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Doubtful Family Violence? TEST!

Drafting a Solid Mediated Agreement

by Andy Flink

After a very difficult day at work, a mom came home to find her two children in the kitchen arguing over an orange. There was only one left and each child was trying to wrestle it out of the others hands. In frustration the mom grabbed the fruit and quickly sliced it down the middle, handing each of the children their half. Both children walked away crying.

One of them actually needed the rind of the orange for an art project and the other wanted to eat the orange. What we all think are logical and obvious answers are not always as they appear. I consistently remember this story when I draft mediated agreements at the conclusion of a session. If we've been at it for 8 or more hours and are at the point where all of us are completely exhausted I still have to be ready to write an agreement that works for everyone. It is crucial at this moment that all of the issues that were resolved during the day are memorialized accurately and that every point is understood and *clear* to the parties.

In mediations that are complicated and last many hours the concept of capturing all of the points can be daunting. For example, we have a solid parenting time arrangement but what if we omit who will provide transportation at the inception and conclusion of the visits? Perhaps the parents could work this out in their future but why leave it to chance? Small points that get overlooked today can become enormous problems tomorrow. You cannot assume to know what everyone is thinking.

Here are six ways to assure that any drafted agreement is solid, to the point and leaves no room for interpretation, no matter how long the session lasts.

1. **Listening carefully.** During the session, in order to remember what is truly important to each of the parties the mediator has to be a focused listener. It also helps to be tedious and WRITE DOWN every point. Sounds elementary, but if this is not done there's a chance something very important to one or both sides can be overlooked.
2. **Repeat it back.** Every position you take must be stated back to you in an effort to be sure that it was *heard* correctly. Perhaps something was assumed that should not have been or maybe it was unclear. Reiterating each point as it was heard will eliminate confusion, especially in cases where the majority of the time is spent in caucus. Mediators that create this atmosphere of clarity will also build trust with each client and their counsel.
3. **Match up the agreed to points.** No matter *when* parties agree to a specific issue during a session it must be acknowledged and memorialized accordingly. Since sessions can take on many

tangential directions, doing this reassures everyone that matters which have been settled aren't raised later as contentious, thereby turning settlement into impasse.

4. **Templates.** Good mediators bring laptops with effective agreements they have drafted in previous sessions that are solid in covering every point imaginable. Equipped with this arsenal of information one can edit and correct an existing document and use a list to make certain nothing is missed.
5. **Knowing what the judge requires.** Ultimately this paperwork may be used in the formation of a final settlement agreement (if the mediated agreement isn't used) and therefore must comply with the requirements of each court. While it is obvious that the draft has to make it past the approval of client and counsel, the final approval is from the judge, and any agreement that is not clear and straightforward will be questioned.
6. **Realizing I'm human.** Once the agreement is drafted I hand the documents over to the parties and their counsel. Perhaps I did overlook an item or maybe there is a misunderstanding. It happens. However, if I get 98 percent of the points correct, fixing a small one at the conclusion is part of the process. It's the agreements where half the issues aren't clear that have a tendency to fall apart.

While the best written agreements cannot possibly cover every point imaginable, utilizing these strategies will help minimize mistakes and errors. The sessions that go long into the night, when everyone is ready to be anywhere else, is prime time for problems and assumptions. Don't let this happen, whether you are simply hungry or have that art project due. *FLR*



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