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Mediation Agenda Order

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Diana Mercer, Attorney-Mediator, is the founder of Peace Talks Mediation Services in Los Angeles (www.peace-talks.com) and the co-author of *Your Divorce Advisor: A Lawyer and a Psychologist Guide You Through the Legal and Emotional Landscape of Divorce*, (Fireside 2001).

Mediation Agenda Order

After much experimentation, we've found that starting with the easiest items and working up toward the more difficult agenda items works best. Tackling the easiest issues first lets mediation participants get used to the mediation process and gives them a chance to settle into the rhythm of the session. It also lets them see the progress they're making in mediation, and illustrates for them what we as mediators have come to know: most couples are closer to an agreement than they think.

By working up to the more difficult issues, we also get a chance to accumulate all of the facts so that we (the mediators) can begin to formulate hypothesis about where the difficult issues lie and where to anticipate impasses. In our more evaluative moments, we can start to formulate our own proposals and suggestions for settlement. In our more facilitative moments, we can start to see the ruptures and trouble points and begin to think of ways to help couples rebuilt the trust necessary to reach an agreement.

Typically, by the end of the first session we've handled or tabled the easiest issues and those will become the "tentative agreements" in our first summary letter. We've also outlined all of the more difficult issues, pinpointed the numbers on financial issues or identified the disagreements in the parenting issues, and we've discussed the elements of the issue with the clients and outlined possible settlement options for them to think about before the next session. These topics typically become a "to do list" in a mediation summary.

For example, if a family law mediation couple is not sure what to do with their home, we might start the discussion as follows:

- How much is the home worth?
- What do you owe?
- Did either of you contribute some pre-marital money or a gift from a parent that you're seeking to be reimbursed? If the other person doesn't agree, can you put together the paperwork showing the pre-marital or gift money?

If both parties would like to keep the home and buy out the other person's interest, the next line of discussion might be:

- Can either of you afford to own the home on your own? If you can afford it, is that the best way to spend your money? Will all the peanut butter and jelly sandwiches be worth it?
- If you can afford the home, can you handle all the maintenance by yourself? Is that how you'd like to spend your free time?
- What kind of a mortgage loan do you have? If it's a variable rate loan, can you handle an increase in payments?
- Would you be in a position to refinance and remove the other person's name from responsibility?
- Would you be in a position to refinance and borrow enough money to pay off the other person's interest? Or are there other assets which can be traded off against the equity in the home? And if so, is this the most desirable way to allocate your money?

By the time you've broken down the agenda into these bits and pieces, you've taken some of the emotionality out of the decision and turned it more into a data conflict (see Christopher Moore, *The Mediation Process*, pages 64-65, Wiley/Jossey-Bass 2003), which lets people take back some power in making their own decision. By investigating the facts behind the decision "I want to keep the house", asking people to speak with a financial planner about asset allocation and a mortgage broker about available financing options, they start to see the house in terms of "is this the best decision for me?" rather than a competition against their spouse.

Resistance to Agenda Order

Although trial and error has taught us that starting with the easiest issues and working up to the most difficult issues is the best formula for success in our practice, we often encounter resistance to this agenda order. Clients often want to start with the most difficult issue, wanting proof that mediation can really work.

The problem we've found with starting with the most contentious issue is that the discussion can quickly devolve into low road behavior without our having gotten to know the clients well enough to help them manage this behavior and overcome impasse. The clients don't know us well enough to trust that we really are impartial and that we have their best interests in mind. We make the hidden transparent by directly asking them to make the initial leap of faith into our agenda order and explaining why we think it helps them make the best progress.

There are also a few shorthand words of persuasion we use as well:

- Gentle persuasion: If these other issues are truly simple, it will just take a few minutes to get them all down on paper, and then we can get to the issue which is really troubling you;
- Forcing the issue: Do you know how you're going to handle your 2005 taxes? Tell me about how you're going to do that (*i.e.*, mediator forces the issue by picking what appears to be the easiest issue) and let's get it out of the way quickly;
- Reality testing: Is that really the easiest agenda item? Surely the car lease is an easier issue;

Even when there is a time constraint making a contentious issue a quasi-emergency, we'll start with something simple, or break the issue down into simpler issues so as not to jump right into the hardest discussion without a warm-up.

Summary Letters as Mediation Tools

We insist on doing summary letters. In our practice, it used to be optional, but in the name of saving a few dollars too many clients went without the summary letter and too many mediations fell apart between sessions because neither client had an accurate record of what went on during the session. Our case management compromise (so far) is that we bill for ½ an hour to a full hour for the summary letter, but in reality it takes us 2-3 hours to write. It's worth it to us not to have the mediations fall apart, and the clients see it as a manageable expense. We also don't give them the option of refusing a summary letter—it's just too valuable a tool both for the clients and the mediators.

What the mediation summary letter does: Without asking people to make a decision on the day of the mediation, the agreement about the issue is simply that they will investigate their options. The summary letter will outline the discussion, questions to ask their advisors, and the to-do list so that the clients don't have to take copious notes during the session.



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The other advantage of the summary letter is that it gives both the clients and the mediator an “institutional memory” of what went on at the session. A good, detailed summary letter can eliminate much of the he said/she said. Even if the mediator makes a mistake in the summary, at least everyone is starting from the same place.

The summary letter can also flesh out discussions that didn’t quite get finished, or which might be too technical to be of use during the session. A good example of this is the explanation of how Qualified Domestic Relations Orders work. “There’s a special court order you can use to divide up a pension, so don’t worry about how that will happen,” might suffice for the mediation session itself, but ultimately the client will need more detail than that. The summary letter is a good place to make sure the clients get the information they need to make a good decision.

We also use the summary letters to ask the clients to expand their range of options between sessions. We’ll ask them to think of different ways to resolve things, or whether they would consider a particular solution, even on a temporary basis. The summary letter is also an opportunity to acknowledge high points in the mediation, point out progress made, and gently encourage clients to keep thinking about certain issues.

Conclusion

It’s the mediator’s job to develop case management protocols which help mediation participants to succeed in reaching an agreement. Simple office procedures and thoughtful rules within your mediation structure, like how to set the agenda and tackle agenda issues, can go a long way toward providing structure for settlement discussions.