

A BAKER'S DOZEN

Suggestions for making your next
mediation a successful one

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1. SELECT THE RIGHT MEDIATOR

- Choose a mediator who is compatible with your client's personality
- If you have a client who bristles when pushed, avoid an aggressive mediator
- Consider choosing different mediators to handle different disputes, i.e., one for the parenting plan and one for division of property
- Ask other attorneys to recommend a mediator

2. CHOOSE THE RIGHT LOCATION FOR YOUR MEDIATION

- Choose a neutral location
- Ensure that accommodations are comfortable, with easy access to restrooms, refreshment and additional space for caucusing or breaks.

3. PREPARE YOUR CLIENT FOR THE MEDIATION

- Ease client's anxiety by describing the mediation process.
- Let the client know that the mediation process involves give and take. Help set the tone for potential compromise.
- Do what you can to help your client have realistic expectations.
- Make sure the client understands that good settlement is one in which neither client achieves a "home run" result, and that both clients may experience some level of disappointment.

4. PROPERLY PREPARE THE MEDIATOR

- Submit a position statement to the mediator that summarizes key issues, set forth party's position on key issues. Include copies of significant documents.
- Counsel should agree prior to mediation whether position statements will be sent confidentially to the mediator or provided to opposing counsel.
- Consider contacting the mediator in advance of the mediation to alert him or her to any issues or unique dynamics that might come up during the mediation. Private caucus between the mediator and the party or party's attorney may be helpful.

5. OPENING STATEMENTS BY COUNSEL SHOULD BE AVOIDED

- Opening statements can be counterproductive to the process, and may alienate or anger the opposing party.
- A skilled mediator can convey one party's position to the other in a less confrontational way than the attorney for one of the parties.

6. HAVE A NEGOTIATING STRATEGY

- Decide whether or not to engage in negotiation prior to the mediation conference, or whether it is preferable for the parties to proceed to mediation with no prior negotiations.
- A pre-mediation negotiation, involving an initial proposal and a counter proposal, can be helpful to the process by helping to set the parameters from which parties will be expected to negotiate.
- Determine whether negotiations should proceed with “baby steps” or more significant moves. Clients who are relatively sophisticated as to the issues and expectations may be able to move forward more efficiently with larger moves.
- Consider the use of “brackets” or “boxes” to expedite the negotiation of strictly financial terms. A bracket proposal is one in which a party communicates a settlement range and the party receiving the bracket responds with a counter-bracket.

7. USE CAUCUS STRATEGIES TO AVOID IMPASSE

- If a mediator believes that one or both attorneys are an obstacle in the negotiation, the mediator may invite attorneys or the clients to caucus separately with the mediator.
- Consider having parties meet with the mediator without their respective attorneys. This may be less desirable if one party is perceived to be a stronger negotiating power than the other.

8. ALLOW PARTIES TO VENT EARLY IN THE MEDIATION

- Encourage clients to put emotions on the table to set the stage for a less emotional meeting going forward.
- A good mediator will reframe points in a less threatening, less emotional manner to avoid derailing negotiations.
- Allowing a party who believes that he or she has been wronged the opportunity to be “heard” can be cathartic and therefore instrumental in reaching a successful agreement.

9. CONSIDER MULTIPLE MEDIATION SESSIONS IF APPROPRIATE

- Mediation can be emotionally and physically draining. Monitor client's status and request adjournment if it seems warranted.

10. ENCOURAGE PARTICIPATION BY INDIVIDUALS WHO CAN AFFECT THE NEGOTIATIONS

- In situations where a client is actively receiving support with respect to the negotiations, it is more efficient to have these individuals present during the negotiation.
- Consider having conversations with expert witnesses (i.e. accountants) to give the attorneys and their clients a better understanding of differences in respective opinions.

11. WHEN PARTIES ARE AT AN IMPASSE, REQUEST A MEDIATOR'S PROPOSAL

- A mediator's proposal is a suggestion made by the mediator for a resolution between parties with respective lines in the sand. A skilled mediator will explain to the parties and their counsel why the mediator believes that the proposal is fair.
- The Mediator's Proposal can provide a basis for parties to discuss with their respective counsel the pros and cons of settlement.
- Such discussions should include the respective attorneys' opinions as to that party's BATNA (best alternative to a negotiated agreement) and WATNA (worst alternative to a negotiated agreement).

12. INCORPORATE ANY AGREEMENTS INTO A SIGNED MEMORANDUM OF UNDERSTANDING

- It is imperative that any agreement be written into a Memorandum of Understanding to be signed by parties and their counsel. The Memorandum of Understanding is critical in the event of post-mediation disputes.

13. IF PARTIES ARE UNABLE TO REACH AN AGREEMENT, SET THE STAGE FOR FUTURE MEDIATION SESSIONS

- In the event of an unsuccessful mediation due to incomplete understanding of financial issues, the mediator can facilitate an agreement as to discovery steps to be undertaken. Once such information has been obtained and exchanged, the mediator can bring the parties back to the table.
- If an impasse has occurred due to unrealistic expectations of one party, the mediator should discuss with the party's attorney the sources of this, and determine whether this issue can be addressed with the party.

Thank you.

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