



FAILURE IS ALWAYS AN OPTION

BY JOSEPH HOHLER III

An email from the director of a dispute resolution center, for whom I mediate, crossed my desk somewhat recently, concerning the year-to-year settling rate of the domestic relations mediations at the facility. Two things stood out from the numbers:

1. Total domestic relations mediations were up, year-to-year, in a healthy way; and,
2. Settling rates for the same period were substantially down, in an *unhealthy* way.¹

Worrying about settling rates is reasonable. If dispute resolution centers are not resolving disputes, then what *are* they doing? However, focusing only on resolution rates misses two key things:²

1. There are legitimate explanations for variances in year-to-year settling rates not easily captured by a single number; and,
2. Settling isn't the point of mediation.

Why It Happens

When a mediation I recently conducted at the center went unresolved, I pondered the question – *why hadn't it settled?* In those circumstances I blame myself first – self-reflection is *always* a good starting point. Fortunately, one the parties stayed behind and was very candid about why it wasn't resolved and the challenge I faced in settling a matter that was *never* going to settle. The fact was, that these people were so hardened in their respective positions that, even should I have mediated *perfectly*, they *still* would have gone to trial, even if one had broken down and capitulated completely.

Trial for trial's sake – what was the point? What could be gained?

It clearly wasn't money – payment of any of the financial terms of the judgment would have been impossible, no matter *how* they came about. And it wasn't emotional validation or revenge they sought because each knew the court wouldn't do that.

Was it simply to be disagreeable?

In part, yes – even *could* they agree, they *still* would not.

But at its base, both parties felt entitled to a trial – no matter the outcome – and would have felt cheated without it.

To be sure, this case is an extreme example, though it does illustrate the point that sometimes we fail to find a solution because there is no solution *to* be found. In their own way, these folks are indicative of many of those passing through the center over the past 15 months, which is when the decline in settling rates began. It is also when the center began making a concerted effort to attract lower-income cases from our local family court, i.e., pro per litigants, to the low-cost mediations the center provides. Clearly, the effort has worked, as the number of domestic relations mediations are up.³ But, the influx of pro per cases may also be what is driving down the settlement rate:

- h Because pro per litigants do not have an attorney dipping into their pocket during the process, thus they don't feel the cost of litigation as others will, and therefore have no financial disincentive to sticking to their guns.
- h The influx of pro per cases might have brought in a greater number of folks immune to reality testing, a key part of any mediation. Without their trusted counselor/therapist/attorney/emotional buffer to disabuse them of their more fanciful notions, the only reality is the one they've created for themselves.⁴

That said, there are probably other reasons for the decline that are not pro per specific:

- h Some litigants only see the world in black and white, when successful mediations require appreciation of gray areas.
- h Some are simply racked with indecision, paralyzed by the consequences, and opportunity costs, of their choices.
- h Sometimes, the matter is simply too complicated for one, or both, parties.
- h Sometimes, the mediator is just plain lousy.⁵
- h Sometimes, people can't even agree to disagree.⁶

How To Fix It?

So, what's the fix? More training for the mediators? Or, is the solution in the litigants – can we find a better way to

prime them for the push/pull required of mediation? And if not that, just get them all lawyers?

The short answer is yes – yes to *all* of these. But also, no.

Yes, because more training will no doubt improve the quality of mediations and help break through to some of those who would otherwise refuse to compromise. The same could be said for injecting a qualified lawyer into the equation on their behalf – sometimes, that's all it takes. But also, no, because the questions posed rely on the fallacy that mediation is valued by the outcome. When we assume the value of mediation is based on the outcome, it follows that failure of mediation to reach an outcome is bad. And when we assume a failure to settle is bad, it reinforces the notion that mediation *must* resolve disputes. What's misunderstood here is that, if mediation *has* to result in settlement, *that's* not mediation—that's trial.⁷ To be a *true* mediation, in the purest sense, the failure to settle should not only be an option, it must be an *acceptable* option, which means the emphasis of mediation should be less on the outcome and more on the *process*.⁸

This is not to say resolution is immaterial, or pointless—it's not. Resolution is what attorneys seek and when it's achieved, it should be celebrated—perhaps my greatest failing as a mediator is forgetting to congratulate the parties when they can agree. But to treat the resolution as the be-all, end-all, is failure. The only thing a good mediation requires is communication as communication is the only way to free people from their recalcitrance. It helps get them over their inability to choose. It helps them see through the gray areas. It helps reality test. It builds trust.

Ironically, focusing on reaching an outcome only pushes *true* resolution farther away. Yes, it might resolve things, but not in the way mediation intends. In truth, the most undervalued thing in mediation is how powerful, and *empowering*, it is when the parties *know* they can say 'no.' It is strangely-counter-intuitive but, when people know they can say 'no', their 'yes' is that much more valuable, and, more freely given.

So, rather than focus on settled vs. not-settled, the focus should be here:

- h Did the parties have good communication?
- h Were they each heard?
- h Did they explore resolutions of their own creation?
- h Did they have the power to say no?

Only when all these questions can be answered 'yes' can a mediation be declared a success.

The Lesson

As attorneys, mediation is a different animal than what we're used to dealing with. If there is anything we should know about this process, it is that failure is always an option. In fact, this may be the one time in life where you get a free pass for failure. So enjoy it – you will not get this opportunity again.

About the Author

Joseph Hohler III is a family law attorney, and mediator, practicing in and around the home of the Western Michigan Broncos – Kalamazoo. He regularly volunteers at the Family Law Clinic in Kalamazoo, is a volunteer mediator in Kalamazoo, and is an avid runner. His personal best in the 5k is 18:42; in the 10k is 38:56; and in the half-marathon is 1:28.44.

Endnotes

- 1 It is worth acknowledging that I deliberately do not quote the numbers here. Unfortunately, the data needed to get a look at the long-term trend on the issue – if it *was* a trend – was incomplete, going back only 8 quarters. At best, we would get a short-term look at what might well be an anomaly. Nevertheless, because the email *assumed* a trend, I will too.
- 2 To be fair, I do not believe the focus of the email was *entirely* on settling rates, but given an email asking how to improve mediations led off with the settling rates, there is a strong assumption to be made.
- 3 We can see a *sharp* jump in family law mediations beginning quarter 2 of 2015, which is when the attempt to corral more family law cases.
- 4 It goes without saying that, absent attorneys, the mediator must do his/her best to reality test; but, given most mediators are strangers to the parties, the kind of relationship needed to effectively reality test may be lacking. Besides, if we all have a difficult enough time as an attorney with clients who want the same deal as Cousin So-and-so, who had *absolutely the same* situation, imagine the difficulty as the mediator.
- 5 I've *never* encountered *this* as a mediator.
- 6 The mediation described above was *exactly* this sort.
- 7 Or arbitration.
- 8 I have a notion that because there is such a focus on achieving settlement, many mediated agreements are reached through some form of coercion by the mediator and that if we remove those particular agreements from the equation, the true rate of settling at mediation is much lower than believed.