might emerge.

The marital and separate share determination of pensions and retirement accounts usually involves a straightforward formula application. But the growth/loss on separate and marital shares of retirement accounts and any loans against them must be disclosed, creating trickier issues for classification purposes.

Classification can depend on whether certain property was a gift to one spouse or the other. What proof or indicia of gift exists? Gift issues are frequently hotly contested, and a court's ruling may not be predictable. Disagreements over an increase in value during the marriage of a gift (or other separate property), through active efforts of either spouse, lend themselves to compromise through mediation.

As with other ED issues, but particularly where classification is disputed, lawyers with persuasive arguments and the often voluminous tracing documents at the ready have an advantage. They are in a stronger position to convey effectively their positions to the Mediator to use in negotiating with the other side during caucus.

Division

Virginia law requires an equitable, not equal, division of marital property, taking into consideration the eleven statutory factors enumerated in Va Code Ann. § 20-107.3 (E). Whereas courts are restricted by statute as to the means by which assets can be divided in ED, mediation can provide creative and flexible options to sell, offset, buy out or transfer certain property in the case.

A lawyer must come into mediation comprehending his client's range, high to low, for an all-inclusive acceptable division of the property, prepared to provide the Mediator with an opening position on his preferred total asset division. How and when to modify the overall opening position or individual asset positions is a tactical decision the lawyer and his client have to make with each bargaining step in the mediation process. If the division of certain property is non-negotiable, he should advise the Mediator early on. The Mediator can help assess and craft allocation schemes agreeable to each party, as the case plays out.

The Mediator must consider both the emotional and financial impact on the negotiations. When the parties do not agree to a third party sale of certain property, the cost to buy out a spouse might require agreement not just on market value, but also on imputed costs of sale and hypothetical tax ramifications. On the emotional front, if one party entertained a paramour at the family ski chalet, the other spouse may be hell-bent on his not ending up with that chalet.

A party claiming more or less than a 50% division must have a compelling rationale for doing so. The Mediator should facilitate the venting early on in private caucus of any emotionally charged arguments for a non-equal split, such as marital misconduct, waste, or monetary and non-monetary contributions. Some clients cannot proceed rationally on financial matters until they have unloaded their intense feelings and grievances. Counsel and the Mediator ignore this at their peril.

A court will not have the authority to allow a party to recoup a premarital personal injury settlement that was spent on maintaining the parties' joint lavish lifestyle. However, motivated parties guided by astute counsel and the Mediator might want to think outside the box and consider how to make the "victim" spouse feel whole, solely on the basis of fairness. Such a concession may then bolster resolution of more significant financial matters.

If one spouse owns high valued non-transferable assets, such as stock options or an interest in a professional practice, he will undoubtedly vehemently resist a large cash payout to compensate the non-owning spouse. This tough issue often keeps the Mediator occupied for several rounds of caucusing before a scheme to address it emerges.

The nature of an asset may dictate its preferred division. Perhaps the developer husband should keep the commercial real estate that he has always managed and leave his wife the liquid investments. Joint debt often has to be paid off or refinanced. Counsel should have in his back pocket potential solutions to debt issues, as they often present barriers to settlement.

The unique features of qualified vs non-qualified deferred compensation, military, civil service and railroad pensions, and traditional IRAs vs Roth IRAs can all impact a fair division. If thorny tax issues are anticipated, tax advisors should be on call during the mediation process. Lawyers should have on hand model QDRO language, obtained in advance from plan administrator(s), to use subject to negotiation of the coverture fraction and percentage shares going to each party.

The issue of the waste of marital assets can absorb an entire day of mediation. (It is not likely that any court will afford counsel this kind of time.) Waste is a troublesome and sensitive issue, especially when huge sums have been spent on paramours, drug habits, and/or lavish selfish spending. If the waste is provable, a tactical play may be to concede it, rather than to ratchet up emotions in the mediation in tracing all the minutiae of expenditures on trips, jewelry, gifts, cars, boats, and a lover's plastic surgery.

In waste cases, it is prudent to prepare the client for the day of reckoning. In one case that I mediated the lawyer did just that. Once the amount of waste, over \$1,000,000, had been negotiated, the client was persuaded to treat that amount as part of his share of the division of the marital estate, and the case settled to everyone's satisfaction.

In mediating high stakes financial matters, it is critical to maintain good will, trust and integrity. Therefore, counsel does not want to get bogged down in inflammatory issues such as waste that engender suspicion and lack of good faith.

Documentation of Agreement

Prior to the mediation, counsel can hopefully agree upon the template of a stipulation agreement containing all the usual boilerplate provisions, any stipulated matters, and blank paragraphs for each issue to be mediated in the case.

Sometimes mediation seems like magic. But in reality it works, in part, because the parties' and lawyers' hard work and singular focus on the case at hand, with the assistance of a skilled mediator, enable them to come to their own tailor-made resolution of the case. But if everyone leaves the mediation, without a signed agreement, and returns to the fray of life and law practice, the written document may take weeks to be produced. Or worse, the settlement may fall apart as the good will and motivation engendered by the mediation itself diminish with time.

Effective advocacy dictates that, if at all possible, before adjourning, the mediation should conclude with execution by the parties and counsel of a comprehensive settlement agreement.

In closing, good lawyering requires advising clients of the potential benefits that the mediation process affords any divorce case. This is decidedly important when satisfactory resolution of complex equitable distribution issues needs the flexibility and creativity available only in a negotiated settlement. Effective advocacy brought to bear throughout the mediation process is crucial to its success.

The Honorable Winship C. Tower is a Retired Judge of the Virginia Beach Juvenile and Domestic Relations Court, where she served admirably for sixteen years. She is a Fellow of the American Academy of Matrimonial Lawyers and practiced family law and finance in the Hampton Roads area for twenty years prior to her appointment to the Court. Judge Tower currently serves as a Family Law Neutral with The McCammon Group.