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From Distrust to Resolution: Leveraging Mediation in Contentious Divorces

BY JUDGE SUSAN LOPEZ-GISS

Imagine this scenario: You are representing a client—the wife, in a long-term marriage of over 15 years, with children under 12. Despite the fact that their lifestyle doesn't suggest there is extra money, she insists that her husband is hiding assets. She is distraught and wants you, her lawyer, to “do everything you can” to make him pay. You have obtained a temporary support order...but she is convinced it is not enough. Your fees have been completely exhausted. You went to mediation at the Court-house, but she felt unheard and is consequently convinced that “when a judge hears my story...”

Who you gonna call? I suggest a case buster.

Every lawyer, litigator or not, faces this ultimate challenge—how can I prove that my client (but actually me) is right? Is the issue, the way you are presenting it, going to prevail?

For a family law practitioner, that question is complicated by emotions, lack of documents and, finally, a client who is looking to prove the other person is a liar.

As a former prosecutor and civil litigator for the City of Los Angeles, I learned that the more I knew about the opposition and my own client, the more effective I became. I am not simply talking about documentation; I am talking about how the other side presents. What triggers the opposition? How does my witness present when free to speak?

The best way to gather that information is through mediation. Mediation is a completely confidential process that allows you to observe your client and watch the opposition respond in a manner where nothing is “on the record”, helping you build your strategy. As a side benefit, it can also serve as a function to narrow the issues.

Family law doesn't have jury instructions. There is no legislative authority guiding the presentation of issues. An effective mediator can assist in determining the disputed

issues and obtain, at a minimum, an agreement of what specific questions need to be addressed.

Early mediation can therefore provide insight into the credibility of the parties and a framework of the issues at stake.

The key to success is in preparation. Based on my experience, both as a litigator and as mediator, I've found that these are the top three ways you can set yourself up to succeed in mediation:

1. Hold a joint conversation with both counsel and the mediator prior to the mediation to establish a framework for the mediation. For instance, how does the mediator conduct the mediation? Who goes first? What role do the parties expect the mediator to play?
2. Prepare a Joint Statement of disputed issues. What issues do *both* sides agree are in dispute—not simply “We disagree about everything”. If, for instance, the issue is support, what type of support? Spousal or child? And what are the sticking points? Oftentimes these include income, pre-marital agreements, time shares, among other assets. Be sure to list all disputed issues so the roadmap forward is clear.
3. Make sure the mediator recognizes that the parties need to vent. California is a no-fault state, but that doesn't mean the parties do not need to talk about fault.

A mediator who recognizes the importance of these three components has the information necessary to effectuate resolution.

Resolving these issues requires parties to recognize that there is risk inherent in every litigation. Parties who spend more money than they can, or do recover, either ignored or failed to evaluate the risk in their case. A family law judge has much codified discretion, e.g. California Family Code Section 3040-matters to be considered when granting custody. Judicial discretion translates to risk. There is no guarantee that two judges will rule the same on a given set of circumstances. Add to that the emotional state of the parties, and evidence that, in many cases, is in dispute



Judge Susan Lopez-Giss

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because of interpretation by experts or inconsistent testimony and certainty of results is diminished. An experienced mediator can articulate the risks to the parties and by doing so enhance each attorney's credibility. To quote from a movie—an attorney that chooses a mediator that identifies the potential weaknesses in your client's cases—helps that mediator to HELP YOU!

Following a remarkable legal career, Judge Susan Lopez-Giss was appointed to the bench in 2007 and served 15 years as a Judge, entirely devoted to Family Law. Judge Lopez-Giss presided over thousands of cases involving all types of contested and complex Family Law matters. Judge Lopez-Giss became known for actively and successfully settling her cases. Her strong legal mind and collaboration to resolve family disputes, has resulted in her reputation as an effective negotiator, problem solver, and adjudicator. She is available in the private sector for mediation and discovery appointments with ADR Services, Inc.

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