CHECKLIST FOR MEDIATION
AND SETTLEMENT CONFERENCES

_____ Check to see if either party is self-employed.

_____ If so, make sure to adjust their "gross income" to normalize the parties' income by taking into account the effect of "self-employment tax" (the employer portion of FICA).

_____ Determine how many allowances the parties are reporting on their W-4 or NC-4.

_____ Consider whether a party is having excess taxes withheld, which reduces disposable income.

_____ Consider tax refunds.

_____ Consider whether refunds are income if more money is being refunded than was actually paid in by the employee.

_____ Make sure that someone is not having excess taxes withheld from their income to make their monthly disposable income look artificially low.

_____ If looking at monthly disposable income, review tax refunds for the purpose of spousal support.

_____ Consider voluntary deductions.

_____ Look at the opposing parties' paystubs to make sure they are not decreasing their net disposable income by increasing their voluntary deductions in an effort to avoid a support obligation.

_____ Make sure contributions to retirement accounts are consistent with pre-DOS levels.

_____ See if the expenses being accounted for are "cash" expenses.

_____ Don't give credit for depreciation when looking at a parties' business or self-employment income.

[**NOTE:** *It is not a cash expense, but rather an accounting method used to distribute the cost of assets to the years the asset is in use.*]

_____ Look to see if the party is given credit for actual "cash" expenses.

[**<u>NOTE</u>**: *The following questions are most important when looking at business returns and/or self-employed (IRS Schedule C) returns*.]

_____ Make sure that an asset that is being depreciated, but which was purchased with cash, is being accounted for on a cash basis.

_____ Look at the source of funds to determine if there is any underlying financing for the purchase.

_____ Compare income and expenses reported on the tax return to the equitable distribution inventory affidavit.

[**<u>EXAMPLE</u>:** *If someone is listing mortgage interest as a deduction, but is not reporting any real property, something is amiss. If someone is reporting dividend income, but has not reported invested assets, this is another problem*.]

_____ Do the income and expenses reported on the tax return correspond to the assets and debts reported on the equitable distribution inventory affidavit?

[**<u>NOTE</u>:** *The tax return can be helpful in determining if the opposing party has reported all of their assets and debts*.]

_____ Determine if the other party is overstating their monthly debt service obligations (*i.e*., confirm that spending is consistent pre-DOS as with post-DOS).

[**<u>EXAMPLE</u>:** *The parties have a 30-year mortgage with a fixed interest rate and have always made the minimum monthly payment. Now, the opposing party is making additional payments toward principal on a monthly basis. Likely, this should not result in an increase in the paying party's monthly expenses because that party has made a voluntary increase in his or her expenses.*]

_____ Review supporting documentation.

_____ Request to see the supporting documentation for the income and expenses set forth in the opposing parties' Financial Standing Affidavit.

[**<u>NOTE</u>**: *This will help to determine the answers to many of the questions set forth above*.]

_____ Consider the IRS requirements for avoiding taxation.

_____ Make sure that your terms for distribution of marital property do not exceed six (6) years.

[**<u>NOTE</u>:** *This will cause the parties to lose the presumption that the distribution was pursuant to divorce and, therefore, not subject to typical taxation laws. There* *is a risk that the 1041 presumption will be lost and this can affect enforcement of the agreement in future years.*]

[**<u>EXAMPLE</u>:** *If you are in the process of a breach of the agreement or contempt of an order six (6) years after its execution, ensure the remedy you seek considers potential tax consequences.*]

_____ Consider including an indemnification clause for taxes.

[**<u>NOTE</u>:** *If your client was not involved in household finances and did not participate in the preparation of tax returns, it is a good idea to request that the other party indemnify your client from any latent tax consequences. If the parties' returns are audited three (3) years later and the other party was engaged in "creative" accounting, you want to make sure your client is not on the hook for those choices*.]

_____ Consider who will claim the children for deduction purposes.

_____ Determine if it is in the best interest of your client to negotiate this term.

_____ Determine whether your client is the primary custodian.

a. Primary Custodian

[**<u>NOTE</u>:** *The IRS would determine that your client has the right to claim the children as deductions. In this instance, it may be best not to bring this up if your client will get the deduction each year already. This reduces the likelihood that the opposing party would request splitting or alternating the children as deductions*.]

b. Equal Custody of Children

[**NOTE:** *The tie-breaker rule is that the party with higher adjusted gross income on his or her federal return will have the right to claim the children unless otherwise agreed by the parties. Note that this considers the total adjusted gross income on the return, including spouses. If one of the parties remarries and files jointly with their new spouse, both of the incomes would be considered for the tie-breaker rule even though the new spouse's income is irrelevant for child support.*]

c. <u>Not</u> Primary Custodian

[**NOTE:** *If your client is <u>not</u> the primary custodian and the parties don't have shared custody, then you may want to bring this up in negotiation*.]

_____ If you do address this, make sure your agreement requires the parties to sign any documents required by the taxing authority to effectuate the terms of the agreement.

_____ If the parties have an equal number of dependents, consider splitting the dependents rather than alternating them.

[**<u>NOTE</u>:** *It is typically easier to handle this way; alternating them will result in the parties having to file new W-4s with their employers each year and ultimately results in inconsistent monthly income from year to year.*]

_____ If your client receives child support and is giving up the tax benefit of claiming the children, you can and should ask for some consideration in the monthly child support amount.

[**<u>NOTE</u>:** *The North Carolina Child Support Guidelines assume that the party receiving child support is getting the tax benefit of claiming the children*.]

_____ Examine the tax attributes of the asset or debt being divided.

[**<u>NOTE</u>:** *Not all assets and debts are the same when it comes to tax treatment. Certain retirement accounts have different tax treatment than others, some investments have different tax rates than others, and some debt obligations have tax benefits that others do not. It is important to understand the tax consequences associated with each asset and debt and make sure that, in the grand scheme of things, they are negligible or that they are accounted for when dividing the marital estate*.]

_____ Be sure to address any marital portion of tax liability.

[**<u>NOTE</u>:** *If the parties separated in the middle of the tax year, and in particular if one party is self-employed, it is important to make sure that the marital portion of the tax liability is being taken into consideration for settlement purposes*.]