

Mediation, Self-represented Parties, and the Future of Family Law

By Lindsey A. Kujawa and Susan A. Hansen

In a recent firm meeting, we were discussing the changes that have occurred in the practice of family law from a time when most parties had lawyers to the present time when an estimated 70 percent are self-represented parties (SRP).

Questions from our new lawyer and law clerk centered on why so few parties are hiring lawyers and what we can do about it. Our resounding response was to highlight SRP mediation as an alternative for those who would otherwise choose to go without lawyers.

A Growing Trend

There are many views as to why the SRP numbers continue to grow. Reasons include:

- the escalating legal costs per case that has affected affordability at many income levels;
- the proliferation of internet “advice” (just Google it) and online or check box legal forms that have fostered a DIY approach for many, in lieu of seeing the need for or value of professional services (likely to expand with the growth of AI); and
- an increased public view of lawyers as exacerbating conflict and cost rather than as problem solvers.

For low-income parties, access to justice options are further limited by insufficient funding for legal services, leaving the court self-help centers often struggling to fill the gap. Even middle-income parties can find the cost of individual representation for each out of reach.

More Interest in Mediation

There have been varied responses by family lawyers from a business and practice perspective.

Size of family law firms and paid marketing has grown in some areas, as has cost for retainers and hourly rates, along with alternative billing structures including tiers of flat fees, point-of-service or pay-as-you-go, or incremental payment plans.

An increasing number of lawyers have expanded services to include limited-scope representation (including collaborative practice), consulting, and mediation, including both direct mediation with SRPs as well as impasse mediation with lawyers and retired judges.

At both our firm and our lower cost Family Mediation Center (FMC), we have seen significant growth in public interest in mediation as a process choice by SRPs. Our first-year associate has a caseload that is over 80 percent mediation. In addition to courses offered by other educators, we have trained over 200 lawyers, commissioners, judges, and mental health and financial professionals through FMC.

Statewide, numbers of mediation cases are difficult to estimate, since many lawyers who mediate do not officially register on CCAP for eFiling purposes, despite the availability of a drop-down filing option for lawyer mediators.

For lawyers and the parties themselves, mediation offers a one-lawyer bridge between the choices of do-it-yourself and each party hiring an advocate lawyer. Even courts are ordering some SRP couples to mediation as a pretrial dispute-resolution intervention.

Wisconsin is a trendsetter in the area of family law mediation. SCR 20:2.4 allows a lawyer serving as a mediator with self-represented couples in family law cases to neutrally draft and file all legal documents necessary for their agreement and implementation with the informed consent of both parties.

Mediation and Your Practice

Mediation provides a business growth opportunity for lawyers, since many parties who choose to mediate would otherwise not hire lawyers. What is essential is that lawyers understand the shift of perspective and skills necessary to transition from client advocacy (legal advice) to neutral guide (legal education).

In addition to making the paradigm shift and acquiring a new skillset, lawyers who want to provide mediation services need a complete review and revision of their intake process and case management structure.

By way of example, here is a summary of the process we use at our firm and the panel lawyers use at our FMC:

We begin with a no-charge initial call (generally 15-20 minutes). Sometimes both parties are on that call and other times it is just one party. In that call, we provide a brief explanation of all process choices, explain mediation as a joint neutral lawyer process, and outline the options for next steps – either an individual consult for potential representation or a joint consult for potential mediation. If the party is interested in

mediation during that initial call, we ask that they speak to their spouse about using mediation to navigate the legal process.

If the spouse is willing, we then have a similar no-charge call with the spouse about process choices and options for next steps.

It is essential to explain the mediation role of a neutral lawyer as legal educator and guide in a way that maintains neutrality, avoids confidentiality concerns or any advocate legal advice, and keeps the door open for mediation.

After the initial calls, we schedule a flat-fee Joint Education Meeting (JEM) – up to two hours for \$300 firm, \$250 FMC. At that meeting (in-person or Zoom), we explain all process choices, provide an overview of the law, outline the steps of the legal process, highlight the value of the interdisciplinary mediation process with a family and/or financial specialist, and explain how mediation will help them navigate their divorce. We do not ask anyone to commit to mediation at the JEM.

If subsequently retained as lawyer mediator via a signed mediation retainer agreement, we obtain biographic data and questionnaires focused on safety and goals and interests. We then schedule one-on-one meetings with each party for safety screening and process design assessment.

Thereafter, meetings are typically joint. At the first joint meeting, we review the Joint Petition/CPA and share interests and goals for the process, assign the financial document gathering and FDS homework and schedule future meetings. If there are minor children, the parties may also start their parallel mediation with the child or family specialist to work on their parenting plan.

The second mediation meeting includes a financial specialist if needed. The agenda is a walk-through of a draft of a Joint Financial Disclosure Statement and Property Division Worksheet, and TaxCalc if time permits. We assure full understanding of all data on the FDS and begin discussing preliminary property division worksheets and Marital Settlement Agreement topics, including child support calculations if applicable.

The number of mediation meetings varies depending on the complexity and communication between the parties.

Once the parties have come to a full agreement, the lawyer mediator drafts the final pleadings and does a complete review with the parties before signing, to assure they fully understand their agreement and are prepared for the final hearing.

The process ends with the parties attending their

final hearing (without the lawyer mediator, who is not ethically permitted to appear in court), and any follow-up necessary after the hearing to be certain all implementation steps are completed (e.g., QDRO, Quit Claim Deed).

Adding Mediation to Your Practice

Making the shift in a traditional legal practice to offering mediation requires training, practice, consultation, and self-reflection, to assure competence as a mediator and support for the growth of skilled and structured mediation as a positive process choice.

Lawyers who are experienced client advocates and trial lawyers need to set aside their litigation perspective and learn new skills to function effectively as a neutral lawyer working jointly with a pro se couple in mediation. It is a shift from telling parties what to do to helping them reach their own agreements. Moving between the processes is challenging but possible.

In our experience, here are helpful tips for lawyers interested in starting or growing a mediation practice:

Attend a quality, in-depth training program: 25 hours is the minimum for Wisconsin custody and placement mediation, 30-40 hours is available for introductory divorce mediation training; and additional advanced trainings are offered online.

Starting with a strong foundation and understanding of best practices is key, and ongoing learning is essential. There are a number of quality training programs in the area in addition to the one offered by the Family Mediation Center, and numerous advanced programs are available online.

Begin every potential client call with an explanation of all process options: Staff and lawyers need to understand that keeping the door open for mediation requires an open-ended initial contact about process options to avoid compromising neutrality. Each person who calls should be informed of their process options and their ability to choose the process that best suits their family and financial needs.

Offer a flat-fee, no obligation, Joint Education Meeting: Our JEMs are designed to allow the parties to receive information about process options and the law without any pressure to sign a retainer agreement. This enables both the parties and the lawyer mediator to make an informed decision about whether mediation is a fit. In our experience, couples readily recognize the value of this meeting in providing legal education and supporting well-informed decisions from the outset.

Use an interdisciplinary process: The effectiveness and family value of mediation is enhanced when mediation is an interdisciplinary process with

mental health and financial professionals as either lead mediators or as child/family and financial specialists incorporated by the lawyer mediator as part of the mediation team. Interdisciplinary mediation creates the best opportunity to utilize the skills of each profession and incorporate their specialized expertise in the process for the family's benefit. This helps curb legal costs for the family and opens the door to interdisciplinary cross-referrals.

Understand the profound impact of your presence: Effective mediators understand that a calm, neutral presence is a critical skill in facilitating productive conversations during the emotions of separation and divorce. Providing a clearly structured process and a space where all parties are treated with respect sets the stage for open discussion of the topics and gives the parties the confidence to move toward agreement. A neutral presence is much more than not giving advice – it is a friendly, optimistic, non-judgmental, and calm demeanor to help the couple skillfully navigate their negotiations.

Cultivate a network of mediators: As you shift your practice, you are bound to run into issues or have questions. Building a network of other lawyer mediators and interdisciplinary professionals to consult with is invaluable in working through challenges you may face.

An Opportunity

Mediation provides an opportunity for lawyers to grow their practice even as the number of SRPs continues to rise. Mediation is not a panacea that can resolve all of the issues and challenges for SRPs or family lawyers, but it can be a positive process option that benefits the parties, lawyers, and the courts.

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