

Fox Rothschild Podcast

Featuring New Jersey Family Law Attorneys Robert Epstein and Eliana Baer in Princeton

We are talking today about how to pursue the best outcome from a divorce mediation with Robert Epstein and Eliana Baer on Fox Rothschild Podcast. Robert and Eliana are attorneys with the firm's New Jersey Family Law Group. They are frequent contributors to the firm's New Jersey Family Legal Blog and helped to develop the firm's New Jersey Divorce app for mobile devices. Robert, Eliana, good morning.

Robert Epstein and Eliana Baer: Good morning. Thank you.

Question: *Robert, in your recent blog headlined "Stop, Collaborate and Listen," you write about the fact that these golden words are so easily ignored by divorcing spouses in the midst of what often are heated settlement talks. In your judgment and in your experience, why is this?*

Robert Epstein: The perfect way to explain this is by a mediation that I recently attended in a case where, as soon as I walked into the mediator's office, my adversary refused to stop talking or arguing his client's position, and he just refused to "collaborate" with me, my client or the mediator to facilitate a settlement. Not surprisingly, he wouldn't "listen" to anyone other than himself. Not surprisingly, the case didn't settle, and the parties left dissatisfied with the outcome. The only progress that was made at the end of the day was when my client made proposals on various issues, since the other party refused to do so. In fact, it was clear from the moment that we started the mediation that the other party had no intention on settling at all, which was a position facilitated by his attorney, and a sentiment that I made clear in requesting to leave early so that my client did not have to spend any more on counsel fees than she already had.

Eliana Baer: Considering that the entire point of mediation is to actually settle a case, or at least to move toward a settlement, it's always surprising to me when this sort of conduct occurs, even in the wild world of family law.

Question: *Robert, with that in mind, what is the first thing you encourage your clients to follow while trying to settle in mediation?*

Robert Epstein: The first is to just stop. At the mediation I mentioned before, the other attorney seemed to believe that if he was the first person to assert his client's position, it somehow meant more to the mediator. The same can be said for the amount of time that he spoke. What I mean by that is that he believed that the longer he spoke, the more important his client's position became, and the less important my client's position became. In that world, the case simply is never going to settle and will only heighten the acrimony.

Eliana Baer: It is no surprise that family law cases can often be quite acrimonious, with attorneys frequently arguing with each other at least as much as the parties. Such conduct, however, ultimately serves no one. Worse, one or both parties or the attorneys often feel the need to essentially “run” the mediation by only allowing their points to be heard, talking over the other party (and attorney), interrupting the other party (and attorney) while feigning insult should the same happen while he or she is talking.

Question: Eliana, how can warring parties even then try to collaborate?

Eliana Baer: Well, keep in mind that the entire point of mediation is actually to settle your case. While you as the litigant may not agree with the other party or attorney (actually very common), use your best efforts to work together, in a collaborative fashion, to achieve a meeting of the minds on the issues in your case. Consider the positions being taken by the other party and, if reasonable, work with those positions to reach a compromise. If you and your spouse are starting in different “universes,” then there is only so far you can go. But if you are on Mars and she is on Venus, however, then keep the momentum going. Ultimately, a good settlement is one that neither party is happy with because each side has given on certain issues.

Robert Epstein: Look, if one party refuses to budge, the case is going to continue. It’s as simple as that, which is sometimes what that party wants to do. They want to force the opposing party to give in, to surrender, to incur more fees as a result. In the mediation I referenced before, the other party was completely unwilling to convey his prior settlement position to the mediator because he had obviously taken a step back toward a more aggressive approach. He did not want to make it seem as if he had previously been more reasonable because then he thought that the mediator was going to make a different recommendation. While a litigant is entitled to engage in that kind of conduct, why mediate at all unless either (1) you’re just trying to fulfill your requirement to the court; or (2) send a stern “message” that you will not be denied in what you want? These tactics are also so transparent to the other party and the attorney and only cause the other side to push back more, and, again, the litigation is going to continue.

Question: So Robert, with all that in mind, how can someone listen when everyone else is talking?

Robert Epstein: In the mediation we’ve been discussing, my adversary refused to allow his client to talk, and I don’t experience that often. But it was interesting that even that client could have provided something that was useful or thoughtful, that could have helped reach a settlement. Literally, for four hours, he sat there silent, while his attorney, myself, my client and the mediator spoke. And when his client spoke up and tried to offer something useful, his lawyer would literally chime in and say, “Stop speaking.” Again, what is the point of attending a mediation if that’s what’s going to happen, unless there’s really an intention to send a message of “I will not compromise?”



Eliana Baer: Parties in a divorce matter often don't want to listen to each other, or worse, the lawyers may love listening to only what he or she has to say. Typically, progress can only be made when both parties are willing to listen to each other, understand the other's position and collaborate. I try to follow the mediator's lead and always encourage my client to do so, to get a sense of the other party's intentions while also providing the mediator with a level of respect that allows him or her the best opportunity to successfully perform the task of settling the case.

***Question:** Robert, in closing this podcast, what do you recommend?*

Robert Epstein: Look, while no one can force a party to settle, New Jersey's court system will certainly do whatever it can to make you try to settle as many times before a trial occurs. Rather than wasting everyone's time and money by turning a mediation into a private trial, it's better to serve yourself and your wallet by working toward an amicable resolution in mediation, rather than away from one.

***Narrator:** Well, thank you Robert and Eliana. Listeners, to confidentially discuss concerns you may have about mediating your family law dispute, please contact Robert Epstein in Roseland, New Jersey at 973.994.7526 or Eliana Baer in Princeton at 609.895.3344.*

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