

DIVORCE LAW GUIDE FROM A TO Z
JANUARY 21, 2014
NATIONAL BUSINESS INSTITUTE
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I. Mediation, Arbitration, Negotiation and Trial

(3:30 PM – 4:30 PM)

A. Making Mediation Work For You: Every case in our firm is mediated, and 95% settle in mediation. Sometimes a second or even third mediation is required, but clients must seize the opportunity to settle a case, or at least part of it, in their best interests and terms that they can live with rather than having a stranger (the judge) decide how to end their marriage and raise their children. A successful mediation requires significant preparation and if you are determined to settle, you must often do the work for the other side put them in a position to settle.

1. Mediation

a. In Florida, all family cases are referred to mediation at some point after filing a Petition.

b. Fundamental Principles of Mediation

i. Voluntary Process: The court can order mediation and require the parties to appear for the scheduled conference, but cannot force the parties to mediate. Fla. Fam. L. R. P. 12.740.

ii. Parties Have Ultimate Decision Making Authority: The role of the mediator is not to force a settlement or to guide the process towards a particular result, but to help the parties come to their own decisions about the issues in their case. It is important to keep your client on track and not let their emotions control their decisions during a mediation. If the client needs to involve third parties in the

process to reach a decision, it is important to allow them to consult with this safety net so that they are confident about their decisions and do not have buyer's remorse later on.

c. Role of the Mediator

i. The mediator acts as a neutral, impartial third party who facilitates the process to reach a mediated agreement. It is important to take the time to select a mediator that your client will be comfortable with.

ii. Mediators are usually attorneys, but may not be the same attorney that represented either party in a dissolution of marriage after serving as a mediator in the same case because it is a conflict of interest. It is advisable to select a mediator that either previously had a family law practice or is currently carrying a family law caseload.

d. Confidentiality: The Mediation Confidentiality and Privilege Act, § § 44.401-44.406, Flat. Stat. (2013).

i. Promotes honest and candid discussion and party self-determination.

ii. Grants a privilege to the parties to refuse to testify about a mediation communication in a subsequent proceeding. This privilege can be waived.

iii. However, evidence in the case that is admissible or subject to discovery does not become confidential because it was discussed in mediation.

iv. A mediator is prohibited from revealing any information obtained during a separate meeting to any other mediation participant without the consent of the disclosing party.

e. Pre-Mediation Conference With Client

i. Approximately one week prior to mediation, you should schedule a meeting with your client and any of the client's support network that will assist your client to make decisions during the mediation, to thoroughly prepare the client for mediation. A prepared client will reduce the length of time it takes to present counter-offers or make a decision as what the client is willing to accept. Discuss with the client all phases of the mediation process, the physical location, whether the parties will be sitting together or in separate rooms, case evaluation, probable trial results, items that may not be achievable at trial but can be negotiated for at mediation, and the range for settlement (the 40 to 60 range);

ii. What is the client participation as opposed to the attorney participation?

iii. Explain who the "players" will be in the mediation and what their roles are;

A. Client, spouse, parents, adult children, counsel, experts and mediator;

B. What is each player's "stake" in the mediation? How will this affect the negotiations? Do egos need to be catered to in order to reach a resolution? Who will be the party committed to a resolution- -the attorney? Client? Adult Children?

f. There is no “binding” mediation agreement until all of the parties sign a written mediation agreement. Until then, there is no harm in exploring settlement options. However, it is necessary for the client to understand that whatever document is signed is a binding contract that can rarely be undone.

- i. Explain the importance of good faith negotiation;
- ii. Explain the advantages and possible disadvantages of mediation;
- iii. Assess the strengths and weaknesses of the client’s positions on each issue;
- iv. Evaluate any unrealistic expectations;
- v. Review the issues and relevant information that will be discussed at mediation.

g. Attorney Preparation – Mediation Memoranda: Prepare a mediation memorandum, which should include the following:

- i. Summary of the issues, range of trial result;
- ii. Proposed distribution chart of assets and liabilities, reflecting appropriate asset assignment and realistic values, including valuation dates.

- iii. Preparing to Discuss the Issues
 - A. Parental Responsibility and Timesharing
 - 1. Provide your client with the Florida Supreme Court approved parenting plan to review before the mediation. Fla. Fam. L. R. P. Form 12.995(a).

2. Bring a blank school calendar and a blank regular calendar to the mediation.

B. Equitable Distribution

1. Control the mediation by preparing an equitable distribution schedule of assets and liabilities with the values of the assets as of date of filing or date of mediation included.

2. Bring all of the information required by Fla. Fam. L. R. P. 12.285 including multiple copies of each parties' financial affidavit.

3. Bring the equitable distribution chart in an electronic format.

C. Alimony: If income is in dispute, bring the documents that support your client's position as to the payor's income, payee's income, evidence to impute income, and lifestyle. For example, the most recent income tax return; paystubs and evidence of the expenses should be brought with you to mediation.

D. Child Support

1. Do not take the attitude that "the calculations will take care of themselves when everything else is resolved."

2. Bring several different calculations based upon the various factors that should be taken into account.

3. Consider base child support and the additional child support to be paid.

E. Life Insurance: Make sure your client brings clear information on any life insurance policies and the cost to maintain the policies.

F. Attorneys' Fees and Costs: Discuss with your client the difference in the amount of attorneys' fees and costs depending on whether the case settles in mediation, or proceeds to trial.

h. The Mediation

1. Opening statements to the mediator should be constructive, convey a desire to settle and effectively advocate positions, without alienating the other side.

2. Attempt to reach a fully integrated agreement and do not leave any issues unresolved, especially those which may leave room for ambiguity in the future or "buyer's remorse" of the parties. It is recommended that an agreement is signed prior to leaving the mediation.

i. Resources: "Getting to Yes: Negotiating Agreement Without Giving In," Fisher, R., Ury, W., and Patton, B.

B. Arbitration

1. Arbitration can be used in domestic relations cases to resolve disputes that do not involve parental responsibility, timesharing, or child support. § 44.104(14), Fla. Stat. (2013).

2. Utilizing arbitration clauses in marital settlement agreements

3. Special Considerations for Children as Witnesses

DON'T DO IT!

4. Obtaining the Final Judgment or Decree
5. Appealing Judgments and Divorce Decrees