

## Ethics

# What to do if a Client Interprets Our Attempts to Help them Reach Agreement as Coercive



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*The Ethics Committee shares this information so that we all continue to grow our skills and promote public confidence in mediation as a process for resolving family disputes. We share this information to our community and trust that it will **not** be disseminated in any way beyond our members.*

The Ethics Committee recently received a complaint where the complainant shared that he/she felt the mediator used “fear” tactics to get him/her to agree to certain terms. The complainant acknowledges that the mediator made clear that the participants should retain their own attorneys, but he/she was concerned about the cost to do so and felt that the attorney would likely not advise differently than the mediator had done. The complainant said that the mediator used a “gun to the head gesture” when discussing what terms would be accepted by a court. The complainant also reported that the mediator said: “you will be killed in court.”

Interestingly, the other participant had a different perspective and indicated that, after multiple drafts and revisions and extensive discussion, at the time of signing, the complainant hesitated to sign the document and was visibly upset. The other participant reported that the mediator responded to complainant’s nervousness by saying, reassuringly, something along the lines of “nobody is putting a gun to your head” and reminding the complainant that, until it is signed, or even afterward, the terms could be revisited.

The complainant did sign the agreement and after consultation with other counsel, the document was used as the basis of a divorce filing.

***What to do if a client interprets our attempts to help them reach agreement as coercive***

Pursuant to the Model Standards of Practice for Family and Divorce Mediation (“Model Standards”), we should all recognize that mediation is based on the principal of self-determination by the participants.

### ***Standard I***

Paragraph A, Self-determination is the fundamental principle of family mediation. The mediation process relies upon the ability of participants to make their own voluntary and informed decisions.

Paragraph B, The primary role of a family mediator is to assist the participants to gain a better understanding of their own needs and interests and the needs and interests of others and to facilitate agreement among the participants.

A mediator shall facilitate the participants’ understanding of what mediation is and assess each participant’s capacity to mediate before the participants reach an agreement.

### ***Standard III***

Paragraph C, The family mediator should be alert to the capacity and willingness of the participants to mediate before proceeding with the mediation and

throughout the process. A mediator should not agree to conduct the mediation if the mediator reasonably believes one or more of the participants is unable or unwilling to participate.

*A person's perception is their reality.*

If people perceive you as coercive, it does not matter whether or not you intend to coerce them. Mediators need to be sensitive and choose expressions which are carefully and sensitively worded.

Mediators typically work with participants who are in some form of crisis. Stressors are known to influence a person's state of mind or exacerbate an existing mental illness. Mediators should avoid using definitive terms when explaining to a participant that they might be unsuccessful if they pursued their proposal in court as the mediator could be accused of coercion, intimidation and undue influence. For example, using statements like, "You'll NEVER get that in court" should be avoided. Statements like these could seem innocuous, but they can easily be interpreted differently due to the mediator having the perceived power and expertise in the mediation process. Intervention by the mediator could interfere with a participant's ability to consider all of the options, or to determine for themselves what is in their best interests. Mediators should try their best to empower participants to make their own decisions using different methods of mediation (directive, facilitative or transformative) to support participants.

A mediator may hazard a guess based upon experience about what COULD happen in a court, but one never knows until they are in court what WILL happen. Good practice would be to say, "in my experience ..." or "trends in current case law are ....". Expressions like "You'll get killed in court" evokes mental images of violence and could be perceived as threatening.

Mediators should routinely and repeatedly remind participants of their right to retain and consult with separate attorneys, during the mediation process. You can tell them verbally, during sessions, in writing in the Mediator's Agreement to Mediate, Retainer and in the Parties' Settlement Agreement, and again before they sign a Settlement Agreement.

*Standard XI*

Mediators should not forget Standard XI of Model Rules: the Mediator has the right to suspend the mediation process if the Mediator believes that a participant is unable to effectively participate.

Additionally, if you find that a participant appears unable to make decisions or is using profane or threatening language, banging on the negotiation table or withdrawing and refusing to make eye contact with you, take advantage of all resources available to you. Suggest that the participant retain a divorce coach to help him or her through the process. If a participant refuses your suggestion, blaming financial constraints, you may suggest that mediation be temporarily suspended, and that funds be used to pay for other services to help that participant navigate through emotional issues. Sometimes this option is better than the participants having unproductive mediation sessions. Alternatively, you could call in another mediator to co-mediate the case with you. Sometimes having another person in the room will diffuse the situation. You should keep records of all alternatives you have suggested to help your client(s) in the event a complaint is filed against you, or simply to refresh the client(s) recollection.

As mediators our goal should be for our clients to take ownership and responsibility for the terms of their Agreement. We must present ourselves as neutrals and use language that reflects this. We should not give the impression of wanting an Agreement more than our clients.

We encourage all members to reach out to their colleagues for advice and support if you have a challenging case.

*1 Of course, there was much greater texture to this matter that is not shared here.*

*2 As Barry Berkman once remarked, "If lawyers could agree about what would happen in court, no one would ever go to court."*