

ABA SECTION OF FAMILY LAW

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Successful Mediation Techniques

Start strong and stay settlement focused



BY MAURICE JAY KUTNER AND KATHRYN DEVANE HAMILTON

A successful mediation is all about knowledge and trust—the cornerstones of the attorney-client relationship.

The initial interview

The initial interview is the single most important event in that relationship, because it begins the discussion and development of realistic goals, which ultimately must be agreed upon. The probable case outcome, whether at settlement or trial, is assessed and approximated

initial interview is the time for the lawyer to decline representation because the relationship is doomed.

During the initial interview, give the client a “client kit,” that includes copies of the statutes, rules of procedure, deposition instructions, and coparenting publications. Throughout the case, provide the clients with copies of all papers received or generated in the case. Schedule regular case evaluation discussions with the client and support team, including experts and family members.

Premediation conference

Prior to mediation, meet with the client and support team to discuss all phases of the mediation process, client and attorney roles, case evaluation, probable trial result,

financial affidavits, expert witness reports, and a mediation memorandum that contains: (1) a summary of issues; (2) a range of trial results; and (3) a proposed distribution chart of assets and liabilities, reflecting appropriate asset assignment and reasonable numbers.

Mediation day

Start early and set aside an entire day. Thorough client preparation guarantees that your side will spend less time with the mediator. During opening statements, all comments should be constructive, convey a desire to settle, and effectively advocate positions without alienating the other side.

Closure

We prefer to execute a complete agreement at mediation and provide that the mediator will serve as the binding arbitrator of any ambiguity that may arise, as opposed to “arranging” for future drafting, which usually leads to “buyer’s remorse” and a failed mediation. **FA**

IF THE CLIENT CONTINUES TO CLING TO UNREALISTIC GOALS OR A “SPECIAL” AGENDA, DECLINE REPRESENTATION BECAUSE THE RELATIONSHIP IS DOOMED

within a given range based on total candor, integrity, and a full and frank discussion. The lawyer, demonstrating knowledge, experience, honesty, and skill, advises the client as to both the procedural and substantive aspects of the entire process. In addition, the lawyer provides a definitive game plan and immediately corrects any false or shaded outcomes expressed by the client. If the client continues to cling to unrealistic goals or a “special” agenda, the

items that may not be achievable at trial, and the range of settlement options. Explain to the client the roles of each of the “players” (spouse, parents, adult children, counsel, and experts), their possible motivations and contributions (positive and negative), and how we expect each person to respond during the mediation process.

Attorney preparation

Cases that are ready for trial are the ones most likely to settle. Prepare



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