MEDIATION TIPS FOR FAMILY LAW LAWYERS

A. WHEN TO MEDIATE/SETTLEMENT CONFERENCE:

1. As early as possible; early resolution saves grief and money and in many ways provides a better quality of justice. Mediation puts the client in control of the outcome instead of taking their chances with a judicial officer.
2. Make sure you have conducted enough discovery or your client has enough of the information that you need to give your opinion on the fairness of a settlement. Make sure you have copies of key documents connected with the mediations (relevant deeds, balance statements, documents showing ownership, date of purchase, etc..)
3. Make sure the parties can be present and that anyone who controls the settlement who is not a party can also be available.

B. PREPARING FOR THE MEDIATION/MSC.

1. Meet with your client to prepare for the mediation/MSC. Explain the process. Ascertain whether your client will totally rely on your recommendations, whether your client is a smoldering volcano, explosive and unpredictable, or if your client is somewhere in between. (make sure you know and can explain to the mediator the reason for the divorce. Though this is a no-fault state, it is useful to the mediator to know which one (or both) of the parties feels angry and betrayed and short on trust.)
2. Discuss with your clients the facts and the law and find out and manage your client's expectations for the MSC. Discuss the division of property. If your client wants to keep a certain asset, have a certain custody/visitation plan, discuss it ahead of time. Explain to your client the differences in mediation and trial. Explain that a settlement conference is a COOPERATIVE process. A trial is an ADVERSARIAL process. A settlement conference is a joint attempt at solving a problem; the problem created by the litigation.
3. If bankruptcy issues or tax issues are involved, find the answers ahead of time. The MSC judge will rely on your knowing the answers to these questions.
4. Prepare a settlement brief for the MSC. Judges prefer briefs that are truly brief and to the point. Anyone can write a 30 page brief. The short brief takes skill. Mention the facts, the law and the history of settlement negotiations. Comply with Orange County Superior Court Rule 707.
5. Find out ahead of time about the MSC judge's style. Some judges don't talk to the parties. Other judges expect to talk to the parties. Make sure your client can participate intelligently or tell the judge that your client wants you to be the client's mouthpiece in this process.
6. Know very well the content of the declarations under penalty of perjury that have been submitted on the case.
7. Inform your client ahead of time of the weaknesses in your case that the other side will attempt to exploit. Explain the risks of going to trial. Consider best and worst case scenarios.
8. Get your client to tell you what is most important and what is least important so that you know what issues you can trade during the mediation/MSC. This is also one way of reducing your clients expectations and informing your client that he/she can't have it all.
9. Comply with Rule 707.
10. Be aware of mandatory child custody mediation (Family Code 3170)

(DEMONSTRATION - PREPARING FOR THE MEDIATION)

C. AT THE MSC

1. Don't "unimpress" the judge with your ignorance of the key facts the mediator wants to know. Be prepared and know your case, the facts and the law.
2. Help the judge to help you. "Judge I fully agree with my client" or "Judge I have client control problems. My client thinks she is going to get rich with this settlement" or "Judge my client is so emotional, so angry at the spouse that I can't get my client to accept what I think would be a reasonable settlement." A skilled and patient mediator will know how to handle the emotional issues so they don't interfere with the process.
3. Discuss the best case scenario and the worst case scenario. Discuss BATNA; the Best Alternative To a Negotiated Agreement.
4. Describe out of the presence of the clients any relevant emotional issues that might affect the settlement.
5. Be a zealous advocate without being unpleasant. Accusing the other side of lying NEVER helps the settlement process. It is easier to say that you are relying on different facts. If you attack the other side's integrity in the presence of the judge you sabotage the process and have in effect challenged other counsel to battle. It is intended to be a cooperative process
6. Keep away the new girlfriend or boyfriend from the mediation; his/her presence is rarely helpful and often creates problems. (However, if your client is a victim of domestic violence, feel free to invite the boyfriend, brother, father, or anyone you think will help your client to arrive in court feeling safe and secure).
7. Know the difference between "the principle of the thing" and "ego".
8. Be able to explain to the judge what your client wants and how and why that demand would be a fair settlement.
9. Have patience with the process. Don't start with the bottom line since both sides will expect the other side to make some concessions as part of the process. Make a realistic demand. If your demand is outrageous, expect the other side to match your ridiculous demand with a ridiculous offer.
10. Be ready to identify potential trade-offs.
11. Don't waste time arguing that future discovery will show your case to be made of gold leaf and diamonds. Both sides have similar expectations and the judge has heard that many times before.
12. State Bar Rule of Professional Conduct 5-200

(DEMONSTRATION - AT THE MSC)

D. AFTER THE MEDIATION (AND BEFORE GOING SEPARATE WAYS)

1. Either put the agreement on the record or in writing or both. Know how to use the settlement forms.
2. Be familiar with CCP 664.6.

QUESTION AND ANSWER SESSION

FAMILY CODE 3170

3170. (a) If it appears on the face of a petition, application, or other pleading to obtain or modify a temporary or permanent custody

or visitation order that custody, visitation, or both are contested, the court shall set the contested issues for mediation.

(b) Domestic violence cases shall be handled by Family Court Services in accordance with a separate written protocol approved by the Judicial Council. The Judicial Council shall adopt guidelines for services, other than services provided under this chapter, that courts or counties may offer to parents who have been unable to resolve their disputes. These services may include, but are not limited to, parent education programs, booklets, video recordings, or referrals to additional community resources.

LOCAL RULES – SUPERIOR COURT of CALIFORNIA, COUNTY of ORANGE

Rule 707. Mandatory Settlement Conferences

The following rules apply to all mandatory settlement conferences.

A. General Requirements

A Mandatory Settlement Conference may be set by the court on its own motion or upon the request of counsel and the parties.

1. Parties and their attorneys must meet in person at the courthouse at the assigned time and date in a good faith effort to eliminate the necessity of trial or to eliminate as many of the disputes between the parties as possible.

2. Not later than five (5) calendar days prior to the conference, or any other date set by the court, the parties must serve upon the other parties settlement conference/trial briefs, and where applicable, fully executed income and expense declarations, and property declarations. Settlement Conference Brief/Joint Statement of Issues to be Tried (local form L- 0966), or any other pleading that puts forth the position of each party on the following issues, may be used:

Custody & parenting time
Child support
Spousal support
Division of property (values and proposed division)
• Community • Separate
• Debts
• Credits
Attorneys fees & costs

3. Parties must prepare a joint statement of issues remaining to be tried, defining and limiting the issues to be tried. At the discretion of the court, issues not fully considered in the course of the mandatory settlement conference may not be considered for trial. The joint statement of issues must be filed with the court at least 5 court days prior to the trial date, and parties must bring a copy to court for reference, and the parties must lodge a copy with the court prior to the commencement of trial. The joint statement of issues must be signed by each party participating in the settlement conference.

B. Attendance

Attendance at the conference is mandatory. Failure of the parties and their attorneys to attend may result in the imposition of sanctions.

(issued 07/01/13)

C. Sanctions
Sanctions may be imposed by the court, with appropriate notice, without the necessity of a request by an opposing party.
(Adopted as Rule 705 effective January 1, 1987; revised eff. July 1, 1994; revised eff. January 1, 2007; revised and renumbered as Rule 707 effective July 1, 2011)

CCP 664.6

664.6. If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement.

Rule 5-200 Trial Conduct

In presenting a matter to a tribunal, a member:
(A) Shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth;
(B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law;
(C) Shall not intentionally misquote to a tribunal the language of a book, statute, or decision;
(D) Shall not, knowing its invalidity, cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional; and
(E) Shall not assert personal knowledge of the facts at issue, except when testifying as a witness.