



BOULDER COUNTY BAR ONLINE NEWSLETTER

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F E B R U A R Y 2 0 0 4

SUCCESSFUL MEDIATION: A FAMILY MEDIATOR'S TOP TEN SUGGESTIONS FOR EFFECTIVE PREPARATION

BY CHRISTOPHER L. GRIFFITH, M.S., J.D.

The following suggestions derive from my observations and experience as a former litigator and now full-time divorce and family law mediator. Although cast in the milieu of mediation familiar to me, the resolution of divorce and family law disputes, I believe these elements widely apply to preparing for mediation of commercial, tort and other forms of civil litigation.

As true in mediation as in life generally, good fortune seldom is accidental. More often, success in mediation derives instead from the exceptional preparation of participating counsel. I repeatedly witness the concrete, positive results reaped by attorneys who have spent the time and effort to effectively prepare for mediation. Here are my top ten suggestions to effectively prepare your case for successful mediation.

1. Where possible, obtain and review documents, reports and information required to evaluate your case properly in advance of mediation.

Attorneys with adequate information or essential facts have a distinct advantage in mediation. They hold the superior position to develop settlement strategies and evaluate settlement proposals of opposing counsel. Deferring mediation until both parties have had a reasonable opportunity to conduct meaningful discovery is generally prudent. (There are, of course, exceptional cases in which beginning some dialogue in mediation even in the absence of complete discovery, may still make sense, to reverse or halt an increasing polarization of the non-communicating parties or even of their counsel).

2. Provide opposing counsel adequate documents, reports and information necessary for him or her to evaluate your settlement proposals, both in advance of and during mediation.

No effort at discovery or advance collection and review of information is ever fully complete. Mediation is most effective, then, when parties exchange ideas and, if necessary, additional information in support of them, not merely arguments. Why give the other side an excuse to waste time in mediation? If there is discovery helpful for opposing counsel to understand the issues of the case, attorneys seeking to resolve cases

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HIGH SCHOOL MOCK TRIAL COMPETITION

FEBRUARY 17 - 18

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FEBRUARY 2004 *(Details for programs on page 6)*

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
1	2	3	4	5	6 Natural Resources / Environmental Law Section	7
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SUCCESSFUL MEDIATION *(continued on page 1)*

in mediation forthrightly disclose such information.

3. Evaluate respecting whether counsel's attendance is helpful and get agreements.

Especially in disputes between parties with significant history or emotional attachments (thus in nearly all divorce or family law cases), evaluate objectively whether the presence of counsel in mediation in a particular case is advantageous. Just as isolation may serve the ends of litigation, the parties' direct communication in the presence of a neutral especially without counsel, often results in settlement of stalled disputes. Effective counsel rarely employ an inflexible one-size-fits-all rule (I always attend mediation with my client); rather they evaluate the importance of their attendance on a case-by-case basis, and if necessary secure safeguards for their clients to address legitimate process concerns.

4. Determine realistically who must be present or available to resolve the case and get agreements in advance with the mediator and opposing counsel on their attendance and any ground rules.

Surprises are bad and delicate issues of privilege and waiver need to be resolved in advance. But effective mediation always requires determination of the real decision-makers in a case. If a party is unable or unwilling to commit to a settlement without consulting a third party (for example, a new spouse or third party's participation), is essential. Experienced mediators can assist in setting boundaries for uncomfortable situations. Effective

counsel do not hesitate to identify this dynamic and insist on somehow including the third party in the mediation.

5. Fully explain the mediation process to your client and contrast it with litigation.

Many parties arrive at a mediation session without even a basic understanding of how the process works and how it differs from litigation. Many clients naturally fear any meeting with a spouse, former spouse or co-parent, especially one scheduled and prepared for in advance with their attorney in attendance. Clients may be reminded that the process is informal and confidential and that the collaborative nature of the mediation process seeks to afford a safe atmosphere to explore of a range of possible solutions.

Effective mediation counsel make clear to clients that mediation is not a debate and that the mediator's role is not to decide who is right and wrong, but to facilitate the discussion and perhaps assist the parties in a reality test. Effective counsel prepare clients to participate in the mediation and encourage them to talk to the mediator during the process about what is most important, including how they feel about the situation and what they need. Participation invests clients in the process and allies them with the mediator's insight as to the other party's interests -- an essential element in effective problem-solving.

6. Prioritize issues with your client and prepare your approaches to settlement.


Effective mediation counsel discuss with their clients the realities of economic or time constraints on mediation and prioritize the issues to be addressed. A typical two hour or even half day mediation session requires time (typically in separate rooms for each party where the mediation includes counsel) for introductions, listening to concerns, and issue identification before actual problem solving begins. Effective counsel consider which issues can be more readily resolved and identify priorities for the mediation.

7. Discuss the weaknesses of your case with your client as well as the range of possible or potential outcomes in litigation.

Effective mediation counsel detail their candid evaluations of the case, including potential pitfalls and weaknesses, with their client. This entails comparing the range of possible litigated outcomes (including

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SUCCESSFUL MEDIATION *(continued from page 3)*

counsel's assessment of the costs of trial and its preparation), to the range of agreements which might be reached in mediation.

8. Provide the mediator in advance with essential tools to understand the issues in the case.

Mediators are asked to assist both parties and their counsel to see the realities of the case and achieve a negotiated result that meets their clients' needs, often in the span of a few hours and without the months of study that the parties and their counsel have done on the facts and issues of the case.

Effective counsel recognizes that the mediator needs adequate background information to understand the case. Good mediators hugely appreciate a brief written statement that identifies the parties and their history, summarizes the facts, defines the issues, discusses the strengths and/or weaknesses of the case, and briefly describes any other helpful information including settle-

ment discussions, prior rulings and court status. Although economics will not allow for an elaborate statement in every case if the parties are going to pay for both counsel and a mediator, some effort is always justified if only providing copies of basic documents.

9. Examine your client's emotional needs and ready your client for the emotions of settlement and of settlement discussions.

An element of preparation often overlooked is helping clients become comfortable with resolution of the case. Especially in divorce and family law cases, clients may need assistance, even formal psychotherapy, to ready themselves emotionally to release the conflict. Mediation may materially advance this passage as well, especially with counsel allowing appropriate time in the mediation for the client to express his or her personal interests in hearing the dispute and with the mediator acknowledging those concerns. At the same time, effective counsel prepare clients on the importance,

at some early point in the mediation process, of moving past emotions and adopting a more business-like perspective from which to evaluate settlement options.

In mediation not attended by counsel, effective counsel stress to clients the importance of their language and how things said in mediation will contribute to or deter from the resolution of the case. Clients often need to hear repeatedly that personal attacks and inflammatory comments, as well as offensive, non-verbal gestures, invite defensiveness and promote impasse.

10. Ready yourself to listen in mediation and to consider new options and the other side's point of view with your client.

Effective mediation counsel perceive mediation as an opportunity to learn more about the interests of the other side and new alternatives

(continued on page 9)

A JOURNEY TOWARD PEACE OF MIND IN DISNEYLAND

PRESIDENT'S PAGE BY VIRGINIA CHAVEZ

My nephew visited Disneyland as a six-year-old child. On his return to Colorado he announced that he was "back in America." To foreigners, both adults and children alike, our entire country might seem to be an amusement park and no city less than Boulder, a "most magical place on earth." We travel by relatively luxurious buses without people grabbing us by the arm to help us squeeze into crowded vehicles. We have great restaurants, Pearl Street Mall busker entertainment, bike lanes, creek paths and annual creek festivities with amusement park rides. Almost everyone who wants a car has at least one. There are plenty of luxury cars and SUVs. Everything costs a lot, just like at Disneyland, and we who are financially able, buy these expensive items and products.

My family just returned from Peru. While it is a beautiful country, its Third World life left me thinking of how very spoiled we are with our dietary choices, spacious homes, jobs, cars, plumbing, roads, health and the lack of highly visible police on the streets everywhere. This was not my first Third World visit, but it was definitely the most vivid and provocative.

We first stayed in Miraflores, a nicer section of Lima where the people seemed to live in relative comfort. However, there were plenty of young children working the streets for a quick "Sol," the equivalent of about 30 American cents. We learned from our Peruvian travel agent that the local factory worker assembling jeans for Abercrombie & Fitch earns

about a dollar a day. Those workers probably earn less than the young children on the streets of Lima. It appears the average net monthly income per Peruvian is the equivalent of about \$40 U.S. Of course the cost of living is lower than here.

We traveled to various parts of this beautiful country, where the people live very humbly and simply. Some live with many families in a single small dwelling near Peru's wonders: the Nazca Lines in Ica, along the Pacific Coast, and on the highest lake in the world, Lake Titicaca. There people live in reed houses on floating islands. We floated down a tributary of the Amazon, the Urubamba, portaged over land and

then canoed to our rainforest ecolodge on the shores of the pristine Lake Sandoval, where we saw monkeys and other fascinating and thrilling wildlife, as well as people living off the land. We spent considerable time visiting areas of archeological interest at Machu Picchu, Ollantaytambo, Chinchero (Village of the Rainbows) and the Sillustani Tombs. These are and were sacred sites to the indigenous people. We learned that the Conquistadors largely systematically destroyed the Incan temples and other structures as part of their mission to eradicate the native culture and convert Peru's inhabitants to Catholicism in the 16th and 17th centuries.

We witnessed a strong connection to the past in Peru among those who had their roots in the country. The native Quechuans and Aymara still hold closely the work ethic, beliefs and mystical practices of their ancestors. The sun is God for the Aymara, whose ancestors cleverly built temples to the sun that were not completely destroyed by the Spaniards because the king's men did not appreciate the significance of the architecture, which allowed the sun to shine through the windows on the solstices and cast meaningfully shaped shadows. The Quechuans worshipped the sun, mountains, serpents and condors. Post-conquest indigenous artists cleverly painted pictures of the Virgin Mary to include camouflaged images sacred to their own beliefs. When the head of the Virgin is removed from the picture, there is a mountain revealed

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February 6, 2004

Natural Resources / Environmental Law Section

"Ditch Easement Issues"

Speaker: Jeff Kahn

Noon Brown Bag Lunch at the
Boulder County Justice Center
Courtroom C

CLE \$15

February 10, 2004

Employment Law Section

"Ethical Issues in Employment Law"

Speaker: Alec Rothrock

Noon at Caplan & Earnest
Lunch \$10 (Veggie, beef or turkey)
CLE: 1 General, 1 Ethics

February 17, 2004

Business Law Section
Topic: TBA

Noon at Dolan's Restaurant
in Boulder
Lunch \$14 CLE \$15

February 18, 2004

Family Law Section

"E-filing Panel Discussion"

Noon Brown Bag Lunch at the
Boulder County Justice Center
Courtroom D

CLE \$15

February 18, 2004

Real Estate Law Section

Intergovernmental Agreements &
their Impact on Real Estate
Development

Speakers: Larry Hoyt and Sam Light
Noon at Dolan's Restaurant
in Boulder
Lunch \$14 CLE \$15

February 20, 2004

Bankruptcy Law Section
Noon at Dolan's Restaurant
in Boulder

February 25, 2004

Tax, Estate Planning & Probate

"Community Property"

Speaker: Shelly Merritt

Noon at Hutchinson, Black & Cook,
Lunch \$10 (veggie, beef or turkey)
CLE \$15

February 27, 2004

Intellectual Property Section

"Practice Pointers for Domain Name
Disputes Under the Uniform
Domain Name Dispute Resolution"

Speaker: Ben Blaugrund

Noon to 1 p.m.
Holland & Hart in Boulder
Lunch \$10 (veggie, beef or turkey)
CLE \$15

February 27, 2004

Civil Litigation/Medical-Legal

"Colossus: What Every Physician
(and Lawyer) Should Know"

Speaker: Dr. Aaron DeShaw, Esq.
Noon to 2 p.m.
at NITA, 363 Centennial Pkwy.
in Louisville
Lunch \$14 CLE \$35 (general and ethics)

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PRESIDENT'S PAGE *(continued from page 5)*

in the rest of the figure, while head-dresses are actually images of the sun or moon. The people are proud of these surviving artifacts and, more importantly, in their surviving beliefs and spiritual practices.

The Aymara work hard from sun up to sundown, for fundamental survival and because in labor they worship God. At the day's end they return to their adobe homes, where there is neither plumbing nor electricity. For entertainment they make babies. Young women are married and pregnant by the age of fifteen. Children become units of domestic production. More children mean more workers and a more productive family, whether they are herders or farmers. The women perform the traditional jobs of food preparation or spinning and weaving wool for

clothes, blankets or wares for sale. The people remain aware and proud of their heritage whether they are 100% indigenous or mestizo.

In one humble homestead we visited there were about six adobe structures. Two were living quarters, with beds built of adobe. Slots for shoes were molded under the bed. The mattresses were woven thatch, and hand-woven alpaca blankets covered the bed. The sun on the adobe bricks provided the only heat source. A separate structure was for storing food and cooking when the weather prevented outdoor cooking. Food was heated on a stove of hardened mud. Cooking fuel was dried cow dung. There was a structure dedicated to drying the cow dung. Grains were ground with stones. The people in these homesteads raised their few lla-

mas, alpaca, sheep or cattle and bartered for what they did not grow. They all had smiles on their faces for us foreigners traipsing through their homes. The cynic might believe that the family was friendly in the hope that some home-grown and hand-made product would be purchased. But the women seemed genuinely content and at peace in the only world they knew.

We who have the luxury of reading this newsletter presumably live very well compared to those in the Third World. We do not lie awake with fears of cold weather and a lack of food. We know that if one of us falls ill we can buy over-the-counter products or, if necessary, drive to the doctor's office to receive proper care.

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Our lives are comfortable, yet we still have problems that may pale in comparison to those in a Third World country. Without survival struggles and a deep rooted connection to the earth and our individual heritages how and do search for peace of mind or learn to know ourselves?

For my part, I will try to better appreciate what I have and to recognize problems as growth lessons and not reasons for verbalizing my complaints. My mantra can be "there is no human perfection." I will remember that not once did I hear a Peruvian citizen's complaint. In this game of life I will strive to use my tools to serve well. I will try to judge less and to not take others or myself so seriously as I enjoy my life in Disneyland.

to settlement that address both parties' interest. They ready themselves and their clients to listen actively in order to determine how the other side has been affected by the dispute, how they define the problem, what they regard as their most important interests and what is required to resolve the case. These insights should allow counsel and the parties to craft a new and mutually beneficial approach to settlement.


Conclusion

Attorneys who are successful in mediation, however, almost always make time to prepare for mediation

as they would for trial. The positive effect of advance work is consistently observed in the success of mediations as well as the satisfaction of their clients.

Christopher L. Griffith, M.S., J.D., is a full-time divorce and family law mediator and Colorado attorney in private practice with Divorce Resolutions, LLC, in Westminster. A former marriage and family therapist, Chris is co-chair of the Boulder County Bar Association's Alternative Dispute Resolution Section, and Secretary of the Boulder chapter of the Colorado Council of Mediation Organizations (CCMO).

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WEST GROUP'S COLORADO CIVIL RULES ANNOTATED, Third Ed., Vols. 4 & 5, Colorado Civil Procedure Forms and Commentary, Vols. 11-13, Colorado Handbook on Civil Litigation 2003-2004 Ed., Vol. 5A \$400 (New-\$550) Contact Amy 303.527.3462.

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PRO BONO PAGE

Twenty-six cases were referred during December. Thank you to the following attorneys:

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Boulder County AIDS Project:

Thank you to the following attorneys, who accepted pro bono referrals for the Boulder County AIDS Project during December.
Paul Bierbaum
Renee Ezer
Martha Meshak (paralegal)

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COST TO BE DETERMINED

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