

FAMILY MEDIATION CANADA
2004 ANNUAL CONFERENCE
MISSISSAUGA, ONTARIO

WORKSHOP ON MEDIATION REPORTS

SEPTEMBER 29, 2004

By JUDGE MICHAEL H. PORTER (RET'D), C.AR.B., C.MED., RFM

“PRESENTATION IS EVERYTHING”

The purpose of this workshop is not to try and establish that there is only one set or right way to record the results of a mediation, but rather to pool a number of ideas, to share ideas and thoughts in order to lead to the development of the best form of reports possible. Obviously, there are as many different styles as there are Mediators, and this applies just as much to how they write their reports as to how they conduct their mediations. Nonetheless, it seems to me that there is a great variance in the quality of Mediation Reports. As Registrar of the Alberta Family Mediation Society, I see a great number of Mediation Reports when people submit samples of their work when applying for our Registered Family Mediator (RFM) designation. Some of these Reports are stylish, containing a great deal of detail so that one can readily understand what took place in the mediation and the reasons why. Others contain only the bare bones of any content, type of agreements reached, and create no understanding of what led the parties to those agreements. Some samples, modified to prevent any identification, are attached as Appendix I. Most family mediation training programs seem to have scant reference to Mediation Reports, simply including a couple of samples. In all the conferences and workshops I have attended, I have seen no sessions on this subject. Yet, it is by these Reports that we are very much judged both by our clients and certainly by their lawyers.

Presentation is Everything
Michael H. Porter



Long ago, when I first started to practice law, I remember attending a Canadian Bar Association seminar on the business administration of a law office. There was an American speaker, from Texas, who talked about “projection of effort”. He recounted how when we go to the dentist, we are only too painfully aware of how much work the dentist is doing and we see the result immediately afterwards. If our teeth were all crooked or fillings were left out, we would know right away. In other professions that is not necessarily always the case, and the client is not able to see the result until later.

It strikes me that if we walked into a good restaurant and the food, although properly cooked, was simply slapped onto the plates, so it looked untidy, we would not be too impressed.

Hence, my title “Presentation is Everything”. In today’s consumer society, we are very much judged by how it looks. The contents has to be comprehensive, but it also has to be laid out well. So I am proposing to look at both content and layout in this workshop. I will thus divide the workshop into 3 sections:

1. Presentation of Reports
2. Purpose of the Reports
3. Content of the Reports

1. Presentation of Reports

(a) Name

I ask first, why they are called “Memorandum of Understanding” (MOU). How modern or plain English is this? What does it mean to the clients? Or further, when we talk about MOU’s, what does that mean to the clients?

I saw a medical specialist recently who did an examination of me. He had a resident along with him who performed some of the tests. They started to talk about “xxx” to each other and it occurred to me that the way I felt may well be the way our clients feel when we start to use these technical terms (buzz words) around them.

Presentation is Everything
Michael H. Porter

I settled some time ago on the terminology “Mediator’s Report”. However, I never liked the apostrophe in the title and finally asked myself what would be wrong with simply “Mediation Report”.

I don’t own anything in it. I am simply reporting my understanding of the provisional or tentative agreements the clients have come to.

Discussion

(b) Front Page

As we are likely to be judged by our presentation, why would we not take the small amount of extra time to create a title page with our name, maybe our logo, address, phone number. Any other product we buy in this consumer society has its brand name written all over it. Why? To keep it top of mind. It’s marketing. Why would we not create an attractive title page. After all, the client is paying plenty for this Report and its contents are very important to him/her, so why would we not make it look like it is important, official so to speak, when it is.

Discussion

(c) Layout

Sometimes in mediation I am presented with different Reports. Maybe a simple land appraisal or it may be a child custody assessment. Sometimes I have to spend a great deal of time wading through it to see what it is about and what are its salient features, let alone find the result. Other times the Report has a concise introduction, following an index, with headings laid out clearly, page numbers, as well as paragraph numbers, so that I can find anything at a glance.

I have set out some sample mediation Reports in the Appendix I. Some you will see have little or no substance. Others have a great deal of detail.

I suggest that a good Report will incorporate most of the following:

Title Page

Index

Preface or introduction

A disclaimer from being a legally binding document

Historical data (preamble)

Division of matrimonial property

Child support

Section 7 expenses

Spousal Support

Parenting Plan

Implementation

Dates and signature by Mediator

2. Purpose of the Reports

- (a) What is the purpose of the Mediation Report? I cannot tell you how many times I have conducted mediations with lawyers who have undertaken to put the provisional agreements reached directly into a written agreement, only to end up arguing months later as to what the agreement was. They seek to avoid the cost of a Report but end up costing the clients more money in the long run.

If the clients are in mediation without their lawyers and each goes back to their respective lawyer, without a Report, disaster soon strikes as, each party quickly develops a new perception of what the agreement was, which she/he probably honestly believes, and recounts to their lawyer. The two lawyers then start writing letters to each other or sending

Presentation is Everything
Michael H. Porter

drafts back and forwards, which quickly eats up any cost savings in not having the Mediator prepare a Report.

- (b) One of the reasons we prepare these Reports is to capture in an objective and neutral fashion, all the provisional agreements made by the parties. This is not only helpful to the clients themselves, but is generally cost effective for them also. I find most of my Reports take between 3 and 5 hours to prepare, unless there is something very simple as the subject of the mediation, when it might be 1 to 2 hours.

Thus, upon receipt of the Report, the clients have what I trust is an objective view of their provisional agreements. Sometimes by the time they get it, they are already rethinking it, justifying changes in their mind or actually believing (having convinced themselves that it should be) it to be different. Usually, I find they accept what is in the Report with some clarifications, additions or minor amendments.

- (c) A comprehensive, detailed Report is useful to the lawyers and enables them to prepare their formal agreements much more quickly with less chance of argument with the other side.
- (d) The second reason we do Reports, it seems to me, is to help the lawyers who often are not present throughout the mediation sessions, to understand the reasons why the clients did what they did. We all know that we encourage clients to think outside the box; that they all have underlying needs - interests that have to be met and that they can be met in a different way to the straight law model. Lawyers tend to think inside the box about what the law provides. If they see no reasons for a client doing what he/she is proposing to do, the lawyer will advise against it. If the lawyer on the other side does the same thing and becomes equally positional, then in the spirit of their "C.Y.A.", the provisional agreements quickly fall apart, despite the protestations of the client. She might say the clients should just tell their lawyers. That is like trying to tell your surgeon how he/she should operate on you. The subtle mystification and power exerted by the all knowing professional will most likely prevent this happening in nine cases out of ten. The clients go to lawyers in the first place

Presentation is Everything
Michael H. Porter

for protection. Often they are fearful. If the lawyer tell them that what they have done in mediation does not protect them (from a law model point of view), they will be confused and find it hard to contradict their lawyer. If, however, the Report sets out clearly the logic leading to the provisional agreements, then both lawyer and client are likely to stick with them.

- (e) Thus, it seems to me that the next purpose of our Reports is to not only set out what the parties agreed to, but the reasons why. Once the lawyers understand the reasons why, they are able to give their advice in a different manner. A client may be able to explain his/her reasons, but not able to explain the other party's reasons. The lawyer needs to understand how it work for both parties.
- (f) Thirdly, agreements made by clients are often looked at by the Courts. It may be at first instance or years later on a review. If the original reasons for the agreement are not recorded anywhere, the agreement may not make sense years later and may be overturned. If those reasons are clearly and succinctly set out somewhere, the parties can refresh their memories of how and why they made the agreements they did. The Supreme Court of Canada has made it clear that when parties make agreements for good reason, taking into account all the things that are important to them and have received full independent legal advice, then the Courts should afford the greatest deference to those agreement.

Another reason for the Report is that it helps for closure to the spousal relationship and enables the clients (parties) to move on, either completely separately or on with their parenting relationship, leaving all their spousal issues behind. If there are still specific issues to be resolved, it focuses the parties just on those (e.g. interim Report or mediations which set up arrangements for a 6 or 12 month period for example, with a view to coming back to settle certain things in the future).

The Mediation Report also reinforces, in their mind, that they are in charge of their decisions, that they have been perfectly capable of making good decisions based on sound

Presentation is Everything
Michael H. Porter

reasons and that in itself provides them with a sense of accomplishment. It cements into place the agreements made verbally by the clients. They built them and they will want to maintain them.

In summary, then, the reasons we prepare these Reports are:

- (i) They provide an accurate and objective account of what the provisional agreements were;
- (ii) They provide the reasoning behind the provisional agreements;
- (iii) They are effective in controlling runaway costs in the later preparation of formal agreements;
- (iv) They assist the lawyers to understand not only what the provisional agreements were, but also the reasons behind them;
- (v) They tend to anchor the clients and stop them drifting away from what they agreed to.
- (vi) They provide an element of closure for the clients.

Discussion

Presentation is Everything
Michael H. Porter

3. Content of the Reports

In Appendix I, you will see a number of sample Reports (all modified to prevent any identification). These are not provided to say what is good or what is bad, but to act as a focal point for discussion and to help formulate ideas for the preparation of the best way to prepare Reports for (your) clients in the future.

The main segments of any Mediation Report might be as follows:

(a) Without Prejudice Clauses

This is legal terminology and has a definite purpose to it. Statements that are written or spoken on a “without prejudice” basis, in negotiations conducted to settle actual or potential litigation, cannot be used in that litigation.

The purpose of setting out these words in a Mediation Report are to ensure that the Report cannot be used in later litigation if the parties fail to sign a written agreement and resort to the Court process. The initial mediation agreements between Mediators and the clients should, in my view, specify that the agreements reached are provisional only and not binding until the parties have received independent legal advice and incorporated their provisional agreements into a formal signed document.

We all know that sometimes clients just implement the terms of the Reports and sometimes just sign those. That is their prerogative, but we have to remember we are not practicing law and not preparing written agreements. We do not want to cross the lines set by the Legal Profession Act(s) in our respective Provinces. We also want to work with lawyers, who if they are supportive of the mediation process, are a great referral source. Preparing legal agreements and giving independent legal advice is their business. Helping clients reach those agreements is our business.

I reinforce this principle by the addition of the follow clause:

Presentation is Everything
Michael H. Porter

“As a preliminary matter, the parties have acknowledged and agreed that the mediation was conducted on a without prejudice basis, that is, any discussions and disclosures in mediation are not to be used in any further Court proceedings or documents, the Mediator is not a compellable witness in the event of further Court proceedings, the Mediation Report will not be produced in any further Court proceedings, that the Mediation Report is only meant to be a working draft and it is the responsibility of the parties through their respective lawyers to put the contents into a legally binding document.”

I commend this clause to you. I recommend you use it or any modification of it you choose, along with the words “without prejudice” in order to make it perfectly clear to the clients that this is a “report” not an agreement for signature and will not be binding until they have taken independent legal advice and signed a formal agreement.

I believe we assist our clients when we do this. They do not want an agreement that either or both of them can set aside down the road when things change. The only way it can be firm for both of them is to have independent legal advice before signing it. Thus, it is in John’s interest to have Mary get that advice before she signs and it is in Mary’s interest to have John also get that independent legal advice.

I appreciate that in the mediation world this is a contentious matter. I simply present my view which for me and my clients has always worked well.

Discussion

Presentation is Everything
Michael H. Porter

(b) Index

Please, let's make it easy for the lawyers and clients alike to find their stuff.

It really takes very little effort to create an index, but it saves everybody, even ourselves later on, a lot of time looking for a particular item.

(c) Headings, Page and Paragraph Numbers

Similarly, headings are important. Collect all the material that goes under that heading and keep it together. Paragraphs should be numbered as should page numbers.

Headings should establish the main items discussed and provisionally agreed upon. Sub-headings should be used when that item splits into different areas.

All this seems relatively elementary. I cannot begin to tell you how useful it is to both lawyers and clients. It puts a professional touch on your work. The more user-friendly your work is, the more referrals you are likely to get from that source.

I also cannot tell you how many Reports I see that have none of this, elementary as it may be. Those Reports are hard to follow and sort out what happened in the mediation.

(d) Introduction

I use the introduction to set the scene, so to speak. I start with the non-binding clause. I set out how many sessions of mediation the parties attended and for how long, which conveys to them and the lawyers the time and effort which the clients put into the result. I also set out the issues to be decided or the main areas of negotiation, taken from the original Agreement to Mediate.

(e) The Preamble

Whilst the introduction sets the scene from a process point of view, I use the preamble to set the scene from a factual point of view. Who are these people, when did they marry or get together, how many children do they have; what ages are the children and their names; what Court proceedings have taken place (e.g. Restraining Orders, Support Orders, etc.); what is the history leading to the present situation, what advice (if any) have they had/advice from legal counsel; who else was involved in the mediation and provisional agreements, e.g. business valuers, child psychologists or counselors, property appraisers, accountants; what information did they have before they came to their agreements; as what, in outline, are the major things of importance to each of them. In short, who they are, how they got to where they are, what resources they used to make their provisional agreements, and what was important to each of them.

This gives a comprehensive overview to the reader of what has taken place in mediation prior to then reaching their provisional agreements..

(f) The individual subject matters of the mediation, e.g. parenting plan, child support, Section 7 issues, spousal support, and division of matrimonial property, along with the details of what was important to each party and the provisional agreement reached are then set out under their respective headings..

(g) Implementation

In my mediations, the parties generally agree to return to mediation if any future dispute arises. Thus, I generally include the following clause:

“The parties will use their best endeavours to fully co-operate with each other in the implementation of these arrangements and to treat each other at all times with respect and dignity. In the event of any dispute arising between them each agrees that they will refer the matter back to mediation before commencing any legal action.”

Presentation is Everything
Michael H. Porter

(h) Signature

I generally end my Reports as follows:

“The above is my understanding of how the parties wish to arrange their affairs/conduct themselves.”

And then I sign it with my name and designations printed below the line, accompanied by the word “Mediator”. I do not have the parties sign the Report.

Conclusion

In spending some time on how we might individually put these Reports together, we enhance our work. Going back to that American lawyer, it amounts to a “projection of effort”. If our clients see a well presented and accurate Report, they are more likely to be well satisfied with the services we have provided.

Presentation is Everything
Michael H. Porter