



First
Call
Consulting

Gilbert Feibleman, J.D.
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Mediator
Reference Judge

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PREPARING FOR MEDIATION

1. What is Mediation?

- a. Mediation is a cooperative process through which an equitable settlement is sought and both the parties' needs are addressed. Each mediation session will be conducted in private. No meeting will take place in the absence of either party and no other persons will be present during the mediation, except by mutual agreement.
- b. All statements made during the mediation process are privileged and are made without prejudice to any party's legal position and are non-discoverable and inadmissible for any purpose in any legal proceeding.
- c. The privileged character of any information is not altered by disclosure to the mediator. Disclosure of any records, reports, or other documents received or prepared by the mediator cannot be compelled. The mediator shall not be compelled to disclose or testify in any proceedings as to (i) any records, reports or other documents received or prepared by the mediator or (ii) information disclosed or representations made during the mediation process or otherwise communicated to the mediator in confidence.
- d. Since the parties are disclosing sensitive information in reliance upon this agreement of confidentiality, any breach of this agreement would cause irreparable injury for which monetary damages would be inadequate. Consequently, any party to this agreement may obtain an injunction to prevent disclosure of any such confidential information in violation of this agreement.
- e. **Decisions.** Mediation leaves decisions to the parties. The mediator will facilitate discussion and help generate options but will not make decisions for the parties.

2. Timing

- a. At least 48 hours prior to mediation, counsel will provide the mediator with any pleadings they deem relevant to the mediation.
- b. If property division is an issue, the parties should make their best efforts to provide the mediator with a joint asset division spreadsheet in Microsoft Excel format showing side by side where they agree and where they differ. Mr. Feibleman can provide an excel form to use upon request.
- c. At least 24 hours prior to mediation, each lawyer shall send the mediator a letter outlining the issues as discussed in Exhibit "B."

3. Representation. The mediator is Gilbert B. Feibleman, *dba First Call Consulting*. Acting under current standards of the Oregon State Bar Association, Mr. Feibleman will be neutral as to any conflicting interests. In this mediation, the parties are required to have separate legal counsel throughout the mediation and to seek independent legal review of any proposed agreement developed through mediation.

4. Adversary Actions. The parties should not engage in adversary legal action during the course of the mediation. Mediation will be terminated if it is determined that one of the parties is acting in bad faith. Any settlement without such disclosure is subject to being set aside by a court of law.

5. Confidentiality. All written and oral communications made in the course of mediation are confidential, except as provided for below. No party will call the mediator to testify concerning the mediation, any statements or admissions made during the course of mediation, or any recollection of the mediator, nor will a party seek production of any written documents prepared or produced during the course of mediation which are not otherwise discoverable through the legal process, including, but not limited to, the notes, records, and work product of the mediator. In the event either party contravenes this provision, the mediator will move to quash subpoena or summons and the party in breach will pay all the mediator's fees and expenses for so doing.

Notwithstanding the preceding paragraph,

- a. The mediator may discuss the mediation and any information disclosed by the parties in mediation with the parties' attorneys and any third-party advisors or experts engaged by the parties or either of them for the purpose of resolving the matters in issue;
- b. The mediator will disclose otherwise confidential information where required by law (e.g., where the mediator suspects child abuse or where the information suggests an actual or potential threat to life or safety or intention to commit a crime), or where ordered to do so by judicial authority (e.g., on public policy grounds);

- c. The mediator may disclose to a party, wholly or in part, any information provided by one of the parties to the mediator in a "caucus", which in the mediator's sole judgment is relevant to resolution of the matters in issue, unless the parties have agreed in advance that the information shall be treated as "confidential";
- d. The mediator may disclose "agreements" made between the parties or their counsel in any joint sessions;
- e. The mediator may disclose non-identifying information for the purpose of mediation research or educational presentations; and
- f. This agreement to mediate and any written agreement made and executed by the parties arising out of the mediation may be used in any related legal proceeding unless the parties have agreed to the contrary in writing.
- g. In the event the parties reach a settlement in mediation, the mediator is permitted to testify or sign a declaration stating the terms of the settlement agreed by the parties in any action to enforce the settlement.
- h. If called to testify the lawyer of the party requesting the mediator to testify shall be responsible for the mediator's hourly rate.

6. **Withdrawal.** Either party or the mediator may withdraw from mediation at any time.

THINGS TO PROVIDE THE MEDIATOR

In order that the mediator may prepare to assist you with the mediation and settlement negotiations, please send a letter with "CONFIDENTIAL: MEDIATION STATEMENT" in the heading to the mediator at the following email address: gjl@fcconsulting503.com

You should send the letter no later than 9:00 a.m. on the day before the mediation. It should address the following:

- A concise summary of the facts of the case.
 - Bullet points are preferred to indicate such factors as the length of the marriage; names and ages of any children; incomes of the parties; and assets that are likely to be the focus of settlement negotiations.
 - If child or spousal support are at issue, to the extent possible, please include at least a draft Uniform Support Declaration.
- A concise summary of the issues to be discussed along with a brief discussion of your client's concerns.
 - For example, "The parties cannot agree on a parenting plan for their 9-year-old son. My client is concerned that the child's homework will not be consistently completed if the child spends weeknights with his Father," or "my client does not believe her spouse is accurately representing his income for support purposes."

- Please note that every divorce case involves poor behavior by at least one of the parties; please focus on those issues that arose before the divorce was filed and likely will persist after the case has resolved.
- Copies of all settlement offers exchanged along with a candid discussion of what you perceive to be the obstacles to settlement.
 - For example, "we have made three settlement proposals. Copies are attached. Opposing counsel has never responded," or "Despite the fact that the parties have been married for 20 years and my client has never worked outside the home, the husband has consistently refused to consider spousal support."
- If there are personality conflicts with the parties or counsel, please describe them in sufficient detail to help me understand the dynamics between the parties or counsel.
- A joint spreadsheet of assets and liabilities (if property division is at issue). If you have been unable to prepare a joint spreadsheet by collaborating with opposing counsel, it is unlikely that the case is ready for mediation. You should exchange a single draft of the spreadsheet and talk with opposing counsel in person or via telephone to discuss valuation issues and agree on a comprehensive list of the assets that are subject to division by the court.
 - *I can provide an excel format blank to use upon request.*
 - I frequently receive two separate spreadsheets that are not organized the same way and do not even list the same assets; to the extent possible, those issues should be resolved between counsel in advance of any mediation. It is not a good use the fees you are paying me to resolve those issues and create a joint spreadsheet during the settlement negotiations.
- A list of any discovery that has not yet been provided if you believe will impact settlement.
 - While there are occasionally cases that can resolve without exchanging discovery, there is not much value in mediation negotiations when one party is convinced the other party is hiding assets but has not yet conducted sufficient discovery to resolve the issue either way.
- A candid analysis of both the strengths and weaknesses of your client's positions on each issue.
 - For example, "my client's spousal support claim is hampered somewhat by the fact that this case has been pending for two years but she has never sought employment during that period," or "my client disagrees that the DHS finding of abuse of the child of this marriage may impact the parenting time he receives."

In addition to the letter, the lawyers should provide their own client with the lawyer's estimate of the attorney's fees necessary to prepare for and try the case, including the anticipated cost of any discovery that still needs to be completed and the cost of having

expert witnesses testify at trial; the risks of trial, including the possibility of having to pay the other side's attorney's fees; and the benefits if any of allowing the court to decide issues that the parties cannot resolve.

Paying for Mediation

Each party and that party's attorney/firm shall be responsible for payment of Gilbert Feibleman's fees as outlined in the email communications with counsel

- The payment is due as billed and will be paid to Gilbert B. Feibleman, dba First Call Consulting.
- Mr. Feibleman typically requires that a retainer be placed in the lawyer's trust account 7 days prior to the date of mediation. It is the lawyer's responsibility to pay the bill.
- By hiring Mr. Feibleman each party's attorney has guaranteed the payment of their client's share of the billed mediation fees and has agreed to be primarily responsible for the fee. That agreement shall also bind the lawyer's firm as a representative of their firm.
- The lawyer's financial responsibility to Mr. Feibleman is primary and their client's responsibility is secondary.
- On a case-by-case basis Mr. Feibleman may require counsel and/or the parties to execute a written mediation agreement.

Incorporation in Mediation Agreement

This Preparing for Mediation Document is incorporated by reference in the oral and/or written Mediation Agreement.

I look forward to assisting both counsel and the parties with mediation in the hopes of achieving a complete settlement of your case.

Gilbert B. Feibleman