

Knobel Mediation Services, LLC

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A MEDIATION PRIMER 101

From the "practical" to the "psychological" -
10 guaranteed ways to reduce your client's mediation fees
and greatly increase the opportunity for a successful mediation

1. If your clients or you have any questions regarding the mediator's fees and the mediator's billing/invoicing practices, communicate those questions/concerns with the mediator immediately and before you engage the services of the mediator. It is important for you to realize that the Ethics Advisory Committee of the South Carolina Bar recently issued an opinion, which stated, in pertinent part, "...if an attorney hires a mediator, the attorney is responsible for ensuring timely payment. If the court orders a mediator, the attorneys should look to the courts for assistance in determination of how the payment will be rendered".
2. As soon after the mediation date, time and location have been confirmed, have your administrative assistant send your mediator (by e-mail, scan, fax or mail), the following basic information:
 - a. The pleadings.
 - b. Any order, which has been entered of record.
 - c. A completed and accurate financial declaration (the current 2/2009 version). It is fine to send the financial declaration, which was filed for your initial hearing, unless that version is more than 6 months old (however, if all of the entries on the "old version" remain exactly the same, then advise your mediator of that fact).
 - d. A brief memorandum of the "relief" your client is interested in seeking at the mediation (mark it as "confidential - for mediator's review only").
 - e. Any written settlement offers which may have been exchanged with the opposing attorney.
3. Realizing how busy you are, if you have scheduled the mediation comparatively well into the future (e.g., a month or longer), please do not wait until the week before the mediation to begin forwarding the requested information. As in any case, if you treat the mediation process as "something to get through without your having to do too much work in preparation", you've actually wasted your client's money, because the "window of opportunity" for a successful outcome becomes too narrow. Just as you

must prepare for a trial, you should at least give your mediator an opportunity to prepare to conduct not just a mediation session, but also a successful mediation session.

4. The best mediations (and the ones which most often settle rather quickly) are those where the attorneys and their clients have come to the mediation prepared to make a firm opening settlement offer to the other side (it must be presumed this is an offer which has not already been rejected by the other side...there must be a new component to it).
5. Immediately forward to your clients any e-mails or correspondence sent you by your mediator. It cost your client nothing for you to "forward" an e-mail sent you by your mediator. Although you may not have the time (or wish to take time) to read and digest these transmissions, rest assured that your client is keenly interested in being fully informed about this process, and he or she is relying upon you to provide information and explanation about mediation. Your client does not know the mediator...your client knows you.
6. If you are truly interested in fully settling your client's case at mediation, then you must emphasize to your clients the opportunity, which a mediation (entered into in good faith) will present them. No attorney has ever questioned that a case settled in mediation is ultimately much less expensive to your client than a case, which goes to trial. Consequently, and unfortunately, if you minimize to your client the important opportunity which mediation offers, then you should most probably not even bother with mediation.
7. If you know prior to the date of the mediation that your client and/or you are not prepared to settle the entire case, you must professionally and ethically make that position known to the opposing attorney and, of course, to the mediator. Do not begin a mediation session only to inform the mediator that you knew ahead of time you were not prepared to settle certain issues that day. Although, for example, settling 70% of a case at mediation may sound promising, the "unsettled issues" may ultimately undermine the entire mediation process and result in a rescission by a party or parties on even the "settled matters". [Remember that in family court an agreement reached in mediation is never final until the family court judge (a) approves the agreement, (b) signs an order approving the agreement, and (c) the order is entered in the Clerk's Office.]
8. During the mediation session you should not openly undermine the mediator's conduct of the mediation. A mediator is a complete neutral in this process, and has, as his or her objective, a goal of being able to reach a full and final settlement of your case. If in your client's presence you "challenge" the mediator's method of conducting the session, you will bring the mediation to an immediate standstill, and impasse. (With that said, if you truly believe the mediator's impartiality is in question, then request a private conference with the mediator and the opposing attorney only, without the clients present, and then voice your concerns openly and frankly.) You must remember that your client is relying upon you for your advice and guidance, not on the mediator. Consequently, and psychologically, once you plant in your client the

perception that the mediator is no longer completely neutral, the chance for a successful mediation is remote, if not impossible.

9. Please do not trivialize a mediation session as being "less important" than the trial of a case inside a family courtroom...and do not trivialize the work of a competent mediator. It is far better - and much less expensive - for your clients and you if you request that your chief administrative family court judge (CAJ) waive mediation in your case, rather than your making only a half-hearted attempt to participate in this process. Where professionalism and professional courtesies are involved, mediators, like attorneys, have long memories.
10. And finally, you are once again urged to consider entering into a blended form of mediation/arbitration, which is gaining acceptance statewide as the ultimate form of a family law dispute resolution. Ethically, however, in agreeing to this form of ADR, your clients and you should be prepared to agree there will be no "confidential mediation" matters which might temper or impact upon the mediator's role on the "arbitration" side of this process. Nevertheless, if your clients and you are intent on bringing a final resolution to the case, then a blended mediation/arbitration process should provide you with that excellent opportunity.