

FAMILY LAW MEDIATION: THE MASTER CHECKLIST
by Mark E. Sullivan

INTRODUCTION

In a large number of family law cases mediation offers the best hope of problem resolution and dispute settlement. Trials are costly in terms of time and money as well as bad blood between the formerly married parties. It takes time to get the case on the docket, and then there are usually several issues to resolve, necessitating several different hearings. Letters and written proposals usually come up short, with the net result being only so many more trees cut down in the rain forest. Given the raw emotions and frayed feelings often found in marital dissolutions, many couples aren't quite ready for face-to-face negotiations.

Mediation offers a better alternative. When a party needs to "tell the story," as so often occurs in the aftermath of a bitter separation, the mediator is there to listen, to understand, to sympathize. When someone is needed to carry a proposal to the other side with candor, encouragement and support, the mediator can do it best; as an uninvolved intermediary, he carries none of the "baggage" that often accompanies a settlement offer from opposing counsel. And when an outsider is needed to pick up a strained or aggressive proposal and give it a bath in the cold water of reality, the mediator can do it best. For all these reasons, mediation is the domestic lawyer's best dispute settlement tool.

Domestic mediation can be a race horse of a different color, however. It bears little resemblance to mediation in a case involving land condemnation, personal injury commercial contracts or worker's compensation. Equitable distribution cases are often multi-level, complex disputes involving numerous issues. These "moving targets" can involve classification of marital, separate, mixed and divisible property, putting a value of the assets in each category both at separation and at trial, and distributing them equally or unqually: Child support and custody/visitation problems must be solved promptly and fairly with an eye to the future, since these parties will, through their children, continue to maintain some sort of relationship after the settlement is done, unlike most parties to a dispute. Future enforcement problems and tax considerations put a premium on creative drafting of the settlement instrument; a well-

written one can last for decades and continue to return value to the parties who signed it.

For these reasons, it is important to approach family mediation much as one does a used car for prospective purchase. While there is certainly some value to walking around and kicking the tires, so to speak, it's much better to have an organized approach to the ordeal. And that means using a checklist.

"A wife may not have any incentive to negotiate when she retains exclusive occupancy of the marital residence, receives substantial support and does not work."

--Gary Skoloff, *The Art and Craft of Successful Divorce Negotiation*

BEFORE MEDIATION

- ___ 1. **Decide if this case is meant for mediation.** While many cases have a good chance of settlement in mediation, some will never be closed in this way. Take the measure of your case and see if it's a candidate for mediation or not. Does the other side want to reach an agreement? Is there any reason for *your client* to agree on a settlement? What are the incentives promoting agreement? What will each side lose if the case is finished with a mediation instead of a trial? For example, Mr. Jones may want "his day in court" for purposes of vindication, embarrassment of his ex-wife or other reasons. Mr. White, who has control over all of the family and business assets, may see no reason why he should negotiate a settlement which will only divest him of some of these. If Mrs. Brown is receiving a hefty amount of temporary alimony, why should she have any incentive to negotiate a different settlement for final alimony? One side may have nothing to gain and much to lose by engaging in a mediation. When this situation is present, you'll save time and money by discarding the idea of mediation in favor of setting a prompt date for trial. While trials are costly, in this case mediation would probably just add unnecessary expenses to the front end because the other side has no incentive to settle and would probably prolong the settlement

negotiations indefinitely.

___ 2. **Choose the right mediator, or “Who ya gonna call?”** Choosing the mediator is a vital initial decision. Do you want a tiger? Or perhaps a tiger lily? Is the case right for someone who can act as the impartial umpire, standing apart and carrying offers and messages back and forth? Do you want an involved intermediary who, after listening to both sides, begins to offer independent suggestions on how to settle the case? Will your client listen to and respect a mediator who weighs in with some opinions of her own as to the merits of the client’s position? “Hands off” and “hands on” are two of several possible styles that mediators adopt. Background and experience are other factors in deciding on a mediator. Do you need a certified mediator, or will an untrained attorney do? Do you want a former judge, who might have enhanced credibility by her ability to point to cases she has had when on the bench? Do you want a North Carolina lawyer who is board-certified in family law (over 100 in the state), or a Fellow of the American Academy of Matrimonial Lawyers (fewer than 30)? Do you even need an attorney? Perhaps a psychologist would do if the issues are visitation and custody, or a CPA would be useful if the matter involved finances (support or property division). Spend some time analyzing the the case and your client to see what kind of mediator and mediation style is right, and then call around to get the lowdown on which mediators can offer your case and your client what you need.. *Do not* call the mediator unless you have the opposint attorne linked into the phone conversation; not only does this smack too much of “shopping around,” but it also taints the expected neutrality and objectivity that the mediator brings to the settlement table.

___ 3. **“Is the time right?”** Choose the optimum time for settlement discussions. If your client has just been brought to his knees by an onerous award of post-separation support or a preemptive strike involving interim allocation, perhaps the passage of a few weeks or months might help smooth the road for mediation. Your client might be in a bitter and oppositional frame of

mind if her husband just walked out of the marriage to spend the rest of his new, middle-aged life with his common-law secretary. On the other hand, the client might be agreeable to a mediation session if some time has passed since the separation, the time and legal expenses have taken their toll, feelings of anxiety and uncertainty about the future are present, or the prospects for a “better deal” do not appear bright on the horizon. The timing of a court date can work both ways in prompting mediation. In some cases, it is best to schedule a mediation close to the threshold of the trial so that the fear of a decision over which they will have no control will drive the parties to a bargain. At other time, the fact that the trial is in the far distant future has the effect of moving the parties toward mediation which can speed up the resolution of their domestic case. Analyze the time dynamics of the case. Time is not a neutral factor, ticking away quietly in the background. It is a dynamic, active factor which can drive the entire case to settlement or trial. If John needs to get the case over with quickly so he can marry his secretary, then time is against him and may prompt a settlement meeting. If Jane needs to have a custody order so she can move back to Ohio with the kids, then the time factor might be useful in her case to get mediation moving. Discuss the issue of mediation candidly with your client to find out if it’s worth pursuing at this time. And continue to pursue it until the client is ready or else makes a final and informed decision against it.

- ___ 4. **Before mediation: Prepare, *Prepare*, PREPARE!** In a limited sense, you can use mediation for discovery, that is, you may probe and explore your opponent’s position. This latter point is, of course, important if you wind up in trial - you have used the time in your failed mediation fruitfully to make the other side show its hand. In a broader sense, however, mediation is *not* for discovery. Discovery must be accomplished before the mediation starts. No truly effective mediation session can be held while the attorneys are trading documents and data. The time for this intensive review of your case and the other side’s is *before* the mediation begins. At least a month in advance of mediation, do an inventory of two items -

what *your own side* needs to produce to be ready for mediation, and what you need from your opponent. Then start assigning tasks and deadlines for your own “internal discovery” and send out a request (by phone, mail, fax or e-mail) for the other side’s information. Tailor the requests to your opponent so that you are not doing boilerplate requests for “everything you’ve got.” This type of request bespeaks no preparation at all. Rather, examine what your position is, what you need to support it or clarify it, and go get the information that you need. In a simple spousal support matter, for example, you might need the other side’s financial affidavit, last year’s tax returns and a current pay stub. For a custody case you might require school progress reports and report cards, plus a copy of the last two years’ medical and dental records. In a pension division matter your request might include the annual benefit statement and the summary plan description for a private plan.

- ___ 5. **Outline your issues.** Make an outline of what issues must be resolved in the mediation. This should include substantive ones (custody, decision-making on major issues, visitation for weekends, summer, holidays, travel logistics) as well as administrative ones (separation agreement vs. consent order, attorney’s fees if breach, incorporation of agreement into divorce decree, future mediation if disagreements or changes occur, etc.).
- ___ 6. **Determine a starting time.** Then give yourself some time with the client before the session begins to listen to any last-minute concerns or questions. Clients can be nervous about mediation, even though (or perhaps *because*) they control whether a settlement will be reached; this is your way of showing a little extra consideration.
- ___ 7. **Rehearse “give-and-take” with your client.** Neither side can demand results in a mediation. Your client can neither force a settlement nor have one forced upon her. She has control over the outcome in the same sense as the other side does - no mediation agreement will result from the session without joint agreement. For this reason, you’ll want to do a “shakedown cruise” with the client to find out the answers to a lot of “what-if” questions. Your rehearsal might

include the following give-and-take questions: Suppose the other side refuses to extend alimony beyond five years? What if they won't budge on the amount, not offering over \$1,000 a month? What can we trade if they won't transfer the house over free and clear? How do we respond when they demand a share of *our* pension? Make your client think about the answers to these questions in advance of the mediation so she is ready to confront reality and the dynamics of give-and-take bargaining.

- ___ 8. **Prepare the client for what to say.** Go over with your client how the mediation will take place. Try to give him a generally accurate description of where to sit, how to dress, what to bring (documents, pictures, etc.), whether to address the other party or not, how to respond when you ask him questions, and how to signal the need for a break (to ask a question, to add a concern or just to get a drink of water). Emphasize the need to take a businesslike approach to the issues and the importance of controlling emotions so that principles, not passions, rule in the mediation room. If your client needs to "vent," it may be wise to have him do it before the mediator only, instead of in a five-way conference. That way, the mediator can truly understand what motivates your client without the dangers of spending unnecessary time reciting past peccadillos or former faults, or inflaming the other side to the point that agreement becomes impossible.

DURING MEDIATION

- ___ 9. **Set time limits.** At the outset decide on stopping points, if applicable. When will be lunch break be? At what time will the mediation conclude? Are there any set-in-stone deadlines? You *don't* want to be at the point where you're about to write up a memo of the settlement, only to hear opposing counsel say, "Oh, I have to run - I told the sitter I'd be home by 6 to fix supper for the twins!"
- ___ 10. **Listen to "Why?"** The best advocates have tight lips and big ears. They listen to the other side and, when a break occurs, then tend to follow up with "Why?" instead of responding

immediately with a counterpoint. Getting to the bottom of the other side's position, with reasons, past problems or expectations, can be helpful in solving those problems in mediation. There's no such thing in mediation as "That's *their* problem!" If a legitimate problem, not a feigned one, exists, the mediator and the parties need to understand it, to explore it in depth, and to try to solve it with creative lawyering and skillful drafting - "thinking outside the box." Finding out what motivates the other side is the key to writing a successful agreement if those needs and requirements are genuine. And if they are not bona fide needs, then listening to "Why?" will help to prepare a good counter-argument in reply or, if the mediation fails, a good case in court.

- ___ 11. **Role-play with the mediator.** If you're having trouble getting your client to "come around" to a settlement, use the mediator in a role other than as messenger, just carrying offers back and forth. Ask the mediator to "play judge" for a while, giving some opinions on how the issues would be resolved in court. This can sometimes nudge a reluctant client into a settlement by using the neutrality, experience and objectivity of the mediator as part of the persuasion. Have the mediator explain the problems that are holding back the other side from agreement, the goals that the other side has. Get her suggestions on how to respond to those problems or to achieve a mutual fulfillment of goals. Ask her to propose what can be done to win the settlement without "giving up the farm."
- ___ 12. **Use 3-way meetings.** It's a good idea to meet with opposing counsel and the mediator alone to get to the bottom of an impasse. Quite often the mediator will be able to see, explain and articulate the issues and viewpoints which are preventing an agreement. Perhaps he believes that movement on Issue A will produce more progress than dithering on Issues X, Y and Z. Maybe there are some documents which he recommends your client produce. Does he see a "hidden agenda" on either side which should be mentioned first to counsel before laying it out before the parties? Make an ally of the other attorney by committing to nudge and push your

client in Area A if she'll do the same to get movement in Area B and C. Work on ways you and the other attorney can cooperate for mutual benefit through positive recommendations to the clients. Focus on problems to be solved, not personalities. Look to the future, don't dwell in the past.

- ___ 13. **Limit what you say.** You should make a studied decision as to what you say in the mediator's presence and what you let the mediator tell the other side. Sometimes this approach will enable the mediator, if allowed to sit in on the attorney-client session, to convey more clearly to the other side what is holding up an agreement. When you do this, discuss it first with the client to decide how much role-playing there will be. You might want your client to take a forceful position before the mediator, without you as the voice of reason. Or it might be the opposite. Or there might be *no* role-playing at all, with everything *on the record* and available for the other side. You should know that the mediator will honor what you tell her about taking information to the other side and you should use this to your advantage. Many mediators will start a session with the statement, "Whatever you say to me will be fair game for me to repeat to the other side, unless you instruct me otherwise." Play an active part in deciding what the mediator can carry into the other room as what will remain behind. If you don't want the mediator to sit in on your counseling sessions with your client, say so. That way, you can invite the mediator to join the two of you once you have firmed up your position or response, and not before.
- ___ 14. **Listen to the mediator.** When the mediation is slowing down and doesn't appear to be making much progress, ask the mediator how to keep it moving along. Mediators have a vested interest in effecting a successful conclusion to each and every mediation that they conduct. Sometimes the mediator, when invited to comment, will respond with something dramatic: "You need to tell them that you're fed up and will be walking out in five minutes." At other time, she'll suggest that small movements; for example, when the other side is only

making small adjustments to their position, you should respond in the same way with nickels and dimes of change in each counterproposal instead of big bucks. Get the perspective of the mediator on the process that is going on and how to promote prompt resolution.

- ___ 15. **Be honest.** No settlement is worth risking a bar complaint or grievance. If the other side has made a mistake on the math, point it out to them promptly. Never use the other side's inattention or lack of understanding to help settle a case. These problems will come back to bite you later on, and it's not worth that hard-earned law license to settle a case with a major misunderstanding on the other side. Stay within the rules. The settlement doesn't have to be fair; it *does* have to be *right*.
- ___ 16. **Be persuasive.** Nothing that's written about mediation says you have to leave your persuasive abilities parked at the mediation room door. Do you have exhibits you'd use in trial? Bring them. Are you adept at Powerpoint? Prepare a set of slides which you use to show the mediator - or the mediator and the other side - at the outset of the session. If the case involves equitable distribution or alimony, come armed with your spreadsheets and also your laptop (in case some numbers need adjustment during the meeting). Appealing to the eye and the ear make your persuasion tools doubly powerful.
- ___ 17. **Close the deal.** Make sure there are no stones left unturned at the end of the meeting. The mediation advocate should be adept at *closing doors* as well as opening them. If you have, for example, settled everything but the pension, don't just leave it out. If the pension is to be waived, say so. If it is to be resolved in court, write that down. While some say "Silence is golden," the domestic attorney know that in agreements "Silence is deadly." *When in doubt, write it out.* Don't let the omission of an item, such as the availability of attorney's fees in the event of breach or the incorporation of the agreement into a decree of divorce, be the subject for a later fight between the parties. If at all possible, leave nothing for later resolution; if there is any such open item, write down exactly what it is, how long will be given for

resolution, and what the consequences or default result will be if there is no agreement. The author found this out the hard way. In one mediation opposing counsel begged off signing the settlement because of “dinner deadlines” and asked that her client be given a week to think about the settlement and discuss it with her CPA. It was nine months later, at the cost of many thousands of dollars, that the final revised settlement agreement was signed by the wife!

AFTER MEDIATION

- ___ 18. **Sign the settlement.** When a session is winding toward conclusion, the good advocate whips out his laptop and starts to draft the agreement. All too often a settlement is lost because the parties shake hands at the ends of the session and fail to finalize the agreement. The document to prepare is the final settlement agreement, not just a brief memo of this. If you can write up the entire agreement, you can close the case file on that issue upon leaving the mediation room. Be sure to have the appropriate templates on your laptop for a separation agreement, a parenting plan or a consent order. Remember, the job isn’t finished till the paperwork is done!