MEDIATION DO’S AND DON’TS – TIPS FROM A MEDIATOR

Introduction.

The purpose of mediation is to maximize the potential for settlement prior to the case going to trial. In the substantial majority of cases, both parties want to settle. Even in cases where the conflict level has been exceptionally high, most often there is some part of each party that wants to settle rather than going to trial.

In order to maximize the potential for settlement at mediation, each side must be educated in the practicalities and legalities of that client’s own position as well as the other party’s position. Each side, both attorney and client, must be able to acknowledge the other side’s goals and good points. Each side must be prepared to give and take in order to reach agreement and avoid the financial cost, emotional toll and uncertainty of trial.

This presentation will focus on what to do, and what not to do, to make a mediation successful.

What to Include in Submissions.

In every dissolution case, there are basic documents which should be submitted:

- **Do submit** a letter which outlines the issues and your position on those issues.

- **Do submit** a completed Financial Declaration or Settlement Conference Declaration in every case.

- **Do submit** a property and liability allocation spreadsheet.

- **Do submit** proposed parenting plans and child support orders. Consider bringing them on a disk or emailing them to your mediator for use at the time of the mediation.

- **Do submit** a copy of the parenting plan evaluation, Guardian ad Litem report if parenting is at issue.

- **Do submit** a copy of your real estate appraisal or business valuation if appropriate. If you have issues with regard to such assets, it can be extremely helpful to have your expert submit a critique of the other side’s expert’s appraisal or valuation which explains the differences between the two reports.

- **Do submit** copies of temporary orders if they include provisions which are relevant to settlement, such as where you have issues of back due support or maintenance or where issues (e.g. attorney fees or characterization of payments) have been reserved for settlement or trial.

- **Do submit** copies of case law which may support your client’s position if you have a unique or unsettled issue.

- **Do submit** documents which are relevant to a disputed issue such as where the character of property is being disputed; copies of paystubs where overtime or bonus income is in dispute; credit card statements where the nature of a charge is in question.
What Not to Include in Submissions.

- Do not submit full copies of depositions – if necessary, provide the relevant pages which support your argument.

- Do not submit documents which support issues, values, etc. which are not in dispute.

- Do not submit, as a rule, copies of pleadings other than temporary orders.

Content of the Mediation Letter.

There are many styles which can be used for the mediation letter. My partners and I are frequently asked what a mediation letter should include or exclude.

- Do include a statement outlining the names of the clients and their attorneys; the names and ages of the children; the date of cohabitation, if applicable, together with the date of marriage and date of separation; the ages, employment, income and health of each party; the name of your assigned judge and date of trial.

- Do include a summary of the issues, together with describing any points of agreement arrived at by the parties prior to the mediation.

- Do include facts which support your client’s position as to the proposed parenting plan, if parenting is at issue.

- Do include your rationale for seeking maintenance from the other spouse or, conversely, why your client should not be expected to pay maintenance or should pay less maintenance than what the other spouse is requesting. It can be helpful here to outline the factors set forth in the statute to support your client’s position. This would include discussion of relevant health issues; a plan for employment or, conversely, retirement; incomes available from all sources; the parties’ ages and financial resources and obligations.

- Do include an explanation as to the child support worksheets which you have submitted; i.e. how you have computed each parent’s income and deductions; whether withholding tax has been computed automatically by the software or whether you have calculated it by itemizing deductions; support for any special expenses which you have included on the worksheets; cost of health insurance; whether you are using the current child support schedules or those which come into effect on October 1, 2009; whether you are seeking deviation or upward adjustment to the standard calculation of child support and the reasons for your request.

- Do include a general description of the assets and liabilities of the parties. If you are claiming a separate interest in an asset on behalf of your client, explain the basis for this claim and refer to the documentation which supports the claim.

- Do include the basis for your request for payment of attorney fees and costs, if applicable.

- Do include a summary of what your client is proposing if you haven’t already done so.

- Do not include inflammatory statements in your letter, even if the case is highly conflicted. Effective advocacy does not necessarily mean that you need to inflame and antagonize the other side.
How to Give the Mediation the Best Opportunity to Succeed.

As we all know, while mediations are certainly far less expensive than litigating, there is still a substantial amount of preparation time involved, both in preparing the paperwork and in preparing the client, and a significant amount of cost. For many of your clients, the cost of a settlement conference or mediation is a substantial investment. The following is a list of tips as to how best to insure that the process is successful or, putting this another way, how not to sabotage the mediation.

**Review the other side’s letter with your client in advance of the mediation.** It is crucial to review the opposing side’s materials with your client in advance of the mediation – at least several days in advance, if possible, so that your client can digest the information.

- **Review the parenting evaluation, GAL report, business evaluation or other expert report with your client before the mediation.** Similarly, it is critical that your client have the opportunity to review and discuss the parenting evaluation or GAL report, if parenting is an issue, or the other side’s appraisal or business valuation, if those assets are at issue, before the time of the mediation.

- **Explain negotiation strategy to your client.** It is critical for your client to understand that, especially in family law, there is a range of options for reaching a fair settlement and that there are few black and white lines.

- **Leave room to negotiate.** On rare occasions, we have attorneys come in with an opening proposal which they inform us is their client’s only and best proposal – that there is no room to negotiate.

- **Listen to the mediator.** The client should understand that you have chosen your mediator by agreement because you believe that mediator to have the experience and knowledge to facilitate settlement of the case.

- **Have necessary discovery completed prior to the mediation.** If a critical report or portion of discovery cannot be completed prior to the mediation, consider rescheduling if time allows.

- **Make sure your client is emotionally ready for the mediation.** Timing of the mediation can be also be critical. Be sensitive to whether or not your client is ready to mediate (or as ready as possible).

A Mediator’s Pet Peeves.

While I cannot speak for all mediators everywhere, I can speak for myself and for my partners as to what actions make us lash our teeth and make the mediation process more difficult.

- **A party who makes an outrageous proposal or, conversely, a party who makes no proposal at all.**

- **Not sharing submissions with the other side.**

- **Late submissions.**

- **Failure to schedule enough time for the mediation.**

- **Reluctance or refusal to make the 1st offer.**

- **Submissions which are not organized or tabbed.**

- **Faxing or emailing lengthy documents without first obtaining approval.**

- **Failing to alert us in advance of any time constraints.**

- **Failure to alert us of the attendance of third parties, including experts.**