

THE ART OF MEDIATION: CLIENT PREPARATION

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INTRODUCTION

Every case in our firm goes to mediation, and a vast majority settle at that stage of the proceedings. This article focuses on preparing the client to seize the opportunity to settle all or part of the case, if and when a settlement in their best interest can be reached.

CLIENT PREPARATION AND THE INITIAL INTERVIEW

By far, the initial client interview is the single most important event that occurs between the attorney and client, because:

A. Realistic goals for closure are discussed and agreed [ftnref1\[1\]](#) upon.

B. Mutual trust and confidence are established, based upon integrity, full and frank discussion of goals, and the probable [ftnref2\[2\]](#) case outcome, whether during settlement or trial. It is the lawyer's obligation to acquire the operative facts at the initial interview, and advise the client about certain fixed and predetermined outcomes. For example, we know that in the absence of special circumstances, all marital assets will be evenly divided. We also know that the stay at home spouse, in a long term marriage, will receive permanent alimony. A stay at home spouse, who is the primary caregiver to minor children, will also likely be designated the primary parent, in the absence of special circumstances. The lawyer, demonstrating his knowledge, experience, honesty, and skill,

advises the client as to both the procedural and substantive aspects to expect during the entire process.

C. The lawyer does not state or permit the client to express any false or shaded outcome which is false, misleading or unrealistic.

D. The most satisfied clients [ftnref3\[3\]](#) are those that are well informed and never surprised during the proceedings, because the lawyer has laid out the possible scenarios for each phase of the case. The majority of clients appreciate knowing the good and the bad news during this emotional and unstable time of their life.

PREMEDIATION MEETING

Approximately four to seven days prior to the scheduled mediation, an appointment should be made for the client and any of the client's support network attending mediation, to come to the office to thoroughly prepare the client for mediation. The areas that should be understood by the client are:

A. The mediation process at all stages.

B. Client participation juxtaposed to attorney participation.

C. Case evaluation, which includes the probable trial result.

D. Discussion of items that may not be achievable at trial: for example, requiring the payer spouse to obtain insurance for the alimony, a payout on equitable distribution and security for the payout.

E. Strategy, including specific issues to be resolved and an understanding of the "players." [ftnref4\[4\]](#)

F. Documents to be prepared for mediation:

- (1) Financial affidavit.
- (2) Expert witness reports, including summaries or oral pronouncements.
- (3) Summary of the issues for mediation and trial.
- (4) Equitable distribution charts.

MEDIATION PARTICIPANTS

The attorney and client should jointly decide, based upon the attorney's experience and advice, who should attend mediation.

- A. Forensic experts.
- B. "Support people," including family members.

THE DAY OF MEDIATION

The mediation day itself should be carefully planned with constant client involvement:

A. Place of Mediation

- (1) Client comfort: Schedule the mediation where your client is comfortable. If neither party is comfortable at either law office, consider doing the mediation at a neutral location.
- (2) The comfort of the opposing party: While client comfort is a premium, you must also be cognizant of the fact that if the other side is not secure in their surroundings, they are less likely to achieve a comfort level to reach closure.
- (3) Start time: Make sure you start early enough and schedule enough time to settle the issues. It is not uncommon for our firm to participate in mediations that do not finish until 10:00 P.M., or even midnight! Personalities, egos and the idea of letting go of the marriage takes time. The more you prepare your client prior to mediation, the less time your side will have to spend with the mediator.
- (4) The client should arrive early at the location of the mediation to have enough time to get comfortable with the surroundings, before the mediation starts.
- (5) Refreshment, food, and beverage issues.

B. The First Move

- (1) Sitting together: The opening statement
 - i. Constructive comments
 - ii. Conveying the desire to settle
 - iii. Advocating your position effectively, without alienating the other side.
- (2) The First Demand
- (3) The First Offer
- (4) The High-Low Game

CLOSURE AND SIGNING

Our procedure is to close, draft, and sign a marital settlement agreement, at mediation, before anyone leaves. Allowing everyone to go home prior to signing leads to buyer's remorse. Drafting, even as early as the next morning, leads to additional

negotiation of items to which the parties have already agreed to in the marital settlement agreement.

SETTLEMENT CLAUSES

Because "midnight" drafting is problematic, we have developed the following paragraphs, which provide significant protection. After all, the mediator (turned arbitrator) was present and knows the deal:

- A. "The parties agree to waive confidentiality of the mediation process, in the event of an ambiguity in the language or the meaning or intent of the agreement."
- B. "The parties agree that in the event of an ambiguity in this agreement, the parties shall submit the issue to binding arbitration with Alison Weinger, Esquire" (the mediator used).