Mediators Should Provide the Parties with Basic Information

By Frank Garfield

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It is widely assumed that family mediators do not have liability for professional negligence. A mediator's job is to assist the parties in reaching agreement. The mediator does not represent either party, let alone both parties. If the parties need legal advice, they are routinely told to consult counsel.

Under the current state of the law, this analysis is probably correct. There is as yet no reported appellate case in the State of California holding a mediator liable for professional negligence. At the same time, the lesson of history is that clients who feel victimized by a professional's negligence consider suing a legitimate option. Mediators should not rely entirely on their ability to disclaim responsibility for decisions made by the parties or the immunity from suit they may currently enjoy. *Howard v. Drapkin* (1990) 222 Cal.App.3d 843.

Mediators may legitimately disclaim responsibility for the parties' decisions, as well as any obligation to give legal advice, but they cannot as persuasively disclaim responsibility for providing the parties with legal information. The fact of the matter is that mediation clients look to the mediator for help in identifying the issues. Denying that the parties have a right to do this ignores the reality of practice. Mediators who fail to identify important issues, or who provide incorrect information with respect to those issues, are inviting client dissatisfaction and, perhaps, lawsuits as well. This article outlines the legal information that mediation clients may have a right to be told by their family mediator.

1. *Date of separation.* The parties are often confused about the date of separation. Sometimes they mix up the *date* of separation with the concept of *legal* separation. It is important for the parties to understand how the date of separation is ordinarily defined, how the date of separation can be blurred, and why the date of separation matters so the parties can decide how they wish to proceed. There is no reason for the parties to discover, sometimes many months later, that one of them thought they were separated and the other did not. Absent clarity on this point, the parties may recall historical facts in a manner that serves their present self-interest, which may create an issue that could have been avoided.

2. *Support.* The Court retains jurisdiction to award child support retroactive to the date the Petition for Dissolution of Marriage is filed. Calif. Fam. Code § 4009. However, there is no comparable statute for spousal support. To the contrary, spousal support may be awarded retroactive only to the date an Order to Show Cause is filed. Calif. Fam. Code § 4333. The parties should be informed of these important limitations on their rights and duties when it comes to support. The source of funds used to pay the parties' ordinary and necessary living expenses is also an important consideration. It makes a difference if those expenses are paid out of community savings, or one party's separate earnings. This point is directly related to the preservation of community assets.
3. *Preservation of community assets.* The parties may wish to agree on the ground rules for handling their community assets while the mediation is pending. In some cases, the parties are comfortable with the *status quo*. In other cases, they prefer to transfer liquid assets into an account requiring both parties' signatures for all withdrawals. It is always better for the parties to focus on what arrangements will best meet their needs than to find that community funds one party thought were in the bank have been spent by the other party.
4. *New Debt.* Similar considerations apply to joint credit cards. The parties should have a clear understanding about the responsibility for paying post-separation charges.
5. *Deductibility of Support.* The parties may assume that payments that are intended as spousal support are deductible to the payor and taxable to the payee. But this is true only if the payments are made pursuant to a written agreement or Court order. Knowing that the parties may not be aware of this legal requirement, the mediator should tell them, and not wait for the parties to discover on their own that the spousal support being paid voluntarily is neither deductible to the payor nor taxable to the payee.
6. *Real property.* If the parties own real property as joint tenants with the right of survivorship and one of them dies before a judgment has been entered, the property automatically passes to the other. The parties should know that they have the right to terminate the joint tenancy and convert their ownership to a tenancy in common. Calif. Civ. Code § 683.2.
7. *Use and occupancy of the family residence.* Very often one party continues to

reside in the family residence during the mediation. This situation potentially gives rise to an *Epstein* claim by the party occupying the residence (*i.e.,* a claim for reimbursement from the community for the separate funds used to pay the mortgage, taxes, and insurance attributable to the property), or a *Watts* claim by the other party (*i.e.,* a claim for reimbursement based on the premise that the fair rental value of the property exceeds the aggregate cost of the mortgage, taxes, and insurance). Advised of these potential claims, the parties may decide to resolve them or reserve them, but at least they will know about them.

8. *Allocation of deductions.* The deductions for mortgage interest and real estate taxes could be significant. How those deductions are to be allocated should be discussed and decided; otherwise, one party or the other may be prejudiced as a result of how and by whom the payments were made.

9. *Joint or separate tax returns.* The parties should think about whether they intend to file joint or separate tax returns for the year in which the marriage will end. To a certain extent, the answer to this question varies based on a number of factors, including when the date of separation occurs; the later in the year, the more likely it will make sense for the parties to file joint tax returns. The ability of one or both parties to file as head of household is also an important consideration.

   In any event, the parties should be alerted to the issue, and encouraged to consult an accountant about their options. For most couples, minimizing the overall tax obligation is a shared goal. While there may be some disagreements about allocating responsibility for payment of the obligation, that is a separate issue. It is particularly important for both parties to understand that all income earned prior to the date of separation is allocated half to each party if the parties elect to file separate returns; not 100% to the party who earned the income.

10. *Estate plan.* If the parties have wills, they probably want to change them. If they don't have wills, they probably want to make them. A mediator does not need to know anything about estate planning to know that divorcing spouses are well advised to take a fresh look at their estate plans.

11. *Insurance.* Once a Petition for Dissolution of Marriage has been filed and served, both parties are restrained from changing their life, health, automobile, and disability insurance. There are several issues involved here. First, unless a

Petition is filed, there are no restraints. Second, whether or not a Petition is filed, the parties should consider if existing insurance meets their needs, or changes are in order. Third, how the premiums for existing insurance will be paid is not addressed by the standard restraining order. Restraining the parties from making changes does not require either party to pay the premiums.

12. *Confidentiality.* The parties must be informed that agreements reached in mediation are confidential, and may not be used as evidence in Court unless the parties agree. Calif. Evid. Code § 1119. An agreement that the parties intend to be legally binding and enforceable should preferably be in the form of a stipulation that is filed with the Court, or at least recites that it is admissible into evidence. Calif. Evid. Code § 1123.

Wholly apart from a mediator's potential liability for negligence, the parties have a right to expect a minimal level of competence. The mediator's job is not limited to facilitating agreement between the parties only with respect to the issues they identify. The parties to a marital dissolution are often upset, confused, and ignorant. They may be aware of broad categories – property, support, custody, and so forth – but rarely will they understand the nuances. While the mediator may have no responsibility for how the parties resolve their situation, the mediator does have a professional obligation to provide them with the legal information they need to identify all of the issues. The parties can't resolve them unless they know about them.

Franklin R. Garfield is a family lawyer and mediator in Los Angeles.