

9 Hour Family Law Course
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9 Hour Family Law Course
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Overview:

This series of 9 one-hour programs provides a solid basic family law education for any new family law attorney or transitioning practitioner can add family law to his or her services after seeing these seminars and buying a local (state specific) form book.

1. Family Law Client Interview and Intake

Description: Conducting a successful 1st client interview helps you get hired, decide if you want to get hired, set client expectations and gather information for a successful family law case.

2. Preparing Your Client for a Court-Ordered Custody Mediation or Evaluation

Description: Thorough and ethical preparation of your client for a court-ordered custody mediation and evaluation can mean the difference between success and failure in a contested custody matter.

3. Discovery Basics: Reality Check, Tax Returns, Wage Records, Perks, Subpoenas, and Your Own Disclosures

Discovery in family law goes well beyond the required court forms. Learning to read tax returns, pay stubs, and other financial documents can help you discover undisclosed income and assets. Learn where and how to find the information you'll need to advise your client, settle, and try a case.

4. Preparing For Evidentiary Hearings: You and Your Client

You'll lose very few family law cases if you're well prepared. Learn what and how to prepare a family law case, and client, for an evidentiary hearing.

5. Negotiating a Settlement: Client Conversations, Settlement Meetings, Mediations

Since over 95% of all family law cases settle before trial, effective negotiation and settlement skills are essential to successful family law practice. Learn how to get the upper hand in negotiations and settlement meetings for favorable resolutions for your family law cases.

6. Preparing for a Pretrial Settlement Conference

You'll lose very few family law cases if you're prepared. Many cases settle at the pretrial conference stage, so being well-prepared can mean the difference between an acceptable settlement conference and a successful recommendation from the settlement officer.

7. Custody: Crafting a Developmentally Sound Parenting Plan

Your client's parenting plan needs to serve the children's best interests as well as work for the parents. A detailed plan based on the children's ages and bonds with the parents will have the best chance of being adopted by the court as well as insuring a successful post-divorce co-parenting relationship.

8. Drafting a Tight Judgment

Family law is a minefield of potential malpractice and unintended consequences. Drafting a tight judgment will avoid problems later while giving your client a clear roadmap of everyone's rights and responsibilities.

9. ADR in Family Law: Mediation, Collaborative Law, Arbitration, Private Judges

Alternative Dispute Resolution is more popular than ever. Learn the basics of each type of ADR, how to advise clients about ADR choices and optimize your advocacy for clients involved in alternative dispute resolution.

Outlines and Materials

Disk 1: Family Law Client Interview and Intake

After 20 years of practice, I've got some very strong opinions on how to do an initial intake and how to handle those first few appointments. Those opinions are much different than when I first started out.

Purposes of the meeting:

- Sales
- Qualify the client
- Educate the client

- Set up client expectations
- Assess client management issues
- Gather information for the case which will expedite things later

What will you do when the phone rings?

- Who will answer, you or an assistant?
- If it's an assistant, how will this person be trained?
- If it's you, how will you avoid spending too much time on the phone?
- Define your goal: to get the client into the office
- Be ready to politely refuse to give advice over the phone or e-mail: "Your situation sounds complicated, and the decisions you have to make are important. I couldn't do your situation justice with an 8 minute telephone call---do you have time to come in today?"
- Giving advice on the phone or e-mail can give the impression to a layperson that you "represent" them, which could create an ethical nightmare.
- You also don't get paid, since they're not yet clients and you don't have a retainer

Free consult?

- You will get asked. Clients will assume because lawyers who advertise heavily often offer free consult
- Western society: we believe you get what you pay for, so a free consult has no value
- Ethical issue: by meeting with one spouse, you will conflict yourself out of being able to represent the other spouse and potentially other people based on the information you learn in this initial consult, so it is really worth doing for free?
- Fewer and fewer family law attorneys offer a free or cheap consult, and as you get busier you'll have less time to do free consults
- The key is to decide what you want to do in advance and set your policy

Examples of policies:

- First 30 minutes are free
- Orientation is free—but we don't talk about your specific case
- Nominal charge—we used to charge about 1/3 of our hourly rate so that we could assess that people were serious enough to pay something
- Flat fee
- Full hourly rate

Serve before you sell:

- Timing: most divorce clients are in a panic to see someone. Our office policy was to schedule them for the same day if possible.
- Most people do not shop around; they hire the first person they see

- This consult will determine whether or not the client hires you so make it valuable to the client
 - You can make it easier on yourself by offering handouts which explain routine procedures, providing a fee and office policy agreement at the consult, financial disclosures worksheets, or even other selling “value add” freebies, like a copy of a divorce book
 - Have other referrals ready: accountants, financial planners, therapists, child experts
 - Put everything in a folder with a sticker with your office name and contact info on it: keeps clients organized, gives a good first impression & makes you look organized and prepared, plus you never know who the client will pass the package along to in the future
- For people who are not suitable clients for your office, offer other resources: legal aid, domestic violence resources, attorneys who you think would be a good fit. It’s polite, professional and good karma. You do not know who this person knows and, if you make a great impression, they may ultimately “find” the money to hire you.

Retainers:

- You must provide a fee agreement to the client before representation can begin, so do this at the very first appointment and keep a record that you have done so.
- The retainer may be the only money you see from the case, so keep that in mind when you’re considering discounting your retainer
- Many family law firms run a 20% uncollectable fee average—the equivalent of an entire day off per week, so be careful when you qualify clients unless you’re in a position to offer involuntary pro bono services
- Many court jurisdictions won’t allow you to withdraw from a case simply because you’re not being paid, so once you’re in a case assume you’re in to stay
- You also don’t do a service to clients by taking all the money they have for a retainer and then having to withdraw or force them to hire you after only a small portion of the case has been completed---then they’re without representation and broke.
- Some jurisdictions allow for a replenishing retainer---when the initial retainer dwindles, you can ask the client for another retainer rather than having to bill by the month and risking that they don’t pay
- Some jurisdictions allow clients to pay with credit cards. Be careful if it’s a joint credit card or if there’s the threat of bankruptcy. You don’t want to fall into an ethical trap or be considered to be a creditor who received “preferential treatment”.
- Most jurisdictions require you to deposit the retainer into your attorney’s trust account, so be sure to do that. You can only draw down and deposit into your operating as you bill the fees.

- Other jurisdictions allow you to designate that your retainer is an advance fee earned when paid, and so you can deposit it directly into your operating account.
- Will your retainer be refundable, or not? You won't get many cases in which there will be money left over, but it will happen once in awhile. Sometimes people reconcile...would the balance of your retainer be refundable then?
- Some jurisdictions allow "unbundled fees" which can let you consult with clients who can't afford you who are willing to do some of the work themselves.

As you conduct the actual interview:

- Have a specific goal for the information you collect. We use intake sheets so that we make sure to get all of the information we know we will need.
- Clients are notoriously bad at getting financial disclosure information done. If you get a chance to do that at the initial interview or early on in a case, take advantage of that opportunity. While you've got the client at the office (if they're hiring you) you could also delegate drafting the disclosures to support staff since it can be time consuming.
- Have an outline of what you intend to cover. Examples might include:
 - Outline of your state's family law
 - Discussion about how child support and alimony are set
 - Discussion about how family court works and what to expect
 - Discussion about your office procedures and what the client needs to be prepared to do
 - Discussion about billing procedures and policies as well as telephone protocols
 - Questions that you need to have answered so you can decide if you want to take the case
 -

How to get started:

- As much as you're prepared with the material above---questionnaire, information package, outline of the interview, don't just start talking
- **First: ask the client what his or her questions are.**
- They will be unable to concentrate until whatever is on their mind is answered, so you'll be ahead of the game if you ask them first what their questions are.
- By listening to the client's response to what they're concerned about, you'll also get to their goals for the case and what is most likely to make them "happy" with your service. That's crucial to avoiding trouble with clients.
- By listening first, you'll set up a caring dynamic with the client---also crucial to avoiding trouble with clients. Clients rarely grieve or sue lawyers they actually like.
- That said, you cannot let them go on and on. Be ready to gently steer them into the topics which you know that they need to be educated on and the questions which you need answered to determine if you want to take the case.

- Clients who can't be steered are going to be trouble, so keep that in mind when you decide if this person is someone you want to represent or not.
- Clients who have been to every lawyer and professional in town and done endless research are clearly not listening to advice, so that's also something to consider when you decide if you want to take them on as clients. They are going to be difficult, they will call all the time, and when they are disgruntled you may have trouble collecting your bill.
- Clients who have been to a couple of sources and seem to be listening are also going to listen to you and take your advice.
- If you avoid all difficult clients, you will not have a family law practice. It's the nature of the type of law. You need to decide what cases you will take and what cases just spell trouble.
- Do Not: go over your credentials unless the client asks. If the client has come in to see you he or she assumes you're qualified. Telling the client how great you are (especially first, before they've had a chance to tell you their concerns) is a counter-productive waste of time. That said, have your resume ready, a list of your more notable public record cases and appeals, client testimonials (with written client permission), etc. in case the client asks.
- Let your office procedures, organization and professional demeanor speak for themselves.

Assessing the case:

- Get an idea of the facts, both in terms of income and assets as well as inter-personal dynamics
- Is fault considered in your state? If so, be sure and know the potential grounds for fault and ask the relative questions with regard to fault
- If fault is not considered, you're still going to hear about all of the fault-type issues from your client. You will need to listen—they need to tell their story. You also need to be clear that while you empathize with the heartbreak of the situation that this is not something that the court will consider. Be clear.
- Does the client have an idea of the assets? If the answer is "no, no idea" is it because the client has chosen to keep himself or herself in the dark (the financial records are in a cabinet that's available but he or she has chosen not to look in it) or is it because of secretive behavior by the other spouse?
- The "no idea about the assets" cases are expensive and time consuming because they include all of the usual divorce stuff plus a heavy client education component. The client may also be scared of finances and reluctant to compile records even if they have access to them. Keep this in mind as you set the fee.
- The best predictor of how much a case costs is ACRIMONY, not complicated finances. Ask questions to get an idea of the amount of acrimony you're up against.
- If they have children, does your client think that they can work out a parenting plan? Or is this likely to be a contested custody matter? If it appears to be

contested, do you expect extreme facts like accusations of inappropriate sexual behavior or mental illness? The complexity of the custody situation will greatly impact the amount of time and fees involved.

- Is the client listening? Taking notes? Talking over you? Repeating themselves? These are all indications of how they will behave throughout the case so take note.
- Is the client's perspective realistic?
- How does the client describe the other spouse? In western society, we don't just collide and there are few arranged marriages, so these people got married for a reason, even if was an unhealthy one. The terms in which the client describes the spouse say a lot about the client, too. "Every garbage can has a lid".
- Does the client demonstrate a capacity for empathy? Does he or she understand what the other spouse's worst fear is, or what their goals might be? If so, this is a good indication that this will be an easier case to settle and that your client will be helpful in preparing the case. If not, you may be in for a long ride.

Begin with the end in mind:

- Get the client's financial picture on paper, even if the details are sketchy.
- Have a list of possible issues ready so that you can make sure you get the whole picture (agenda)
- Understand what his or her primary goals are---and write them down. You may even want to do a follow up letter outlining what they've said they want so that you have a benchmark against which you can measure as the case goes on (anecdote about stewardess fee dispute issue)
- Prepare the client for the reality of the situation. There's a tug of war between telling an optimistic truth and a pessimistic truth and reality (open letter from your divorce attorney)
- Are there any shared goals between client and spouse? Examples: do they both want to put the children first, or spend as little as possible in legal fees? (or as much as possible?)

Therapeutic Intake:

- Provides clues about what you're in for
- Ambivalence: is there a chance for reconciliation?
- Make sure client is clear about what divorce court can and cannot do.
- Stress points---may point to unfinished business in the relationship which will mean a bumpier ride with the client throughout the case

Red Flags:

- If something seems NQR it is probably NQR. Trust your instincts.
- If you are tempted to cut your fee to take the case, unless you need experience in this type of case and are willing to do it for free (or practically so) consider your mortgage, student loan, family....a client who is not paying is stressful, a time

waster, and can create resentment between you and the client which makes it harder or even impossible to do a good job.

- If you immediately sense that you don't like the client or that they are trouble, that's probably true.
- If every story the client tells is about how the spouse or couple is out of control, then consider that as you set your fee.
- If the client has been to every attorney and divorce professional in town, they probably won't listen to your advice either, and you'll spend all your time doing CYA letters.

The tug of war:

- You will make more money litigating all your cases (provided the client can pay) than you will settling them.
- There is often more liability in settling cases than litigating them because clients can change their minds and there's less of a court record (e.g., spouse's fraud) if it turns out that there is an after-discovered asset or an under-valued asset
- Clients in a "low road" state often won't want to hear about the value, benefits and result of taking the high road and will fight with you. Eventually, you will be tempted to stop trying to tell you why more court motions, discovery, and depositions are counter-productive and expensive

Self-care:

- Be prepared with referrals for clients: therapists, accountants, forensic accountants
- Do not do everything yourself, especially in a complicated case. A forensic accountant is better qualified to do some tasks than you are and if the client cannot afford it, that is something that should be discussed beforehand. You're not a trained therapist yet some clients will use you as their therapist
- Establish office policies which set boundaries and keep them: telephone calls, cell phone numbers, payment of fees
- Determine when and how you will let clients go

Materials:

- Sample retainer agreement
- Sample Unbundled Fee Agreement
- Budget & Expenses worksheet
- Financial Affidavit worksheet
- Client intake Information form
- Client intake form
- Open Letter From Family Law Attorney

Sample retainer agreement

Re: Fee Agreement

Dear

I wish to confirm my arrangement with you concerning our fee for legal services rendered in this case. This summary explains the attorney fee charged for legal services by this office.

Legal fees for this matter shall be billed by the hour, except as set forth below. All legal services rendered are billed, including phone conferences, office conferences, legal research, court appearances, preparation of pleadings, and the like. Although our charges are recorded in tenths of hours (in six minute increments), you should know that because of time needed both before and after a telephone call, telephone calls are charged at actual time plus an additional increment, but in no event less than .2 of an hour.

Other costs in connection with your matter, such as filing fees, sheriff's fees, subpoenas, appraisals, court reporters fees and depositions are separate from and in addition to the attorney fees. Federal Express mailings are billed at \$25.00 each, and facsimiles \$5.00 each. In the event that this office elects to pay costs on your behalf (generally those under \$100), the amount of the costs expended on your behalf will be reflected on your statement.

Fees for experts, appraisals, depositions and other costs (generally those over \$100) are your direct responsibility and will not be advanced or paid by this office on your behalf unless we specifically agree to do so in writing, in advance of the cost being incurred. Costs are your direct responsibility, and, if they are sizable, we will discuss them with you before incurred. If you determine that you cannot afford to pay costs for experts, depositions, or other related fees, then you may have to forego some or all of these services.

Our hourly rates are as follows:

| | |
|-----------------|----------|
| Diana L. Mercer | \$275.00 |
| Legal Assistant | \$150.00 |

Certain types of fees are billed on a flat-fee basis and are payable in advance:

Preparation of initial petition and response papers, notice and acknowledgement of receipt. Fee includes postage and filing service, but not filing fee of \$214.50 or first appearance fee of \$211.20 (which fees are to be paid via check made payable to Clerk of the Superior Court). Fees also do not include sheriff or registered process server fees, which, if necessary would be contracted individually. Flat fee: \$325.00

Preparation of Judgment papers. Fee includes legal drafting, photocopying, and filing with the court. For judgments without children: Flat fee: \$725.00
For judgments with children: Flat fee: \$875.00

Fees for other types of legal services, such as real estate closings, are billed and handled either on an hourly, contingent, or flat fee basis. Should such services become necessary in your case a fee can be quoted at that time.

With increasing overhead, it may be that during the course of our representation, your hourly rates may increase, although such an increase is not presently contemplated. If

such an increase is required, we will notify you in advance and the charges thereafter will be at the new rate.

It is impossible to determine in advance the amount of time that will be needed to complete your case, nor can we make an estimate as to the total fee. In addition, other factors which influence an attorney's fees are the need for concentrated allocation of time and effort because of time limitations imposed by you or by the particular circumstances of your case, the amounts involved in connection with the matter and the overall results which we obtain. In certain cases, it may be determined that an additional sum, over and above the hourly rate will be charged, based upon these last mentioned factors. However, if yours is such a case, you and I will discuss the matter. Legal fees, to a large extent, depend upon the reasonableness of your (ex) spouse, your (ex) spouse's attorney, and you.

This office requires a retainer in the amount of \$_____ which is a fee paid in advance and applied against legal services rendered and costs advanced. If the amount for legal services is in excess of the retainer, your statement will show a balance due. The balance due is payable when billed, and in any event must be paid in full prior to the date of your final hearing in your case.

If, during our representation of you, the retainer has been exhausted, then the firm shall elect one of the following two options: (1) either the firm will require you to pay an additional retainer or provide another form of security for our fees and future disbursements, or (2) the firm will bill you for time charges monthly, with payment due within thirty days or prior to any court appearance on your behalf, either for preliminary matters or for the final hearing. If payment of the additional retainer or of the balance on your monthly statement is not received in a timely fashion, it may become necessary for the firm to request of the court permission to withdraw its appearance as your attorney in this matter. By signing this retainer agreement, you agree that this firm may withdraw its appearance on your behalf, and you agree to permit the firm to withdraw its appearance on your behalf if your bill remains unpaid without firm consent for more than thirty days.

All disputes between Peace Talks Mediation Services, the parties and the attorney or legal assistant regarding any aspect of our professional relationship will be resolved by binding arbitration administered through the County Bar Association pursuant to the

California Code of Civil Procedure and not by litigation in court. By this provision, the parties and Peace Talks Mediation Service are both giving up the right to have any such dispute decided by a judge or a jury and we are each giving up the right of appeal.

The prevailing party in any arbitration between us will be entitled to reasonable attorney's fees and costs. Any litigation or arbitration between us will take place in Los Angeles County and State law will apply.

Before signing this agreement, you have a right to consult your own attorney about the legal consequences to you of signing this agreement and specifically waiving the right to use the courts in any fee dispute and using arbitration instead.

I am enclosing an extra copy of this letter for you to sign and return to me in the enclosed envelope. If you have any questions, please do not hesitate to call me. Please note: This

is a legal, binding contract between you and this firm. Before signing it, please read it carefully and be sure you understand all of the contents. Upon receipt of the signed copy and the retainer we will proceed to represent you in this case.

Very truly yours,

Diana L. Mercer

I have read the foregoing agreement. I understand all of its terms and I am knowingly and voluntarily signing this agreement.

Date: _____
Client _____

Sample Unbundled Fee Agreement

Limited-Scope Client-Lawyer Agreement

This agreement is made between Attorney and client as designated at the end of this agreement.

1. **Nature of Agreement.** This agreement describes the relationship between the Attorney and Client.

Specifically, this Agreement defines:

- a) The general nature of Client's case;
 - b) The responsibilities and control that Client agrees to retain over the case;
 - c) The services that Client seeks from Attorney in her capacity as Attorney-at-Law;
 - d) The limits of Attorney's responsibilities;
 - e) The immunity from civil liability granted to the Attorney for services not provided by Attorney;
 - f) Methods to resolve disputes between Attorney and client;
 - g) The method of payment by Client for services rendered by Attorney.
2. **Nature of Case.** The Client is requesting services from Attorney in the following matter:

 3. **Client Responsibilities and Control.** The client intends to handle his/her own case and understands that he/she will remain in control of the case and be responsible for all decisions made in the course of the case. In the event that

Attorney is requested to file an Appearance with the Court, or full representation is requested, then this Limited-Scope Client-Attorney Agreement shall be replaced by a traditional Retainer Agreement which will be provided to Client at that time.

The Client agrees to:

- a) Cooperate with Attorney or Attorney's office by complying with all reasonable requests for information in connection with the matter for which Client is requesting services;
- b) Keep Attorney or Attorney's office advised of Client's concerns and any information that is pertinent to Client's case;
- c) Provide Attorney with copies of all correspondence and documents to and from Client relevant to the case;
- d) Keep all documents related to the case in a file for review by Attorney.

4. **Services Sought by Client:** The Client seeks the following services from Attorney:

1. Legal advice office visits, telephone calls, fax, mail, e-mail;
2. Advice about availability of alternative means to resolving the dispute, including mediation and arbitration;
3. Evaluation of Client's self-diagnosis of the case and advising Client about legal rights;
4. Guidance and procedural information for filing or serving documents;
5. Review correspondence and court documents;
6. Prepare and/or suggest documents to be prepared;
7. Factual investigation: contacting witnesses, public records searches, in – depth interview of client;
8. Legal research and analysis;
9. Discovery: interrogatories, depositions, requests for document production;
10. Planning for negotiations, including simulated role playing with Client;
11. Backup and trouble-shooting during a trial;
12. Planning for court appearances made by Client, including simulated role playing with Client;
13. Referring Client to other counsel, expert, or professional;
14. Counseling Client about an appeal;

_____ 15. Procedural assistance with an appeal and assisting with substantive legal argumentation in an appeal;

_____ 16. Providing preventative planning and/or schedule legal check-ups;

_____ 17. Other: _____

5. **Attorney's Responsibilities.** The Attorney shall exercise due professional care and observe strict confidentiality in providing services identified by a check mark in Paragraph 4 above. In providing those services, Attorney **SHALL NOT**:

- a) Represent, speak for, appear for, or sign papers on the Client's behalf;
- b) Provide services in Paragraph 4 which are not identified with a check mark; or
- c) Make decisions for Client about any aspect of the case.

6. **Method and Payment for Services. Hourly fee:** the current hourly fees charged by this office for services under this agreement are as follows:

Attorney Diana Mercer: \$395.00 per hour
Legal Assistant: \$250.00 per hour

Unless a different fee arrangement is specified in clauses (b) or (d) of this Paragraph, the hourly fee shall be payable prior to the commencement of the service.

b) **Payment from Retainer:** The Client shall have the option of setting up a deposit fund with Attorney in the amount of \$_____, out of which payment for services will be made as they occur. If a retainer is established under this clause, Attorney shall mail the Client a billing statement, typically done monthly, summarizing the type of services performed, the costs and expenses incurred, and the current balance in the retainer after the appropriate deductions have been made. Client may optionally replenish the retainer or continue to draw the fund down as additional services are delivered. If the retainer becomes depleted, Client shall pay for additional services as provided in clauses (a) or (d) of this paragraph.

c) **In the alternative,** Client may leave a credit card number and expiration date with Attorney in lieu of the retainer. If Client chooses to do this, then Attorney is authorized to charge Client's credit card with legal fees as services are rendered without additional authorization from Client.

Credit Card Type: _____ Account Number: _____

Expiration date: _____ Name as it appears on card: _____

Flat Rate Charges: The Attorney may optionally agree to provide one or more of the services described in Paragraph 4 at a flat rate. Any such agreement shall be set out in

writing, dated, signed by both Attorney and Client, and attached to this agreement. We've attached a full fee schedule to this agreement for your reference.

- d) **Attorneys' Fees.** Should it be necessary to institute any legal action for the enforcement of this Agreement, the prevailing party shall be entitled to receive all court costs and reasonable attorneys' fees incurred in such action from the other party.

7. Resolving Disputes Between Client and Attorney.

- a) **Notice and Negotiation.** If any dispute between Client and Attorney arises under this Agreement, both Attorney and Client agree to meet and confer within ten (10) days of written notice by either Client or Attorney that the dispute exists. The purposes of this meeting and conference will be to negotiate a solution short of further dispute resolution proceedings.
- b) **Mediation.** If the dispute is not resolved through negotiation, Client and Attorney shall attempt, within fifteen (15) days of failed negotiations, to agree on a neutral mediator whose role will be to facilitate further negotiations within fifteen (15) days. If Attorney and Client cannot agree on a neutral mediator, they shall request that the Beverly Hills Bar Association select a mediator. The mediation shall occur within fifteen (15) days after the mediator is selected. The Attorney and Client shall share the costs of mediation, provided that payment of the costs and any Attorneys' fees may also be mediated.
- c) **Arbitration.** If mediation fails to produce a full settlement of the dispute satisfactory to both Client and Attorney, Client and Attorney agree to submit to binding arbitration under the rules of the Los Angeles County Bar Association. This arbitration must take place within sixty (60) days of the failure of mediation. Fees and Attorneys' fees for arbitration and prior mediation may be awarded to the prevailing party.

- 8. **Amendments and Additional Services.** This written Agreement governs the entire relationship between Client and Attorney. All amendments shall be in writing and attached to this Agreement. If Client wishes to obtain additional services from Attorney as defined in Paragraph 4, a photocopy of Paragraph 4 that clearly denotes which extra services are to be provided, signed and dated by both Attorney and Client and attached to this Agreement shall qualify as an amendment.

- 9. **Civil Immunity for Counsel.** Client hereby waives any right to prosecute a claim of professional negligence against Attorney for any service not specifically set forth by a check mark or actually undertaken by Attorney in Paragraph 4 of this Agreement. The Client grants to Attorney complete immunity from Civil liability arising from all aspects of the case not specifically undertaken by the Attorney. Client acknowledges that many attorneys will not offer limited-scope representation due to the fear of malpractice claims by clients who later find or believe that the limited-scope representation was not sufficient to properly protect the client. The Client acknowledges that retaining an attorney for limited-scope representation is a consumer choice by the Client based on Client's desire to

lower fees and maintain client control and belief that Client can competently handle all issues and tasks not specifically undertaken by Attorney. Client agrees to bear the full risk of any damage caused to the Client due the Client handling the matter without specifically requested legal services from the Attorney. Such waiver of malpractice claims does not extend to those services which the Attorney undertakes to render on behalf of the Client as instructed by the Client. The Attorney represents that the law firm carries Professional Liability Insurance as required by the State Bar of California.

10. **Statement of Client’s Understanding.** I have carefully read this Agreement and believe that I understand all of its provisions. I signify my agreement with the following statements by initialing each one:

- _____ I have accurately described the nature of my case in Paragraph 2;
- _____ I will remain in control of my case and assume responsibility for my case as described in Paragraph 3;
- _____ The services that I want Attorney to perform in my case are identified by check marks in Paragraph 4. I take responsibility for all other aspects of my case;
- _____ I accept the limitations on Attorney’s responsibilities identified in Paragraph 5 and understand that if I make mistakes in handling my own case, I have granted the Attorney immunity from being sued for professional malpractice. This means that I cannot sue and/or recover from the Attorney regardless of the damage I might suffer;
- _____ I shall pay Attorney for services rendered as described in Paragraph 6;
- _____ I will resolve any disputes I have with Attorney under this Agreement in the manner described in Paragraph 7;
- _____ I understand that any amendments to this Agreement shall be in writing, as described in Paragraph 8;
- _____ I acknowledge that I have been advised by Attorney that I have the right to consult another independent Attorney to review this Agreement and to advise me on my rights as a Client before I sign this Agreement.

Date

Diana Mercer, Esq.

Date

Client

Fee Schedule:

Hourly fees:

| | |
|----------------------------------|----------|
| Diana Mercer, Attorney-Mediator: | \$525.00 |
| Linda Duarte, Paralegal-Mediator | \$250.00 |

Paper Preparation (Flat Fees):

Petition and Response:

Petition or Response \$325.00

Petition/Response Papers include at no extra charge:

Case Cover Sheet
Summons
UCCJEA Statement
Notice and Acknowledgment of Receipt
Proof of Service
Actual mail service of papers and copies

Judgment Package:

Judgments (no children): \$1995.00
Judgments with Parenting Plans: \$2295.00

All judgment packages include at no extra charge:

Typing and service of Income and Expense Declarations
Typing and service of Schedule of Assets and Debts
Declaration of Disclosure (one for each party)
Appearance, Stipulation and Waivers
Declaration Re: Default or Uncontested Divorce
Judgment
Notice of Entry of Judgment
Declaration Re: Service of Declaration of Disclosure
Mail service of papers and copies
Proof of Service
Child Support Case Registry Form
Wage Assignment (if requested)

Court Filing Fees:

Please make your checks payable to "Clerk of the Superior Court".

Petition \$350.00
Response or Agreement (whichever is first) \$350.00

Miscellaneous fees:

Evening and weekend appointments: \$50 per hour surcharge
(Weekdays before 10:00 am and after 6:30 pm)
Quitclaim deed or Inter-Spousal Transfer Deed \$300.00
(includes recording, recording fees, and copies)
Preparation of Income and Expense Declarations
and Schedule of Assets and Debts (financial disclosures) usual hourly rate
Divorce paperwork only (no mediation time) \$300.00
Expedited papers fee (prepared and mailed within 7 days) \$150.00

| | |
|--|------------------------------|
| Faxes (each) | \$ 35.00 |
| Federal Express letters and packages | \$ 45.00 |
| Courier deliveries surcharge (courier bill plus) | \$ 30.00 |
| Telephone calls (minimum charge) | .2 of attorney's hourly rate |

Budget & Expenses worksheet

Worksheet of Monthly Income and Expenses

Name: _____

Note: The first 4 pages of this form are the most important. If you can complete them before our discussion of support, that will save you time and money. If you prefer to complete them during a mediation session, or with our Dispute Resolution Associate, that's fine, too.

BUDGET INFORMATION

Please base these figures on a monthly average. Please translate all items (e.g., weekly allowances, semi-annual insurance, etc.) into average monthly amounts.

- 1) Rental/mortgage and household:
 - a) Rent/mortgage payment--total... \$ _____
 - i) average principal.....\$ _____
 - ii) average interest.....\$ _____
 - b) Property Taxes:.....\$ _____
 - c) Property Insurance:\$ _____
 - d) Maintenance and Repairs.....
 - Gardener & Mowing \$ _____
 - Housekeeper \$ _____
 - Repairs \$ _____
 - Replacement costs budgeted
 - For furnace, water heater, roof,
 - Etc. \$ _____
 - Plumbers, electricians \$ _____
 - d) Maintenance and Repairs subtotal\$ _____
 - e) Homeowner's Insurance\$ _____

- 2) Medical (not covered by insurance)
 - a) Doctor\$ _____
 - b) Dentist\$ _____
 - c) Optometrist\$ _____
 - d) Contacts/glasses\$ _____
 - e) Orthodontist\$ _____
 - f) Prescriptions\$ _____
 - g) Medical Insurance.....\$ _____
 - h) Dental Insurance Premium.....\$ _____
 - i) Vitamins and supplements.....\$ _____

j) Other: _____ \$ _____

Total: \$ _____

3) Childcare: daycare, nanny, work-related sitters..... \$ _____
Childcare: occasional sitters..... \$ _____

4) Food and supplies
a) Groceries..... \$ _____
b) Shampoo, toothbrushes, cleaning supplies (misc. grocery store)..... \$ _____
Total Grocery \$ _____

c) Eating Out (alone or w/friends).... \$ _____
d) Lunches out while at work..... \$ _____
d) Eating out w/children..... \$ _____

Total eating out: \$ _____

5) Utilities
a) Gas..... \$ _____
b) Electric..... \$ _____
c) Water..... \$ _____
d) Garbage collection..... \$ _____
e) Cable television..... \$ _____
f) Satellite Radio..... \$ _____
g) Other..... \$ _____

Total: \$ _____

6) Telephone
a) Telephone..... \$ _____
b) Cellular phone..... \$ _____
c) Children's cell phones..... \$ _____
d) Internet access..... \$ _____
e) E-mail accounts..... \$ _____
f) Other telephone \$ _____

Total: \$ _____

7) Laundry
a) Laundry at Dry Cleaners..... \$ _____
b) Dry Cleaning..... \$ _____

c) Household supplies for Laundry \$ _____
d) Laundromat..... \$ _____

Total: \$ _____

- 8) Clothing
- a) Your clothing \$ _____
 - b) Children \$ _____
 - c) Shoes \$ _____
 - d) Shoe Repair \$ _____
 - e) Alterations \$ _____
 - f) Other: _____ \$ _____

Total: \$ _____

- 9) Education..... \$ _____
- a) Your tuition & school fees \$ _____
 - b) Continuing Education fees \$ _____
for your profession
 - c) Private School Tuition \$ _____
 - d) Tutors, books, videos \$ _____
 - e) Outside classes (self or children) \$ _____

- 10) Other
- a) Travel (you and children)..... \$ _____
Annual vacation, trip to see
Grandparents, unreimbursed work
Travel, weekend trips, school trips, etc.
 - b) Entertainment..... \$ _____
Videos, children's parties, movies,
Concerts, CD's, I-Pod downloads,
Theater, etc.
 - c) Haircuts, manicures, personal \$ _____
care
 - d) Gym membership, YMCA, other \$ _____
Dues and club memberships

Total: \$ _____

- 11) Transportation
- a) Car payments..... \$ _____
Name of creditor: _____
 - b) Gas and Oil \$ _____
 - c) Repairs \$ _____
 - d) Oil changes..... \$ _____
 - e) License \$ _____
 - f) Car Wash \$ _____
 - g) Auto club \$ _____
 - h) Parking \$ _____
 - i) Public transportation..... \$ _____
 - j) Other: _____ \$ _____

| | | | | |
|--|--|--|--|--|
| | | | | |
| | | | | |
| | | | | |

Total Monthly Payments: \$ _____

Personal Education and employment Information:

Are you currently employed? _____

If YES: Name, address, and telephone number of employer:

When did you start work there? _____

Approximate number of hours worked per week: _____

What was your gross monthly income?: _____

If you do NOT work, date job ended: _____

What is your occupation: _____

Completed high school or equivalent? _____

If no, please indicate highest year of education completed: _____

Number of years of college completed: _____

Degree (circle one) BA or BS

Number of years of graduate school completed: _____

Degree (circle one) MA MBA MFA JD MD PhD other: _____

Professional/occupational license(s) (specify):

Vocational training

Income Information:

*Most of this information is easily extracted from your current pay stubs and looking at your most recent tax returns. **Attach copies of your three most recent pay stubs and return them to the office with this worksheet.***

Most recent tax filing (year) _____

Filing status: Single head of household married, filing separately married, filing jointly with: _____

Did you file California state tax (circle one) yes no

If you answered no, in which state did you file _____

If you file taxes in any additional states, please list below:

Estimate of other party's income: \$ _____

Total gross (before taxes) earnings for the past 12 months (do NOT include welfare, AFDC, SSI, spousal support from this marriage, or ANY child support):
\$ _____

Total gross earnings last month: \$ _____

Of the following deductions, only some may apply to you. If the deductions aren't shown on your pay stub, then just write none, or leave the line blank. All of these deductions are based on monthly figures. If you're having problems with these figures, please call us after you've provided us with a pay stub.

| Type of Deduction | Monthly amount last month | Average monthly amount over the past 12 months |
|--|---------------------------|--|
| State Income Tax | | |
| Federal Income Tax | | |
| Social Security & Hospital tax (FICA and MEDI), self employment tax, or the amount used to secure retirement or disability | | |
| Health Insurance for you and children | | |
| State Disability Insurance | | |
| Mandatory Union Dues | | |
| Mandatory Retirement and Pension | | |
| Child/Spousal support actually being paid from PREVIOUS relationship | | |
| Necessary job-related expenses (attach explanation) | | |
| Hardship deductions | | |

| Dividends/Interest | Monthly amount last month | Average monthly amount over the past 12 months |
|------------------------|---------------------------|--|
| Rental Property Income | | |
| Trust Income | | |
| Other: (specify) | | |

Are you self-employed? If so, please provide a list of business expenses for the past year, or year-to-date, and attach your Federal Tax Schedule C for the last two years.

Income from self-employment, after business expenses for all businesses:

I am the: sole proprietor business partner

other (specify): _____

Number of years in business: _____

Name of business: _____

Type of business: _____

Have you received one time money (lottery winnings or inheritance, etc.) in the last 12 months?: yes no

If you answered yes, please specify source and amount:

Has your financial situation changed significantly over the last 12 months?:

Yes No

If you answered yes, please specify:

Enter below the average monthly amount for the following:

AFDC, welfare, spousal support from this marriage, and child support from previous relationships received each month: \$ _____

Cash and checking accounts: \$ _____

Savings, Credit Union, certificates of deposit, and money market accounts:\$ _____

Stocks, bonds, and other liquid assets: \$ _____

All other significant property, real or personal: \$ _____

Expense Information:

List all persons living in your home whose expenses are included in your figures and their age, relationship to you, and gross monthly income (child support received from previous relationship, etc.): _____

List all other persons living in your home, whose expenses are not covered by you, their age, relationship to you and gross monthly income: _____

Financial Affidavit worksheet

FINANCIAL INFORMATION AND INCOME STATEMENT

Name _____

The financial information on the following pages is important. If you need help in completing any item, please let the Dispute Resolution Associate know.

Please bring this information to the mediation session, along with documentation for the items on the sheet (*i.e.*, bank statement, appraisals, etc.). Please also bring or have available copies of Federal and State income Tax returns for the past three years and W-2 forms or copies of your pay stubs.

ASSETS

Enter the value of each of the following items of property as precisely as you can. Also identify the property as precisely as possible, including account numbers, names of banks, etc. List according to the name the property is titled under.

| | |
|----------|-----------------------|
| Mortgage | Fair market value |
| owed) | (what you could (debt |
| | sell it for today) |

A. Real Estate (Residence, Vacation Home, and Investment):

| | |
|-------|----------|
| _____ | \$ _____ |
| _____ | _____ |
| _____ | _____ |

B. Checking Accounts and Saving Accounts: List bank or financial institution and last 4 digits of account number:

| | |
|-------|----------|
| _____ | \$ _____ |
| _____ | _____ |
| _____ | _____ |

Fair market value Loan amount owed today
(today's sale price)

C. Vehicles, Boats, Trailers (year, make and model):

| | |
|-------|----------|
| _____ | \$ _____ |
| _____ | _____ |
| _____ | _____ |

D. Credit Union and Deposit Accounts (Account name, number, bank and Branch) :

| | |
|-------|----------|
| _____ | \$ _____ |
| _____ | _____ |
| _____ | _____ |

E. Cash (Give location):

| | |
|-------|----------|
| _____ | \$ _____ |
| _____ | _____ |
| _____ | _____ |

F. Tax Refund: tax year & amount, State or Federal debt

| | |
|-------|----------|
| _____ | \$ _____ |
| _____ | _____ |
| _____ | _____ |

Fair market value Debt owed

G. Miscellaneous Assets – Patents
Trademarks, Copyrights, Royalties
Stock Options, etc.:

| | | |
|-------|----------|-------|
| _____ | \$ _____ | _____ |
| _____ | _____ | _____ |
| _____ | _____ | _____ |

H. Life Insurance with Cash Surrender or
Death Benefit
Loan:

Cash Value Loan amt.

| | | |
|-------|----------|-------|
| _____ | \$ _____ | _____ |
| _____ | _____ | _____ |
| _____ | _____ | _____ |

H. Stocks, Bonds, Secured Notes,
Mutual Funds: List financial institution & acct. number

Loan?

| | | |
|-------|----------|-------|
| _____ | \$ _____ | _____ |
| _____ | _____ | _____ |
| _____ | _____ | _____ |

I. Personal Effects, Antiques or Art, Tangible
Personal Property (valued at \$500 or more):

| | | |
|-------|----------|-------|
| _____ | \$ _____ | _____ |
| _____ | _____ | _____ |
| _____ | _____ | _____ |

J. Pension plans, Keogh, IRAs or
Profit Sharing Plans, (Please
Furnish last statement):

Today's Value Loan Amt

| | | |
|-------|----------|-------|
| _____ | \$ _____ | _____ |
| _____ | _____ | _____ |

K. Accounts Receivable and Unsecured
Notes: (money others owe you)

Amount

| | | |
|-------|----------|--|
| _____ | \$ _____ | |
| _____ | _____ | |

L. Partnerships and Other Business Interests:

Fair market value Loans owed

\$ _____

If you are involved in a lawsuit (either plaintiff or defendant) or have separate property claims (premarital assets, inheritances, gifts from your family), please let us know.

TOTAL ASSETS

LIABILITIES

Amount you owe today

A. Student Loans: List debtor and acct #

\$ _____

B. Personal Loans and Notes Payable to Banks and Others:

\$ _____

C. Credit Card Debts: (list card name & number) Amount you owe today

\$ _____

D. Other Debts (including store charges, debts to other spouse or parents):

Amount you owe today

\$ _____

A. Taxes owed: (give tax year and state or federal) Amount you owe today

_____ \$ _____

TOTAL LIABILITIES _____

Client intake Information form

PERSONAL DATA AND INFORMATION

1. Name _____
Last First Middle (maiden)

Home Address _____ Home Phone _____
Street

_____ Work Phone _____
City State Zip

Best way to contact you: _____ e-mail: _____

2. Age _____

3. Date of Marriage _____ Date of Separation _____

4. Children of Current Marriage

| Full Name | Date of Birth | Residing With |
|-----------|---------------|---------------|
| _____ | _____ | _____ |
| _____ | _____ | _____ |
| _____ | _____ | _____ |

Are you currently paying support for these children? _____ Yes _____ No

Are you currently paying alimony to current spouse? _____ Yes _____ No

5. Children of Previous Marriage/Relationship?

Full Name

Date of Birth

Residing With

Are you currently paying support for these children? _____ Yes _____ No

Are you currently paying alimony to a former spouse? _____ Yes _____ No

6. Other than your children and/or your spouse, are there any people living with you now? _____ Yes _____ No

If yes, list their names and their relationship to you.

7. Are you employed? _____ Yes _____ No

If yes, give name of employer: _____

Address of employer: _____
Street City State Zip

Job Title _____ Nature of Job _____

Date Hired _____ Current Salary _____

8. Highest level of education attained _____

Field(s) of study _____

9. Do you have an interest in reconciliation? _____ Yes _____ No

As far as you know, does your spouse? _____ Yes _____ No

10. Are you presently seeing a counselor or therapist? _____ Yes _____ No

If yes, _____ Individual _____ Joint _____ Family

Please list name of counselor or therapist _____

11. Have you previously seen a counselor or therapist? _____ Yes _____ No

If yes, _____ Individual _____ Joint _____ Family _____

12. Do you anticipate a dispute about custody of the children? ____ Yes ____ No

13. Do you presently have an attorney? ____ Yes ____ No

If yes,

| Name | Address | Phone |
|------|---------|-------|
|------|---------|-------|

14. Are there joint bank accounts to which your spouse has access? ____ Yes ____ No

15. Does your spouse have credit cards you are responsible for? ____ Yes ____ No

16. Do you have a will? _____ Yes _____ No

17. How did you learn about Diana Mercer and Peace Talks Mediation Services?
(Give name and relationship, where applicable)

Date _____ Signature _____

Client intake form

TELEPHONE INTAKE

Date: _____

PARTY #1: _____ **FULL LEGAL NAME:** _____
First, Middle, Last, check spelling

ADDRESS:

_____ STREET _____ APT. # _____

_____ CITY _____ STATE _____ ZIP CODE _____

_____ HOME PHONE _____ WORK PHONE _____

_____ E-MAIL _____ BEST WAY TO CONTACT YOU _____

OCCUPATION/NATURE OF BUSINESS:

PARTY #2: _____ **FULL LEGAL NAME:** _____
First, Middle, Last, check spelling

ADDRESS:

| | | |
|------------|-------------------------|----------|
| STREET | APT. # | |
| CITY | STATE | ZIP CODE |
| HOME PHONE | WORK PHONE | |
| E-MAIL | BEST WAY TO CONTACT YOU | |

OCCUPATION/NATURE OF BUSINESS:

FOR DIVORCE MEDIATION

MARITAL STATUS: _____ **DOMESTIC VIOLENCE?** _____

DATE OF MARRIAGE: _____ **DATE OF SEPARATION:** _____

ORIENTATION DATE/TIME _____ **MEDIATORS PRESENT:** _____

MAIDEN NAME/PRIOR MARRIED NAME: _____ **RESTORE? Yes / No**
Encourage restoration request on Pleadings

NAMES AND DATES OF BIRTH OF MINOR CHILDREN:

1. _____ age ____ Male Female Date of Birth _____
2. _____ age ____ Male Female Date of Birth _____
3. _____ age ____ Male Female Date of Birth _____

Children's Place of Birth: _____
(city, state)

Children's Residence Addresses for the Past 5 Years:

From _____ to present: _____

From _____ to _____: _____

HOW DID YOU LEARN ABOUT PEACE TALKS MEDIATION SERVICES?

Open Letter From Family Law Attorney
<http://www.divorceinfo.com/letterfromlawyer.htm>

Disk 2: Preparing Your Client for a Court-Ordered Custody Mediation or Evaluation

Preparing Your Client for a Mediation or Custody Evaluation

This advice pertains to court-annexed mediations and evaluations but most of the information translates directly to private mediation settings as well.

The assumption is that you will not be in the room with your client and so everything in this presentation is designed to help you help them to present their case on their own.

[Points from Article]

Always have them prepared with:

- Written proposed orders you and the client have prepared together. They will take 3 copies (or enough for everyone expected to be present)
- Plan A, Plan B, Plan C
- Basic facts written out—date of marriage, timeline, etc.

Always Meeting with the Client and Discuss:

- A frank discussion about the pressure there will be in the room to reach an agreement
- Priorities—some aspects of the custody plan will be more important to them than others. Identify all aspects (wring it dry) and then have them prioritize.
- They won't get everything they're asking for. On what points is there room to compromise?
- Reality test—make sure they're aware that they won't get everything they're asking for
- What do they identify as the deal breakers for the other parent? What can be built into your client's proposed orders or presentation plan to be ready to address these issues?
- Is your client acknowledging the other parent's role in a respectful and meaningful way?
- What issues with the other parent raise about your client? Wring the list dry and rehearse with the client (in writing if necessary) so that the client is ready with an answer to each allegation.
- Address every possible barrier to success in your written parenting plan: pick up and drop off protocols, telephone and e-mail etiquette, log book, online parenting calendar, tone of voice in front of children

Your client's demeanor:

- Must be respectful of the importance of a child having 2 parents
- Must be respectful of court personnel, the judge's authority, and the influence that the mediator, evaluator, court clerk and all other court personnel may have over the outcome of the case
- Losing your temper only reinforces the other parent's case. If your client might lose his or her temper, what safeguards or preventative measures might be taken to avoid a problem?
- Tying money or possession of the house to child issues is a problem. Listen to your client's narrative and identify and address red flags.
- If your client has done something "bad" like affairs, substance use and abuse, and it's public knowledge, help your client find words to apologize, acknowledge the issue, and explain how it's being addressed and why the proposed orders are appropriate under these circumstances. Even if it's not public knowledge (or the

client thinks it isn't), if it is an issue he or she should be prepared to address it if it comes up.

- Being on medication or having a substance abuse problem is not the end of the world—working with a therapist, following the medication schedule, going to AA...all of these things are positive and probably won't work against your client as much as he/she is afraid they will and as much as the other parent hopes they will.
- Mixing adult issues and child issues: Also a problem. Keep the discussion child-focused and help your client avoid any traps the other parent might set (on purpose or unconsciously) so as not to be drawn into the adult dispute.

Special Needs Children:

- Make sure proposed parenting plan takes into account special needs and experts' recommendations re: special needs
- If your client is taking an unconventional approach (e.g., anti-vaccines) be sure he or she has credible evidence to back up his or her position and that they can talk about it rationally.

Unconventional clients:

- For clients who have adopted unconventional lifestyles, they need to be ready to acknowledge that others don't necessarily think like they do and how this impacts the children
- Client needs to be prepared to respond gracefully to what might feel like an assault on their lifestyle or beliefs. Raging or acting like theirs is the only perspective will only make them look crazy and unreasonable.
- Example: JW witnessing---reach them on the safety issues, or children being confused
- Example: swingers or porn---that children aren't involved and that appropriate safeguards are in place so that children are shielded from this lifestyle

For the extremely difficult case:

- Have the client hire a therapist to help him or her prepare. It may take multiple sessions and it can get expensive, but not as expensive as fighting an unfavorable mediation or evaluation outcome in court. Hourly rates are often lower than lawyer rates and if it falls under range of treatment may qualify to be covered by health insurance
- Especially valuable when client continually mixes adult issues with child issues
- What will client listen to? A child expert? A book? A video? Figure out what will get through to the client and help him or her find the resources
- [anecdote about nurse as parenting coach]
- Focus is on being the best parent you can be.
- Consider a step-up plan, where the parenting time is less or more restricted than your client might want but as it goes well it automatically increases
- [anecdote about supervised visitation]
- Clients who have been abused or who have Borderline Personality Disorder (or whose co-parents are narcissists) often present very poorly in these settings even though they may be terrific parents. These folks should probably work with an individual coach. The more written orders and preparation they've done the better. Abusers and narcissists often present very well in these settings, which

may aggravate the situation and make your client upset (and as a result present even worse).

Materials:

MCLE Self Study

Client Prep for Custody Mediation

**Edited by Peg Healy
By Tara Fass and Diana Mercer**

Custody mediations and evaluations are critical in contested custody cases, yet clients routinely go into sessions without a basic knowledge about the process and what is expected of them, and often with inflexible positions on custody arrangements. Family lawyers, as advocates and educators, can help clients dig themselves out of entrenched positions, evaluate their goals, and develop a child-centered parenting plan that will get them through the mediation and evaluation process and promote the best interests of their children.

DRESS REHEARSAL

Most custody disputes are resolved in mediation. But custody mediation can also be the dress rehearsal for the child-custody evaluation, because if the case is not settled in mediation, the evaluation process (see Fam C §§3110 et seq.) could be next.

The mediator's job is to reduce acrimony and get the parties to agree to a custody and visitation arrangement that is in the best interest of the children. Fam C §3161; Cal Rules of Court 1257.1. In mediation the current circumstances of the parties is paramount, although parenting history is also material. Although some counties have a written policy permitting "extended" mediation, often the mediation meeting is a one-time appointment that lasts 90 minutes at most, so there's no time to go into the client's past in depth.

However, big-picture information is always used in evaluation. You can help your clients organize their background information and, more important, develop a more objective perspective about their case by creating an overview of the relationship and putting the important events in the parties' and children's lives on several thematic time lines.

In the relationship time line, include when the parents met, when the parents' relationship became serious, when the parents began living together, when the parents got married, when the parents first separated, the total number of separations, the date of the last separation, and whether and when couples or family counseling was ever done. In the parenting time line ask: What was each parent's share of custody during the first six months after separation? From the six-month mark to the end of the first year after separation? When were the significant changes in the amount of time each parent had custody over the next two years? What is the current parenting plan the parents are using?

In the personal time line, ask: Are the children's grandparents living or dead, married or not? If living, where do the grandparents live, and are they a part of the children's lives? How many siblings does the client have, and what is his or her

relationship historically and presently with the siblings? What contact does the client have with extended family, and how often? Briefly, what was the client's life like from birth to age 12? From 12 to 18? From 18 to 30? What is the client's educational history? What is the client's work history? What is the client's current living situation, including all the household members? If there are minor children other than those in question, what are the custody arrangements concerning those children? What is the client's drug and alcohol history, including DUIs and hospitalizations, if any? What is the client's domestic violence history? Who was the client's family at these times?

There are certain red flags that mediators and evaluators look for; discuss these with your client in advance. Challenge his or her version of the time line and ask whether the other parent might see the time line and relationship in a different way. Your client's ability to see the situation from the other parent's perspective is an important part of starting to test his or her grip on the reality of the situation and learning to live constructively with it.

Red flags that often appear in the parents' time lines include: different representations about the existing parenting plans; different dates, particularly the date when the relationship became serious; inability to identify troubling aspects of the relationship even in retrospect, particularly if a similar dynamic is present today; glossing over or dismissal of traumatizing history; and inability to put the situation in perspective by recognizing unresolved issues from childhood or family of origin.

Never forget, and never let your clients forget, that presenting themselves as reasonable, articulate, and flexible parents is essential to success in mediation and evaluation, as well as in implementing the actual parenting plan. So remind clients to cooperate with the mediator, tell the truth, and focus on the children's best interests at the mediation. Remind them that they will get their point across better if they don't interrupt, shout, or cry. Tell them to expect that strong feelings may come up: anger, despair, or fear. And remind them that they must speak for themselves, even though counsel is routinely present at the mediation in some counties, under local rule and practice.

Framing the custody conflict in terms of angel versus devil is unproductive, unrealistic, and divisive. If your clients are stuck in that attitude, remind them that unless such a dynamic can be documented, asserting it will likely work against them in the long run and give the impression that they are emotionally out of control. Worse, your clients run the risk of being viewed as abusing a tax-supported service. A client who consistently fails to grasp that concept, or who stays mired in the past, should be referred to a mental health professional.

A PARENTING PLAN

Obviously, the actual parenting plan proposal is very important. Though the client should request as much parenting time as is realistic, you should help the client generate three or four possible plans, ranging from the best-case scenario to a backup plan that is "the nightmare the client can live with." Think in terms of a step-up plan, perhaps starting with less than your client might have hoped for but working into a more desirable plan over time. Take into account each child's general developmental stage and consider having your client consult with a child psychologist to discuss what might be appropriate. Provide names of providers for parent-training courses or other

resources to improve parenting skills.

Red flags in the area of parenting proposals include: plans that are not well thought-out or fail to recognize the realities of their lifestyles; plans that don't take into perspective the child's point of view and developmental needs; or plans that aren't based in reality, such as starting parenting duties at 3:00 p.m. when the parent typically works until 6:00 p.m., without providing for childcare.

Ultimately, your client will be asked about his or her concerns regarding the other parent or the proposed parenting plan. Find out these concerns in advance and help your client make a list. Make sure that the client keeps to the present and only includes the past as a prelude to the present. (Dwelling on the past is a definite warning sign, especially if the other spouse has stopped drinking or otherwise worked to improve problems.) List or explain how the other parent might reduce your client's concerns. Then explore what the other parent might raise as a concern with your client's parenting or parenting plan, and how your client might address those concerns. List relevant skill building your client has done or is willing to do, such as attending parenting classes or anger-management therapy.

Red-flag issues that come up during the formulation of a parenting plan include: negative attitudes, especially failing to recognize *any* positive qualities in the other parent; claiming that the other parent can do little or nothing to repair the damage; lack of perspective on the client's own role in the conflict; and perceiving no room for improvement by either parent.

EVALUATION

You'll need to prepare your client for the evaluator's home visit. Before the visit, do a safety check and make necessary adjustments. The home does not have to be spotless, but sheets should be on the beds. Odors from cigarettes, trash, pets, and diapers should be minimized. A wide variety of fresh and healthy food should be in the refrigerator and cupboards. Everyone who lives in the home should be present for the interview. Anyone who is a frequent visitor to the home may be there at the beginning but should also be prepared to leave approximately ten minutes after the evaluator's arrival.

The television should be turned off as soon as the evaluator arrives. The evaluator should not be offered anything but a glass of water. Let the evaluator choose where to sit and where to talk to household members individually and as a group. Inform the evaluator in advance if a household member needs to be seen first because of a work or school commitment.

REFERENCES

When the evaluator asks for collateral references (sometimes called a custody evaluation witness list), have your client be prepared with names, addresses, telephone and fax numbers, as well as the best time and way to reach them. You may want to speak with the references in advance to make sure they can, in good conscience, say positive things about your client's parenting and that they have had enough contact with your client to comment intelligently. Put the reference into the time line to give the evaluator some perspective on when and how long the reference has known the family. Choose references, including family members, whose observations can corroborate the

parenting-plan history as well as a parent's good character. Finally, minimize problems with collateral references, including: dates on documents that come from the parents differing from dates on the same document that comes from a reference; and references who fail to back up the referring parent's claims, who barely know the parent, or who haven't observed him or her being a parent.

AFTER THE EVALUATION

The evaluator's confidential report must be filed with the court and served on the parties (if appearing in pro per) or their attorneys at least ten days before the custody hearing. It is not otherwise distributed. It will be used as evidence at the hearing and is technically not binding on the court. Fam C §3111. The parties may object to the contents of the evaluator's report when it is presented to the court (Cal Rules of Court 1257(c)) and even present other evidence or cross-examine the evaluator if permitted under local rules.

Many counties provide for a postevaluation meeting or settlement conference among the parties, their attorneys, and the evaluator. See Alameda County Local Rule 11.4(9); Contra Costa County Local Rule 13.2(I); Orange County Local Rule 703(E)(5); San Francisco County Local Rule 11.30(D). This postevaluation conference gives your client a quick opportunity to hear the results of the evaluation before it's actually put on paper and gives both parents an opportunity and an incentive to return to negotiations or mediation, and settle. It can save the client money, as it is not necessary to pay for the writing of the evaluation if the matter settles quickly, before the written report is required. Have your client make sure the evaluator knows that he or she is interested in using this service as soon as the evaluator has done the last visit or research on the case, because the custody hearing will come up relatively quickly.

SPECIAL CONSIDERATIONS

In custody matters, Family Code section 3011 requires the court to consider the health, safety, and welfare of the child; the nature and amount of contact with both parents; any history of child abuse by relatives or any caretaker; and any allegations of either parent's substance or alcohol abuse. Typically it is considered to be in the child's best interests to preserve close contact with both parents (Fam C §3020(b)) as well as siblings and other close relationships (see Fam C §3040; *Marriage of Williams* (2001) 88 CA4th 808). The court will consider the child's wishes if the child is "of sufficient age and capacity to reason so as to form an intelligent preference as to custody." Fam C §3042.

Normally the courts encourage settlement, in which the parents stipulate to a custodial arrangement without court investigation or intervention. (There is a presumption in favor of joint custody if the parents stipulate to it. Fam C §3080.) But the court will review a situation even when there is a settlement if the court becomes aware of substantiated domestic violence or substance-abuse allegations. Fam C §3011(e). A court finding of domestic violence within the past five years also creates a presumption against joint or sole custody by the perpetrator that can only be rebutted by a preponderance of the evidence. Fam C §3044.

Therefore, if your client's background includes unflattering elements, it may become important to know whether the case is in a county where the mediator will make a custody recommendation to the court if the parties do not agree. Fam C §3183. That

is known as nonconfidential mediation. In contrast, with a private mediator, or in a "confidential" county such as Los Angeles or San Francisco, the mediator does not report back to the court except to report nonagreement. Although the case may proceed to evaluation anyway, confidential mediation gives a client an opportunity to rethink or address the other parent's concerns.

There are some important exceptions to confidentiality even in confidential counties. Therapists, mediators, and other officials may be required to report child abuse or child endangerment to child protective services. See Pen C §11166. Therapists and mediators may have a duty to disclose the existence of threats of death or bodily harm in accord with *Tarasoff v Regents of Univ. of Cal.* (1976) 17 C3d 425. Allegations of sexual abuse or neglect, if made during a child-custody proceeding, are treated very seriously, and subject the accuser to sanctions if the allegations are found to be false. See Fam C §§3027, 3027.1, 3118. And the mediator may recommend appointment of counsel for the minors or appropriate restraining orders. Fam C §§3183, 3184. Note: Recent legislation (SB 174, signed September 30, 2002) may modify the mediator's duty to tell the court why he or she makes such a recommendation and may make more counties' mediation confidential.

In cases of domestic violence, the victim-client is free to decline mediation. However, mediation and evaluation is available that can be tailored to the parties' needs; for instance, through separate sessions and other safety precautions. See Fam C §§3113, 3181 (separate meetings), 3170 (protocols), 6218 (protective order); Cal Rules of Court 1257.2 (protocols). If the client chooses to participate in a joint session, which can be very helpful strategically in revealing the truth about the relationship, he or she may also request the presence of a nondisruptive advocate or support person. Fam C §3182; Cal Rules of Court 1257.2(h).

When a party's mental health is placed at issue, the party may be examined by a qualified expert for discovery purposes. CCP §2032. Though participation in therapy need not be revealed in mediation, it is typically interpreted as a positive fact about a client. Your client's adherence to a therapist's treatment plan and medication instructions can work in his or her favor. The court may also order the parents and the children to participate in outpatient counseling for up to one year (Fam C §3190).

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Disk 3: Discovery Basics: Reality Check, Tax Returns, Wage Records, Perks, Subpoenas, and Your Own Disclosures

Discovery Basics: Reality Check, Tax Returns, Wage Records, Perks, Subpoenas, and Your Own Disclosures

Discovery in family law goes well beyond the required court forms. Learning to read tax returns, pay stubs, and other financial documents can help you discover undisclosed income and assets. Learn where and how to find the information you'll need to advise your client, settle, and try a case.

Relying on forthcoming discovery is a gamble in family law cases. Lots of people think they can play hide-and-seek with discovery. Don't let them get away with it.

Start by asking nicely, and by issuing interrogatories. Review what you get. You'd be surprised the number of lawyers who don't review what they get. Your review will point out the holes as well as enlighten you on the information they're actually providing.

Have your client respond to interrogatories in a forthright way. You do nothing for your reputation by playing hide the ball with the interrogatories or discovery process. Many lawyers make a game of it, trying to under-disclose and assuming the other side will never look.

You will encounter difficult clients who will fail or refuse to turn over information. It's part of the family law dynamic—maybe it's avoidance, maybe it's laziness, maybe it's hidden assets but my hypothesis is that it's just one more sign that their marriage is over and they can't bear to put the effort into that sad task.

Most jurisdictions either have form interrogatories or a template that everyone uses. I'd love to say "customize this and draft each set based on your case" but the truth of the matter is that at the beginning of the case, when these things go out, you will be so busy with other cases you won't have time. If you know for sure that you need something, though, be sure and ask for it specifically. Ideally, you'd send a cover letter with a list of documents you must have so that your priorities are clear.

Figure out what you want. At a minimum, that will be:

- Last 3 years of tax returns
- Last year of brokerage account statements (longer if there are questions about how money was spent)
- Pay stub or W-2
- 1-60 months of credit card statements
- 1-60 months of checking account records

You are looking for anomalies, dishonesty, fraud, reimbursements, inconsistent statements, stealing

Mostly, what you must have will depend on the type of case. Are there allegations flying of money which was misappropriated? Or do both parties have a pretty good idea of what the assets and debts are and while they don't agree with every penny they don't want to make a big deal out of it?

Once you've gotten the voluntary documents, figure out what you have and what you don't have.

- Write a letter specifying what you need and by when.
- Most courts have a discovery dispute process "meet and confer", etc.
- If you don't get what you need, figure out where you can get it without having to go through opposing counsel.
- Issue subpoenas or otherwise gather information
- Private detective
- Offshore bank account search rarely worth it

Subpoenas

Reasonably inexpensive and very useful. You don't have to rely on the spouse or opposing counsel to get you what you need. We used to issue them for every bank in town as well as for employment records.

Must subpoena them to something, e.g., deposition or hearing. Generally tell people that they can just send the records instead of coming unless you actually need to depose them.

What Wage Records Tell You

Actual tax withholding vs. actual tax owed

Overtime, accrued vacation, deferred bonuses, retirement savings

Any influence in delaying bonuses?

Employers generally won't lie

What are perks and why do you care?

- Health insurance
- life insurance
- company car
- credit card
- Entertainment
- Health club
- Gas card
- Meals
- Illegal perks

Employer issues:

- Deferred compensation
- Reserve accounts
- Over-reinvestment in a business

Reading a tax return

- Hidden assets: Schedule B interest and dividends
- Schedule C deductions: Depreciation, Vice President of Peace Talks
- Personal expenses passed off as business expenses
- Litmus test: would a wage earner have to pay it out of pocket?
- Luxury items

- www.irs.gov is a wealth of information

Depositions:

- Prepare your questions in advance
- Good chance for settlement
- Have your client present
- Be careful about your own conduct
- Therapy records
- Am Jur Proof of Facts

Stock Options:

Other assets:

ESOP

401(k)

Pensions

Pension Valuations

Appraisals <http://www.pensionappraisers.com>

annuities

Disk 4: Preparing For Evidentiary Hearings: You and Your Client

Preparing For Evidentiary Hearings: You and Your Client

You'll lose very few family law cases if you're well prepared. Learn what and how to prepare a family law case, and client, for an evidentiary hearing.

The key is learning to properly value a case:

- Mentor
- Shadow
- Experience
- Listen
- Hang out in court
- Ask to sit in arbitrations or mediations with experienced practitioners

If the law is on your side, pound the law. If the facts are on your side, pound the facts. If neither is on your side, pound the table.

Don't let more experienced lawyers undermine your confidence (baby lawyer). They can be lazy, resting on their laurels. This is your chance to make a name for yourself in the courthouse, with judges, with other attorneys who are watching your trial---take advantage of your precious court time. It's a personal branding strategy.

If you always back down, you'll get the reputation of backing down.

Try a case or evidentiary hearing early in your career if possible, provided the case warrants it.

What to have ready:

- What are you trying to accomplish?
 - Do you and your client have the same goals?
 - Are the goals realistic?
 - Have you properly valued the case?
- Your theory of the case: one sentence
- What are the main themes of your case?
 - Prepare your opening and closing statements based on the main themes
 - Get to the point
 - Be clear
 - Be brief
 - Map out your direction
- Preparing your client
 - Going over direct testimony
 - Going over cross-examination
 - Is there something your client needs to tell you?
 - Writing out your questions, sharing them with your client (helps you avoid repeating yourself, too)
 - Preparing client to simply answer the question that is asked
 - CYA: have clients sign all stipulations and orders, get their agreement on the record, stamp “Copy sent to client on date:_____”, make notes on your notes about what you did to prepare the client (Pragano story).
- Have your client help you get prepared
 - What does he or she know that you don't know yet?
 - Encourage them to be honest with you
 - What will the other side say that is unflattering? (Disneyland story, wife had slept with restraining order client)
 - What does client want you to ask?
 - You're putting on an evidentiary hearing but you're also in the client service business. Make sure you prepare together with the client and that the client is on the same page with you and your strategy.

Your own preparation:

- Recheck your own file
- Make sure pleadings are straight
- Evidence
 - As soon as you suspect you're going to have a hearing, start to get prepared---make sure your discovery is complete and if you still need something, figure out how to get it fast.
 - Appraisals: will the other side stipulate to allow your appraisal in or do you need to have your appraiser present?
 - Depositions: Index your depositions thoroughly for key facts and possible prior inconsistent statements
 - Know your own stuff. Use everything in your arsenal.
 - Offers of Proof. No shame in writing them out or keeping a list of the steps handy.
 - James Publishing has a book “Trial Objections”
<http://www.jamespublishing.com/books/tob.htm>. My favorite is *Evidentiary*

Foundations by Edward Imwinkelreid. You can find an out of print copy online. Very clear, short, concise book on evidentiary foundations

- *Am Jur Proof of Facts*
- Hearsay exceptions are fun! Memorize them or keep a list in your notes where you can easily find it. You'll be under pressure to respond quickly with your hearsay objection or offer of proof.
- Before you object to the other attorney's evidence, are you sure it's worth it?
 - Don't want to appear stupid
 - Don't want to let in evidence which harms your client (Williams trial)
 - Don't make needless objections
 - Judge will get irritated at opposing counsel, too. You don't have to pile on. Make your point a couple of times and then let it go.
 - Let the opposing attorney dig own hole
- Copies of documents
- Pre-marking exhibits—start early—you will score major points with the judge
- Joint fact pattern or timeline?—again, you'll score major points.
- Trial notebook
- Briefs
- Last minute motions: *Motion in Limine*, motions to have witnesses excluded from the courtroom
- Copies of cases
- Copies of statutes
- Unconventional exhibits
 - Investigations
 - Maps
 - Photographs
 - Graphs
 - CDFA exhibits
- Is there a last chance to settle this?
 - Both clients will be nervous last minute; could be opportunity to settle
 - Other lawyer may be less prepared than you and wary of trying case
 - How far apart are you really? (narrowing the perception of gap)
 - Post-evaluation conferences
 - Court-annexed mediation settlement programs
- Pay attention to the Judge
 - You may get clues as to ruling before it happens (Glynn)
 - Judge may let you stop or take a break to negotiate---ask if you think that's a possibility
 - Stop objecting if you're irritating the judge
 - Use your manners
 - Never repeat yourself
 - Don't get in a fight with the other lawyer. Tensions run high but it looks very unprofessional yet it's very hard to resist temptation
 - Make your point succinctly
 - See how your client is coming off to the judge—coach during breaks if necessary
 - Volunteer to pro tem
- Your client's behavior

- They will be tempted to roll eyes and make noises
- Give them a pad & pen
- No talking
- No telling them what to say
- Tell them how to dress “your best Sears suit”
- Have written proposed orders, maybe even 3 versions
- You want to control the drafting of every possible order so put it in writing and/or make notes
- Don’t be afraid to put on an evidentiary hearing
- If you’re that afraid, ask a mentor or another associate to help with a mock trial, or partial mock trial

Disk 5: Negotiating a Settlement: Client Conversations, Settlement Meetings, Mediations

Since over 95% of all family law cases settle before trial, effective negotiation and settlement skills are essential to successful family law practice. Learn how to get the upper hand in negotiations and settlement meetings for favorable resolutions for your family law cases.

Materials:

- Interest-Based Negotiations
- Impasse
- Beyond Argument into Dialogue article
- *What to do if* interventions
- Advanced Negotiation Tips

Interest-Based Negotiations

During a conflict, many people become very “position-based”, articulating their settlement proposals in terms of labels, and lose sight of the goals that they hope these positions will achieve. Because I’m a family law mediator, I’m using family law examples, but interest-based negotiations are key to resolving all kinds of conflicts, both professional and personal.

Interest based negotiations help divorcing spouses to identify their goals, *i.e.*, to remain a meaningful part of their children’s school life as well as weekend life, or to be able to have financial security at the end of the divorce, as opposed to the single option that would traditionally be set forth in a settlement offer. There may be *many* ways to accomplish the underlying goals, *not just one single way*.

Expanding the Options: By having each divorcing spouse define his or her goals, mediators can begin to generate multiple settlement options that could accomplish the goal. This helps the divorcing spouses see that there isn’t just one way to settle, and gives everyone more bargaining room at the table.

Many people think that mediation is all about compromise. This is only partly true. A true “win/win” situation occurs when both parties accomplish their most important goals with fewer compromises, and compromising more on their less important goals.

As a result, it helps if each person can *prioritize* his or her goals. It may be that each spouse needs to compromise on some of his or her less important goals (which may be more important to the opposing party) in order to make sure the most important goals are accomplished.

Here’s the breakdown:

- Win/lose outcomes—one winner, one loser. Competitive.
- Impasse outcomes—no agreement or resolution.
- Compromise outcomes—some parties give up some of their goals to obtain others. Accommodation.
- Win/win outcomes—all parties feel their interests have been satisfied

By way of illustration, here’s how a position can be articulated in terms of the underlying goal:

| Position | Interest |
|---------------------------------------|---|
| “I want Wednesday night overnights” | I want to be involved in parenting my child during school time as well as vacation time. I don’t want to be stuck being a “Disneyland Dad”. |
| “I don’t want to pay spousal support” | I want to be financially secure, and to be able to retire when I’m ready. |

Positional bargaining vs. interest based bargaining is a fundamental shift in thinking which lets go of the labels in favor of the bigger picture. By way of example¹:

| Positional Bargaining | Interest Based Bargaining |
|--|---|
| Assumes: resources are limited, and solution will require compromise or someone giving up something | Assumes: resources not limited, look to “added value” as well as non-monetary solutions |
| Attitude: parties will come in firmly rooted in their position (think “label”), which they think is THE solution | Attitude: problem-solver, not winner/loser. Looks to win/win outcome. |
| How do they reach agreement? When they meet enough of an opponent’s interests to induce settlement. Often, parties leave with an agreement, but are still dissatisfied. Represents | How do they reach agreement? By identifying the issues and goals of each party, and working through them. 3 types: 1) substantive: issues such as |

¹ Adapted from *The Mediation Process*, Christopher Moore (2002), Wiley/Jossey-Bass.

| | |
|--|--|
| compromise or giving up rather than working out a joint solution. ² | money and time are often central 2) procedural: behavior & session are civil and organized. Focuses on mutual interests and a plan for implementing 3) psychological: emotional and relationship needs—respect, mutual positive regard |
|--|--|

Can you see the inherent problems in positional bargaining? It's typically positional bargaining that brings people to impasse and litigation.

Interest-Based Negotiation seeks to *enlarge the range of alternatives* so that the needs of all parties are addressed and met to the greatest extent possible. This is the basis of most mediation. It also works best when:

- Parties have at least a minimal level of trust in each other;
- Parties have some mutually interdependent interests;
- Equal, but not necessarily similar, means of influence exist, or the party with the superior power is willing to curtail the exercise of power and work toward a cooperative solution;
- Parties have a high investment in a mutually satisfactory outcome; because of mutual fear of potential costs that might result from impasse
- Parties desire a positive future relationship.

When parties cannot identify their issues:

- They may not know what their genuine interests are;
- Are hiding their interests in favor of “strategy”;
- Are so set in their “position” that the interest itself is obscured;
- Are unaware of procedures for exploring interests.

It's up to the mediator to convey a positive attitude toward interest exploration:

- It is in each party's enlightened self-interest that the other party is also satisfied with the ultimate agreement (opposing party will be more cooperative in the future, and more likely to abide by agreement, for example);
- In order to settle, both parties must sign the agreement, so both must be satisfied. Divorcing spouses needs to have an agreement the other party will sign;
- All parties have interests and needs that are important and valid to them;
- A solution to the problem should meet the maximum number of interests of each party;
- Interests can be traded to achieve the most satisfactory combination;
- There is probably more than one acceptable solution to a problem;
- Any conflict involves compatible interests as well as conflicting interests.

The key to resolution is to link the solution to the underlying issue to be solved.

² See examples on 72 of *The Mediation Process*, Christopher Moore (2002), Wiley/Jossey-Bass.

Here's an intervention to generate options for settlement in individual meetings with divorcing spouses (first) and in a 4-way conference (second):

Step 1:

- Convince them that they have options—many spouses will come into the room completely entrenched in their positions
 - Make sure they feel heard;
 - Get them to commit to listening to other options—not to agree, but to explore. Remind them that listening is not the same as obeying
 - BATNA (best alternative to a negotiated agreement);
- Detach parties from unacceptable positions.

Step 2:

- Help parties develop options: strategies and procedures
 - Building block approach, “baby steps”—small components are easier to deal with than big issues. Keep breaking impasses down into smaller components that are easier to settle.
 - Agree on formula for settlement—agree on how to approach
- Types of settlement options
 - Collaboration—interest-based negotiations & option generating
 - “logrolling”—trading off issues which are more important to the other party
 - “alternation”—trading off times for privileges
 - designing a new way—orange argument (one wants the peel, the other wants the fruit)
 - Bargaining on positions—proposals and counter proposals

How to generate options:

- Begin with what's already agreed or working
- Develop objective standards for an acceptable agreement
- Open discussion
- Brainstorming
- Nominal group process—brainstorming, but each makes own list, then discuss in subgroups
- Plausible hypothetical scenarios
- Model agreements—how did somebody else do it?
- Linked trades—trading one issue for another since parties value issues differently
- Deciding a procedural solution to a substantive agreement (e.g., posting a bond)
- Package agreement
- Using outside experts or resources

Help them assess options for settlement:

- Reviewing their interests
- Assessing how these interest are met by solutions developed in session
- Determining costs/benefits of selecting or rejecting the solutions
- Determining BATNA (best alternative to a negotiated settlement)
- “tweaking”: Beginning process of modifying/trading (etc.) options to reach a final settlement

Part of being a good mediator, especially for parties that are not represented is helping people understand the settlement range. As the mediator you're not setting the settlement range, but helping clients explore win/win options within the range established by the mediation participants.

Recognition of settlement range

- Moderation of inflated expectations:
- If you were in the other party's situation, would you accept the proposals?
- Is the offer fair? Would other people perceive it as such?
- Is the demand you're making in line with other court decisions or settlements?
- Do you have the power to force this issue?
- What are the benefits to you of pursuing your present course? Are there any risks?

BATNA—examples of what happens if you win/lose or give up a specific issue?³

The danger of adopting this as a mantra: never forget that the “interests” described in the techniques above are merely a rational, logical, sensible set of interests, and that people involved in conflict, particularly divorce conflict, may have non-rational “interests” as well. Revenge, reparations for hurt feelings, apologies, shame, guilt, embarrassment, public perceptions.... the list goes on indefinitely. Simply appealing to the logical component often won't be sufficient to complete a settlement or overcome impasse. It may be that the parties are not yet ready to contemplate a true resolution of the conflicts at hand, or it may be that you need to explore these other non-monetary, non-rational benefits.

Example:

Position: “I don't want to pay spousal support.”

Intervention: ask why, and what they're feeling about it

Response: “I am really angry at my spouse. He/she has betrayed me, refused to work [every bad thing divorcing spouses can think of]

Intervention: reframe and rephrase what divorcing spouses have said, making divorcing spouses feel heard before making suggestions of any kind. Then address the emotional interest (fear about financial security, not wanting to be taken advantage of, anger) and attempt to get to underlying emotion, “so you are afraid of _____ happening”. Get a “yes, you understand” indication from the spouse, and then go to the interest-based negotiations intervention: “Would you be open to exploring options that would satisfy your need for safety [security, whatever the concern is] and at the same time would allow you the possibility of an ongoing relationship with your ex-spouse?”

Address the fear, offer to come up with a solution that addresses fear and which also creates the possibility for settlement and ongoing cordial relationship.

³ Source: adapted from Christopher Moore, *The Mediation Process*, 2nd Edition, Wiley/Jossey-Bass (2002)

By going beyond a party's stated goal, and uncovering the interest behind the goal, you can help open up the range of settlement possibilities and help the parties to reach a mutually acceptable agreement with the fewest possible compromises.

Impasse in Negotiations

Here are my top 10 tips for breaking impasse in negotiations:

1. Determine how the pecking order in the relationship is maintained regardless of who technically has more or less power in the hierarchy of the relationship. Then shift the one-up/one-down zero-sum competition to one of power-sharing in the spirit of enlightened self-interest.

Like it or not, there's usually an underlying psychodynamic basis to every conflict. Some old unresolved familial drama is being played out in the workplace, in a marriage, or wherever the conflict exists. Top negotiators can quickly spot personality types that are particularly likely to engage in conflict and the pecking order in relationships even if it's unspoken as to who is "the boss."

For example, a boss might be domineering and controlling and the subordinate may be indecisive and dependent. This pairing of personalities creates perfect conditions for conflict when the latter starts to feel more powerful as a result of having been mentored by the former. Not any longer the worshipped mentor, trouble starts when the dominant one will not promote a more equitable relationship with the subordinate one or adequately acknowledge the contribution of the subordinate one. Without using jargon, speak to the dynamics that lead to this 'deadly dance' in which there is a request, usually not for a complete role reversal, but usually a renegotiation of roles that is perceived as threatening to the one normally in power and a scenario for sabotage for the one seemingly less powerful. The request may be a case of role-sharing or to reframe the conflict, a renegotiation of the division of labor, or even a change of title or labeling of work responsibilities that can be accommodated within the relationship.

One way you might handle this dynamic would be to first acknowledge the two-way street nature of relationships. Ultimately one party is only as content as the other, because if one party has a complaint, the other will hear about it. The conflict will be ongoing until the underlying complaint is resolved. Being heard and having your concerns taken seriously is another reframe of the win/lose conflict in that there are never clear-cut winners and losers when you look at the long-term perspective if the relationship is overall a productive one.

Another more basic reason people get into conflict because they care about the other person or about the situation. The opposite of love is not hate—it's "I don't care". The fact that these people are in conflict tells you that they care about something in this relationship. If you can figure out their connection, or what it is that they care about, then you've got an important clue to the solution. When you can point out common interests, you can begin to develop some common ground for settlement. Often, the parties' interests are intertwined and ongoing, e.g., a manufacturer and a supplier of raw goods, professional colleagues in the same community, business partners or relatives. It's in their best interests to satisfy the other person almost as much as it is to satisfy their own needs. Here's the rationale: if the other party is happy (or at least happier), then he or she will be less likely to cause trouble in the future. So by definition, in any ongoing relationship, if one party has a complaint the other will have a problem. If both

parties are satisfied with the result of the negotiations, it will be easier to work together, or at least be cordial, in the future.

2. Explore the payoffs and secondary gains from being in conflict.

No one gets into conflict by himself and it takes two people (at least) to fight. Knowingly or not, each party contributes to the cause and/or maintenance of the problem. One or both parties may even be protective about maintaining a 'perfected' complaint. Although one party may point a finger decisively at the other for having started the conflict, the finger-pointer is also a participant. He could, after all, simply choose to stop fighting.

Despite their protestations to the contrary, many people become embroiled in conflict as a way of avoiding something else. For example, if they can focus on the problem at work, they can ignore their failing marriage. If the conflict at work ends, they might have to face the bigger conflict at home. So the conflict is maintained and continues needlessly, even if it could be easily solved. If litigants understand that one way of staying in touch, or avoiding something else, is through conflict they might understand the real issue and be ready to deal with the conflict on its own merit. Once they see their own role in the conflict, and the secondary gains for continuing the conflict, they can begin to see their role in negotiating the solution.

3. Take turns putting the parties on the 'hot seat.'

Becoming an agent of reality for each party in turn can be very effective. It works best when you can cite a prior case, anecdotal example, statistic or study and therefore frame the information as neutral and objective even though it is likely to be more acceptable to one party than the other. Pre-empt the score-keeping by acknowledging to the party who won't like what you're saying that they might not want to hear this, and then be prepared to warn the gloating party not to use this as ammunition as their turn is next. Make sure that you use this technique equally with both parties, or do it in private caucus. Follow through on your promise to make the process equal no matter how difficult it is to find a neutral angle on the dispute. Remember that one party's best case scenario is the other party's worst-case scenario, after all.

4. Distinguish between stylistic differences that are negotiable and personality differences that are not.

Sometimes something as simple as a personal style or use of language can exacerbate a complaint to the point of conflict that never actually represented a disagreement in the first place. In a recent case I mediated, one party was a New Yorker and one party was a Southerner. The New Yorker called the Southerner an "SOB", which was acceptable everyday parlance for the New Yorker. The Southerner took great offense, and couldn't hear what the New Yorker was saying after hearing himself being referred to as an SOB.

If the New Yorker had a point to make, the Southerner was not going to hear it until he got past the language. Were the parties hearing each other? Is their disagreement as deep as they believe, or has an intervening event, such as the abuse of language, either irritated a problem or caused one where none existed?

5. Express needs in language that the other can hear and accept.

There are certain phrases used over and over when people are in conflict that rub the other party the wrong way. Take time to note what those 'fighting words' are and request that each side refrain from using them in the spirit of resolving the conflict. Help them to create a new phrase to describe their concerns, and avoid these triggers that the other party has heard over and over again. Remind them that they've probably had this same argument before, and since it's not working, it's time to try a different approach.

Like the New Yorker and Southerner described above, until Mr. New York could stop cursing and use more business-like language, the Southerner was unable to hear him. Every time Mr. Southerner heard "SOB" or a similar curse, he tuned out of the conversation because he was angry over what he considered to be disrespectful and belittling remarks. Clearly, if Mr. New York wanted to be taken seriously it was in his enlightened self-interest to use language that would not make Mr. Southerner less open to his concerns. Once this was brought to his attention, Mr. New York was able to adopt a more conventional tone, and Mr. Southerner was much more open to Mr. New York's ideas.

6. Frame the disagreement as something they have in common and point out the irony of the situation.

This is particularly helpful in having otherwise competent and rational people who have gotten out of control with their conflict realize this and be embarrassed enough to reach resolution. If people develop an 'observing mind' and can see themselves being seen, this might also help. All too often people in conflict forget that they are not the first people with a similar conflict and that with variation their story has been told before and lived through by others. The various professionals who work in the law and courts have seen hundreds of similar cases. It helps for clients to know this and to begin to see their case from the outside perspective when thinking about how to present themselves to others to assess the rationality of their arguments and complaints.

7. Address the physical and mental toll paid from the stress of being in conflict.

Sometimes after being involved in conflict for an extended period of time, people forget that they might have better things to do than continue fighting. The sheer exhaustion conflict creates and the resulting inability to be truly productive in other areas of life may need to be pointed out. A simple question like, "what will you do when this lawsuit is resolved?" may do the trick, reminding people of vacation plans, family responsibilities, and new business ventures may bring them back to reasonableness.

8. Discuss the basics of compromise and the difference between listening and obeying.

No one gets everything that they want in conflict resolution, but each should at least have their concerns and goals heard. Sometimes people confuse listening with having to obey. Hearing and acknowledging another's position is not the same as agreeing with it. Everyone has the right to be heard and listened to, without the commitment to agreement or to being obeyed. If you can stop this part of the dynamic, you can start to make real progress on the resolution of the case.

9. Distinguish between perception and reality as a method for beginning to take responsibility for the consequences of one's actions without admitting one is wrong.

This technique is lifted from Alcoholics Anonymous. Though it can be particularly effective when one party makes allegations that the other denies it must also be used judiciously. There is the valid point of view that establishing guilt does matter as much or more than the perception of guilt and no one wants the reputation of being insensitive to such issues.

Nevertheless, in this impasse-busting scenario validity of the allegation is not the problem; rather it's the consequence, or appearance or claim that the allegation is true that is cause for concern. For instance, in the case of domestic violence, whether or not the alleged perpetrator committed the act of violence is separate from the idea that the person making the allegations is afraid of the alleged perpetrator. In addressing the alleging person's fears, the 'crime' takes a back seat. In negotiation, you can point out that the truth matters as much as the perception of truth to the other party, and you can begin to structure ways in which the settlement, including reparations, might be reached without having to determine whether one party is "wrong" or not.

10. Determine how to give the parties what they need and not only what they ask for.

Quite frequently I have clients who come in and are adamant about only wanting to work on an agreement and not use their precious billable hour to address problems in the relationship that has led to the conflict. I naively proceed as requested, oftentimes getting to a pretty sound agreement, or at least a first proposal is made. Then I get the feedback that one, less often both, parties feel we moved too quickly into a settled agreement. Clinically, I know it is because we did not address the dynamics of the relationship. I grapple with how to 'slow down' the negotiation just enough that clients do not feel they are wasting their time in the room but enough so that the agreements stick or at least are not sabotaged for other reasons.

Taking a semi-psychological approach to negotiations can help your client—and the other litigants—get past what seem to be impossible sticking points. When you're stumped, try and look at the situation a different way and perhaps you can help the litigants see past the basic dollars and cents of the situation.

Advanced Communication Skills: Moving Beyond Argument To Dialogue

In beginning mediation trainings, trainees spend a lot of time practicing communication techniques: reframing, rephrasing, reflective listening and "I" statements. Yet as important as communication is to success in mediation, after those first few trainings little is said about improving your mediation communication skills. Here are a few advanced communication techniques for your mediator's toolbox in addition to all that reframing and rephrasing: reading facial expressions, listening to the meta-message, listening for shame and trauma, conflict as contact, forgetting in conflict and remembering in agreement, detoxifying information, normalizing affect and handling sensitive topics.

Reading Facial Expressions: Reading a client's body language is important in mediation. After all, we communicate with much more than words. To begin to read a client's facial expressions, one technique is to make eye contact with the left of his or her face, preferably with your left eye or left side of your face. Simply put, we wear our emotions on the left side of our face because the right hemisphere of the brain houses emotional feeling. By tuning into what's happening with the left side of a client's body, a mediator can sometimes read an emotional reaction that may not be clear with words alone. Believe it or not, this also helps clients calm down.

Other non-verbal cues include clients who are still wearing their wedding rings despite their decision to divorce, clients who come to mediation kissing and holding hands, clients who sit next to each other rather than across the table, and clients who cry easily at simple discussions and who are hard to console. Some other things to note: does the date of the appointment coincide with an important milestone in the relationship? Do clients say that they're ready to mediate, and then immediately pick a fight or never return necessary paperwork?

Basically, these are all outward manifestations of ambivalence, which is the simultaneous back-and-forth conflicted feelings that most divorcing clients seem to experience. One moment, the divorce is necessary and must be completed as soon as possible, and the next moment the client waivers, not sure if the divorce is a good idea or not. One moment, clients are working well on an agreement, and the next moment they are fighting over what was just settled. Ambivalence is evidence of unfinished emotional business, either for the parties as individuals or as a couple.

Ambivalence is an underlying force at work in the toughest cases. You can watch for ambivalence by observing the parties' behavior, the date of the appointment, and by reading the left side of their faces. By paying attention to and addressing the client's ambivalence, as uncomfortable as it may make you feel, you are proactively working to prevent impasse.

Listening for the Meta-Message: What are you listening for and what are you hearing? It's important to tune into both parties in an even-handed way. Communication in mediation is different than it is in therapy, collaborative law or litigation, and while that sounds simple to say, it's easy to forget to shift your perspective if you handle many different types of cases in your practice. In litigation, lawyers are trained to ask only closed-end questions to which they know the answer. In client appointments, lawyers ask fact-based questions and are looking for information. Therapists are trained to ask open ended questions to which they don't know the answers.

Collaborative processes like mediation encourage open ended communication, exploration and sharing of ideas. In mediation, although the questions are designed to encourage open-ended communication, it's also the mediator's responsibility to make sure that the communication is focused toward the agenda and aimed at making progress toward resolution. In therapy, the therapist might encourage the conversation take its own direction with some very light guidance from the therapist, while in mediation the conversation is more agreement focused. The mediator needs to help the parties strike a balance between having discussions necessary for healing and

closure as well as making sure those discussions don't stray too far from the task at hand.

Listening for Shame and Trauma: It's easy to become seduced by the content of the discussion in mediation, but the words clients use are only part of the story. Many clients will posit that a past event triggered whatever conflict they are currently experiencing, blaming a past affair, gambling habit, unplanned pregnancy, or other traumatic event of choice as the sole source of their present problems.

Mediators need to remember that although those events may *galvanize* a situation, they have not *caused* the situation. It is important for the mediator to not be seduced by the symptoms, caught up in the content or the many manifestations of the problem, no matter how much the clients want to hang the demise of a relationship on a single event. Mediation gives parties the opportunity to confront the impediments to agreements, including the ambivalence that taboo material creates, in such a way that it brings about new levels of awareness and consciousness. Mediators can help clients do this by moving focus away from the past single event to identifying and working with the actual ruptures in the relationship.

Similarly, when clients issue complaints, they're really talking about unmet or unaddressed needs. For example, a complaint about an imbalance of power might really be about the client's inarticulate anxiety about being unworthy and inadequate. Fueling the complaint may be an undigested trauma that is re-enacted over time and ultimately undercuts one's sense of confidence. Unaddressed, these feelings of inferiority can become a loop of self-sabotaging ideas and behaviors. For example, the client may be backing away from mediation yet it may actually be that same client who desperately wants to participate and be taken seriously.

It's part of the mediator's job to turn complaints into requests for assistance and to help the client to frame the request in such a way that the other can hear and respond to in a productive way.

Remember, too, that how clients manage themselves in mediation likely harkens back to attachment styles formed in childhood and brought into adulthood. Without going into a lengthy explanation of attachment styles, suffice it to say that patterns formed in childhood influence how adults act, especially when they're in a traumatic situation like divorce. The content you are hearing may be a re-traumatization of an earlier unresolved family of origin issue that is playing out in the current marital relationship. So it's very important to listen to more than the parties' words.

It is our job to monitor and work with the verbal and non-verbal signs of ambivalence introduced when the taboo issues surrounding traumatic material can no longer be hidden or ignored. When not dealt with properly, these can become the impasses of mediation. Impasse in our work is akin to looking at a Polaroid picture. There is a much larger back story than the snapshot we're seeing at that moment in our office. Impasse is a glimpse into the empathic disconnects, self-fulfilling fears and interlocking pathology that have affixed, taken root and grown from early on in the genesis of the conflict. In a mediation session we're coming into the middle of an ongoing conversation (conflict), not the beginning.

Mediators can only reveal and decode a small cross-section of the individual and interpersonal historical build-up that has been laid down and the residue that remains. We can only focus on the area of the cross-section involved in accomplishing the divorce. We do not allow clients to ignore the deeper levels and issues that cause an impasse; rather, we attempt to navigate it with good-faith skill and sensitivity.

Conflict as Contact: Another reason to listen beyond the words is that sometimes people use conflict as an attempt to stay in touch with each other.⁴ Resolution of conflict would be one way of letting go and being free of the other. As mediators we need to help clients remember “Anger is a great place to start, but a horrible place to stay.”⁵

Another way to understand people in conflict is that clients may not know another way to communicate or they haven’t remembered to leave room for each other to be in the relationship. Caught up in the problems at hand, the clients no longer think of the other person and his or her needs, but only themselves. In redefining the relationship through divorce, the agreement can represent new ways of remembering each other. Finding room for each other in the agreement is a key to resolving conflict.

Being lost in conflict is another way of saying, “I don’t remember what’s important to or about you,” or it’s a way to negate the pain of “you don’t love me anymore.” If people in conflict can forget the life partner or negate the dream of the promise of marriage, it’s easier to cope (at least on the surface) with the disappointment of the failure of that marriage. The mediator then becomes an intermediary in the dialogue.

We humans can’t seem to face our imperfections on our own. So not only do mediators act as the intermediary and regulator of the hostile energy, we restore what has been forgotten by reminding parties of what needs to be remembered in the details of agreements.

Moving Beyond Conflict as Contact: As a mediator, it’s important to find tools to help clients to feel and then release their pain, without remaining in pain. Sometimes the simple act of talking about the pain out loud can help clear the air. For example, if one party calls the other a liar the mediator could ask the accused to think back and articulate what the accuser may mean. Bringing out the specifics helps the client to let go of the hurt. Letting go is the first stage toward being agreement-ready.

In the agreement, the mediator can use neutral two-way statements and proposals that address both parties although only one may have the problem or complaint at the moment. For example: the mediator can suggest adding reciprocal, neutrally phrased language about house rules like watching R-rated movies with the children. In addition to reframing and rephrasing, the mediator can ask the clients to give each other the benefit of doubt with whatever it was that happened in the past with the goal to develop greater trust of one another. For example, the mediator could help a client figure out how to say, “If I had known how much that action was going to hurt you, I never would have done it,” while encouraging the other party to believe that although the action hurt

⁴ Isaac Berman, Ph.D.

⁵ Rabbi Jonathan Omer-Man

that this had not been the intention. Be patient, because for many clients the temptation to blame and shame may be irresistible, especially early in the mediation.

Forgetting in Conflict, Remembering in Agreement: This is where you will put your reframing and rephrasing skills to use. The goal is to make sure each party feels heard and taken seriously irrespective of whether the other party agrees with that perspective. Remind clients that listening is not the same thing as obeying or agreeing. It's important that clients feel like you truly understand them, and better still if they believe the other party has truly listened. As you're guiding one client through telling his or her story, you can turn to the other party and ask "Is there any new information that has been shared that is different from what was shared in the past?" and spend a moment talking about what it's like to communicate.

Detoxifying Information to Digest New or Discomforting Information: Many complaints mediation participants voice may be offensive to the other party, or something that the other party will be reluctant to acknowledge. A good example of this is domestic violence or cruel treatment. The alleged perpetrator may be reluctant to admit to wrongdoing, but for the purposes of mediation it isn't necessary for him or her to confess. The mediator can point out that whether or not it happened isn't as important as that fact that now one party is afraid of the other. The dynamic in the relationship has caused confusion or fear in the other party and that confusion or fear becomes the problem to be solved. By taking the guilt and blame out of the equation, it's easier to negotiate a resolution.

Normalizing Affect: Another communication technique that is useful in mediation is to normalize the situation, and to let the clients know that what they're going through is normal, even if it's difficult. Remind them that even positive change can be stressful. Statistically, the first 18 months after physical separation is the 'crazy making time' in any divorce and it is statistically normal to experience the roller coaster of emotions up to 3 years post-separation. The mediator can use empathy and acknowledgement, e.g., "I know it's hard" and "I can appreciate why you feel that way, but..." or "You are not alone in feeling that way...."

The mediator can also introduce the idea of taking action consistent with one's Enlightened Self-Interest.⁶ The idea is that if my former spouse is reasonably pleased with any given situation that he or she will be more cooperative and easier to work with, thereby making my own situation easier. The mediator can encourage clients to give the other party the benefit of the doubt when there's a question about the motive behind a certain action. By giving the other party the benefit of the doubt, the client can avoid feeling slighted or hurt. For example, by encouraging the client to say, "I'm sure that his/her failure to return the child's new coat when he/she dropped the child off was an oversight, and that it wasn't meant to punish me" helps the client to remain calm when asking for the coat's return. For more difficult situations, the mediator can ask "What would help the other party to put this issue to rest, even if you don't think he/she deserves it?" ...or..."What can you do to put the other party's mind at ease? How can you get on the other party's side to get him or her on your side?"

⁶ This term was coined by economist Adam Smith in discussing the invisible hand of efficiency.

This benefit of the doubt also works for the required financial disclosures. The more forthcoming and co-operative the parties are, the more trustworthy each becomes. Because full financial disclosure is required anyway, encouraging both parties to offer financial documents and disclosures before the other party has to ask for them is an easy way to help clients begin to rebuild trust.

Handling Sensitive Topics: Always narrate for the parties what you intend to do. Work with empathy and compassion to get cooperation, and never rush in where you do not have permission to go. For example, the mediator could ask “We’re going to be going into some very sensitive material now. Are you ready? If it gets to be too much, give the time-out sign and we’ll take a break, knowing that we will come back to the discussion,” or...”The irony of divorce is that the difficult discussions and boundaries that were necessary in your marriage are also required as part of the divorce.”

As the mediator the goal is to understand another’s perspective without the appearance of alignment. For lawyers or therapists this can be tough because they’re trained to align with and empathize with one client only. The key is to create a relationship with all of the mediation participants without either or both feeling like you’ve become biased.

Conclusion: As cases become higher conflict and more difficult to settle, the parties’ desire to collaborate may not easily translate into settlement opportunities. Deep communication on important issues does not come naturally to everyone, and it’s particularly difficult for clients who are no longer invested in pleasing each other on a spousal or intimate basis. While reframing and rephrasing are the cornerstones of mediation communication, continuing the discussion on how to enhance communication in mediation is essential to cultivating artistry in your mediation practice.

“What to do If” Interventions

Mediation relies heavily on intuition mixed with underlying skills. As much as mediation involves feeling your way along given the tone of the mediation session, it’s also helpful to have a mediator’s toolbox of moves and interventions to call upon when you’re out of intuitive ideas.

What to do when parties don’t see the progress they’ve made in mediation:

From a therapist’s perspective:

- Acknowledge their frustration;
- Ask clients to articulate more clearly what is ‘a lack of progress;’
- Identify what progress they do see;
- Explore what this means to them;
- Ask what they think stands in the way of their progress;
- Ask what could be done to clear the path to progress;
- Explore what progress would look like;
- Explore what progress would feel like.

From a lawyer’s perspective:

- Reiterate all that they have accomplished;
- Reiterate it in writing in the summary letter;
- Be transparent about the lack of progress at the time, e.g., "You've said you only have 15 minutes to talk about this, but you keep going off the topic. We can't finish unless we stay with the agenda." Straying frequently from the agenda can be a sign of ambivalence, so be sure to address this issue soon enough for the clients to be able to change their behavior and still make progress. It's okay to deviate from the agenda, but do it with everyone's agreement that you're switching topics;
- Suggest a caucus if the clients can't stop fighting;
- Ask what they'd hoped to accomplish and how best to get to their goals;
- Ask if there's another way to go about things that might show them more progress more concretely;
- Point out how much faster mediation has been than litigation.

What to do when parties seem to want to stay in a joint session but you think it's counter-productive

- Talk about your own physical or emotional discomfort. Where and how are you as the mediator feeling it?
- Ask each one of them if they're uncomfortable. You'd be surprised how normal extreme discomfort can feel for some people. If you're uncomfortable, say so.
- Make the hidden transparent: e.g., "You've said you only have 15 minutes to talk about this, but you keep going off the topic. We can't finish unless we stay with the agenda. I'm concerned that you won't reach your goal for today's session if this fighting keeps up."
- If none of this helps, you may have to insist upon a caucus.

What to do when it appears that one party has chosen mediation to bamboozle the other spouse under the guise of the mediator's legitimacy

- Make it clear that full disclosure of assets is mandatory, not optional, and explain the unpleasant consequences of untruthful or less than full disclosure of financial information if the matter goes to court.
- Explain your office policy about legal information and consultation with attorneys. Make it your policy is that clients may make an unconventional decision in mediation but it must be an informed decision. To preserve the integrity of the process, mediation participants can choose to give up their legal rights in a mediated agreement, but only after they have an understanding of what their rights might have been.
- Articulate your concern in the session, summary letter or in subsequent sessions by talking about each party's distress. There are typically behavioral clues related to this problem, and if you notice them during the session you can bring it up at that time. If you notice it afterwards, you could bring it up in the summary or next session. If it's too risky to do it in joint session, you could do it in a caucus.
- Explore with the bamboozling spouse what is going on. Although it may appear to you that there's an attempt to curtail the other participant's power or rights the parties may not see it the same way. Check your own biases or discomfort and

make sure it's truly about the parties and not about your own agenda. For some bamboozlers, the attempt to unduly sway the other party stems from the sense of having done everything right in the marriage and now having to pay when the divorce wasn't his or her idea or fault.

- Explore with the other party about any perceived lack of contribution to the marital team's successes.
- Re-screen for domestic violence, controlling behavior or severe power imbalance in the relationship.
- Be prepared to let go of the case.

What to do when a client is out of control

- Caucus, or end the session early;
- Take a break that's long enough for everyone to calm down;
- In caucus, help the client self-soothe, and don't try to cover any more ground on the agenda until the client has completely calmed down;
- Reiterate that for mediation to work, the timing must be right. Give the client the opportunity to stop the mediation, and the option to return when he or she is more ready to reach an agreement;
- Separate the behavior from the person, not to establish guilt or blame, but to emphasize how the behavior is perceived or perhaps even misinterpreted as scary, manipulative or odd;
- Talk about your own discomfort even if the parties cannot;
- Consider more drastic security measures like installing a panic button.

What to do if the session is moving too fast: signs you should slow things down

- Ask. If you suspect you should slow down, you probably should. Take the temperature.
- One or both clients are showing emotional distress. For example, if one party starts to cry, ask the one who's not crying if they know why the other party is crying and if they know what the tears are about.
- If one or both parties are wearing their wedding bands. This unspoken gesture speaks volumes and is usually an outward sign of ambivalence about the breakup.
- One or both clients have a glazed over or far away look in their eyes and don't appear to be taking in the information.
- By paying attention to clients' right hand side of their face and eyes, you are beginning to tune into your client's internal world. This makes them feel more attended to, thereby slowing things down to a more manageable pace.
- Acknowledge agitated behaviors such as a client pounding the table or clenching their hands by talking about them directly in the session. For example, "I couldn't help but notice that when she said XYZ that your face flushed and you clenched your teeth. Can we talk about that for a minute?"
- If you notice from the intake that the date of the appointment coincides with an important time in the relationship, or that one or both parties tell you about a recent death in their respective families. Remind them of the anniversary,

acknowledge that it can be difficult to reach an agreement when they're remembering an important milestone, and invite them to either slow down or come back another day.

- You know one client is giving up much more of the marital assets than is provided under the law without having the opportunity to fully explore the issues. It's time to do some reality testing, to check for bamboozling, or to discuss the reasons he or she might want to give up too much.

What to do if the mediation is meandering: Signs you should speed things up

- You should probably never speed up a mediation session. It's not your job to make the clients go any faster than clients are inclined to go. A nice, slow pace may be exactly what the clients need. Part of your job is to keep clients on the agenda, or to mutually agree when to stray from the agenda. Your job is never to race through the issues.
- Our policy is never to work harder at reaching an agreement than the clients are willing to work themselves. Check your own discomfort at the slow pace of the mediation. Are you truly at fault? If you're still uncomfortable a few minutes later, take the temperature and ask the clients how you can best help them.
- For clients who aren't talking at all, ask why they're not talking or engaging in the process.
- If clients are going round and round on a subject starting to repeat themselves, not adding new information, and getting emotionally distraught, suggest that the issue should be tabled for the moment, that it will be an issue to return to and that by addressing other issues, the solution to this one may become clearer.
- When you return to the issue and there is still no resolution, start offering some suggestions for resolution, or make a referral to an attorney or accountant who might be able to make suggestions.
- Clients should never feel rushed in their progress. Remember that mediation is a very thoughtful process and bound to bring up highly volatile material that takes time to take in satisfactorily. Relax. They will reach an agreement when they're ready.

A full mediators' toolbox can help you get over some rough moments in tough mediation sessions. One of the best perks of being a mediator is sharing techniques with other mediators and mediators' commitment to lifetime learning.

Advanced Negotiation Tips

Once the 40 hour basic training is over, and newly minted mediators have practiced reflective listening and making agendas, it quickly becomes clear that beginners' interventions can only take a mediation so far. As the field of Alternative Dispute Resolution in Family Law matures, reflective practitioners find that willingness to mediate or work collaboratively doesn't necessarily translate into cases that are easy to settle. Sophisticated approaches to complex cases are needed to address the special requirements of more complex and higher conflict cases.

This article introduces some advanced skills, some which skilled mediators are practicing reflexively and some which will be new, requiring some practice.

Advanced skills:

- Mediator's choice;
- Self-soothing and self-confrontation;
- Content to process shift;
- Turning business away.

Mediator's Choice

Mediator's choice is a technique to use when you're all out of other ideas and time is running short. This move is more often used in civil mediations than in family mediation situations, but it's useful to discuss because it's an interesting jumping off point for how it might be adapted in family law mediations.

Here's how it works: The mediator silently formulates a proposal that he or she thinks will be barely palatable to each side---hanging the ham low enough to where the dog can get at it, so to speak. After spending several hours with both sides, if the mediator has an idea of each side's breaking point, he or she can formulate the "mediator's choice" proposal. The idea is that it's the last dollar that each side may be willing to concede.

The mediator then presents the proposal to each side in caucus clearly indicating that it's the mediator's proposal, not a proposal made by either side. In the first round there's no "yes" or "no" answer, but simply an opportunity to think about the mediator's proposal. Some mediators put the proposal in a basic stipulation form so that a written agreement can be left with the parties and signed if there is indeed an agreement.

Once the proposal has been made to both sides, the mediator clearly explains the rules: the mediator will not reveal either side's answer to the proposal unless the answer by both sides is "yes" and the parties have an agreement. If they have an agreement, the stipulation is signed. There is no re-negotiation of any terms of the agreement---it's mediator's choice or no agreement.

If either side says "no", the answer from both sides is kept confidential. That way, if one side says "yes" and the other side says "no", the rejecting side doesn't know the agreeable side would settle for the mediator's proposal. By revealing only mutual "yes" answers, the mediator preserves confidentiality for the ongoing negotiations.

This is a last-ditch attempt to help the parties reach an agreement, and is generally only suggested 15 minutes before the mediation is scheduled to end. It's very evaluative in nature, and is simply one last mediation intervention to try before sending the parties on their way without an agreement.

Self Soothing and Self Confrontation

At times in the mediation process, some clients will become agitated such that they cannot continue to mediate. If you're already in caucus, it may be time for a break or even a postponement of the rest of the mediation session. If you're in joint session, however, there's a technique which can help clients self-soothe and self-regulate before the entire mediation is derailed.

Here's how it works: When you note that a client is too agitated to continue to make progress in a joint session, to use this technique you'll call a caucus. We'd suggest that your client is too agitated to continue when you observe such behaviors as crying, slamming the table, twitching, incessant sniping, and other clearly agitated behaviors.

In caucus, you'll ask the upset party, "what can you do to make yourself feel better?" Your first focus is just on helping the agitated party calm down. Acknowledge his or her pain or fear in the underlying conflict. Get the client to make a commitment to get a grip in him or herself. Ask them what has worked in the past, and let them choose what they think might work. Don't suggest a method for self-soothing until after the client has made his or her own suggestions and decided that they won't work. Make sure the client is out of ideas before you make your first suggestion.

Suspend the negotiations until the party has calmed down and self-soothed. Expect a relapse, but hope for progress! Once the party has self-soothed, you may wish to move onto self confrontation before going back into joint session.

Self Confrontation

In caucus, after self-soothing, you'll ask your client, "what can you do to take responsibility for improving your (or your spouse's) willingness to negotiate?"

Explore the possibilities with him or her. Acknowledge the progress he or she has made from self-soothing. Before asking your question, confirm that the client is ready to go on and if they're ready for a bigger challenge. Ask what they can do to move the negotiations along. Use this caucus time in a focused way to discuss the client's options and select an acceptable proposal for the client to make in joint session or as part of your shuttle diplomacy.

Content-to-Process Shift

When things get too heated or counter-productive in the mediation room, you can borrow a therapists' intervention called content-to-process shift.

The premise is pretty basic: when the content of the session, e.g., the current discussion topic, is too controversial or generating too much conflict, step back a little in the session and think about what mediation process tools you could use to diffuse the tension. You're switching from the discussion itself to the mediation process, hence content-to-process shift. Do you need to take a break? Call a caucus? Help a party self-soothe? What mediation intervention can you use to lower the temperature in the room and make the discussion possible again?

Turning Business Away

When in doubt, don't take the case. Trust your intuition. Or, if you're hungry enough for new business, take the cases you're not sure you should take, determined to be both thoughtful and mindful in your trial-and-error. It's an irony that we often learn more from the cases which fall out of mediation and from the cases we work too hard to keep in mediation than we do from the successful cases.

Before you plunge your practice into bankruptcy by turning away too many cases, though, also ask yourself why you won't take the case. Is it because the clients are a bad fit for your services, you don't think you can help them, or is it because you are unwilling to challenge yourself enough?

Not every client is worth working with. Seasoned practitioners have their own boundaries (and horror stories) about which clients are worth working with and which are best refused. One rule of thumb is that the cases which are too difficult to convene are that way for a reason; you could spend as much time trying to get some parties to agree to mediate as they spend mediating their case. We call those clients "suspects" rather than "prospects"⁷. Is that client on the phone really a potential client, ready to mediate, with a spouse, partner or adverse party who's ready to mediate, and who can afford your services? As the demand for mediation grows, and our practices grow, it's natural to stop trying to convene these more reluctant cases sooner and sooner into the convening process.

Conclusion

One of the tangible benefits of a career in mediation is the opportunity for lifelong learning. Adding to your mediation toolbox, and expanding your thinking about what you're doing in the mediation room, will help you move to the next level in your mediation practice.

Disk 6: Preparing for a Pretrial Settlement Conference

Preparing for a Pre-Trial Settlement Conference

- Trial judge as mediator
- Mediator as mediator
- Different judge as mediator (not trial judge)
- Client Participates
- Client doesn't participate

Always be prepared with:

- Written proposed orders you and the client have prepared together. Take enough copies for everyone expected to be present
- Plan A, Plan B, Plan C
- Basic facts written out—date of marriage, timeline, etc.

⁷ *Selling the Invisible: A Field Guide To Modern Marketing*, by Harry Beckwith (Warner Business Books 1997)

Always Meeting with the Client and Discuss:

- A frank discussion about the pressure there will be in the room or at the conference to reach an agreement
- Priorities—some aspects of the settlement will be more important to them than others. Identify all aspects (wring it dry) and then have them prioritize.
- They won't get everything they're asking for. On what points is there room to compromise?
- Reality test—make sure they're aware that they won't get everything they're asking for
- What do they identify as the deal breakers for the other spouse? What can be built into your client's proposed orders or presentation plan to be ready to address these issues? How can we hang the ham low enough to where the dog can get at it?
- There's also an advantage to appearing reasonable in front of the mediator or judge---they may start to advocate for your position
- What issues will the other attorney/spouse raise about your client and his or her settlement proposal? Wring the list dry and rehearse with the client (in writing if necessary) so that both you and the client are ready with an answer to each allegation.
- Address every possible barrier to success in your written proposed orders: funding arranged for house buy out, appraisals either done or lined up, copies of disclosures and pertinent exhibits

Your demeanor and your client's demeanor:

- Must be respectful at all times
- Your reputation is your best asset; each hearing builds on that
- Address the other attorney formally, no matter how well you know him or her
- Must be respectful of court personnel, the judge's authority, and the influence that the mediator, evaluator, court clerk and all other court personnel may have over the outcome of the case [what sniping looked like when I was a judge *pro tem*]
- Losing your temper only reinforces the other lawyer's case. If you or your client might lose his or her temper, what safeguards or preventative measures might be taken to avoid a problem?
- Listen to your client's narrative and identify and address red flags. (example: Tying money or possession of the house to child issues is a problem.)
- If your client has done something "bad" like affairs, substance use and abuse, and it's public knowledge, help your client find words to apologize, acknowledge the issue, and explain how it's being addressed and why the proposed orders are appropriate under these circumstances. Even if it's not public knowledge (or the client thinks it isn't), if it is an issue he or she should be prepared to address it if it comes up.
- Being on medication or having a substance abuse problem is not the end of the world—working with a therapist, following the medication schedule, going to AA...all of these things are positive and probably won't work against your client as much as he/she is afraid they will and as much as the other parent hopes they will.

- Mixing adult issues and child issues: Also a problem. Keep the discussion child-focused and help your client avoid any traps the other parent might set (on purpose or unconsciously) so as not to be drawn into the adult dispute.

Special Issues/Unconventional Requests:

- Make sure proposed parenting plan takes into account special needs and experts' recommendations re: special needs
- If your client is taking an unconventional approach (e.g., anti-vaccines) be sure he or she has credible evidence to back up his or her position and that they can talk about it rationally.
- If you're asking for something unconventional (longer alimony, a house buy out when a spouse doesn't work) be prepared to explain why this will work and that you and the client have thought it through

Unconventional clients:

- For clients who have adopted unconventional lifestyles, they need to be ready to acknowledge that others don't necessarily think like they do and how this impacts the children
- Client needs to be prepared to respond gracefully to what might feel like an assault on their lifestyle or beliefs. Raging or acting like theirs is the only perspective will only make them look crazy and unreasonable.
- Example: JW witnessing---reach them on the safety issues, or children being confused
- Example: swingers or porn---that children aren't involved and that appropriate safeguards are in place so that children are shielded from this lifestyle

For the extremely difficult case:

- Have the client hire a therapist to help him or her prepare if it looks like you're headed to trial. For a pre-trial, you can usually just tell a client to let you do all the talking. No rushing with difficult clients and cases.
- Consider a step-up plan, where the parenting time is less or more restricted than your client might want but as it goes well it automatically increases; for spousal support, explain why your "more now, less later" is mutually beneficial
- [anecdote about supervised visitation]
- Consider settling: Clients who have been abused or who have Borderline Personality Disorder (or whose co-parents are narcissists) often present very poorly in these settings even though they may be terrific parents. These folks should probably work with an individual coach. The more written orders and preparation they've done the better. Abusers and narcissists often present very well in these settings, which may aggravate the situation and make your client upset (and as a result present even worse).

Disk 7: Custody: Crafting a Developmentally Sound Parenting Plan

Crafting a Developmentally Sound Parenting Plan

Sometimes it's triage

Listen to parents—if it works for them, it will likely work for the kids.

Materials:

Model Parenting language

Parenting Protocols for difficult situations

Model schedules

Parenting Plan Model Language

A. _____ shall share joint legal custody of the minor children _____, born _____, who shall have regular and ongoing contact with both parents in accordance with the parenting plan set forth below:

1. Both parents shall share the right and responsibility to make decisions relating to the health, education and welfare of the minor child(ren).
2. In exercising joint legal custody, it is explicitly required that the parents are in agreement in making decisions on the following matters for each minor child:
 - a. Enrollment or termination of attendance in school or university, marriage before the age of 18 years, and/or joining a branch of the military service;
 - b. Beginning or ending the regular practice of a religion. Both parents agree that the child(ren) will be raised in the _____ faith.
 - c. Commencing psychiatric, psychological, or other such mental health counseling or therapy including but not limited to educational testing;
 - d. Authorizing the issuance of the minor child's driver's license, and providing an automobile for the child to drive;
 - e. A passport application or issuance of a passport. Original documents for passport, birth certificate, Social Security card and immunization records shall be held by mother/father and copies shall be provided to the other parent;
 - f. Enrollment and participation in regularly occurring extracurricular activities;
 - g. Permission for tattoos, piercings, and any and all other permanent alterations of the child's body; and
 - h. Non-emergency medical, dental, or other elective care treatment, as well as routine checkups. Each party shall notify the other of the name and address of any health practitioner who examines or treats the minor child within one week of the commencement of the first such examination or treatment.
 - i. Employment prior to the age of 16 years, including but not limited to acting and modeling.
3. In emergency situations, each party is authorized to take any and all actions necessary to protect the health and welfare of the minor child including, but not limited to, consenting to emergency medical, dental and surgical procedures or treatment. Each party shall attempt to notify the other party within one hour of any such emergency situation and of all medical, dental or surgical procedure and treatment administered to the minor child. In the event of an emergency in which one party cannot reasonably be contacted, either party acting alone may continue to give his or her consent to any medically necessary emergency medical or dental care, test, treatment, service or procedure until the other party can be notified. The party consenting to treatment shall forthwith thereafter

have the other party's consent to treatment as stated above and if the other party can not be in contact with medical personnel, the party with the child shall inform the other party about any care, test, treatment, service or procedure administered to the minor child.

4. Except upon prior agreement, each party shall avoid scheduling activities for the minor child that conflict with the other party's physical custody. Both parents are encouraged to attend their child's activities. Parents are responsible for keeping themselves advised and for advising each other of all school, athletic and social events in which the child participates.

5. Both parents shall have access to the minor child's medical, dental and school records, as more fully set forth in California *Family Code* Section 3025. The names of both parents shall be listed on class rosters, school records and extracurricular cards to be contacted in case of emergency. Each parent is expected to keep himself or herself informed of the school schedule and class activities via the school's web site and teacher e-mail. If either parent does not have internet access then that parent may request that the child's schools duplicate all materials and send them to both parents. The requesting parent shall provide self-addressed, stamped envelopes to the school in order to assist the school in carrying out this request.

6. The parents are ordered to confer in advance and in good faith on matters having to do with the health, education and welfare of the minor child including, without limitation, all matters listed in Paragraph IV A. above. If they do not agree, they shall consult with a mediator or appropriate professional first in an attempt to resolve the issue(s) prior to seeking the assistance of the Court, as more fully set forth below.

B. Physical Custody – The parents will share parenting time as follows:

1. The day-to-day schedule shall be as follows:

a. Weekends –

b. Weekdays –

c. Both parents agree to make-up or reschedule mother/father's time if the child is ill or otherwise unable to spend time with a parent during his or her regular custodial time, or if one or both parent's travel schedules require that the child misses his or her time with the mother/father.

2. Holidays - The holiday schedule shall supercede the regular schedule and the vacation schedule as follows:

| HOLIDAY | TIME | DAD | MOM |
|---------------------------------|---|-----------------------|-----------------------|
| Passover | | | |
| Good Friday | | | |
| Easter Sunday | | | |
| Mother's Day | | xxx | With mother each year |
| Memorial Day/Weekend | | | |
| Father's Day | | With father each year | xxx |
| July 4th | | | |
| Labor Day/Weekend | | | |
| Rosh Hashanah | | | |
| Yom Kippur | | | |
| Halloween | Each parent has 2 hours to spend with the child(ren) or to pool their time by mutual agreement between themselves. In the event of a disagreement, Mom shall have 1 st choice of time in even numbered years and Dad in odd numbered years | | |
| Thanksgiving Day/Weekend | | | |
| Chanukah | | | |

| | | | |
|---|---|--|--|
| Christmas Eve | | | |
| Christmas Eve Overnight to Christmas Morning | | | |
| Christmas Day | | | |
| New Years Eve overnight | | | |
| New Years Day | | | |
| MLK Day/Weekend | | | |
| Child Birthday | Each parent has 2 hours to spend with the child(ren) or to pool their time by mutual agreement between themselves. In the event of a disagreement, Mom shall have 1 st choice of time in even numbered years and Dad in odd numbered years | | |
| Child Birthday Party | | | |
| Parent Birthday | With the birthday parent or the other parent, at the birthday parent's option, with 48 hours' notice to the other parent | | |
| Special Family Events, e.g., Family Reunions | | | |
| Other Three Day Weekends | | | |

3. Vacations: shall supersede the regular schedule but not the holiday schedule.
- a. Each parent shall have the opportunity to exercise up to _____ weeks of uninterrupted time with the child(ren) to go on vacation per calendar year

commencing in _____ and every year thereafter until further agreement between the parents.

b. Winter Vacation shall be shared as follows: First half/second half to include or not include Christmas and/or New Year's holiday.

c. Spring Vacation shall be shared as follows: Share the week or alternate the year.

d. Summer Vacation shall be shared as follows:

e. Vacation times shall not interfere with school unless mutually agreed by both parents. Vacation time not taken by either or both parents in any given calendar year shall not accrue to the next year.

f. Each parent shall give as much notice as possible as to his or her intended vacation dates, and at least 30 days' notice of his or her intention to take vacation time with the child(ren). In the event of a disagreement as to vacation times, the mother will have first choice of dates in even-numbered years and the father shall have first choice of dates in odd numbered years.

g. The parent traveling shall give the other parent the itinerary, contact information, and telephone numbers so that both parents can be in contact with [child's name] and in case of emergency.

h. Both parents agree not to vacation in a location which the United States State Department has issued a travel hazard warning against during the 90 days prior to commencement of travel (<http://travel.state.gov/travel/warnings.html>). Foreign entry requirements are posted at www.travel.state.gov/visa/americans1.html. Both parents are aware that for international travel, written, notarized permission must be given by both parents in order for children to travel with only one parent. Most airlines also recommend taking a copy of your parenting plan with you when you travel with your children.

i. When arriving at the intended vacation destination, the traveling parent shall insure that [child's name] makes telephone contact with the other parent either by direct telephone contact and/or telephone message.

C. Other Issues

1. **Travel Schedules and Work Emergencies:** Both parents will be flexible about each other's schedules, and will give the other parent as much notice as possible when he or she needs to be out of town or when he or she has an emergency which prevents the custodial parent from being with [child's name] during their time with the child. Both parents will exchange their emergency situation and travel schedules as soon as they are aware of them.

2. **Childcare:** For the present, will stay in the current placement or school, _____, which both parents agree is good and that [child's name] enjoys. Both parents shall have access to the childcare provider's name, address, and telephone number.

3. **Right of First Option of Child Care:** In the event that either parent will require child care during his or her custodial time for more than ____ hours or ____overnight(s), the other parent must be given the first opportunity, with as much notice as possible, to care for the children before other arrangements are made. The other parent is under no obligation to care for the children under these circumstances, and if the other parent is unwilling or unable to care for the children, then it is the parent seeking childcare during his or her custodial time that is responsible for finding suitable

childcare. Unless specifically agreed or ordered by the court, this order does not include regular child care needed while a parent is working.

If the child(ren) is spending the night other than with the parent who has the child during that scheduled time, the custodial parent shall notify the other parent of the child's sleepover and the contact information where the child will be staying.

4. Transportation: The parents shall share transportation of the child approximately equally. Unless otherwise agreed, the parent commencing his or her custodial time shall pick the child up to begin the parenting time. When possible, the parents shall exchange the children at the children's school or activity whenever possible, so as to provide for a "blind transition" and minimize any stress the children might feel at the transfer. When a blind transition is not possible, then the parents will exchange the children at a neutral public place, such as the children's book department at Barnes & Noble or at Starbucks. If the pick up or drop off needs to be at either party's residence, the traveling parent will stop at the curb and the at-home parent will wait for the children at the door. The children will travel between the car and the house without the parents having direct contact.

5. Exposing [child's name] to Adult Disputes: Both parents shall minimize the child's exposure to their disputes with each other as well as new partners or other family members or friends. While it is inevitable that the parents may disagree with one another from time to time, such disagreements are to be expressed in a courteous and dignified fashion, and outside of the children's presence and hearing. Each parent is ordered to use his or her best efforts to keep all communication between them gracious, respectful and productive.

Neither party shall speak in a negative, disrespectful or derogatory manner to or about the other parent, especially in the minor child's presence or within hearing distance of the child. Both parents are ordered to use their best efforts to ensure that other family members and friends also comply with this order.

6. No Use of Children as Messengers: The parents shall develop a method of communicating with each other concerning the children, whether it is by in-person meeting, telephone, fax, e-mail or other methods, and both parents agree that the children shall not be used as messengers between the parents.

7. Toys, Cell Phones, Lap Tops, iPods (other devices add or subtract) and Clothing: The parents are to cooperate to permit toys and clothing to move freely between households, whenever it is reasonable to do so. Toys and clothing are to be treated as the property of the children, not the parent who purchased them. Each parent is ordered to use his or her best efforts to ensure that items are available for each child's use where they will be needed or wanted. As each child gets older, [child's name] can be reasonably expected to remember to bring particular items that [child's name] may want. If one of the adults has a special request regarding return or use of a particular item, that request shall be made directly to the other parent, outside of the children's presence. The goal is to make sure that these items are fairly distributed and available for the children's use in a relaxed and natural way, so that the children do not become hyper-conscious of this issue and so that it does not become a cause of tension between households.

8. Teenage Sexuality, Curfews and Substance Use: Unlike other household rules which each parent has greater latitude in setting in their respective households, parents agree to maintain a mutually consistent set of expectations and rules regarding teenage sexuality and substance use that they will both communicate to the child(ren)

and apply in both houses. Once this set of expectations and rules has been established, it will be enforced the same way in both households.

With regards to teenage sexuality, such rules may include but not be limited to an 'open door policy' while entertaining child(ren)'s friends and partners in each home, restrictions surrounding sleepovers and protocols involving communication with the parents of child(ren)'s partners and friends, especially when the situation includes another minor child.

With regards to teenage substance use, such rules may include agreements with pre-planned consequences over curfews, agreements about using a parental residence for a party and parental party supervision, and what degree of tolerance over tobacco and substance use, if any, that each parent is comfortable with full knowledge and discussion with the teenager of what the law provides.

9. Telephone Contact : Each of the parents shall be entitled to reasonable, unlimited, unmonitored telephone access with the minor child during all periods when the child is with the other parent. Telephone contact is intended for parents to stay in touch with the child(ren) and not necessarily with each other.

10. New Partner Etiquette and other Protocols: Neither parent shall introduce [child's name] to new partners and/or their respective children without prior notice to the other parent. Both parents agree that they shall have a multi-step plan in place that may include, but not be limited to, the adults involved meeting prior to introducing [child's name] to the new partners and/or their respective children, having [child's name] meet the new partner and/or their respective children at neutral locations outside the children's home and school, and overnights occurring with the new partner and/or their respective children and [child's name] only after an initial time period has passed.

Discipline, both verbal and physical, shall only be administered by the parents, not by stepparents or new partners.

11. Parenting Log Book: The parents will maintain a "log book" and make sure that the book is sent with the child(ren) between their two homes to create a record of medication schedules, reactions to medications or missed doses, as well as any agreed upon behavioral consequences to be followed through with in both parent's homes. Using businesslike notes (no personal comments), parents will record information related to the health, education, and welfare issues for the children that arise during the time that the children have been with that parent. Once child(ren) are old enough they may be encouraged to participate in the note writing. The log book will also include the names, addresses and telephone numbers of all of the children's doctors, dentists, healthcare providers, school, emergency contacts, and all of the parents' contact information. The log book will not be used for requested changes to the parenting schedule.

12. House Rules: Both parents will/will not necessarily have the same house rules in each home concerning: computer access and internet supervision, supervision Re: television and video game time, content of movies and TV shows, chores, and how and when to leave children home alone, use of childcare providers, and time with grandparents.

13. Revisiting the Parenting Plan: Both parents agree to revisit the parenting plan contained herein on an as-needed basis/ at least every 12 months / not later than _____ . In the event that controversy arises prior to a scheduled parenting plan review regarding major decisions, both parents shall first consult together in an attempt to resolve the dispute and if they are unable to reach a resolution on their own, they will meet and confer with an expert in the field related to the dispute, e.g., the child's doctor, teacher, counselor, etc. If the consultation does not resolve the dispute, the parents shall return together to mediation in an attempt to reach an agreement. Finally, if the dispute continues, it shall be submitted to the court for a decision. Until such time as this agreement is changed in writing by the parents, or these orders are modified by the Court, the existing order shall remain in effect.

14. Relocation:

a. Local Relocation: If either parent intends to move less than ____ miles from his or her current residence/ move far enough away that the parenting plan would need to be adjusted (how to quantify?) / move such that the children's school would be changed, he or she shall give the other parent at least ____ days advance written notice. Both parents shall work together in good faith to adjust the parenting plan to accommodate the move, and if they are unable to modify the parenting plan on their own, they agree to return to Peace Talks Mediation Services or another mutually agreed-upon mediator to seek assistance in establishing a new parenting plan, and both parents agree to use Court action as a last resort, as more fully set forth in Paragraph XXIII below. Each parent is to provide the other with the address and telephone number where the minor child resides and is to notify the other in writing within 2 days prior to any change of address and/or telephone number.

b. Non-Local Relocation: If either parent intends to move more than ____ miles from his or her current residence / change the country, state or county of residence of the minor child(ren) he or she shall first obtain the written consent of the other parent or an order of the court permitting the move prior to moving. No move of this type shall be undertaken without written consent of the other parent, or further order of the court. Should either parent intend to move from his or her current residence, the other parent shall be given not less than 90 days written advance notice. The notification must state, to the extent known, the planned address of the child(ren) at the new residence. In the event that the parents are unable to work out a new parenting arrangement, they agree to contact Peace Talks Mediation Services or another mutually agreed-upon mediator to seek assistance in establishing a new parenting plan, and both parents agree to use Court action as a last resort, as more fully set forth in Paragraph XXIII below. Each parent is to provide the other with the address and telephone number where the minor child resides and is to notify the other in writing within 2 days prior to any change of address and/or telephone number. For purposes of a non-local "move away", both parents agree that they shall ask the court to use a "best interests" standard to evaluate the move, and not a "substantial change in circumstances" standard or decision based solely on time sharing in the parenting plan, irrespective of the current status of move-away law in California.

15. Final Custody Determination: The Court finds that this agreement concerning legal and physical custody is in the best interests of the child(ren) involved and is a final custody determination per *Montenegro vs. Diaz and Marriage of Rose and Richardson* (2002) 102 Cal. App. 4th 941. For purposes of any modification to this custody stipulation, both parents agree that they shall ask the court to use a “best interests” standard to evaluate the requested change(es), and not a “substantial change in circumstances” standard or decision based solely on time sharing in the parenting plan, irrespective of the current status modification law in California and despite the holdings in *Montenegro* and *Rose and Richardson*.

16. Jurisdiction and Findings:

a. Pursuant to *California Family Code* Section 3048, the court finds that the Superior Court of the State of California, County of Los Angeles, has jurisdiction over the parties and minor child(ren) under the Uniform Child Custody Jurisdiction and Enforcement Act, *California Family Code* Section 3400, *et seq.*, as both parties and the minor child(ren) reside on the County of Los Angeles and within the State of California. Both parties and the minor child(ren) have lived in the County of Los Angeles and within the State of California for at least the past 6 months. **If parties have lived elsewhere during the last 6 months, state where they have lived.** Venue shall stay with the Superior Court of the State of California, County of Los Angeles, Central Civil Courthouse, unless both parents no longer reside in said district or the Court declines jurisdiction under the UCCJEA.

b. The court finds that the manner in which notice and opportunity to be heard was according to the laws of the State of California. Service of the Summons (Family Law) and Petition was by Notice and Acknowledgement of Receipt, and both parties had the opportunity to secure counsel and to be heard on this matter prior to reaching this agreement.

c. A clear description of the custody and parenting rights of each party is set forth above in this Stipulated Judgment.

d. Each party is hereby advised and notified: **VIOLATION OF THIS JUDGMENT MAY SUBJECT THE PARTY IN VIOLATION TO CIVIL AND/OR CRIMINAL PENALTIES.**

e. The court finds that the “home state” of the minor child(ren) under the *California Family Code* Section 3402(g) is the State of California and that the country of “habitual residence” for the purposes of the Hague Convention for international law is the United States of America.

f. The approximate time share for parenting time with the child(ren) is _____ % with the father and _____ % with the mother.

Parenting Protocols for Difficult Situations

The creation and maintenance of a parenting plan is much more important than its role as a legal necessity in a divorce implies. The way parenting plans are

constructed, written and carried out can be an indicator of and influence on the quality of a co-parenting relationship. When parents are reasonably amicable, the parenting plan is both a scheduling tool and an insurance policy: in the event of a disagreement there is a specific plan for custody and parenting time until a new order is in place. In conflicted bi-nuclear families, the parenting plan can be referred to on a daily basis if necessary. At either end of the spectrum, a well-drafted parenting plan is not only helpful for the parents, it's also helpful for law enforcement and court personnel who are called upon to interpret the execution of parenting plans.

Hidden impediments to agreements often relate back to the individual psychological difficulties of the parties involved and/or their interactions. This article addresses the more obvious impediments to agreements, which may be related to hidden impediments, yet which can be framed in objective behavioral terms. When discreet behaviors, specific complaints and attitudes can be addressed in a forthright manner, potential deal-breakers can be turned into deal-makers. A well-drafted parenting plan takes into account each parent's concerns and fears and has the other parent respond in a serious manner. If nothing else, exploring the micro-issues of parenting plans is an excellent way to focus parents on their co-parenting relationship as well as their children's upbringing. A word of caution: behavioral orders may create changes in behavior, but should not be confused with fundamental psychological change.

What follows is a sampling of some of protocols for conduct that allow parents to openly address their differing values about what their children need. Drafting the language such that it applies to both parents can help make the special orders palatable to both parents even if only one parent has the so-called problem, allowing him or her to save face. Although the other parent may object to having the language apply to him or her as well, in the interests of having the offending parent sign the agreement he or she may ultimately agree to the reciprocal wording.

All the studies on the effects of inter-parental conflict conclude that conflict is bad for children at every age and stage in life. A by-product of successful follow through on conduct orders is that it helps parents become more co-operative, thereby helping them become increasingly attuned to their children's developmental needs.

Step-Up Plans

Step-Up Plans are parenting plans with automatic provisions for increased time with one parent. The increases in time may come after a child reaches a certain age, a parent has a certain amount of time clean and sober, or upon entry into school, to provide a few examples. A parent may agree to less parenting time in the initial court order in exchange for the parenting plan he or she prefers being phased in over time.

In practice, step-up plans are great settlement tools when the children are very young, overnights are being introduced into the parenting plan, the non-custodial parent is moving from monitored to unmonitored visitation and/or if there has been an absence, or lack of hands-on care, by the non-custodial parent in the life of the child. Step-up plans help the non-custodial parent create a bonding sense of trust and reliability into a relationship with the children as the parent familiarizes themselves with the daily routines of the children, working up to more parenting time as his or her skills and bonds grow. This might be particularly helpful when a child is either temperamentally unable to handle transitions between households or has special needs that make transitions problematic.

Step-Up Plans designed to eliminate supervised parenting time can start with visits for as long as an hour or two in a public place such as a park or a mall, with a family member or professional monitor. Ideally, parents can mutually agree to a trusted monitor. As parenting time proceeds successfully, over time these short visits increase to half-days, then to full days, and then to full weekends as the parent and child find their comfort levels. Ideally, time will increase when the child asks for more time with the non-custodial parent, but generally speaking changes in the schedule can be safely introduced after 6-8 weeks or 3 months.

As a regular track record of visitation emerges increased periods of time will follow. Always keep the child's developmental needs in mind. A few examples follow: infants develop stranger anxiety around 6-9 months of age which peaks at about 18 months. The younger the child the closer in time the visits need to be, although the visits may be for shorter periods of time. Starting in the toddler years, children will deliberately test the parental relationship and part of the bonding process includes being able to act out with a parent who can then demonstrate the ability to stabilize the child in the trust-building process. For older children, not more than two weeks should pass between visits.

With children who have medical, behavioral, learning or psychological issues, the non-custodial parent should have updated training to deal with the child's issues and should actively participate in the child's therapy. The parent may benefit from joining a support group, even online, for other parents dealing with similar conditions. A commitment to education and support concerning the child's wellbeing helps both the child and the custodial parent to feel safe and assured that the non-custodial parent is not only interested and sensitized to the special circumstances but capable of handling contingencies.

The custodial parent and child also must take care to manage their anxieties as the non-custodial parent attempts to prove his or her dedication to building the relationship. Setbacks are inevitable, and given the chance to be worked through, setbacks can be an opportunity for enhancing the parent-child relationship. The custodial parent must make it very clear to the child that the plan is supported; otherwise feelings of ambivalence will muddy the process for both the custodial parent as well as the child. Failure to comply with the step-up plan should require a return to mediation or court.

Model Language: [insert parenting plan]. Once the parenting plan has been successfully followed for 3 months, the parenting time shall be increased by 3 hours per scheduled visit for a period of one month. The following month, the parenting time shall increase to a full day, from 9:00 am to 8:00 pm, including dinner and a pre-bedtime bath. If this plan is successfully followed, the following month the parenting time shall increase to an overnight, beginning at 9:00 am and ending the next day at 10:00 am. After 3 months of one overnight per week, the overnights shall be increased to two consecutive overnights per week.

Protocols for Dealing with Lateness

Habitually late parents can wreak havoc on the other parent's schedule as well as disappoint an eager child. In a perfect world, the chronically late parent would simply agree to change, but as a stopgap measure, consider using grace periods. Within the agreed-upon grace period, the parent is not technically late. The child is also given the expectation that the parent will arrive within a time frame, rather than at a specific time.

If neutral telephone contact is possible, the late parent should take the responsibility to telephone the other parent.

If the grace period is not adhered to, the parenting plan provides for what will happen. For example, if it's getting late in the day, perhaps visitation begins the next morning at 9 am. If there is sufficient flexibility and good will between the parents, days or weekends can be switched and designated make-up time can be decided beforehand. The worst case-scenario is to cancel the visitation entirely, because that sends a punitive message and may have unforeseen consequences in terms of all the relationships involved. Better that a child have contact with a parent, and know first hand the parent's weaknesses and strengths, so the tardy parent does not become idealized in the child's mind, turning the protective parent into the villain.

Another version of this is the parent who requests to return the children early. One possibility is to have the grace period start at the beginning of the receiving parent's time. This is trickier, because it could be interpreted as a way to control the receiving parent's free time. It could also signal the returning parent's discomfort with his or her parenting skills and the quality of the parent-child relationship. All of these scenarios are legitimate areas of concern, and if nothing else, better discussed than left unexplored.

Model Language: Parenting time begins at the time specified in the schedule; however, each parent shall have a grace period of 15 minutes after the scheduled time to being his or her parenting time. The child shall be told about the time frame in which the parent will come to pick her up so that the child is not left with the impression that the parent is late. If the parent beginning his or her time cannot arrive within 15 minutes of the scheduled time, he or she shall telephone the other parent to let him or her know of the estimated time of arrival. If the beginning his or her time is more than 30 minutes late, the parenting time for that day will be forfeited and the schedule shall resume with the next scheduled parenting time.

Pick Ups and Drop Offs

Ideally, exchanges of the children will be handled in a mutually respectful way between the parents, giving the child a moment to adjust to the transition. When exchanges of the children can not be at each parent's door or using a blind transition, such as a pick up from school or activity, the exchange may take place in a public place, like the children's book department of a local store, a library, or even coffee shop. Another possibility is to use curbside pick ups and drop offs. The receiving parent does not leave the home and the driving parent does not leave the vehicle. The child travels between the home and the vehicle with no face-to-face contact between the parents. If the children need an escort to traverse the distance, a mutually agreed-upon third party can serve as an escort.

Model Language: The parents shall share transportation of the child approximately equally. Unless otherwise agreed, the parent commencing his or her custodial time shall pick the child up to begin the parenting time. When possible, the parents shall exchange the children at the children's school or activity whenever possible, so as to provide for a "blind transition" and minimize any stress the children might feel at the transfer. When a blind transition is not possible, then the parents will exchange the children at a neutral public place, such as the children's book department at Barnes & Noble or at Starbucks. If the pick up or drop off needs to be at either party's residence, the traveling parent will stop at the curb and the at-home parent will wait for the children at the door. The children will travel between the car and the house without the parents having direct contact.

Peaceful Contact

When courts order “Peaceful Contact” in the form of parental communication, it’s important to define what peaceful contact will include and how it may be initiated. For example, peaceful contact may include only issues concerning the children, or it might include both the children as well as businesslike inquiries into financial matters. The means of contact may also be specified, for example, contact initiation protocols may include only e-mail, fax, or answering machine messages, with direct telephone contact only in an emergency.

Model Language: The parents shall develop a method of communicating with each other concerning the children, whether it is by in-person meeting, telephone, fax, e-mail or other methods, and both parents agree that the children shall not be used as messengers between the parents.

Parenting log books may also help parents keep important parenting issues neutral. **Model Language:** The parents will maintain a “log book” and make sure that the book is sent with the children between their two homes. Using businesslike notes (no personal comments), parents will record information related to the health, education, and welfare issues for the children that arise during the time that the children have been with that parent. The log book will also include the names, addresses and telephone numbers of all of the children’s doctors, dentists, healthcare providers, school, emergency contacts, and all of the parents’ contact information.

Interrogation of Children

When one parent, or both parents, interrogates the children concerning the other parent, generally speaking this indicates that the parent is either using his or her interest in the children’s lives to mask interest in the other parent’s private life and/or there is mistrust of the other parent’s judgment with regards to the children. Either way it is very corrosive for the children, making them feel like spies for one parent while being disloyal to the other for disclosing or withholding information. Where parents are higher functioning and less enmeshed with the children in a coalition against the other parent, parenting plan language might look like this:

Model Language: Both parents agree that interrogation or excessive questioning of the children about the private life of the other parent places the children in a difficult position. Both parents acknowledge that they will address their concerns regarding issues of the other parent’s private life with that other parent directly and not with the children, other family members or friends. Nothing in this provision shall discourage either parent from neutrally asking the child about the time with the other parent in a child-focused way

Negative Talk

The standard order for negative talk is similar to that for exposure to domestic violence and substance abuse:

Model Language: Both parents shall minimize the child’s exposure to their disputes with each other as well as new partners or other family members or friends. While it is inevitable that the parents may disagree with one another from time to time, such disagreements are to be expressed in a courteous and dignified fashion, and outside of the children’s presence and hearing. Each parent is ordered to use his or her best efforts to keep

all communication between them gracious, respectful and productive. Neither party shall speak in a negative, disrespectful or derogatory manner to or about the other parent, especially in the minor child's presence or within hearing distance of the child. Both parents are ordered to use their best efforts to ensure that other family members and friends also comply with this order.

Timing and Frequency of Telephone Calls

Ideally, daily telephone contact between the non-custodial parent and child is at will and liberal. For some parents, however, the telephone becomes yet another battlefield. Feeling the need to maintain control of the other parent with excessively telephoning the child may be an indication of being out of control of oneself. Battling over the telephone may send the message to the children that the called parent is incompetent and that the calling parent is anxious.

None of these messages are good for the children's self-esteem. The better solution is to address the problems directly. For example, if the called parent truly needs parenting classes or other skill building that can be addressed on its own merit, then address parenting deficiencies by education, not excessive telephone calls. If it's the child who is having difficulty separating and repeatedly calling the other parent, or acting on a parent's command, then parents should seriously think about getting therapeutic help for the child. The telephone calls may be a sign of a deeper problem.

The parenting plan may list specific times when telephone calls may come into each home along with the number of telephone calls per day. Also specify times when the children will return or initiate telephone calls to the non-custodial parent. Caller identification features on each telephone will help children answer calls from the other parent directly. A land line or cell phone dedicated for the child's use is also a possibility, but the same protocols should apply.

Model Language: Each of the parents shall be entitled to reasonable, unlimited, unmonitored telephone access with the minor child during all periods when the child is with the other parent. On weeknights, telephone calls shall take place between 6:30 pm and 7:30 pm so that they do not interfere with dinner or homework. When traveling, upon arrival at the destination, the traveling parent shall insure that the child makes telephone contact with the other parent either by direct telephone contact and/or telephone message.

Involving Others in Co-Parent Discussions

Ideally, parental contact about co-parenting issues will be handled by each parent directly with the other, or with the help of a co-parenting therapist to guide the parenting discussion. Although each parent may have an individual support network that may be called upon to discuss and disseminate information, parenting conversations should be between the parents and not these other contacts unless explicitly agreed otherwise. Parenting meetings may be set up at a specific time (perhaps quarterly) and place where the children will not be present. A therapist or mediator may help facilitate the discussion if the parents are unable to communicate effectively. Even impromptu parenting discussions should take place outside of the children's hearing. If friends or relatives are meddlesome, parenting discussions should also be private and confidential.

Model Language: Both parents agree to revisit the parenting plan contained herein on an as-needed basis/ at least every 12 months / not later than [date]. They shall set up a private parenting meeting and make childcare arrangements for the children so that they are not present. In the event that a controversy arises, both

parents shall first consult together in an attempt to resolve the dispute and if they are unable to reach a resolution on their own, they will meet and confer with an expert in the field related to the dispute, e.g., the child's doctor, teacher, counselor, etc. If the consultation does not resolve the dispute, the parents shall return together to mediation in an attempt to reach an agreement. Finally, if the dispute continues, it shall be submitted to the court for a decision. Until such time as this agreement is changed in writing by the parties, or these orders are modified by the Court, the existing order shall remain in effect.

New Partners' Involvement with Children

Sometimes it is extremely difficult to impress upon an unwilling parent the wisdom of using restraint in introducing the children to new partners. It can be explained that children may grow attached to new partners, have separate relationships with these people, and that it may be confusing to a child, particularly a young child, to want to please a parent by getting close to a new partner, only to have to part, often without the opportunity to say good-bye.

While the most conservative estimate is to wait upwards of 18 months into a relationship to introduce the children, waiting at least 4-6 months might be easier to accommodate. Both parents should be encouraged to promote to the children that the biological parents (and perhaps extended kin) are the primary adult relationships in their lives. Nothing can compete with the special quality of that bond. Each parent individually needs to express this idea to the children and to act with it in mind.

Model Language: Neither parent shall introduce the children to new partners and/or their respective children without prior notice to the other parent. Both parents agree that they shall have a multi-step plan in place that may include, but not be limited to, the adults involved meeting prior to introducing the children to the new partners and/or their respective children, having the children meet the new partner and/or their respective children at neutral locations outside the children's home and school, and overnights occurring with the new partner and/or their respective children and the children only after an initial time period has passed.

Visiting Parent Not Spending Time with Child

Sometimes the parent who has primary responsibility for childcare complains that the other parent, once given his or her parenting time, doesn't utilize that time to be with the children. This happens particularly when the children are young and the second parent does not feel capable, or culturally socialized, to attending to the physical and emotional demands of caretaking especially when the children are of the opposite sex. The situation can be exacerbated when the person taking care of the children during the second parent's time is not a family member, but a new significant partner, other friend or hired sitter. The child should be encouraged to talk to the parent directly about wanting to spend time with the parent, as a direct plea from a child often has a more profound effect on a parent than pleas from a professional or the other parent.

In such cases, the parenting plan may include a right of first refusal for childcare. The caution in including such a provision is that the right of first refusal must not be used to control or monitor the other parent's time with the children. The timeframe for prior notice can be negotiated, but you want it to be long enough that a simple trip to the grocery store isn't an issue. Many parents put the cutoff at 4 hours or overnight. If it's an extended family member who is the caretaker and the children are happy with the

arrangement, it is within the bounds of normal behavior that the children stay in contact with the other side of the family, which helps to ensure contact with the other parent in the future.

Model Language: In the event that either parent will require child care during his or her custodial time for more than ____ hours, the other parent must be given the first opportunity, with as much notice as possible, to care for the children before other arrangements are made. The other parent is under no obligation to care for the children under these circumstances, and if the other parent is unwilling or unable to care for the children, then it is the parent seeking childcare during his or her custodial time who is responsible for finding suitable childcare. Unless specifically agreed or ordered by the court, this order does not include regular child care needed while a parent is working.

Acceptance of Normal in Each Household

Ideally, both parents agree on mutual household rules for things like bedtime, television, and chores. The ideal parenting plan may include a “house rules” provision which covers these items.

When agreement is not possible, there is a wide definition of what is considered normal. If each party can state minimum standards for household rules for the children, and those standards are within developmentally appropriate bounds, even if the other parent chooses to have different rules, then that is what needs to be tolerated by the other party. For instance, if a weekday bedtime for a 9 year old is anywhere from 8:30 p.m. to 9:30 p.m., then if it's 9:30 pm every time at the other parent's house there should be no cause for consternation, unless the child is showing strain. The same would be true with the amount of television watching or the maturity or violent nature of viewing or listening material. If chores, or the amount or absence of chores, differ at each household, but are within the range of what the children can perform without psychological or physical endangerment, perhaps it can be acknowledge in the parenting plan what the difference is, along with the range of bedtimes if that is helpful, so that neither parent is surprised by household rules in the other parent's home, which may also lessen the need to interrogate the children, if each parent is familiar with the daily routines of the other parent.

Model Language: Both parents agree that the child's bedtime shall be between 7:30 and 8:00 pm until she reaches age 5, at which time the parents shall meet and consider a new, later bedtime. Television shall be limited to no more than 3 hours per day, and programs are limited to those aimed at children or general family viewing. Movies are limited to “G” rated films.

Exposure of Children to Alcohol Use and Drug Use

It is standard practice when there are alcohol abuse allegations to insert the order that neither party should consume alcohol at least 8 hours prior to or during their time with the children. The problem arises, for instance, if the primary custodial parent who does not have a problem with alcohol consumption feels he or she is being penalized by being prohibited from drinking socially because the other parent, who may be in denial about alcohol abuse, cannot drink responsibly. While the trade-off between ensuring the children's safety at the expense of personal freedom may be troubling, it may also be worth the trouble.

If the issue is excessive drinking, as opposed to social drinking, there are convenient and inexpensive alcohol detection devices (intoximeters), small hand-held strips activated by saliva calibrated to measure a single drink in an average sized person up to the legal limit for sobriety. If one parent suspects abuse, the court order can require that the device is administered upon request. The parenting time will cease immediately in the event of a positive result on the device.

Another problem occurs when a child has told the other parent about the other parent's drinking. In that case, the parents also have to agree not to blame the child for reporting the alcohol abuse.

In terms of maintaining sobriety and for relapse prevention, people can agree to participate in a Twelve Step Program, with the requirement of obtaining a sponsor who has authorization to speak to the other parent or the court to monitor sobriety. Alcoholics Anonymous and related 12-step programs will give confirmation that an individual has attended meetings. Obtaining a sponsor's release to speak with the other parent or report to court may be more challenging. Since issues around substance abuse are generally systemic the other parent may agree to become involved in a corresponding program such as Al-Anon for adult family members and for the children, Ala-teen or Ala-tot.

Model Language: Neither parent shall drink alcohol within 8 hours of beginning his or her time with the child or during his or her time with the child. If either parent suspects the other of drinking before beginning or during his or her parenting time, he or she may require the other parent to use an intoximeter to measure alcohol levels. The requesting parent shall provide the intoximeter. If alcohol is present in the other parent, parenting time shall be canceled for that scheduled day.

Neither parent shall have the children around excessive alcohol use. Both parents shall remove the children from any area where people are engaged in substance abuse or over-drinking.

Both parents agree not to use illegal drugs within 24 hours of beginning their time with the child or during his or her time with the child. For prescription and over-the-counter medications, both parents shall use these drugs according to the prescription or package directions.

Both parents shall enroll in alcohol or drug counseling or a 12-Step program with a sponsor such as Alcoholics Anonymous, Narcotics Anonymous or Al-Anon, as appropriate. Each parent shall execute an authorization in favor of the other parent and his or her sponsor or therapist so that each sponsor and parent shall have access to the other parent's adherence to the program.

Exposure to Sexual Activity and Domestic Violence

As with domestic violence, the current standard is that children should not be exposed to their parents' sexual activity. For domestic violence, this means children should not visually witness or hear their parents' or anyone's verbal, emotional or physical abuse of each other. Furthermore, children should be removed from the area where such activity is taking place. The same standard can be applied to sexual activity.

Model Language: Both parents shall minimize the child's exposure to their disputes with each other as well as new partners or other family members or friends. While it is inevitable that the parents may disagree with one another from time to time, such disagreements are to be expressed in a courteous and dignified fashion, and outside of the children's presence and hearing. Each parent is ordered to use his or her

best efforts to keep all communication between them gracious, respectful and productive.

Both parents shall minimize the possibility of the child's exposure to sexual activity and shall take measures to insure the child does not become exposed to sexual activity in either parent's custody. Sexual activity shall take place behind locked doors and while traveling parents will either have separate hotel rooms from the child or refrain from sexual activity.

Agreement of the Other Parent Prior to Making Plans with the Children

Before making plans with the children, both parents should confer with each other and reach an agreement prior to informing the child of the change of plans. Unless the children are teenagers and this is part of the parenting plan any alterations to the parenting plan has larger implications in terms of one parent feeling undermined.

Model Language: The parents shall discuss any changes to the parenting plan or any travel arrangements with each other, and reach an agreement, before informing the children of any change to the schedule or travel plans. In the event that the parents agree that the children should be consulted as to the parenting plan arrangements, the parents shall first meet and confer and agree upon what opinions they will solicit from the children as to their preferences.

Following the Children's Doctor's Orders

It's important that doctors' orders are followed no matter where the children are or whom they're with. This can be one of the most difficult issues, particularly if the medications are prescribed for an indefinite period of time, such as Ritalin and Prozac, and school or other therapeutic or medical personnel are siding with one parent's views over the other parent's objections. The parent in disagreement should be encouraged to get a second opinion by a mutually agreed upon expert, but after that avenue is exhausted, the failure to not give the child medication in a time fashion probably needs consequences that tailor the child's time around the medication timetable, until the child can be responsible for administering his or her medication.

Model Language: Both parents shall have access to the children's medical, dental, and health related records and health practitioners. After routine or emergency care, the parent taking the child to the appointment shall communicate the results with the other parent within 12 hours. Both parents shall follow the healthcare practitioner's orders and administer any medication, diet or other protocols pursuant to the professional's recommendations. If the parents have difficulty communicating with respect to the children's health needs, they shall maintain a parenting log book (described above).

Conclusion

While many of these protocols and provisions may appear to be elementary and obvious, bringing these issues into the open for discussion is a rather delicate undertaking that can lead to greater understanding and appreciation of the differing realities of each party. If nothing else, the existence of such detailed orders communicates to the mediator or hearing officer specific information with regards to what is important to the parties in a case. On a more positive and hopeful note, an increase in candor often leads to an increase in tolerance and respect in a co-parent

relationship. This in turn leads to less mistrust and fewer misinterpretations of intention, which ultimately serves the children’s best interests.

PRIMARY PHYSICAL CUSTODY “Standard” Visitation – Examples

| Week # | Monday | Tuesday | Wednesday | Thursday | Friday | Saturday | Sunday |
|--------|--------|---------|-----------|----------|--------|----------|--------|
| 1 | Mom | Mom | Dad | Mom | Dad | Dad | Dad |
| 2 | Mom | Mom | Dad | Mom | Mom | Mom | Mom |
| 3 | Mom | Mom | Dad | Mom | Dad | Dad | Dad |
| 4 | Mom | Mom | Dad | Mom | Mom | Mom | Mom |

Pros

- For children over age 7, who understand the concept of a week, this is a predictable schedule.
- Allows for flexibility with either Sunday evening or Monday morning return to school and mid-week time to the other parent for either overnights or evenings only.

Cons

- The non-custodial parent goes 6 days every other week w/out seeing the children.
- For children under 7, who don’t yet understand the concept of a week, this may be too much time away from the non-custodial parent unless other means are used to stay in contact or times are made available either during the school day, during daycare hours or by way of involvement extra-curricular activities.

Standard Visitation with additional weekday time to the other parent after the custodial parent’s weekend.

| Week # | Monday | Tuesday | Wednesday | Thursday | Friday | Saturday | Sunday |
|--------|--------|---------|-----------|----------|--------|----------|--------|
| 1 | Dad | Dad | Mom | Mom | Dad | Dad | Dad |
| 2 | Mom | Dad | Mom | Mom | Mom | Mom | Mom |
| 3 | Dad | Dad | Mom | Mom | Dad | Dad | Dad |
| 4 | Mom | Dad | Mom | Mom | Mom | Mom | Mom |

Pros

- The non-custodial parent has continuous weekday time to be involved in the children’s homework routines without substantially increasing the number of transitions between the parents’ households.
- For children between ages 5 and 7, who understand the concept of ‘the day after tomorrow,’ they are not separated from the custodial parent for more time than they can conceptualize.

Cons

- Twice a month a child aged 5-7 is separated from the non-custodial parent one or two days more than they can conceptualize. In such cases, you may want to consider adding dinner on Thursday prior to mother’s weekend as well as other times suggested above.

JOINT PHYSICAL CUSTODY

***Split Week Plan* for parents sharing children on weekdays and weekends**

| Week # | Monday | Tuesday | Wednesday | Thursday | Friday | Saturday | Sunday |
|--------|--------|---------|-----------|----------|--------|----------|--------|
|--------|--------|---------|-----------|----------|--------|----------|--------|

| | | | | | | | |
|---|-----|-----|-----|-----|-----|-----|-----|
| 1 | Dad | Dad | Mom | Mom | Dad | Dad | Dad |
| 2 | Dad | Dad | Mom | Mom | Mom | Mom | Mom |
| 3 | Dad | Dad | Mom | Mom | Dad | Dad | Dad |
| 4 | Dad | Dad | Mom | Mom | Mom | Mom | Mom |

Pros

- Works for children under age 5 who have equally good attachment to both parents.
- Works for temperamentally even-keeled children between ages of 5 to 12.
- This is a regularly recurring and consistent plan.

Cons

- Particularly for children under age 5, this plan may require the child to be away from the more involved parent for excessive periods of time.
- Conflict saturated transitions between parents' households are stressful particularly for immature and learning and/or emotional disabled children.

Alternating Week Plan for parents who want uninterrupted time with their children.

| Week # | Monday | Tuesday | Wednesday | Thursday | Friday | Saturday | Sunday |
|--------|--------|---------|-----------|----------|--------|----------|--------|
| 1 | Mom | Mom | Mom | Mom | Mom | Mom | Mom |
| 2 | Dad | Dad | Dad | Dad | Dad | Dad | Dad |
| 3 | Mom | Mom | Mom | Mom | Mom | Mom | Mom |
| 4 | Dad | Dad | Dad | Dad | Dad | Dad | Dad |

Pros

- Works for children over age 7, who understand the concept of a “week” and “month.”
- This plan may be preferred by teens and pre-teens require fewer transitions.

Cons

- The child may express or experience the need to have mid-week contact with the other parent.
- Though this may be viewed as an interruption, it is highly recommended particularly for children under age 7, to have at least one face-to-face contact with the non-custodial parent, preferably at school if possible.

Disk 8: Drafting a Tight Judgment

Drafting a Tight Judgment

- Knowledge you need to begin with
- Judgment checklist
- Financial red flags and FAQ's
- Dividing retirement accounts

Attorney-Mediator Areas of Expertise

As an attorney mediator in a practice where most family law clients are not represented by counsel and who request a lot of information and guidance on the law, it's helpful to know something about the topics below. You're not acting as either party's attorney, of

course, but in order to provide the kinds of information that clients request, it's helpful to be very knowledgeable about some things and conversant in others.

- Community property and debts, exceptions
- Separate property: reimbursements, *Moore/Marsden*, tracing, *Epstein/Watts*
- Taxes and divorce: spousal support deductibility, exemptions for children, head of household, mortgage deductions, reading tax returns
- Real estate and mortgages: types of mortgages, mortgage resources, calculating equity, closing costs, capital gains, buying a house, appraisals and comparative market analyses
- Retirement Plans: different kinds of retirement plans and methods for dividing them
- Self-employment issues and small business valuations
- Miscellaneous assets: royalties, residuals, stock options, ESOPs, deferred compensation, lawsuits
- Child support and child support add-ons
- Spousal support factors
- Move-aways (custody)
- Infant overnights
- Credit, credit reports
- Basic court procedure
- Basic financial planning

Sources to gain this knowledge:

- *Los Angeles Times* Sunday Real Estate Section (read every week)
- *Los Angeles Times* Sunday Business Section. Read Kathy M. Kristof's and Liz Pulliam Weston's columns each week
- IRS Publications for divorced people
- David Bach (author of financial planning books)
- Pension Appraisers (www.pensionappraisers.com)
- *Your Divorce Advisor*
- CEB Family Law annual volume
- Rutter Group (more complete than CEB but harder to read)
- Certified Divorce Financial Planners

Judgment Drafting Checklist

House: If house is to be sold:

- How to choose the realtor
- How to agree upon price changes
- Who may occupy house during sale period
- How will bills be paid while house is listed for sale
- How fix up costs will be paid to prepare for sale
- What happens if house doesn't sell within ___ time frame?

House: One party buys out other party:

- Is that person required to refinance? If so, by when?
- How will refinance costs be divided?

- If there is a refinance, turn over deed as part of refinance escrow process (usually cheapest and easiest) or immediately?
- Amount to be paid to other party
- Indemnification issues (see Paying the Mortgage below)

House: Own Jointly

Joint Decision Making

- Who will decide what repairs should be made?
- What's a "major repair" and what's a maintenance repair? Consider making a list or setting a dollar figure.
- Who will pay for repairs? Is there a dollar cut-off for shared repairs?
- What about discretionary improvements? Who decides, who pays? And if there's a disagreement and one person decides to pay, will he or she be paid back (say, when the house is sold) and how?
- How will tie-breaker decisions be handled?

Paying the Mortgage

- What happens if the person staying in the house under joint ownership stops paying the mortgage and carrying costs for the house if there's no refinance and the loan is joint?
- Can the other person force a sale after 1, 2, 3 months of non-payment?
- What would you do in the event of a further drop in equity? What if the equity becomes less than the house is worth?
- What happens if there's a foreclosure?
- What about paying the mortgage late, since it will affect both parties' credit (when the loan hasn't been refinanced into the sole name of the person staying in the house)? If the person in the house pays the mortgage late 1 time, twice, three times....at what point must the house be sold?
- Does the person paying down the mortgage balance get credit for doing so? Or are the mortgage payments treated more like rent?

When is it time to sell?

- Who decides when it's time to sell?
- Is it automatically time to sell when one person wishes to sell?
- What if the other person doesn't want to sell but also doesn't want to buy the house?
- Who has the right of first refusal to buy the house from the other party?
- How will the buy out number be established?
 - Agreement
 - An average of 3 CMA's
 - A formal appraisal
 - A bank refinance appraisal (in case of a buy out)
 - Or?
- Is there a "sell by date" like a child's graduation, remarriage or a specific date?
- Are there triggering events for a sale or buy out? If so, what are they?
- Is any of this influenced by a further drop in equity or an increase in value?

Judgment Provisions to include:

- How joint ownership will work (as per checklist above)
- Procedures to follow when there's a disagreement or one person wishes to sell
- If one person is staying in the house and the other is moving out, include "[name of person staying in house] has exclusive use and possession of the family home [give time period and circumstances under which that would end]." By drafting the Judgment this way, you preserve the capital gains tax exemption for the house for both spouses to combine (\$250,000 each) as long as the other spouse doesn't need to use his/her exemption meanwhile.
- Indemnification on any joint mortgages, loans, or obligations regarding the house
- "The court retains jurisdiction over the issue of the joint ownership of the house in the event of a dispute between the parties which they are unable to resolve on their own or in mediation." You never know what might come up.

Cars:

- Are car loans or leases in joint names? If so, is there an obligation to refinance? (very difficult to do, generally)
- Plan B if refinance is not possible?

Bank Accounts:

- Close and divide final balance?
- Turn over to one person, have other person's name removed from account and divide final balance?
- By when?
- Date upon which account will be valued? Or just when closed?
- Any agreed-upon expenditures meanwhile? If so, what?

Brokerage Accounts:

- Same issues as bank accounts plus.....
- Unless otherwise agreed, divide the accounts investment-by-investment so the parties will have the same tax consequences for gains and losses

Life Insurance:

- What kind of insurance? (term, whole, or?)
- Who pays policy, who owns policy? (can be a good idea for spouse depending on the death benefit to pay for the policy so that he or she is sure it's up to date)
- Who is beneficiary (often used to secure child support or spousal support or both)?
- For how long?
- Is life insurance being used as security for spousal support or child support? If so, specify how much must be maintained for what time period and the proper beneficiaries

Child support:

- Start date plus "and continuing on the ___ day of each month thereafter"
- Security: if not life insurance, how will child support be secured?
- Head of household
- Tax exemption for child(ren)
- Bonus division

- Include provisions for health insurance coverage and payment of uninsured medical-type expenses
- College provisions
- See model judgment for other issues

Spousal Support:

- Start date plus “and continuing on the ___ day of each month thereafter”
- Security: if not life insurance, how will support be secured?
- Disability insurance for payor spouse?
- Bonus division
- Modifiable as to amount? Any restrictions? Is any income exempt (e.g., non-working spouse may earn up to \$30,000 per year without support being modified, or because income used to calculate support is unpredictable, support can't be modified as long as payor's income is within X and Y range)?
- Termination: dates, circumstances, modifiable? (always ends upon death or remarriage of recipient...but do parties want to build in other circumstances?)
- How long will jurisdiction be kept open? (always ends upon death or remarriage of recipient...but do parties want to build in other circumstances?)
- Is jurisdiction being kept open but no dollar figure attached?
- Specify that payor is able to deduct spousal support paid and payee must claim it as income pursuant to law
- Spousal support amount cannot change by more than \$15,000 per year during the 1st 3 years.
- See model judgment for other issues

Retirement:

- Use exact names of plans
- Define “community property portion”
- QDRO or rollover?
- Who pays for QDRO?
- Who is responsible for getting it implemented? (generally clients do on their own but someone should take the lead) By when?

Businesses:

- If no appraisal: “Said business has not been valued as part of this proceeding but HUSBAND represents that said business has a nominal or unknown value. WIFE has had an adequate opportunity to value said business but has chosen not to do so, and hereby waives her right to a valuation of said business or business interests”

Personal Property:

- Only list specific items if parties request it or if you had to mediate those items

Debts:

- If debt is in both names, can it be refinanced into one name? Or are the parties positive that the responsible party will pay on time and as agreed? If the debt is in both names, and one party doesn't pay as agreed, it will impact the credit of the other party
- Car loans and leases cannot generally be refinanced but parties may want to check into that

Taxes:

- Back taxes in both names – treat like debts

Dividing Retirement Plans

Quick guide

| Types of accounts: | QDRO Needed? | Appraisal Needed? | Other possible issues |
|---------------------------|---|---|---|
| IRA, Roth IRA* | No. Can be divided using a rollover which is a paper transaction done through each spouse's financial institution. | No. With a defined contribution plan the value is the value. | If there is separate property AND community property in the account, then you may need to do an evaluation of which % is CP and which % is SP and how to attribute any appreciation of SP and CP. |
| SEP-IRA, SIMPLE | No. Can be divided using a rollover which is a paper transaction done through each spouse's financial institution. | No. With a defined contribution plan the value is the value. | If there is separate property AND community property in the account, then you may need to do an evaluation of which % is CP and which % is SP and which % is SP and how to attribute any appreciation of SP and CP. |
| Keogh | Yes, if the plan needs to be divided (as opposed to simply credited to one spouse against other assets) | No. With a defined contribution plan the value is the value. | |
| Profit Sharing | Generally yes, if the plan needs to be divided (as opposed to value simply credited to one spouse against other assets). If the Profit Sharing is not an ERISA qualified plan then a QDRO may not be necessary. | Probably not. With a defined contribution plan the value is the value. This is generally the case with profit sharing plans but it never hurts to check with the plan administrator | Each Profit Sharing plan is different so clients must speak with their benefits office or plan administrator and/or see a copy of the contract. ERISA laws only cover part of the terms. |
| 401(k) | Yes, if the plan needs to be divided (as opposed to value simply credited to one spouse against other assets) | No. With a defined contribution plan the value is the value. | If there is separate property AND community property in the account, then you may need to do an evaluation of which % is CP and which % is SP and which % is SP and how to attribute any appreciation of SP and CP. |
| 403(b) | Yes, if the plan needs to be divided (as opposed to value simply credited to one spouse against | No. With a defined contribution plan the value is the value. | If there is separate property AND community property in the account, then you may need to do an evaluation of which % is CP |

| | | | |
|-------------------------------------|--|--|--|
| | other assets) | | and which % is SP and which % is SP and how to attribute any appreciation of SP and CP. |
| Tax Sheltered Annuity (TSA) | Yes, if the plan needs to be divided (as opposed to value simply credited to one spouse against other assets) | I don't know. Look at the client's annuity statements and contracts and ask the plan administrator. | Generally TSA's are only available to teachers. Each annuity is different so clients must speak with their benefits office or plan administrator and/or see a copy of the contract. ERISA laws only cover part of the terms. |
| Defined Benefit Pension Plan | Yes, if the plan needs to be divided (as opposed to value simply credited to one spouse against other assets) | No if the plan will simply be divided 50/50 using a QDRO. Yes if one spouse will keep the CP portion of the plan and credit the value against another asset. | Each defined benefit plan is different so clients must speak with their benefits office or plan administrator and/or see a copy of the contract. ERISA laws only cover part of the terms. |
| Social Security Benefits | No. No provision needs to be in the Judgment, either. Rights are guaranteed by federal law and cannot be waived by the parties. If a party is already retired, social security retirement benefits are considered "income" for calculating support. | No | Rights are guaranteed by federal law. www.ssa.gov . If you have been married more than 10 years when it's time to retire you can choose between 100% of your benefit or 50% of your former spouse's benefit (one or the other). This is true for every former spouse married more than 10 years. Does not impact the spouse's benefit. Yes, we know this is crazy sounding but that's why the social security system is in trouble. |

* Roth IRA's are the only retirement asset you'll deal with which is AFTER TAX dollars, not before tax dollars. Take this into consideration when you're valuing them and dividing them.

Regular IRA's and all other kinds of retirement plans are BEFORE TAX dollars meaning that the principal, interest and appreciation will be taxed as income when withdrawn at the client's then-present income tax rate. A rollover DOES NOT trigger the income tax when handled properly. To do a rollover, each party contacts their financial institution and let's them know they need to roll money out of one IRA into another IRA (or 401(k) or other qualified plan). The financial institutions can handle the paperwork in-house. The key is that the clients never touch or have access to the money—it "rolls" right over their heads from one account to the other.

Disk 9: ADR in Family Law: Mediation, Collaborative Law, Arbitration, Private Judges

ADR in Family Law: Mediation, Collaborative Law, Arbitration, Private Judges

Mediation

- Models: no attorneys, consulting attorneys, representing attorneys
- Confidentiality and releases (Agreement to Mediate)

- Choosing a mediator
- Mediation training
- Mediator style
- Co-mediation
- Value, benefits and results
- Use of experts, joint retention of experts (pitfalls of dueling experts)
- Working as the representing lawyer with a mediator
 - Preparing your client: expectations, able to speak for self, finances in order, proposed orders
 - Working collaboratively
 - Joint session vs. caucus
 - The way a typical session unfolds
 - How it goes wrong
- Limited scope mediation: discovery, parenting, one issue
- Submitting agreements to court
- Ethical issues

What to look for in a mediator

Mediator organizations: Association for Conflict Resolution www.acrnet.org and www.mediate.com

Mediator training

Advocacy

Collaborative Law

- Format: 2 lawyers, 2 coaches, child expert, financial expert, case manager
- Plan A: How it works
- Forms: New counsel if don't settle
- Cost
- Efficacy
- Pros and Cons

What to look for in a collaborative law professional

Collaborative Law organizations: International Academy of Collaborative Professionals <http://www.collaborativepractice.com/default.asp>

Collaborative Law training

Advocacy as a collaborative lawyer

Arbitration

- Control ability to choose arbitrator
- Control your own schedule, confidential
- Background, skills
- Avoiding ethical conflicts
- Binding or non-binding?
- Loser pays costs?

What to look for in an arbitrator

Arbitrator training

Advocacy in arbitration

Private Judges

- Similar to arbitration

- Can be a mix of mediation and arbitration---arbitration then mediation model, mediation then arbitration
- Pros and cons
- Why it's ultimately less expensive

What to look for in a private judge

Private judge training

Advocacy in private judge setting

Materials:

- Agreement to mediate
- Chart of costs
- Comparison Chart
- Collaborative Law Documents
- Private Judge Stip
- Unbundled Fee Agreement
- Collaborative Law forms and protocols
- Mediation Summary Letters Article
- Agenda
- Orientation
- Ethics roles and functions

Agreement to mediate

AGREEMENT TO MEDIATE

I have read the attached Mediation Agreement completely and understand its contents. I have initialed each page to indicate my understanding and agreement of the terms.

This is an agreement between **Peace Talks. Mediation Services** and _____ and _____, hereinafter "parties," and Diana L. Mercer and/or Tara Fass, hereinafter "mediator," to enter into mediation with the intent of resolving issues related to the dissolution of our marriage.

_____, 2003
Dated

MEDIATOR, Diana L. Mercer

_____, 2003
Dated

MEDIATOR, Tara Fass

Dated

Client

Dated

Client

MEDIATION AGREEMENT

Peace Talks. Mediation Services, the parties and the mediator understand and agree as follows:

1. ESTABLISHMENT OF MEDIATION RELATIONSHIP

The undersigned wish to retain the services of Peace Talks Mediation Services and Diana L. Mercer, Esq. and/or Tara Fass, LMFT to mediate disputed issues with regard to the dissolution of our marriage.

All references to “mediator” apply to any person designated by the mediator to assist in the mediation process, in this case, Diana L. Mercer and/or Tara Fass.

2. NATURE OF MEDIATION

The parties understand that mediation is an agreement-reaching process in which the mediator assists parties to reach agreement in a collaborative, consensual and informed manner. It is understood that the mediator has no power to decide disputed issues for the parties. The parties understand that the mediator’s objective is to facilitate the parties themselves reaching their most constructive and fairest agreement.

3. RIGHT OF CONSULTATION WITH LAWYER

During the mediation, the parties are each encouraged to consult with or be represented by a lawyer at any time, especially before signing the final settlement agreement. Parties are entitled to the confidentiality of any communication with their attorney(s).

4. MEDIATOR REPRESENTS NEITHER PARTY

The parties acknowledge that the mediator does not represent the interests of either party and is not acting as an attorney. The parties acknowledge that the purpose of mediation is to facilitate the ultimate resolution and agreement between the parties regarding the issues, problems, and disputes presented in mediation and that the mediator does not act as an advocate, representative, fiduciary, lawyer, or therapist for either party.

5. IMPARTIALITY OF MEDIATOR

The parties acknowledge that, although the mediator will be impartial and that the mediator does not favor either party, there may be issues in which one party may be reasonable and the other may not be reasonable. The mediator has a duty to assure a balanced dialogue and to diffuse any manipulative or intimidating tactics.

6. CONFIDENTIALITY

It is understood between the parties and the mediator that the mediation will be strictly confidential. Mediation discussions, written and oral communications, any draft resolutions, and any unsigned mediated agreements shall not be admissible in any court proceedings. Only a mediated agreement, signed by the parties may be so admissible. The parties further agree to not call the mediator to testify concerning the mediation or to provide any materials from the mediation in any court proceeding between the parties. The mediation is considered by the parties and the mediator as settlement negotiations. The parties understand the mediator has an ethical responsibility to break confidentiality if s/he suspects another person may be in danger of harm. The only other exceptions to this confidentiality of the mediation are with regard to the mediator's duty to report reasonable suspicion of child abuse and domestic violence; the mediator's ability to defend himself/herself in any legal action; in the event of a joint written waiver of confidentiality by the parties; or otherwise as may be required by law.

7. RIGHT OF MEDIATOR TO WITHDRAW

The mediator will attempt to resolve any outstanding disputes among the parties as long as both parties make a good faith effort to reach an agreement based on fairness to both parties. Parties must be willing and able to participate in the process. The mediated agreement requires compromise, and parties agree to attempt to be flexible and open to new possibilities for a resolution of the dispute. If the mediator, in his or her professional judgment, concludes that agreement is not possible or that continuation of the mediation process would harm or prejudice one or all of the participants, the mediator shall withdraw and the mediation conclude.

8. TERMINATION OF MEDIATION WITHOUT CAUSE

The mediation may be terminated without cause by any party at any time. No reason must be given, either to the other parties or to the mediator. A decision to terminate mediation must be made in writing. Mediation may not resume following said notification, unless expressly authorized in writing by all parties.

Upon termination of mediation for any reason, the mediator agrees not to counsel either party or represent any party against any other party, in any court proceeding, adversary negotiation, or for any other reason involving a dispute between the parties.

9. VOLUNTARY DISCLOSURE OF POSSIBLE PREJUDICIAL INFORMATION

The parties agree that, while mediation is in progress, full disclosure of all information is essential to a successful resolution of the issues. Since the court process may not be used to compel information, any agreement made through mediation may be rescinded in whole or in part if one party fails to disclose relevant information during the mediation process. Since the voluntary disclosure of this information may give one party an advantage that may not have been obtained through the traditional adversarial process, the parties agree to release and hold harmless the mediator from any liability or damages caused by voluntary disclosure of prejudicial information in the mediation process that may be used in subsequent negotiations or court proceedings. The mediator has no power to bind third parties not to disclose information furnished during mediation.

10. **THE MEDIATOR DOES NOT PROMISE RESULTS**

Each party acknowledges that, since mediation is a process of compromise, it is possible that any party might agree to settle on terms that might be considered to be less favorable in comparison to what they party might have received from a Judge after a contested court hearing, or through negotiation in which one or all of the parties have retained legal counsel. The mediator makes no representations that the ultimate result would be the same in kind or degree as might be concluded through negotiation or a contested trial on one or all of the issues. Any questions concerning fairness should be addressed to the mediator as they occur. In addition, parties should consult with independent legal counsel to review compromises made during the course of mediation, and all provisions of a final agreement prior to executing any court documents.

11. **FILING OF COURT DOCUMENTS**

Once an agreement is reached, in whole or in part, or at any time the parties desire to file any court documents to confirm the agreement and to obtain court order or judgment based thereon, the parties understand that the mediator may not represent either party in a court of law. However, the parties agree that if the parties are represented by counsel, or act as their own attorney(s) *In Pro Per*, the parties may authorize the mediator to prepare, or to contract with a law firm to neutrally prepare, court papers and to monitor all paperwork through the court system. In performing such work, Peace Talks and Diana Mercer are performing their neutral mediator functions and will take no action without the mutual agreement and authorization of all parties.

12. **MEDIATION FEES**

The parties agree that the fee for mediation is \$350.00 per hour, or \$175.00 per party per hour. Co-mediation sessions (both mediators) are billed at \$475.00 per hour. Fees for Peace Talks' Legal Assistant and Dispute Resolution Associate are \$160.00 per hour. Preparation of the initial court papers is \$325.00 (flat fee). Court filing fees (Los Angeles County) of \$224.50 (petition) and \$221.20 (response) and process server fees are not included in this fee. Filing fee checks should be made payable to "The Clerk of the Superior Court". Fees for the stipulated judgment are \$775.00 for judgments without children, and \$975.00 for judgments with provisions concerning children.

Miscellaneous fees: There is a \$50 per hour surcharge for weekend appointments and appointment time after 6:30 pm and on weekends. Fees for preparation of the court-mandated Income and Expense Declarations and Schedule of Assets and Debts (financial disclosures) are \$150.00 per party. If you are not using mediation, and only wish to use Peace Talks for the divorce paperwork, the flat fee for the paperwork quoted above will be increased by \$300. If you require the Judgment paperwork to be completed within 7 days of your payment for same, there will be an expedited paperwork fee of \$150.00. Faxes are billed at \$10 each, and Federal Express letters/packages are billed at \$30.00 each.

The parties and the mediator agree that the fees for the mediator are billed on an hourly basis for time spent with the parties and for time to study documents, research issues, correspond, telephone call, prepare draft and final agreements not covered by a flat fee arrangements, and do such other things as may be reasonably necessary to facilitate the parties' reaching full agreement. Additional legal work will be contracted as agreed in advance for specific services requested and billed at a rate of \$350.00 per hour. Payment in full for the first mediation session plus a minimum of one-half hour of follow up work, as well as any flat-fee paperwork is due upon signing of this agreement.

Inter-session letters will be charged at a minimum of one half-hour of the mediator's hourly rate. Payment is due upon request for the letters. One inter-session telephone call between the mediator and the party(ies) is free of charge. However, if more than one telephone call is made, the fee is .20 of the mediator's hourly rate. Payment is due at the next session. Telephone calls between the mediator and clients are charged at the mediator's hourly rate in increments of .2 of an hour.

The parties shall be jointly and severally liable for the mediator's fees and expenses.

Should payment not be timely made, Peace Talks, Diana Mercer and Tara Fass may stop all work on behalf of the parties, including the drafting and/or distribution of the parties' agreement, and withdraw from the mediation. If collection or court action is taken by the mediator to collect fees and/or expenses under this agreement, the prevailing party in any such action and upon any appeal therefrom shall be entitled to attorney fees and costs therein incurred.

13. MEDIATION AND BINDING ARBITRATION

All disputes between Peace Talks, the parties and the mediator regarding any aspect of our professional relationship will be resolved by mediation, and if not resolved, to be followed by binding arbitration administered through the County Bar Association pursuant to the Code of Civil Procedure and not by litigation in court. By this provision, the parties and Peace Talks are both giving up the right to have any such dispute decided by a judge or a jury and we are each giving up the right of appeal.

The prevailing party in any arbitration between us will be entitled to reasonable attorney's fees and costs. Any litigation or arbitration between us will take place in Los Angeles County and California State law will apply.

It is important for you to know that under current California law a mediator has complete immunity from suits regarding negligence or malpractice or any other cause of action. This means that you cannot sue our mediators for any damage to you arising out of the mediation relationship.

Before signing this agreement, you have a right to consult your own attorney about the legal consequences to you of signing this agreement and specifically waiving the right to use the courts in any fee dispute and using arbitration instead.

14. **MEDIATOR'S FEES**

Should it be necessary to institute any legal action or arbitration for the enforcement of this agreement, the prevailing party shall be entitled to receive all court costs and reasonable attorneys fees incurred in such action from the other party.

15. **EXECUTION OF MEDIATION AGREEMENT**

By signing this Mediation Agreement, each party agrees that he or she has carefully read and considered each and every provision of this Agreement and agrees to each provision of this agreement without reservation.

Chart of costs <http://www.peace-talks.com/proscons.php>
Comparison Chart <http://www.peace-talks.com/compare.php>
Collaborative Law Documents <http://www.lacfla.org>
Private Judge Stip

Attorney of record information

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES**

| | | |
|------------------------|---|--------------------------|
| In Re The Marriage Of: |) | Case No. |
| |) | |
| Petitioner: |) | STIPULATION FOR |
| |) | APPOINTMENT OF TEMPORARY |
| and |) | JUDGE AND ORDER |
| |) | |
| Respondent: |) | |

STIPULATION FOR APPOINTMENT OF TEMPORARY JUDGE

Pursuant to the provisions of Article VI, § 21 of the California Constitution, and Rule 44 of the California Rules of Court, the parties hereto personally and by joinder of their separate attorneys, stipulate as follows:

1. *Temporary Judge.* Temporary Judge, an active member of the State Bar of California (office address 1801 Century Park East, Suite 2300, Los Angeles CA 90067; telephone 310/277-1981; facsimile 310/277-1980), shall be appointed as a Temporary Judge.
2. *Scope of Appointment.* Said Temporary Judge shall hear and determine all issues and motions herein, and shall continue to act as Temporary Judge until the conclusion of all matters that may be determined within the jurisdiction of the Superior Court, including, but not limited to, all post-trial motions relating to the Judgment and/or orders filed or to be filed herein.
3. *Parties and Attorneys.* The parties to this cause and their attorneys are:

Parties

Attorneys

4. *Trial Date.*
 - a. The Temporary Judge and the parties have set the trial as follows: _____
 - b. The time estimate is ___ days.
 - c. The place of the trial is 1801 Century Park East, Suite 2300, Los Angeles CA 90067.
 - d. The completion date is _____.
5. *Counterparts.* This Stipulation may be signed in counterparts.

JOINDER BY COUNSEL OF RECORD

The foregoing stipulation is approved as to form and content, and counsel of record for the respective parties hereby join and agree to be bound by all of the terms thereof.

Dated: _____
LAW OFFICE OF

Dated: _____
LAW OFFICE OF

By _____
Attorneys for Petitioner

By _____
Attorneys for Respondent

JOINDER BY THE PARTIES

The foregoing stipulation is approved as to form and content, and the parties hereby join and agree to be bound by all the terms thereof.

Dated: _____

Dated: _____

Petitioner

Respondent

5. *Counterparts.* This Stipulation may be signed in counterparts.

JOINDER BY COUNSEL OF RECORD

The foregoing stipulation is approved as to form and content, and counsel of record for the respective parties hereby join and agree to be bound by all of the terms thereof.

Dated: _____

Dated: _____

LAW OFFICE OF

LAW OFFICE OF

By _____
Attorneys for Petitioner

By _____
Attorneys for Respondent

JOINDER BY THE PARTIES

The foregoing stipulation is approved as to form and content, and the parties hereby join

and agree to be bound by all the terms thereof.

Dated: _____

Dated: _____

Petitioner

Respondent

CONSENT BY TEMPORARY JUDGE

I, Temporary Judge, an active member of the State Bar of California, hereby consent to act as Temporary Judge until final determination of this matter as set forth in the foregoing stipulation.

Temporary Judge

OATH OF OFFICE

Upon appointment to the office of Temporary Judge of the Superior Court of the State of California for the County of Los Angeles as provided herein, I, the undersigned, do solemnly swear (or affirm) that I will support and defend the Constitution of the State of California against all enemies, foreign and domestic; that I will bear full faith and allegiance to the Constitution of the United States and the Constitution of California; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties upon which I am about to enter.

Dated:

Temporary Judge

Subscribed and sworn to before me this

___ day of _____

Notary Public

APPROVAL AND ORDER APPOINTING TEMPORARY JUDGE

Good cause appearing therefor, IT IS ORDERED as follows: The stipulation of the parties and their attorneys that Temporary Judge act as Temporary Judge in this cause is hereby approved.

1. Temporary Judge, having consented to so act, is appointed and designated as Temporary Judge to hear and determine this matter until its final determination in the Superior Court, his oath of office having been filed concurrently with the stipulation of the parties and their attorneys.
2. Said appointment shall remain in full force and effect until the conclusion of all matters herein that may be determined within the jurisdiction of the Superior Court or until revoked by further order of this Court. If there is no final disposition of this case within 30 days of the completion date, this order is subject to revocation by this Court.

Dated:

Judge of the Superior Court

Unbundled Fee Agreement
Limited-Scope Client-Lawyer Agreement

This agreement is made between Attorney and client as designated at the end of this agreement.

11. Nature of Agreement. This agreement describes the relationship between the Attorney and Client.

Specifically, this Agreement defines:

- a) The general nature of Client's case;
- b) The responsibilities and control that Client agrees to retain over the case;
- c) The services that Client seeks from Attorney in her capacity as Attorney-at-Law;
- d) The limits of Attorney's responsibilities;
- e) The immunity from civil liability granted to the Attorney for services not provided by Attorney;
- f) Methods to resolve disputes between Attorney and client;
- g) The method of payment by Client for services rendered by Attorney.

12. Nature of Case. The Client is requesting services from Attorney in the following matter:

13. Client Responsibilities and Control. The client intends to handle his/her own case and understands that he/she will remain in control of the case and be responsible for all decisions made in the course of the case. In the event that Attorney is requested to file an Appearance with the Court, or full representation is requested, then this Limited-Scope Client-Attorney Agreement shall be replaced by a traditional Retainer Agreement which will be provided to Client at that time.

The Client agrees to:

- a) Cooperate with Attorney or Attorney's office by complying with all reasonable requests for information in connection with the matter for which Client is requesting services;
- b) Keep Attorney or Attorney's office advised of Client's concerns and any information that is pertinent to Client's case;
- c) Provide Attorney with copies of all correspondence and documents to and from Client relevant to the case;
- d) Keep all documents related to the case in a file for review by Attorney.

14. Services Sought by Client: The Client seeks the following services from Attorney:

- _____ 1. Legal advice office visits, telephone calls, fax, mail, e-mail;
- _____ 2. Advice about availability of alternative means to resolving the dispute, including mediation and arbitration;
- _____ 3. Evaluation of Client's self-diagnosis of the case and advising Client about legal rights;
- _____ 4. Guidance and procedural information for filing or serving documents;
- _____ 5. Review correspondence and court documents;
- _____ 6. Prepare and/or suggest documents to be prepared;
- _____ 7. Factual investigation: contacting witnesses, public records searches, in – depth interview of client;
- _____ 8. Legal research and analysis;
- _____ 9. Discovery: interrogatories, depositions, requests for document production;
- _____ 10. Planning for negotiations, including simulated role playing with Client;
- _____ 11. Backup and trouble-shooting during a trial;
- _____ 12. Planning for court appearances made by Client, including simulated role playing with Client;
- _____ 13. Referring Client to other counsel, expert, or professional;
- _____ 14. Counseling Client about an appeal;
- _____ 15. Procedural assistance with an appeal and assisting with substantive legal argumentation in an appeal;
- _____ 16. Providing preventative planning and/or schedule legal check-ups;

____ 17. Other: _____

15. Attorney's Responsibilities. The Attorney shall exercise due professional care and observe strict confidentiality in providing services identified by a check mark in Paragraph 4 above. In providing those services, Attorney **SHALL NOT**:

- a) Represent, speak for, appear for, or sign papers on the Client's behalf;
- b) Provide services in Paragraph 4 which are not identified with a check mark; or
- c) Make decisions for Client about any aspect of the case.

16. Method and Payment for Services. Hourly fee: the current hourly fees charged by this office for services under this agreement are as follows:

Attorney Diana Mercer: \$395.00 per hour
Legal Assistant: \$250.00 per hour

Unless a different fee arrangement is specified in clauses (b) or (d) of this Paragraph, the hourly fee shall be payable prior to the commencement of the service.

- e) **Payment from Retainer:** The Client shall have the option of setting up a deposit fund with Attorney in the amount of \$_____, out of which payment for services will be made as they occur. If a retainer is established under this clause, Attorney shall mail the Client a billing statement, typically done monthly, summarizing the type of services performed, the costs and expenses incurred, and the current balance in the retainer after the appropriate deductions have been made. Client may optionally replenish the retainer or continue to draw the fund down as additional services are delivered. If the retainer becomes depleted, Client shall pay for additional services as provided in clauses (a) or (d) of this paragraph.
- f) **In the alternative,** Client may leave a credit card number and expiration date with Attorney in lieu of the retainer. If Client chooses to do this, then Attorney is authorized to charge Client's credit card with legal fees as services are rendered without additional authorization from Client.

Credit Card Type: _____ Account Number: _____

Expiration date: _____ Name as it appears on card: _____

Flat Rate Charges: The Attorney may optionally agree to provide one or more of the services described in Paragraph 4 at a flat rate. Any such agreement shall be set out in writing, dated, signed by both Attorney and Client, and attached to this agreement. We've attached a full fee schedule to this agreement for your reference.

- g) **Attorneys' Fees.** Should it be necessary to institute any legal action for the enforcement of this Agreement, the prevailing party shall be entitled to receive all court costs and reasonable attorneys' fees incurred in such action from the other party.

17. Resolving Disputes Between Client and Attorney.

- a) **Notice and Negotiation.** If any dispute between Client and Attorney arises under this Agreement, both Attorney and Client agree to meet and confer within ten (10) days of written notice by either Client or Attorney that the dispute exists. The purposes of this meeting and conference will be to negotiate a solution short of further dispute resolution proceedings.
 - b) **Mediation.** If the dispute is not resolved through negotiation, Client and Attorney shall attempt, within fifteen (150) days of failed negotiations, to agree on a neutral mediator whose role will be to facilitate further negotiations within fifteen (15) days. If Attorney and Client cannot agree on a neutral mediator, they shall request that the Beverly Hills Bar Association select a mediator. The mediation shall occur within fifteen (15) days after the mediator is selected. The Attorney and Client shall share the costs of mediation, provided that payment of the costs and any Attorneys' fees may also be mediated.
 - c) **Arbitration.** If mediation fails to produce a full settlement of the dispute satisfactory to both Client and Attorney, Client and Attorney agree to submit to binding arbitration under the rules of the Los Angeles County Bar Association. This arbitration must take place within sixty (60) days of the failure of mediation. Fees and Attorneys' fees for arbitration and prior mediation may be awarded to the prevailing party.
- 18. Amendments and Additional Services.** This written Agreement governs the entire relationship between Client and Attorney. All amendments shall be in writing and attached to this Agreement. If Client wishes to obtain additional services from Attorney as defined in Paragraph 4, a photocopy of Paragraph 4 that clearly denotes which extra services are to be provided, signed and dated by both Attorney and Client and attached to this Agreement shall qualify as an amendment.

19. Civil Immunity for Counsel. Client hereby waives any right to prosecute a claim of professional negligence against Attorney for any service not specifically set forth by a check mark or actually undertaken by Attorney in Paragraph 4 of this Agreement. The Client grants to Attorney complete immunity from Civil liability arising from all aspects of the case not specifically undertaken by the Attorney. Client acknowledges that many attorneys will not offer limited-scope representation due to the fear of malpractice claims by clients who later find or believe that the limited-scope representation was not sufficient to properly protect the client. The Client acknowledges that retaining an attorney for limited-scope representation is a consumer choice by the Client based on Client's desire to lower fees and maintain client control and belief that Client can competently handle all issues and tasks not specifically undertaken by Attorney. Client agrees to bear the full risk of any damage caused to the Client due the Client handling the matter without specifically requested legal services from the Attorney. Such waiver of malpractice claims does not extend to those services which the Attorney undertakes to render on behalf of the Client as instructed by the Client. The Attorney represents that the law firm carries Professional Liability Insurance as required by the State Bar of California.

20. Statement of Client's Understanding. I have carefully read this Agreement and believe that I understand all of its provisions. I signify my agreement with the following statements by initialing each one:

_____ I have accurately described the nature of my case in Paragraph 2;

_____ I will remain in control of my case and assume responsibility for my case as described in Paragraph 3;

_____ The services that I want Attorney to perform in my case are identified by check marks in Paragraph 4. I take responsibility for all other aspects of my case;

_____ I accept the limitations on Attorney's responsibilities identified in Paragraph 5 and understand that if I make mistakes in handling my own case, I have granted the Attorney immunity from being sued for professional malpractice. This means that I cannot sue and/or recover from the Attorney regardless of the damage I might suffer;

_____ I shall pay Attorney for services rendered as described in Paragraph 6;

_____ I will resolve any disputes I have with Attorney under this Agreement in the manner described in Paragraph 7;

_____ I understand that any amendments to this Agreement shall be in writing, as described in Paragraph 8;

_____ I acknowledge that I have been advised by Attorney that I have the right to consult another independent Attorney to review this Agreement and to advise me on my rights as a Client before I sign this Agreement.

Date

Diana Mercer, Esq.

Date

Client

Fee Schedule:

Hourly fees:

| | |
|----------------------------------|----------|
| Diana Mercer, Attorney-Mediator: | \$525.00 |
| Linda Duarte, Paralegal-Mediator | \$250.00 |

Paper Preparation (Flat Fees):

Petition and Response:

| | |
|----------------------|----------|
| Petition or Response | \$325.00 |
|----------------------|----------|

Petition/Response Papers include at no extra charge:

Case Cover Sheet
Summons
UCCJEA Statement
Notice and Acknowledgment of Receipt
Proof of Service
Actual mail service of papers and copies

Judgment Package:

| | |
|---------------------------------|-----------|
| Judgments (no children): | \$1995.00 |
| Judgments with Parenting Plans: | \$2295.00 |

All judgment packages include at no extra charge:

Typing and service of Income and Expense Declarations
Typing and service of Schedule of Assets and Debts
Declaration of Disclosure (one for each party)
Appearance, Stipulation and Waivers

Declaration Re: Default or Uncontested Divorce
Judgment
Notice of Entry of Judgment
Declaration Re: Service of Declaration of Disclosure
Mail service of papers and copies
Proof of Service
Child Support Case Registry Form
Wage Assignment (if requested)

Court Filing Fees:

Please make your checks payable to "Clerk of the Superior Court".

| | |
|--|----------|
| Petition | \$350.00 |
| Response or Agreement (whichever is first) | \$350.00 |

Miscellaneous fees:

| | |
|--|------------------------------|
| Evening and weekend appointments: (Weekdays before 10:00 am and after 6:30 pm) | \$50 per hour surcharge |
| Quitclaim deed or Inter-Spousal Transfer Deed (includes recording, recording fees, and copies) | \$300.00 |
| Preparation of Income and Expense Declarations and Schedule of Assets and Debts (financial disclosures) | usual hourly rate |
| Divorce paperwork only (no mediation time) | \$300.00 |
| Expedited papers fee (prepared and mailed within 7 days) | \$150.00 |
| Faxes (each) | \$ 35.00 |
| Federal Express letters and packages | \$ 45.00 |
| Courier deliveries surcharge (courier bill plus) | \$ 30.00 |
| Telephone calls (minimum charge) | .2 of attorney's hourly rate |

Collaborative Law forms and protocols <http://www.peace-talks.com/pdf/ethics.pdf>

Summary Letters as Mediation Tools

We insist on doing summary letters after all of our mediation sessions. The letter sets forth the agenda, the tentative agreements, and the issues and things to think about before the next mediation session as well as a detailed to-do list. The letters are long and time-consuming to draft, despite some model language we use about often-cited topics, but we think it's a valuable part of the mediation process.

Since the summary letter isn't legally binding, and it's simply a record of the session, we tell clients:

These tentative agreements and offers are exactly that—tentative. Nothing is final until it's signed by both of you and submitted to the court. Please think of this letter as a starting place, or a set of building blocks, building toward your ultimate agreement. You may change your mind about some of the agreements or discussions—that's okay. Our only request is that if you do change your mind, please have some alternatives in mind that *will* work for you when you come to the next session. This letter is provided as a basis for further discussions, and we hope that it will help you to measure the considerable progress you made in the first session.

Because mediation is confidential, we also are clear about how we hope clients will use the letters: Although these summary letters are confidential and not admissible in court, we fully expect that you will share them with your lawyer, accountant, therapist or other advisors.

In our practice, it used to be optional, but in the name of saving a few dollars too many clients went without the summary letter and too many mediations fell apart between sessions because neither client had an accurate record of what went on during the session. Our case management compromise (so far) is that we bill for about an hour for the summary letter, even though in reality it takes us 2-3 hours to write. It's worth it to us not to have the mediations fall apart, and the clients see it as a manageable expense. We also don't give them the option of refusing a summary letter—it's just too valuable a tool both for the clients and the mediators.

What the mediation summary letter does: The summary letter accomplishes multiple goals: giving clients an opportunity to think about agreements before they become binding, providing an institutional memory of the session, fleshing out discussions that were not finished, encouraging clients to think of creative solutions between sessions and underscoring progress made during the sessions.

To avoid pressuring people to make a decision about an important issue on the day of the mediation, we often leave the agreement about the issue as simple as they will investigate their options. The summary letter will outline the discussion, delineate questions to ask their advisors, and set forth a to-do list so that the clients don't have to take copious notes during the session. For clients interested in saving money and doing as much as possible outside of the session, the to-do list can give them some guidance.

Another advantage of the summary letter is that it gives both the clients and the mediator an "institutional memory" of what went on at the session. A good, detailed summary letter can eliminate much of the he said/she said. Even if the mediator makes a mistake in the summary, at least everyone is starting from the same place.

The summary letter can also flesh out discussions that didn't quite get finished, or which might be too technical to be of use during the session. A good example of this is the explanation of how Qualified Domestic Relations Orders work. "There's a special court order you can use to divide up a pension, so don't worry about how that will happen," might suffice for the mediation session itself, but ultimately the client will need more detail than that. The summary letter is a good place to make sure the clients get the information they need to make a good decision.

We also use the summary letters to ask the clients to expand their range of options between sessions. We'll ask them to think of different ways to resolve things, or whether they would consider a particular solution, even on a temporary basis. The summary letter is also an opportunity to acknowledge high points in the mediation, point out progress made, and gently encourage clients to keep thinking about certain issues.

Sometimes it's hard to convey the benefits of the summary letters to clients before they've actually seen one, but most are grateful that you've insisted once they see the finished product. It makes case management and mediation session planning easier because you have a great summary of the last meeting, and it helps clients stay organized, too.

Orientation

Mediation Orientation

- **Answer clients' questions first**
- Product vs. Process
- Legal information & education vs. legal *advice*
- Joint sessions vs. individual caucuses
- Balanced Discussion
- Time and cost*
- Paperwork
- Attorneys' roles, mediation friendly attorneys
- Typical first session
- Mediation summary letters
- Win/win outcomes and how they work
- Why mediation works and litigation doesn't work
- Mediator Styles---Facilitative vs. Evaluative explanation since there's no licensing for mediators in California

Taking a detailed family history for the purpose of understanding the family's developmental lifecycle.

Treating the family or any individual member of it.

Identifying interpersonal dynamics in the couple's interactions that contribute to the couple's conflict

Exploring the couple's dynamic for the purpose of marital reconciliation

Identifying the consequences of the above as it affects the children in the family system

Treating the children

Translating the parties' individual and collective experiences of the conflict by putting words to feelings.

Interpreting the meaning of such experiences to a generalized context beyond the issue at hand.

Attorney-mediator: Role is mediator

Appropriate functions for attorney-mediator

Inappropriate functions

Providing both clients with copies of statutes on a given issue

Giving legal advice to one party

making settlement suggestions

insisting on a settlement option

pointing out where differences of opinion might exist

endorsing one option without acknowledgment others exist

referring both parties to several attorneys if mediation breaks down, and stepping down from case

representing one party if mediation breaks down

Permissible functions are completely dependent on the role for which the professional was hired. You'll note that the "inappropriate functions" in this example are inappropriate for an attorney-mediator, but that many of them would be appropriate if the attorney was hired as a litigation attorney or advocate. Likewise, the "inappropriate functions" for the therapist-mediator would be appropriate for an individual's, couple's and/or child's therapist, depending on how the parties originally contracted for treatment with that therapist.

When you're hired for a case, be sure and define your individual role in that case, and base your functions on those which are appropriate for your role. For client requests that fall outside of your role, be prepared with solid referrals to appropriate professionals so that your role is never blurred. You'll preserve the nature of the professionalism of your role, you'll stay out of ethical trouble and you'll also provide better service for your client.

Agenda

- Parenting Plan, Interim Parenting Plan
 - Decision Making
 - Day-to-Day Schedule
 - Vacations, Holidays and Travel
 - Other Parenting Issues
 - Interim Parenting Plan
 - Step Up Plans
 - Telling the Children
- Child Support
 - Monthly Amount
 - Add-on expenses, like work-related childcare, sports, lessons, camp, etc.
 - College and post-high school education (optional)
- Spousal support, spousal support buy-out
- Separation plans
- Boundary issues, communication, changing nature of the relationship
- Interim support & interim financial arrangements
- Move out expenses
- House, mortgages
- Apartment or rental home: occupancy of apartment, security deposit
- Other real estate: rental properties, apartment buildings
- Bank Accounts
- Retirement Assets, e.g., 401(k) plan, IRA, Pension, Profit Sharing plans
- Savings, investments, stocks, mutual funds (non-retirement)
- Cars, RV's, other vehicles
- Frequent flier miles
- Insurance: Health insurance, Car insurance, Life insurance
- Personal Property, Pets
- Debts, student loans, personal loans or loans from family
- Filing taxes for 2008, back taxes, tax loss carry forward
- Business(es)
- Separate property claims, reimbursement claims
- Intellectual property: patents, trademarks, copyrights, songs, books, scripts, works in progress
- Stock Options
- Privately held investments, limited partnerships

- Season tickets, football tickets, Lakers tickets
- Frozen embryos, eggs or sperm
- Injury settlements and lawsuits, workers compensation, car accidents
- Timeshare(s)
- Mediation Fees
- Paperwork, paperwork timing
- Date of Separation
- Legal separation or divorce choice
- Social Security Benefits (protected by federal law & only if married > 10 years)

Ethics roles and functions <http://www.peace-talks.com/pdf/ethics.pdf>