

## **PRACTICE HINTS: PREPARING AN EFFECTIVE WRITTEN MEMORANDUM**

A written memorandum is the tangible product of the mediation process, and therefore, a critical task for the mediator. How thorough and specific the agreement will often mean the difference between whether or not the mediated agreement holds, especially in the face of attorney review. The agreement format is used throughout the mediation process by the mediator as a detailed checklist of the issues to be addressed. It is designed to minimize the need for mediator note-taking in session and the amount of effort necessary to prepare a memorandum of understanding out of session. NOTE the following suggestions:

1. THE MEMORANDUM IS NEVER SIGNED BY THE PARTIES IN THE COURSE OF MEDIATION. The mediator is not preparing a legal document for signature; this should blunt most criticisms of the unauthorized practice of law.

### NOTES FOR MEDIATORS WHO ARE NOT ATTORNEYS:

The point in the mediation process where those who are not attorneys are most vulnerable to the charge of "unauthorized practice of law" is in the preparation of memoranda of understanding. In addition to not allowing clients to sign the memorandum, thereby treating it as a legal agreement per se, the mediator may want to consider doing the following:

- a. Leave off the style of the case (p. 1, top) that makes the document look like a formal legal document.
- b. Leave out the signature spaces (p. 34) to avoid any confusion in that the draft of the agreement is intended for signature in mediation.
- c. Call the document a memorandum of understanding not an agreement; the terms are effectively the same, although agreement has more of a formal tinge of legal meaning. In the final document, after attorney review, the term "agreement" can be subtitled back for "memorandum."

2. The mediator can maintain a draft of the memorandum on his or her office word processor and bring into the mediation process any issues lawyers may raise over wording. This also offers a "selling point" for mediation in that the lawyers will not need to duplicate any work done in mediation.
3. THE MEMORANDUM FORMAT IS NEVER GIVEN TO THE PARTIES. There is a risk they will turn mediation into a "fill-in the blanks" exercise. However, if particular issues have been difficult, (eg. parenting responsibility) a rough draft of the particular section recording their tentative understandings of that issue may be prepared.

4. AN AGREEMENT IS ONLY AS GOOD OR AS EFFECTIVE AS THE PROCESS USED TO DEVELOP THE AGREEMENT. There is a "Zen" of agreements: The more you need a written agreement to define and insure rights, the less protection there will be. There is an inverse correlation between length and detail of an agreement and its effective enforceability and value as a working document. A written agreement has a "working life" of approximately 3-5 years. The parties must be disabused of the belief that this agreement is forever (Myth of Finality); that there will never be any need for modification and that every future circumstance can be provided for and that if the agreement is written exactly there will be no further conflict or dispute. The agreement should address major "what ifs..." likely to occur in the future, not every "what if..." Finally, do not try to spell out future details, rather focus on general principles and process. For example, the section on college expenses provides a process for planning for and allocating financial responsibilities, not an exact formula.