

**MEDIATION - *The Act of Mediation - "Are You Ready to Settle?"***

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# **THE ART OF MEDIATION CLIENT PREPARATION<sup>1</sup>**

## **INTRODUCTION**

1. 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**

2. 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<sup>2</sup> upon.

B. Mutual trust and confidence are established based upon your integrity, a full and frank discussion of goals, and the probable<sup>3</sup> 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 on 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.

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<sup>1</sup>These materials were prepared by Maurice Jay Kutner and Kathryn DeVane Hamilton.

<sup>2</sup>Obviously, this is the "ideal." If the listed concepts cannot be agreed upon between attorney and client, the initial interview may be the time for the attorney to decline representation. A client that cannot be realistic at the initial interview is not likely to be realistic throughout the entire case, especially during mediation.

<sup>3</sup>Within a given range, all of us are able to approximate what would happen with any given case.

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<sup>4</sup> 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 during their life.

#### **PREMEDIATION MEETING**

3. 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 pay out on equitable distribution and security for the payout.

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<sup>4</sup>These are the clients that give you the most glowing praise to their friends and associates and are some of your best referral sources.

E. Strategy, including specific issues to be resolved and an understanding of the “players.”<sup>5</sup>

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**

4. 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**

5. 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.

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<sup>5</sup>One of the most valuable tasks in your mediation preparation and strategy session is to assist your client to understand all of the “players”, and their motivations and contributions (negative and positive) to the mediation: their spouse, opposing counsel, the mediator, “support people” to both parties and the experts. Giving into something that may be relatively significant to the other side, (but may not even change the case outcome) may settle a case.

(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 their 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**

6. 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 negotiating on the items of which the parties have already agreed to in the marital settlement agreement.

### THE KUTNER CLAUSES

7. 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/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).

**APPENDIX TO THE ART OF MEDIATION CLIENT PREPARATION**

**Memorandum for Mediation . . . . . A**

**New Legislation on Mediation Confidentiality  
Family Law Reporter . . . . . B**

**Wife's Memorandum of Law in Opposition to Husband's  
Motion to Enforce Mediated Settlement Agreement . . . . . C**

**Wife's Memorandum of Law  
(Seeking to exclude oral testimony to enforce mediated agreement) . . . . . D**

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**ATTORNEY/CLIENT PRIVILEGED  
FOR SETTLEMENT DISCUSSION ONLY**

**STYLE OF CASE**

**MEMORANDUM FOR MEDIATION**

DATE

DATE OF MARRIAGE:

DATE OF FILING:

CASE NUMBER:

TRIAL DATE:

JUDGE:

OPPOSING COUNSEL:

FORENSIC ACCOUNTANT:

MEDIATION DATE AND PLACE:

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**I. ANALYSIS OF THE NEUTRAL FORENSIC ACCOUNTANT:**

**A. The Husband's Income:** The accountant has computed the husband's annual income at \$95,208.96. Of this amount, \$27,522 were "add backs," consisting of charitable contributions, travel, meals and entertainment, medical insurance and medical reimbursements.

**B. The Husband's Expenses:** The husband's monthly expenses (per his financial affidavit), are \$12,159.76. Based on his monthly net income of \$7,008.42, he claims a monthly deficit of **\$5,151.34**. A considerable portion of this deficit stems from his visitation expense (\$3,000 per month) in traveling to Florida 15 days per month.

**C. The Marital Estate:** There are no non-marital components, as all assets were acquired during the marriage (the wife does have an expected inheritance from her father's estate). The real estate values for the Ohio and Fort Lauderdale homes are derived from appraisals. The real property owned by the husband's businesses have also been appraised, utilizing an income capitalization approach.

*The parties have agreed*

## II. PROBABLE RANGE OF TRIAL RESULTS:

A. Equitable Distribution: The Court will most likely rely on the analysis of the neutral accountant regarding the husband's income and the value of the marital estate, since he is the neutral agreed upon forensic accountant. It is probable that the Court will award an equal distribution of the marital assets. See Equitable Distribution Worksheet for detailed listing of the marital assets.

### B. Alimony:

1. Duration of Marriage: This is a 12 year marriage (gray area in terms of classifying marriage as long term for permanent alimony purposes).

2. Marital Lifestyle: The wife's income is approximately \$250,000 per year. In 2001, her income, including the sale of stock options, was approximately \$360,000. During the marriage, the wife paid the Ohio and Florida mortgages funded through her account in which she deposited her IBM paycheck. The husband's financial affidavit shows a \$5,000 deficit per month.

Based on the disparity in incomes and the fact that an equal distribution of assets will not provide sufficient income to the Husband to maintain his lifestyle, the Court should award rehabilitative alimony (3-5 years) to the husband. It is clear that the husband has the need and the wife has the ability to pay rehabilitative alimony. A compelling factor should be that the Wife unilaterally moved the children to Florida, requiring the husband to incur visitation expenses in the amount of approximately \$3,000 per month to maintain a relationship with the children.

C. Child Support: We will prepare a guidelines worksheet.

## III. ATTORNEYS' FEES, SUIT MONIES AND COSTS:

A. Total Payments:

B. Outstanding Balance <sup>1</sup>:

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<sup>1</sup>This amount does not include work in progress.

- C. **Trust Balance:**
- D. **Hold Back:**
- E. **Fees of Other Professionals:**

IV. **PRIOR SETTLEMENT DISCUSSIONS:** The client has had some settlement discussions directly with the Wife. The prior offer, as indicated by the client, was as follows:

A. **Real Property:** The wife would retain sole interest in the Fort Lauderdale home and would be responsible for the mortgage in the ordinary course. The husband would retain sole interest in the Ohio residence and would be responsible for the mortgage payments.

B. **Business Interests:** The husband would retain sole interest in all his business interests.

C. **IBM Stock and Options:** The wife would retain sole interest in all her IBM stock and stock options.

D. **Retirement, Brokerage and Bank Accounts:** The parties would each retain the accounts in their own name.

E. **Personal Property:** Divided in kind.

V. **CLIENT GOALS:** At minimum, the client would like the following:

A. Our client has repeatedly emphasized the importance of frequent and extended time with his two children. He would like to secure at least 10 continuous days a month with his children, during which he will take them to school and attend to their homework and all activities.

B. The client would like to retain sole ownership of all his business interests, the Ohio home, his IRA and other bank accounts, and the \$50,000 certificate of deposit. This would require an unequal distribution in his favor (see APS' equitable distribution worksheet). At mediation, we should emphasize: 1) the prior appraisal for Gem City property is high because this entity no longer has income from Ryder truck rentals; 2) the pending wrongful

death lawsuit exposes the husband (and the wife as a 5% shareholder) to a significant liability.<sup>2</sup>

C. The husband would like the wife to contribute to his visitation expenses or make the mortgage payments on the Ohio house. Based on my gender neutral analysis, it should be argued that the wife has the ability to pay and the husband has the need for periodic alimony in the amount of \$5,000 per month (the current amount of his monthly deficit) for a period 60 months. Will the Court be gender neutral? This would total \$300,000 in alimony payments. We should use this number to offset the wife's argument for an equal distribution of assets, since it appears that our proposed distribution calls for the husband to receive approximately \$400,000 more in assets than the wife.

## **VI. GAME PLAN:**

A. Let us see if we can get the Wife to make the first offer -or- demand.

B. We have to keep the client focused and reasonable since his expectations as to the probable trial results are totally unrealistic!

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<sup>2</sup>The husband only has insurance coverage of \$1,000,000 and any judgment over this amount exposes the husband to personal liability.