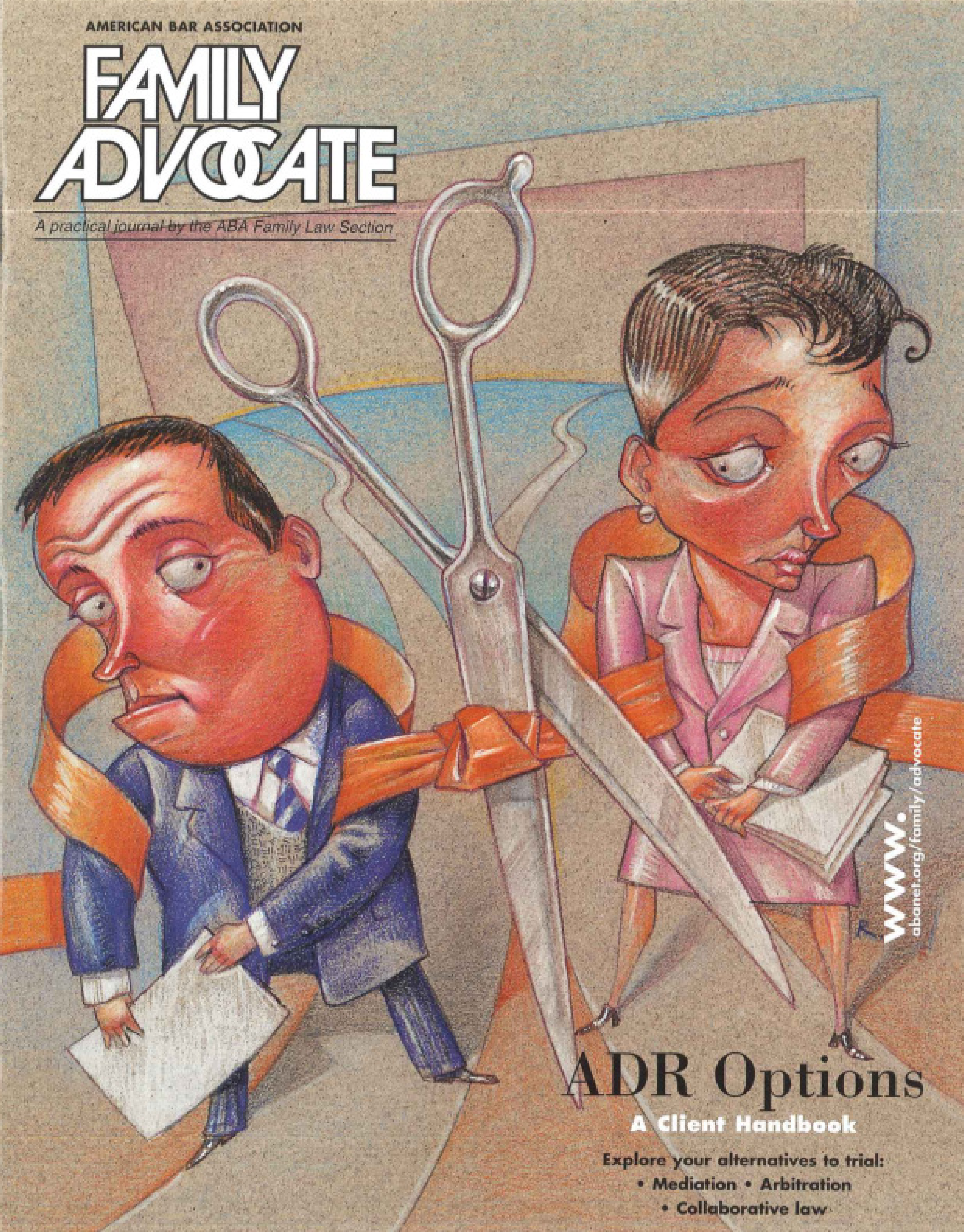
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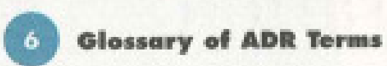

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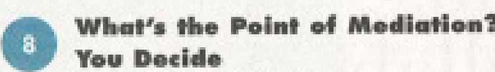

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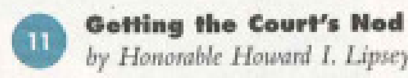

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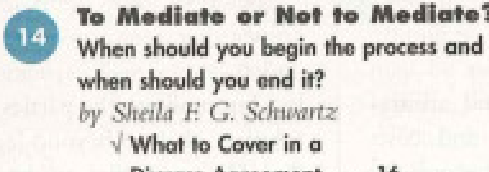

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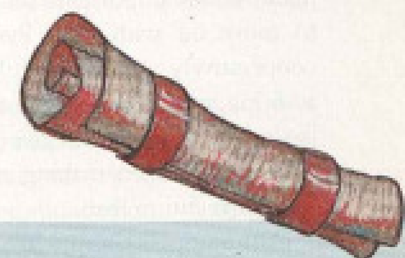
Dear Client,

Your lawyer and we at the American Bar Association want to help you dissolve your marriage with minimal cost and acrimony. We believe that in many cases, alternative dispute resolution is the most effective means of reaching that goal. We hope that this handbook will give you a clearer picture of your ADR options so that you and your lawyer can make the important choices necessary to achieve a speedy and satisfactory resolution of your case.

Sincerely,

Willard H. DaSilva
Editor in chief



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Your ADR Options

Mediation, arbitration and collaborative law

BY JOAN H. MCWILLIAMS

Historically, couples had little choice in how their marriage was dissolved. They either settled the matter or presented their case to a judge or (believe it or not) a jury. The direct and indirect costs of going to court were staggering, and the emotional scars of a hard-fought court battle made it difficult, if not impossible, for couples to move on with their lives or to cooperatively raise their children. In addition, many couples did not realize what it meant to give a court complete decision-making authority over their future lives.

Although litigation is still an option today, many divorcing couples are choosing to make their own decisions with the help of a trained mediator or present their case to an arbitrator. Mediation and arbitration are types of alternative dispute resolution (ADR) or methods of resolving a dispute that are less intrusive and less expensive than litigation. They allow participants to preserve their dignity, resolve their problems, and, if necessary, design their future relationship. Mediation and arbitration offer a cooperative and cost-effective way to navigate through the legal system and reach a conclusion designed to meet each participant's needs.

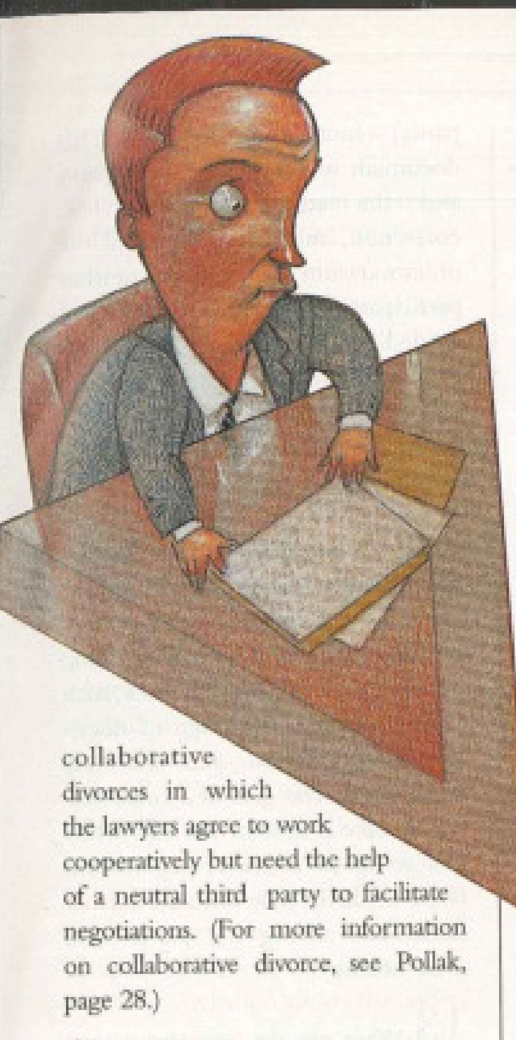
Following are answers to commonly asked questions about mediation and arbitration. For more details, contact your lawyer or a local mediator or arbitrator.

Mediation

1. What is mediation? Mediation is a process in which a trained neutral and impartial third party (the mediator) facilitates negotiations between the participants and helps them reach a settlement that is fair, meets as many of their individual needs as possible, and is in the best interests of their children. A mediator, unlike a judge or arbitrator, has no decision-making authority, but helps the parties identify issues to be resolved, develop options to satisfy each of their interests, and choose the options that work best for both of them. Mediation occurs within the framework of the law, but it allows the parties to create solutions that go beyond legal remedies. The issues that can be discussed are limitless and typically include decision-making for the children, parenting time or visitation, division of marital assets and debts, maintenance, and child support.

2. How is mediation initiated? In most states, the court may order mediation. Court-ordered mediation is helpful when couples are unaware that mediation is an option or when one person is reluctant to participate. Court-ordered mediation may not work if either person refuses to negotiate in good faith. Mediation can be terminated in such cases, and the invested time and expense will be minimal. Although court-ordered mediation is mandatory, it does not preclude a hearing before a judge if all matters cannot be resolved.

Couples also may agree to mediate a dispute or be compelled to mediate by a provision in their separation agreement or prenuptial or postnuptial agreement. Mediation may be used in



collaborative divorces in which the lawyers agree to work cooperatively but need the help of a neutral third party to facilitate negotiations. (For more information on collaborative divorce, see Pollak, page 28.)

3. How is the mediator selected? Generally, the couple and/or their lawyers select a mediator or the judge appoints one. The mediator may be a lawyer or a mental-health professional trained in ADR techniques. Many couples use pastoral mediation services at their house of worship. Participants meet informally with a priest, minister, rabbi, or other religious leader or use the more formally structured services of the Christian Conciliation Services, for example, or, in the Jewish faith, the Bet Din. State judicial departments also offer mediation services.

In some cases, participants choose a team of mediators that brings different skills to the process. For example, a lawyer and a mental-health professional working together can address therapeutic and legal problems. A Christian conciliator, a minister, or a rabbi working with a lawyer can focus on religious and legal problems. A male-female team might help address gender differences.

Regardless of background, the mediator must be a person whom the participants trust and who knows the law and can facilitate communication, can create a safe environment, and can translate the parties' discussions into an agreement that is understandable and legally sufficient.

4. How are mediation sessions structured? Mediation sessions are structured to meet the participants' needs. For example, some people work more productively in several shorter sessions, whereas others may prefer one full-day session. Lawyers may be present, depending on the issues of the case, the parties' negotiating skills or needs, and the participants' preferences. The mediator might meet with the parties in one room or separate the parties and shuttle back and forth with offers and counteroffers. Financial or other experts may be present at the participants' request.

The timing of mediation sessions is flexible. Some sessions begin immediately to meet court deadlines. Others are delayed to accommodate discovery, property appraisals, or business valuations. To have a successful conclusion, the participants must control the structure and timing of mediation.

5. How do we know what to discuss? With the help of the mediator, participants will set the mediation agenda. At the first meeting, the mediator often makes a brief opening statement and explains the process. The participants may establish ground rules, and the mediator will help identify issues to be discussed, finalize the agenda, facilitate discussions, and expedite a settlement.

6. Do mediators use different styles of mediation? A good mediator will be skilled in using different forms or styles of mediation to help the parties reach a settlement. For example, when the parties identify an issue that will require them to work together in the future, the mediator may use an *interest-based style* of mediation in which the parties identify their interests as opposed to their positions. A "position" is a desired result, and an "interest" is the underlying reason a party wants the result. Using this form of mediation, the parties often reach creative solutions that would be unavailable in court.

When the case presents issues in which one party's gain results in the other party's loss, the mediator may use a *settlement-conference style*. Using reality-testing techniques, the mediator helps the parties review the facts, analyze the issues, and project the likely outcome if the case were presented to a judge. With this style, the parties are often in separate rooms, and the mediator shuttles between them.

In *evaluative mediation*, the parties ask the mediator to analyze and assess the strengths and weaknesses of their legal positions. Usually, the lawyers are present during mediations and they ask the mediator for a written evaluation.

The *therapeutic model* of mediation combines counseling or therapy with traditional mediation. A mental-health professional works with the parties on therapeutic issues, while the mediator works with them on substantive issues.

7. Is mediation confidential? In most jurisdictions, mediation is confidential. A mediator is not allowed to disclose communications without the consent of the parties. However, communications that are otherwise discoverable or that the law requires to be reported are generally not confidential. Although confidentiality in mediation is not comparable to privileged communications between a client and a lawyer, therapist, or doctor, it does provide a protected environment in which participants may share factual information and emotional roadblocks as well as explore creative options for settlement.

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8. Can the mediator give legal advice? No. Even if the mediator is a lawyer, he or she does not represent either party and will not give legal advice. Although the mediator may provide legal information, mediation is not a substitute for independent legal advice regarding rights and responsibilities. Each person is encouraged to obtain legal advice throughout the process and have an attorney review the final agreement (memorandum of understanding) before signing it.

9. What is the attorney's role in mediation? Although participants are not required to have attorneys during mediation, many find consulting with a lawyer helpful. The attorney will help the client review the facts of the case, explain applicable law, and help create options for settlement. Clients may have their attorneys present during mediation. The attorneys will advise clients about settlement options and review the final memorandum of understanding before the client signs it.

10. What if some issues are not settled? Sometimes, couples are not able to settle all issues. For example, they might determine how to make major decisions regarding the children (legal custody or decision-making) and how to share visitation or parenting time, but they cannot divide marital assets and debts or agree on maintenance. In such cases, they may submit the agreed-upon issues to the court for approval as partial permanent orders and ask the judge or an arbitrator to make a final, binding decision for any remaining issues. Each party must decide how to handle unresolved issues, but agreeing to separate these will reduce the amount of time in court or arbitration.

11. How are tentative agreements recorded? Generally, at the end of each mediation session, the mediator will draft a memorandum of understanding, which reflects the participants' tentative agreements. This document will be sent to each party and the attorneys for review, correction, and additions. Until the memorandum is signed, neither participant is bound by it. At the end of mediation, both parties will receive the completed memorandum reflecting their agreement. They will execute it and submit it to the court to become a court order.

12. Can mediation be used in a collaborative divorce? Yes. In a collaborative divorce, the participants hire attorneys who are committed to resolving issues through informal methods, such as the voluntary exchange of documents, negotiation, and four-way conferences. The goal of a collaborative divorce is to settle the case without going to court. If negotiations fail, a mediator may facilitate further discussions among the parties and their attorneys.

13. What are the advantages and disadvantages of mediation? Mediation has many advantages. It is private, confidential, and less expensive and less time-consuming than litigation. Although it is not therapy, it allows participants to separate emotional from substantive issues and, ideally, to resolve both. This can be empowering. By focusing on the future rather than the past, participants can design their postdivorce relationship and reach a positive result that is appreciably better than a court could order because the participants make all decisions themselves.

There are, however, risks. For example, mediation is based on full and fair disclosure. This works in many cases but will not work if one participant withholds information or undervalues assets. A competent attorney can remedy such a situation by conducting thorough discovery and performing necessary due diligence.

Mediation may not be appropriate for the mentally or emotionally incapacitated or anyone unable to nego-

tiate due to substance abuse, a power imbalance, or domestic violence. Again, a good lawyer can represent such a client and attend mediation sessions to protect the client's rights.

Finally, mediation will not always result in settlement. When this happens, the parties may terminate mediation and select another form of dispute resolution.

14. Is mediation really worth trying? Yes. Mediation allows the parties to retain decision-making. If the process does not work, the participants may proceed to litigation or arbitration. When it is successful, mediation provides an eloquent way for participants to solve problems, focus on the best interests of their children, and design their future interaction. Ideally, each party will be heard, and together they will arrive at a settlement that meets their individual needs and the needs of their particular situation. Mediation allows the parties to step away from a difficult situation with grace and dignity.

Arbitration

1. What is arbitration? Arbitration is a process in which one or more neutral third parties, the arbitrator(s), are selected by the participants to hear testimony, take evidence, and issue a decision or award, which may or may not be binding, depending on the authority granted to the arbitrator in the arbitration agreement. The arbitrator may be asked to divide marital assets and debts and determine maintenance. In some jurisdictions, arbitrators decide child-related issues, including decision-making about children or legal custody, parenting time or visitation, and child support. The arbitrators may decide other issues at the participants' direction.

2. How is arbitration initiated? Although arbitration may be court-ordered, in most cases the parties agree to arbitrate a dispute or the option has been included in a separation agreement or a pre- or postnuptial agreement. In most jurisdictions, an agreement to arbitrate will be enforced unless grounds exist for revocation of the contract.

As a general rule, the parties, with the help of their attorneys, will identify the issues to be arbitrated. These might include all issues in dispute or only those left unresolved after mediation. The arbitration agreement should identify issues to be decided, grant decision-making authority to the arbitrator, and state whether the award will be binding. If issues are not carefully spelled out in the agreement, one party may later argue that the arbitrator exceeded his or her authority.

3. Who selects the arbitrator? The participants and/or their attorneys select the arbitrator. The choice will depend on the issues to be decided. For example, the conflict may require an expert in a particular area of the law or a mental-health professional adept at dealing with child-related issues. Some participants may prefer to use religious panels, such as the Bet Din or Christian Conciliation Services.

4. How is arbitration structured? The arbitration hearing is much like a court hearing, although less formal. Generally, each party or lawyer presents an opening statement. The petitioner (person initiating the arbitration) presents his or her case, and the respondent (the other party) conducts cross-examination. The respondent then presents his or her case, which also is subject to cross-examination. Then the participants or their lawyers make closing arguments.

5. Is arbitration confidential? No. Unlike mediation, arbitration is not confidential. However, the parties may provide for confidentiality in their agreement and may limit the form and content of the arbitrator's decision. Although the arbitration hearing may be closed to third parties, the proceeding often is recorded, and a transcript of the hearing may be submitted to the court. The arbitrator's decision will be submitted to the court and, if approved, will become a court order.

6. What is the attorney's role? The attorney assists in selecting the arbitrator and helps formulate issues to be presented in arbitration. He or she drafts the agreement to arbitrate. The attorney works with the client to gather facts, review applicable law, complete discovery, and submit documents to the arbitrator. During

REMEMBER

Mediation Can-Do's

- ☐ Emphasize self-determination.
- ☐ Produce voluntary agreements by the parties.
- ☐ *Contain* rather than inflame the conflict.
- ☐ Focus on the needs of children.
- ☐ Generally cost less than litigation.
- ☐ Foster a cooperative relationship between parents.
- ☐ Resolve disputes more quickly than litigation.
- ☐ Produce more "personalized" agreements.
- ☐ Generally result in parents having more contact with their children.
- ☐ Result in higher rates of parenting-plan and child-support compliance.

arbitration, the attorneys question and cross-examine the participants and present opening and closing arguments. The attorney also will prepare postarbitration motions to vacate or change the award or the arbitrator's decision.

7. How does the arbitrator communicate the decision? The arbitrator issues a written decision or award. Unless the participants have agreed otherwise, the award will be binding and will be submitted to become a court order. Either party may request or the court may order that the award be vacated, modified, or corrected if it fails to meet certain statutory criteria.

8. What are the advantages and disadvantages of arbitration? Arbitration has many advantages. It is private, easily scheduled, and not likely to be continued. The parties may select an arbitrator(s) who is well suited by training and experience to their particular case, and the process is efficient and more relaxed than a court hearing. Unless the parties agree that the award will be nonbinding, arbitration results in a final decision with limited rights of review.

On the downside, arbitration should be approached cautiously because your right to have a court review the decision is limited. In some cases, finality is less important than a right to appeal the decision. Likewise, unless prearbitration procedures are limited by the parties, preparing for arbitration can be as time consuming and expensive as preparing for trial. The right of discovery also may be limited, strict rules of evidence may not apply, and the weight of evidence may be different from that of a court hearing. Finally, the parties will have to pay the arbitrator, whereas they would not pay a judge in litigation.

9. Is arbitration worth trying? Arbitration offers great advantages if appropriately used. The parties must decide if the advantages of arbitration outweigh the disadvantages.

Conclusion

Although parties may not choose to be divorced, they may choose the method by which they obtain their divorce. Alternative methods of dispute resolution can save money and time, reduce stress, and create lasting solutions that benefit both parties and their children. ADR makes good sense. ■

Joan H. McWilliams is a lawyer-mediator in Denver, Colorado, and the author of *Creating Parenting Plans That Work* (Bradford 1998). Portions of this article were adapted from the chapters she wrote in the *Colorado Family Law and Practice* and are printed with the permission of West Group.

Glossary of ADR Terms

Arbitration: is a form of alternative dispute resolution in which the parties hire a neutral third party (or parties) to hear testimony, take evidence, and issue a decision or award.

Collaborative law: a form of alternative dispute resolution in which each party hires separate legal counsel who reject litigation as an option and are trained and committed to negotiating a settlement agreement.

Consulting counsel: is a lawyer hired by a party about to begin mediation. The lawyer's role is to answer questions, address concerns, and provide the party with a solid understanding of the legal foundations.

Mediation: is a form of alternative dispute resolution in which the parties hire a trained, neutral, and impartial mediator to help them negotiate a mediation agreement.

Mediation agreement: is an agreement reached by the parties that forms the basis of a settlement agreement and, when accepted by the court, becomes a court order.

Legal advice: may only be provided by a lawyer. It is the translation of information and the law into a recommended course of action.

Legal information: may be provided by anyone who can read the law and report what it says.

Prenuptial agreement: (also called antenuptial agreement)—is a written agreement signed by both parties before a marriage to provide for advance decision-making for future contingencies and events. These agreements are generally entered into to protect the property or inheritance rights of one party or to protect one party from the liability of the other party's debts.

Review counsel: is a lawyer hired by a mediation participant to advise the client about settlement options and review the final memorandum of understanding before the client signs it.

Settlement agreement: is an agreement that is reached by the parties to resolve financial and custody issues in dispute. ■

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Coparenting After Divorce: A Handbook for Clients

What's the Point of Mediation?

You Decide

BY

CHRISTINE A. COATES

Mediation is a powerful process that allows people to take control of decision-making. It has proven useful in many situations both before marriage and after, when a marriage or parenting relationship is dissolving, or when parents have become involved in the child-protection system.

Courts frequently order couples into mediation, but many others choose this nonadversarial, problem-solving approach on their own. Mediated agreements can form the basis of settlement agreements, and, when accepted by the court, become court orders. For public policy reasons, a court is not bound to accept mediated agreements on certain issues, such as parenting rights and responsibilities and child support. However, a skilled and knowledgeable mediator can guide couples' and parents' decision-making in many types of situations.

Parenting decisions

Decisions about children are among the most important ones that parents make. The adjustment of children to their parents' separation and divorce and their future psychological well-being are affected by the level of conflict between parents. Concerned parents will want to isolate children from adult anger and sadness and will attempt to cooperate in parenting decisions. Parents will always be parents, even when they no longer are married or living together. Although divorcing parents may not end up as best friends, it is possible to work together in a businesslike way for the best interests of their children.

Better communication

Mediation encourages parents to sit down together to discuss coparenting. Parents often learn new skills and ways of communicating, which reduce future conflict. Many parents find that the presence of a mediator helps them focus on the needs of their children, rather than on the other parent's shortcomings. The mediator also can suggest methods of communication, such as e-mail or a parenting notebook, when face-to-face or telephone contact becomes difficult.

Mediation is commonly used to create parenting plans in separation and divorce. Two major types of decisions must be made: (1) those involving children's general welfare and (2) when and where children will live.

Decision-making is referred to as "sole or joint legal custody" or, in states that have abolished custody language, "parental responsibility." In mediation, parents can decide how these decisions will be made and can talk in advance about major issues, such as where their children will live, about health care, religious training, education, extracurricular activities, etc.

Parents who share similar values and ideas about child-rearing may decide on joint decision-making or custody, or they may agree that one parent is more qualified or able to make some or all decisions. Mediation allows parents to preview their ability to make joint decisions, even when they have strong differences of opinion.

A mediator will encourage parents to discuss what information should be shared and how best to do it: by telephone, in person, e-mail, fax, or a parenting notebook. The mediator assists parents in talking about the children's needs and can refer them to child-development experts or books if more help is needed. A mediator also can suggest various options that have worked for other families and will raise red flags on issues or decisions that are likely to cause future conflict.

It is important for parents to include in their parenting plan a means of resolving disputes. Often parents who have successfully mediated an agreement will agree to mediate any future impasse. Judges are the first to remind parents that thoughtful, well-reasoned decisions about their children are best made by parents, rather than judges.

Among the most important decisions are where children will live (their residence) and the amount of time to be spent at each parent's home (variously called "visitation," "parenting time," or "access," depending on state law). Mediators do not assess or evaluate parents' situations or make recommendations regarding living arrangements, but they will help parents share their ideas, concerns, and needs.

No one residential schedule works for all children. In mediation, parents are able to create a schedule that works for their children in both of their homes. Each child's developmental and other needs can be considered in a collaborative atmosphere.

Parents also need to discuss how to handle holidays, vacations, birthdays, days off from school, sick days, etc.

Even if parents anticipate no difficulty in working out these arrangements, a specific plan serves as a fall-back guide if communication later breaks down. Parents also must decide how to transport children for parenting time. The mediator will lead a discussion about how much flexibility can be allowed in the schedule and what to do when one parent is unable to accommodate the schedule.

In mediation, parents often create a parenting-time calendar for several months or a year. Both parents will have the same calendar and can make special arrangements in advance. Transition times are designed to work with children's activities, their bedtimes and mealtimes, and with parents' work schedules.

Parents need to discuss how to handle holidays, vacations, birthdays, and days off from school

Parents should discuss what might happen in the future if one parent wants to relocate with the children. Having a mediator guide these discussions will help parents anticipate areas of disagreement and avoid future conflict. Individualized parenting plans provide a roadmap, constructed before the divorce, for the years ahead.

Temporary arrangements

Mediation can be helpful in determining separation arrangements and temporary residential and parenting plans for children. It is best to enter into mediation about children early in the separation or divorce before litigation makes collaboration difficult. Often parents will try different arrangements during the divorce to find which one works best for the family.

Revising parenting plans

Because children's needs evolve as they grow and their parents' schedules and circumstances change, many parents meet after the divorce to revise their parenting plans. When parents are unable to do this on their own, they often mediate the changes, sometimes with the same mediator who worked on the original plan. Using a neutral person helps parents focus on the goals of the session, rather than on what hasn't worked well.

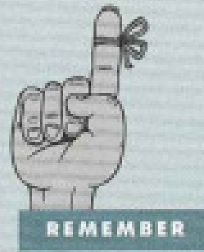
Parenting problems

Sometimes coparenting after divorce is a rocky road, strewn with anger, arguments, and frustration. Examples of difficulties include: a parent's being chronically late for exchanges; children's problems in moving between parents' homes, a new spouse's interference with a parenting plan, or conflicts in decision-making. Mediation can help reestablish communication between parents or establish new communication guidelines or clarify the original agreement. It can be a useful first step before pursuing other legal action.

Child support

All states have child support guidelines that include the parents' incomes and other information in calculating monthly child support. Some state guidelines are more straightforward and "user-friendly" than others. A mediator can help parents gather their financial information and apply it to guideline formulas. The mediator does not decide what income or other figures to use when the information is not straightforward. However, with the mediator's help, parents can use a computer program to see how child support changes when different figures are used.

Mediating changes in child support can be helpful when parents agree or when the law requires a periodic exchange of financial information to update child support. Parents should check with the court to determine if mediators or other court staff can help update child support orders.



REMEMBER

Your Keys to Success

- ☐ To be successful in mediation, a couple does not have to get along.
- ☐ Mediation is not a substitute for legal advice.
- ☐ Mediators do not make decisions, but facilitate a couple's own decision-making.
- ☐ Children adjust to divorce more healthily when their parents can successfully resolve conflicts.
- ☐ Mediation is useful for all divorce issues, including creating parenting plans and making financial decisions.
- ☐ Mediation can help engaged couples create a prenuptial agreement.
- ☐ Mediation in child-protection proceedings empowers parents and provides more comprehensive services for children.

— C.A.C.

Full disclosure of all relevant financial information and documentation is essential to a fair agreement

The division of marital property is often the most daunting task in a divorce because of the sheer volume of information to be gathered. Each spouse must provide the information necessary to make informed decisions. Full disclosure of all relevant financial information and documentation is essential to a fair agreement. A mediator can help both parties determine what information is needed, why it is needed, and when and where it can be obtained.

With the direction and support of their attorneys, the mediator can guide the couple through the almost overwhelming process of gathering and organizing information and documentation needed to determine the marital estate. Until both attorneys have complete information, or at least know that the spouses have different opinions about the value, source, or existence of an asset or debt, negotiations will not be helpful.

Once information is exchanged

(Continued on page 12)

Getting the Court's Nod

What happens once the agreement is mediated?

BY HON. HOWARD I. LIPSEY

Most parties feel that once mediation is concluded "successfully," the case is ended and their problems are over. That is not the case. The parties must proceed to a divorce hearing before a judge. The judge not only grants the divorce (also called dissolution of marriage) but reviews the mediated agreement.

The agreement may be titled "Mediated Agreement" or it may be a formal "Marital Settlement" or "Property Settlement Agreement."

Generally, the parties ask the court to approve the agreement. The judge will not simply rubber-stamp what is presented. He or she will scrutinize any provisions involving property rights, spousal support, custody, and child support.

The mediated agreement may not rise to the level of a property settlement or marital settlement agreement. The court may find the agreement patently unfair to one party and refuse to approve it or find provisions relating to children improper. For example, one party may attempt to waive child support by promising the other party a larger share of the property division.

Courts generally go through three steps in determining whether the request should be given contract-status approval.

1. The court must find that the parties have freely and voluntarily entered into the agreement.

2. The court must find the terms of the parties' mediated agreement to be fair and reasonable.

3. The court then approves the agreement (or not) and, with the exception of those provisions relating to child support and custody /visitation, incorporates—but does not merge—the agreement into the decision with the same force and effect as a contract.

Note, that the terms relating to children were excised from the agreement. The court will require the parties to set forth those provisions in full in the court's decision.

Although the agreement "incorporated by reference, but not merged," would stand as an independent contract—that is, enforced as any other contract—those provisions relating to children could only be modified in the manner that court decisions can be modified. The reason: The court always maintains jurisdiction over issues relating to children. The parties cannot contract away rights unique to the children.

The moral here is that although you have worked hard to mediate an agreement and presented it to the court, there is no guarantee that the court will approve it. The court may require you to return "to the drawing board" and negotiate or mediate further or get ready for trial. ■

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and each spouse has received legal advice, the mediator can assist spouses in negotiating the property division, debt payment, and tax issues.

The mediator discusses with each spouse his or her current and future financial and other needs. All settlement options will be evaluated later by the mediator and the participants, based on how well each option meets their needs. Mediation can save time and legal fees and often results in more individually crafted and creative agreements.

Spousal support, also called "maintenance," or "alimony," is another issue to be mediated. As in property divisions, information gathering is important. A financial advisor, such as a certified public accountant (CPA), may help in determining each participant's projected monthly expenses and income after divorce.

REMEMBER

The Mediator Must Know...

- ☐ The law.
- ☐ The impact of family conflicts on parents, children, and others — including a knowledge of child development, domestic abuse, and child abuse and neglect.
- ☐ How to conduct mediation, having adequate education and training.
- ☐ How to recognize the impact of culture and diversity on the family.

Prenuptial agreements

Before marriage, couples should discuss many things, including finances, whether they want to have children, and their values and dreams for the future. Because no one can predict the future, prenuptial agreements provide advance decision-making for future contingencies and events. Such agreements are useful when one person has a large amount of debt or significant property to be protected, wants to retain inherited assets or real estate, or wants to convey property to children of a prior marriage.

Most states allow future spouses to enter into prenuptial agreements regarding their finances, but the process of negotiating the agreement must be balanced. Most couples enter into marriage with aspirations of "till death do us part," and are uncomfortable talking about divorce. The mediator offers a setting and a process in which safety, respect, and normality can make the topic more palatable. Financial disclosures of assets and debts is critical. Both parties must gather information and organize it in a written document to be shared. The mediator will allow each person to question the other until both understand all the information.

The couple must be entering into the prenuptial agreement willingly and without duress or coercion and as much in advance of the wedding as possible. Prenuptial agreements have been invalidated when executed right before the wedding or when a spouse proved coercion in signing the agreement. By entering into mediation as soon as the prenuptial agreement is broached, the couple can fully negotiate an agreement that is fair to both.

Each party should have independent legal advice. In addition to financial issues, the couple can discuss children and future parenting issues, but these agreements may not be binding, because agreements regarding children are always reviewed at the time of the divorce to be sure that the earlier agreements are still in the best interests of children.

Prenuptial agreements have been invalidated when executed right before the wedding

The mediator will allow each party to discuss his or her needs and concerns and will help them negotiate agreements that are fair to both. The mediator might draft a memorandum based on their agreements, which the couple can take to their attorneys for review, advice, and final inclusion into a prenuptial agreement. If attorneys raise issues that were not discussed or suggest changes, mediation can continue with attorneys present until an agreement is finalized.

Child-protection mediation

Mediation is used frequently in child-protection matters, such as in child abuse and neglect situations and when a parent's rights may be terminated. Whether a child is being abused or neglected is never negotiable or mediated. A child's safety is never compromised. However, certain issues in child-protection cases, such as placement plans, visitation arrangements, treatment interventions, and the nature of parents' involvement in these arrangements are negotiable, at

REMEMBER

The Mediator Should...

- ☐ Explain the benefits of mediation.
- ☐ Assess the parties' capacities to mediate.
- ☐ Obtain the parties' informed consent.
- ☐ Inform the participants of their right to seek independent advice from lawyers and other professionals.
- ☐ Be neutral toward the parties and the negotiated outcome.
- ☐ Facilitate full and accurate discovery and disclosure of information.
- ☐ Promote candor and open discussions.
- ☐ Maintain confidentiality.
- ☐ Be alert to abuse, attempts to control, or intimidation.
- ☐ Ensure the physical safety of participants.
- ☐ Report child abuse or neglect or a participant's threats of suicide or violence to the appropriate authorities and the potential victim.

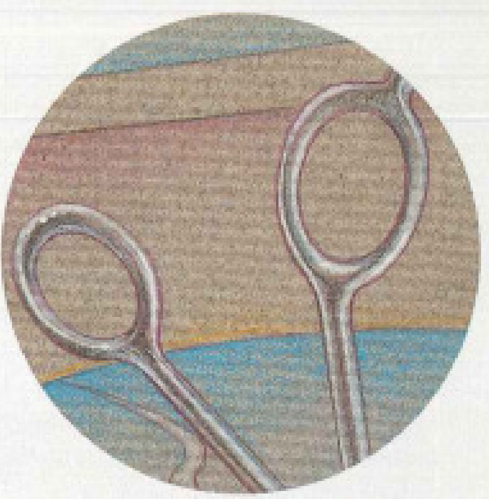
least to some extent.

The child-protection legal system can be confusing and frightening because a parent's right to parent can be at stake. Often decisions seem out of the parents' control as the lawyers and child-protection workers negotiate and then report proposed decisions to parents. Mediation brings parents into decision-making.

Generally, mediation is allowed only when it is court-based or supervised and has strong judicial or interdisciplinary support. In this type of mediation, the mediator receives special training in a program supported and sanctioned by the court. Mediation may be offered at different stages in the process, and parents may ask their attorneys and/or the child-protection personnel about options.

Mediation in child-protection cases is being offered in many places because it benefits parents and results in higher settlement rates, thus saving judges' time and court resources. Parents are empowered, that is, they have a voice in decisions that affect them and their children. Although the child-protection worker may still be seen as an adversary, each mediation participant is expected to work collaboratively and in good faith to reach agreements on the issues.

Research on child-protection mediation has shown that: (1) agreements are more detailed and more likely to include services to children and family members, (2) agreements are reached sooner than in nonmediated situations, (3) parents prefer mediation to other types of negotiations, and (4) parents are more likely to comply and follow through with their agreements because they helped create them.



Parents are more likely to comply and follow through with their agreements because they helped create them

Mediation can be useful to couples who are divorcing or separating, to couples planning to marry, and to parents who may have abused or neglected their children. Families in transition should consider this opportunity to reach agreements that are fair and meet their needs and those of their children. The neutral mediator brings creativity, structure, and compassion to difficult situations, resulting in agreements that generally work better for families than judicially-imposed decisions. ■

Christine A. Coates, an experienced family law attorney in Boulder, Colorado, now exclusively practices alternative dispute resolution.

To Mediate or Not to Mediate?

When should you begin the process and when should you end it?

BY SHEILA F. G. SCHWARTZ

Mediation works best when people want to plan for the future as well as to control the process and outcome of their separation or divorce. To mediate successfully, clients need to absorb information, understand choices, and make decisions. They must respect the mediation process and be willing to do the work involved.

Couples mediate best when they have the intellectual and emotional stability to articulate their interests and needs and to listen to the other person's interests and needs. They must be thoughtful, emotionally stable people who are committed to the difficult work of negotiation and compromise and they must understand the financial, emotional, and parenting issues relevant to their situation.

Mediation clients must gather and share information and agree to set goals, negotiate, compromise, and abide by the results. Parties have the opportunity to present what they believe are workable and equitable proposals and the responsibility of thinking through issues and offering solutions that will benefit the whole family. This is difficult work.

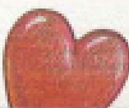
The best mediation agreements are creative and forward thinking. Although some issues, such as property division, are finalized at the time of an agreement, others, including parenting and support, are implemented over time. Couples who can look ahead and plan cooperatively for a range of future contingencies will be most satisfied with mediation in the long run.

A competent, respectful mediator is essential to the process. The mediator's job is to facilitate communication between the parties. Legal counsel, although not required, can be informative and balancing. When appropriate, mental-health support, financial advice, and tax expertise also can help assess the parties' current situation and help plan for the future.

A basic knowledge of one's rights and responsibilities as well as full disclosure of both the marital estate and parenting issues are essential to the process. Serious cognitive, language, and/or cultural problems can impede the process. Although interpreters and coaches may be helpful, each client must be able to communicate effectively, understand the information presented, keep up with the process, grasp the goals, and make decisions. Severe communication problems between partners will hinder or derail mediation.

Signs of trouble

Mediation is most problematic when one partner feels less capable or powerful than the other. This can happen, for example, when one party has little or no information about the family's finances. Mental or emotional illness or medication also can affect one's ability to perceive an equal footing in mediation. Psychological pressure, intimidation, fear, or lack of respect can be used to coerce instead of to negotiate. Mediation can help clarify facts, but it cannot compel a deliberately withholding client to participate fully.



Violence, abuse, intimidation, fear, or an inability to communicate can lead to intractable mediation and unworkable agreements

Domestic violence or drug or alcohol abuse can have a serious impact on mediation and the viability of an agreement. People who are in abusive relationships should acknowledge this to themselves, their attorneys, and their therapists, and deal with this issue in mediation.

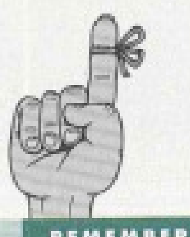
When not to mediate

Clients should choose not to mediate when one or more of the conditions outlined above has seriously affected their ability to negotiate, compromise, and function and when neither time, individual or couple's therapy, or more structure in the process will address the problem. Violence, abuse, intimidation, fear, or an inability to communicate can lead to intractable mediation and unworkable agreements. Parties should not mediate unless they feel informed, capable, supported, and safe. Mediation is not a place to coerce a partner or get around the law. It is also neither couple's counseling nor a place to assign or accept blame.

Respond to problems

Mediation is difficult and demanding. Parties who come with conflicting interests must work together in good faith to reach a compromise. The process may not always run smoothly. One may feel that the other party is not participating fully, honestly, or respectfully. These concerns should be addressed in mediation in a timely fashion and controlled manner. The parties should work with the mediator to restore an atmosphere of trust and to agree to appropriate behavior.

During mediation one person may feel that issues of concern are not being addressed or addressed in a



REMEMBER

What to Cover in a Divorce Agreement

Parenting

Custody

1. Legal: How will major decisions concerning the child be made?
   - ☐ Joint
   - ☐ Sole
2. Physical: How will day-to-day decisions concerning the child be made?
   - ☐ Joint
   - ☐ Sole
3. How will changes in custody be decided?

Visitation/access

1. With whom will the children be? Be specific and detailed:
   - ☐ Daily and weekly
   - ☐ Weekends
   - ☐ Holidays
   - ☐ Birthdays
   - ☐ School vacations and early-release time
   - ☐ Summer vacations
2. When and with what notice can a parent take the child:
   - ☐ Out of state
   - ☐ Out of the country
3. When and how must one parent notify the other of a change in plans?
4. How will visitation be modified?
   - ☐ For the short term
   - ☐ For the long term

Financial issues

Children

1. Child support:
   - ☐ How much?
   - ☐ When is it due?
   - ☐ How is the payment actually made?
   - ☐ For how long does the agreement last?
   - ☐ What expenses are covered by child support?
   - ☐ Who pays for the other expenses?
   - ☐ By whom are large emergency expenses paid?
2. Health-care coverage:
   - ☐ Medical and dental insurance
   - ☐ Uninsured medical expenses
   - ☐ Who pays for medical and dental insurance?
   - ☐ Who pays for uninsured medical and dental expenses?
3. Educational expenses:
   - ☐ Day care
   - ☐ Afterschool
   - ☐ Private school

timely manner. Again, such concerns should be aired. Separating couples often have different priorities and goals. The mediator should be aware of and respect these differences.

Some issues, such as where the children will celebrate an upcoming holiday, need immediate attention. The mediator can help establish reasonable timetables for negotiation and resolution. Interim agreements on specific, immediate issues are sometimes useful.

Sometimes participants agree, for the sake of peace and finality, to a provision they ultimately cannot accept or will not implement. Such agreements are an invitation to resentment and future conflict. One should agree only to what is practical and possible.

Occasionally, one participant may ask the other to make a side agreement, separate from the one presented to the court. Clients should never agree to keep any part of the divorce agreement secret from the mediator. A divorce agreement, whether mediated or negotiated, should include all relevant terms and recite the entire agreement.

Sometimes one person questions the mediator's impartiality. Clients should share such concerns and the reasons for them with the mediator. The participant should be prepared to offer potential adjustments to the process, listen carefully to the mediator's response, and work to resolve the matter. The mediator must be neutral, objective, and respectful of all opinions.

Terminating mediation

Appropriate agreements that work over time are the goal of mediation. Agreements must be clear, flexible, thoughtful, honest, and fair. They should not be made to please a spouse, an attorney, or the mediator. Mediation should be terminated or suspended when emotions and tensions run dangerously high and differences in goals are too great to be resolved. Mediation also should be suspended when clients feel coerced or threatened.

If mediation was judicially mandated, the mediator may be required to report termination of the process to the court. Whether voluntary or not, mediation should end with a statement drafted by the parties, but with the help of the mediator, clarifying what, if anything, has been agreed to, what issues remain unresolved, and how the process of separation or divorce will proceed. ■

Sheila F. G. Schwartz is a clinical social worker (MSW) and mediator in private practice in Needham, Massachusetts. She is a licensed attorney and an adjunct professor at Boston University School of Social Work.

- ☐ College and vocational school
- ☐ Extracurricular activities

4. Life insurance or will provision to ensure payment of child support
5. Provisions for adjustments in child-support payments

The parties

1. Alimony:
   - ☐ How much?
   - ☐ Timing
   - ☐ Duration
2. Health-care coverage:
   - ☐ Medical and dental insurance
   - ☐ Uninsured medical expenses
3. Provision for adjusting alimony

Property division

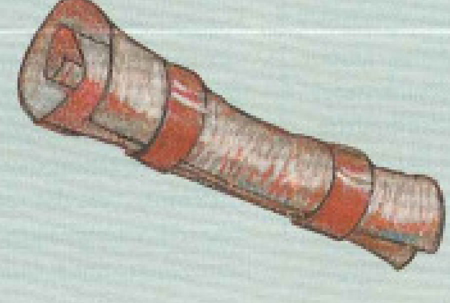
1. Real Estate:
   - ☐ Provisions for expenses (mortgage, insurance, taxes, repairs, capital gains) if owned jointly
   - ☐ Provisions for sale if property is to be sold
2. Cash, checking, and savings accounts
3. Stocks, bonds, mutual funds, other investments
4. Pensions, retirement funds, Social Security, etc.
5. Personal property (cars, furniture, jewelry, collectibles, household articles)
6. Payment of outstanding liabilities

Tax consequences

1. Child support
2. Alimony
3. Dependency exemption
4. Capital gains
5. Provision for existing tax liabilities and for tax refunds

General provisions

1. All identifying data
2. Dispute resolution and who will pay:
   - ☐ Mediation
   - ☐ Arbitration
   - ☐ Court
3. Attorney's fees



Your Lawyer as

You already have a mediator, but having your own lawyer may smooth and soothe the road ahead

BY BARBARA KAHN STARK

All mediators recommend (or should recommend) that you get legal advice as part of divorce mediation. You may ask why this is necessary as you are mediating your divorce, in part, to "avoid divorce lawyers."

Although mediation is all about cooperating, each spouse has individual concerns and legal rights and responsibilities. Mediators are neutral parties who do not give legal advice. Any settlement decisions you make should be based on "informed consent."

Working with your attorney protects you and achieves your mediation goals by:

- Helping you understand the law and identify legal issues;
- Furnishing a private place to discuss your concerns and weigh your options;
- Providing a person who is on call and "in your corner";
- Helping you anticipate how much information is necessary for settlement decisions;
- Giving practical feedback on your settlement ideas and creative suggestions on difficult unresolved issues; and
- Providing a review of the final settlement agreement before you sign it.

Despite what many people believe, mediation is not just for "friendly" divorces. Most divorcing couples experience extreme emotional distress. Yet, angry, hostile, emotional people can still share common goals: to avoid the adversarial process and insulate their children from the conflict. The more grounded you are with private legal information and advice, the less likely you will be to question your final settlement no matter how friendly or hostile you and your spouse are. Consider work with your attorney as an investment in some of the most important decisions you will make in your life.

Finding an attorney

Searching for the right lawyer may seem overwhelming at first. The Yellow Pages are filled with lawyer advertisements, and your friends and relatives will have lots of recommendations—usually from their "nightmare" divorces. Many attorneys "specialize" in divorce, whereas others are general practitioners who include divorce on their "menu" of services. Not all attorneys are "mediation friendly." By excluding those who do not view mediation as a viable approach to settling a divorce, you are narrowing your field of choice. Here are some good ways to further narrow your search.

- Ask your mediator for a list of attorneys who have worked well with his or her mediation clients. Some mediators will not provide this, but most will.
- Review the list of qualified lawyer-mediators you used in choosing your mediator.
- Ask your therapist or counselor for names of attorneys other patients have used in nonadversarial divorces.
- Ask friends and acquaintances who have mediated their divorces for recommendations.

Because of the cost and time required, set up interviews with no more than three lawyers. Do not expect them to provide information over the telephone or the Internet. Your questions require more time and face-to-face attention. Do not expect divorce attorneys to have "references." Most clients are reluctant to discuss their divorce experiences with a stranger. Expect to pay a fee for this first meeting, particularly with an experienced divorce lawyer. Part of the purpose of this meeting is for both of you to see whether you can work together.

Some attorneys will mail you a brochure or direct you to their website for valuable preliminary information. Ultimately, a face-to-face initial consultation is mandatory. In addition to meeting the person you will entrust with details of your private life, you will learn important information about mediation and divorce law and procedure. The consultation will add to your storehouse of knowledge, whether you retain the attorney or not.

How do you decide whether an attorney is right for you? Much of this work is done once you select the attorneys to interview. After the face-to-face meetings, you will either feel comfortable and look forward to working with the attorney or you won't.

Pay attention during the initial consultation:

- How does this lawyer view divorce? As a legal problem or a family crisis best served by nonadversarial intervention?
- Does the attorney use the initial consultation to explain alternative dispute resolution options (mediation, collaboration, unbundled con-

Mediation Coach

sultation, etc.) so that you can select the best approach for you and your family?

- If you have children, does the attorney focus on minimizing the negative impact of the divorce on them and maximizing conditions for positive coparenting?
- Does the attorney assume that mediation and other ADR approaches are only for "friendly" spouses in "friendly" divorces? Or does he or she recognize that mediation is a nonadversarial means for couples to work out their differences—even for "high conflict" couples?
- Does the attorney view the client in control of the process or is that responsibility the exclusive province of the attorney?
- Does the attorney's approach fit the stereotype of aggressive divorce lawyers who aggravate an already bad situation, or does he or she want to help your family in a positive way?

When should I work with my attorney

Imagine that you are the coach of a baseball team. But, instead of being in the ballpark, watching the action and working with the players, you are sitting in the parking lot on the team bus. Players run out to the bus, describe and discuss the action, get your coaching tips, and then run back to the field to tell the players what the coach said and try to act accordingly. Not only would this be incredibly inefficient, but you would have to rely on what the player told you (rather than your own observation) and trust that the player understood and could execute your recommendations. Not the best way of working with members of your team!

Your attorney may feel this way as she or he helps you mediate your divorce. Attorneys for each spouse generally are not present during mediation sessions. They rely on clients to explain what developed during each session and hope that the client can implement their advice in upcoming sessions. Although this "floating lawyer" concept can be a problem, it is not insurmountable. Too often, mediators and spouses view attorneys as enemies of the process. But, the right lawyer can be integrated into the process to preserve the control you want and to increase the efficiency of the process.

The stages of mediation

Divorce mediation includes four basic stages:

- *Premediation:* Before mediation begins, meet with your attorney to get a basic financial, legal, and practical education about divorce. With this information, you may be able to discuss financial and custody issues with your spouse and reach partial agreements.
- *Information gathering:* Work with your mediator to share and understand all relevant information and supporting documentation. At this stage, explore the various legal, financial, and practical implications of the information.
- *Exploring options:* With the assistance of the mediator, discuss with your spouse various settlement alternatives, weighing the pros and cons of each. From this discussion, you will almost always settle your parenting and financial issues.
- *Implementation:* The mediator or one of the attorneys drafts the final settlement contract. Other documents to "close" your joint accounts and make the transition to separate finances will be prepared (such as orders dividing pensions; life insurance beneficiary designations; title transfers, etc.). This stage culminates in the final divorce hearing in court.

An attorney who works with a mediating spouse commonly is called "review counsel." This title reflects that in many situations, attorneys are not hired until implementation to review the final agreement. However, delaying the lawyer's involvement until so late in the process can result in significant problems. By then, spouses are so financially and emotionally invested in the agreement that they

may not listen to their attorneys' objections, sometimes resulting in the collapse of the entire agreement.

The attorney's role should be broader than simply reviewing the agreement. Early involvement will prevent a last-minute crisis over an unraveling settlement agreement. For this reason, "consulting counsel" is a better label for the attorney, reflecting input at all stages of the mediation, and the earlier the better.

Before mediation

Just like medical checkups, working with an attorney before mediation may prevent difficulties during the process. Your decisions must be based on informed consent, which requires information and education. Consulting counsel is your best teacher, answering questions, addressing concerns, and providing a solid foundation before you begin.

Before you start mediation, your attorney will explain the difference between legal "information" (that you get from the mediator) and legal "advice" (that you receive from your attorney). By explaining the difference and applying the law to your case, your attorney lays out the scope of your legal position. For example, the mediator will probably discuss your state's child support guidelines. Most mediators will use your financial information to calculate child support based on these guidelines. However, all states allow "deviation" from the guideline amount in certain limited circumstances, which results in an increase or decrease in child support. The mediator can tell you what the law is (just as you can read the law for yourself), but only your attorney can interpret that law and give you a legal opinion as to what you should do. This translation of information and the law into a recommended course of action is legal advice, the business of your attorney.

Negotiations during mediation are done "in the shadow of the law." This means that the potential legal outcome is only one factor in how you settle. However, legal considerations are important, and your attorney is the best person to define the legal perimeters of your case.

Gathering information

Consulting counsel can help you gather and analyze information and documentation. In some marriages, spouses share financial information, whereas in others only one spouse manages the money.

If you are the less financially knowledgeable spouse, your consulting counsel will tell you what you need to know and make sure you understand information when you get it. Financial documents can be complex. Your attorney may even recommend hiring a financial expert, such as a certified public accountant, financial planner, or business valuator.

If you are the more knowledgeable spouse, consulting counsel can help you maximize the efficiency of information gathering. You may wonder why the mediator and your spouse are asking for so much information. Your attorney can help you sort it all out and comply with the requirement for full and complete disclosure. If you don't provide the information informally in mediation, formal discovery in litigation will require the same amount of or more information, take longer, and cost a lot more. Likewise, consulting counsel will need the same information to evaluate the details of the marital estate and your settlement options.

If you have managed the marital money, you probably have a thorough understanding of your family's finances. Be proactive. Rather than waiting for your spouse and/or the mediator to ask for information, put together a complete picture of family finances. An easy-to-follow notebook of financial summaries with comprehensive backup material demonstrates a commitment to full and complete informal disclosure and will jump-start the process.

Making the deal

Involving your attorney can be critical as you consider options and make settlement decisions. Ask your attorney about the strengths and weaknesses of your case and the range of reasonable settlement options. Your attorney can help you put together a comprehensive settlement proposal or analyze your spouse's proposals.

Critics of divorce mediation believe that the less empowered spouse is at a disadvantage without a lawyer and/or the protections of the adversarial system. Although mediation is not right for everyone, power imbalance can be an issue in any divorce. The adversarial process offers the protections of formal discovery, court enforcement, and legal advocacy. But the adversarial process also can involve personal intimidation, fear of the court system, a lack of control over the process, unpredictability of the outcome, and a significant drain on the family's finances and emotions. Most adversarial cases settle, but too often those settlements are on the courthouse steps the day of the trial—a terrible position for an "unempowered" spouse.

The answer to a serious power imbalance is not necessarily to reject mediation. A competent divorce mediator specially trained to work with power-imbalance issues can be the best option for a less empowered spouse. The mediator may slow the process to give that person time to digest information and negotiate from an improved position. The success of this strategy hinges on the support and advice of consulting counsel. A solid divorce mediation process allows for reflection and supportive decision-making, maximized informed consent, interspousal communication, and control over the process.

When attorneys negotiate divorce settlements in adversarial cases, they get to know their own client firsthand and have limited understanding of the other spouse. To reach a

win/win settlement requires a more complete understanding of both spouses. By this stage, the mediator knows both spouses, their concerns, negotiation styles, etc. Through telephone conferences and/or attorney participation in the mediation, the mediator can work with counsel to better understand both spouses, the progress of the mediation, and the appropriate level of attorney involvement.

Mediation sessions are confidential, based on the parties' contract and/or state law. However, spouses can waive confidentiality to permit attorney involvement in support of the mediation.

In most divorce mediation cases, the parties reach an agreement while exploring their options. Occasionally they reach an impasse. Sometimes only a few issues remain unresolved, but these may be important ones. For instance, many couples settle the parenting plan, child support, and property division but get stuck on alimony (the amount, duration and/or modification).

Reaching an impasse rarely means that spouses call it quits and go to trial. Mediators use a variety of techniques to move on. Most involve integrating consulting counsel into the process.

- If you don't have consulting counsel at this point, you need to hire one. Straight talk from an attorney frequently will provide enough legal information, advice, and brainstorming to help you settle.
- The mediator may convene a session that includes consulting counsel. If necessary, he or she can meet with both attorneys to discuss the impasse.
- The mediator also may use "shuttle diplomacy," which involves the mediator's moving back and forth between meetings with each spouse and consulting counsel.
- The mediator may recommend an experienced divorce attorney to serve as co-mediator or expert consultant. This attorney can evaluate the unresolved issues and make settlement recommendations. Integrating consulting counsel usually makes this approach more efficient.
- If all else fails, in many states mediators can suggest that a private arbitrator (usually an experienced divorce attorney) be used. The arbitrator can decide issues causing the impasse. Once the impasse is broken, mediation can continue as before. Consulting counsel's involvement in defining the issues and presenting the information to the arbitrator will increase the efficiency of this approach.

Occasionally, an impasse cannot be overcome, and mediation comes to an end. If this happens, keep in mind that a divorce settlement is like a mosaic of lots of small agreements that build to a comprehensive settlement of all issues. Most impasses come on the heels of substantial agreement on a number of issues. Although all issues are interrelated, it is a waste of mediation resources for your trial attorneys to start over from the beginning. Even when you are headed for trial on unsettled issues, you may be able to arrive at a negotiated settlement. If you can't settle a few remaining issues, a "limited" trial will allow a judge to accept the agreements you do have and decide the remaining issues.

Pulling it all together

Working with your attorney early in mediation may preempt a "floating lawyer" problem in the final stage. Your attorney already will have been involved in (and supportive of) settlement terms. Thus, in reviewing the written agreement, he or she will be concentrating on the agreement's correct legal form.

Most lawyer-mediators prepare the draft of the final agreement. The mediator and the spouses usually meet to go over the draft, make corrections, and discuss any remaining issues. Once the mediator incorporates these corrections and/or additions into a revised draft, the agreement is ready for consulting counsel to review. The attorneys propose revisions until everyone approves the final form for submission to the court at the final hearing. If the mediator is not a lawyer or is a lawyer who does not draft final agreements, a consulting attorney will draft the legal agreement, based on settlement terms outlined by the mediator.

Consulting counsel and the court process

The role of consulting counsel in the court process will depend on local practice. Check with your attorney and mediator. In general, consulting counsel may serve as a buffer to the court system and may file the legal divorce case with the court, if the mediator has not included that service. Some consulting counsel officially appear in the court file as the attorney of record for the client. In other cases, clients represent themselves in court (pro se). In either instance, attorneys do not engage in court action (temporary motions, formal discovery, etc.) during mediation.

After mediation is over and the agreement has been finalized, a final divorce hearing takes place in court. Decide whether your attorney will go to court with you. Remember, the benefits probably outweigh the costs. Your attorney can:

- Help prepare and present the final paperwork for court.
- Guide you through the process by locating the right room in the courthouse and having your case called according to protocol.
- Perform the "ceremony" as followed in your local court.
- Answer questions the judge has about your case and your agreement.
- Deal with problems that arise, particularly in rare cases when the judge has a problem with the agreement. ■

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Does Your Mediator Measure Up?

Standards of Practice for Family and Divorce Mediation

BY ANN MILNE AND ANDREW SCHEPARD

The rapid growth of family and divorce mediation has triggered a demand for quality control, both to protect the consumer and to protect the credibility of an evolving profession. This demand underscores mediation's importance as well as the serious damage to participants from unprofessional practice. Creating quality control standards inevitably means defining what constitutes good practice.

In most states, mediators are largely self-regulated. However, a variety of means have been developed to ensure that mediation services are provided in a competent and professional manner. Some regulation has been undertaken by state governments, courts, and professional associations. In addition, the *Model Standards of Practice for Family and Divorce Mediation* have been adopted by the American Bar Association (ABA), the Association of Family and Conciliation Courts (AFCC), and other state and local family and divorce mediation groups.

Regulating mediators

Mediators may be licensed, certified, accredited, registered, and/or designated as subscribing to formal standards of practice or a code of ethics.

- *Licensure.* At present, few states license mediators to practice. Those that do, license a mediator upon completion of a training program and an examination. The license is revoked for unprofessional conduct. A number of states and jurisdictions require mediators to have a certain level of training or a particular professional background.
- *Certification.* Typically, a mediator is certified by a government agency, a court, or an independent board. Certification indicates a specified level of training and work experience. Professional associations also certify members based on standards they create.
- *Accreditation.* Unless it is required by the state, not all mediators are accredited. An accredited mediator is one who has met a standard of performance and training.
- *Registration.* A registered mediator is one who is listed on a roster of individuals who provide a service. A register may establish minimal qualifications, but not every mediator who meets those qualifications will be listed. Some courts provide litigants with a list of mediators in the area. If yours does, ask what, if any, criteria are required for a mediator to be listed.
- *Subscription to a standard of practice.* An individual who subscribes to a certain standard of practice or ethical code voluntarily agrees to practice in a certain way. This is the least restrictive method of regulating a profession.

Mediation standards

The Model Standards of Practice for Family and Divorce Mediation (2000) are the product of extensive and thoughtful deliberations over two decades by the family mediation community with input from other groups. (For a history of these standards, see page 24). They consist of 13 general principles designed to guide family and divorce mediators and train future mediators. The *Model Standards* apply to mediators in both private practice and in court-based mediation programs, regardless of the mediator's profession of origin.

These standards are, however, aspirational rather than regulatory. They do not pretend to address every

question that could arise regarding a mediator's style or model of practice, such as a "facilitative" approach versus an "evaluative" approach, or stylistic issues, such as whether mediators draft a memorandum of understanding at the conclusion of mediation or summarize agreements in a summary letter. Rather, they are designed to help the public and professionals define what generally can be expected from a family mediator.

Choosing a mediator

The *Model Standards* begin by defining mediation and affirming its importance and the core values that should help guide consumers in their choice of a mediator:

> Family and divorce mediation is a process in which a mediator, an impartial third party, facilitates the resolution of family disputes by promoting the participants' voluntary agreement. The family mediator assists communication, encourages understanding, and focuses the participants on their individual and common interests. The family mediator works with the participants to explore options, make decisions, and reach their own agreements.
>
> Family mediation is not a substitute for family members' obtaining independent legal advice or mental-health therapy. Nor is it appropriate for all families. However, experience has

The Birth of Model Standards

The family and divorce mediation profession has a long history of developing standards of practice. *Model Standards of Practice for Family and Divorce Mediation* were first promulgated in 1984 when 30 organizations, convened by the Association of Family and Conciliation Courts (AFCC), developed a consensus document for state and national mediation organizations. The American Bar Association's Family Law Section expanded on the 1984 *Model Standards* and produced *Standards of Practice for Lawyer Mediators in Family Law Disputes.*

The 1984 *ABA Standards* were developed for lawyers who wished to be mediators, a role some thought at that time inconsistent with standards of professional responsibility for lawyers. The 1984 *ABA Standards* helped define how lawyers could serve as family mediators and adhere to ethical guidelines of the legal profession. The Academy of Family Mediators promulgated its own standards based on the 1984 *Model Standards.*

Other organizations, such as The American Arbitration Association, American Bar Association, and the Society of Professionals in Dispute Resolution (SPIDR), formed a joint task force and developed *Model Standards of Conduct for Mediators* in 1995.

In 1996 the ABA Family Law Section concluded that interest in and knowledge about family mediation had expanded dramatically since the 1984 *ABA Standards*, and a fresh look was required. The earlier iterations of the *Model Standards* did not address issues of domestic violence, child abuse, and the best interests of children. The AFCC, together with the ABA Family Law Section and the National Council of Dispute Resolution Organizations (an umbrella organization that included the Academy of Family Mediators, the ABA Section of Dispute Resolution, the AFCC, the Conflict Resolution Education Network, the National Association for Community Mediation, the National Conference on Peacemaking and Conflict Resolution, and the Society of Professionals in Dispute Resolution) served as the convener of three national symposiums to update and redraft the 1984 *Model Standards.*

A final version of the revised standards was completed in August 2000. To date, they have been adopted by the ABA upon the recommendation of both its Section of Family Law and its Section on Dispute Resolution, the AFCC, the Connecticut Council for Divorce Mediation, Family and Divorce Mediation Council of Greater New York, the Mediation Association of Northwest Ohio, the Michigan Council for Family and Divorce Mediation, and the Wisconsin Association of Mediators.

The revised *Model Standards* were the result of exhaustive deliberation by the family mediation community with wide input from a variety of voices, including experts in the field of domestic violence. The revised *Model Standards* provide a consensus statement about good mediation practice to which practitioners can subscribe and a framework for defining and refining family and divorce mediation.

—A. M. & A. S.

established that family mediation is a valuable option for many families because it can:

- increase the self-determination of participants and their ability to communicate;
- promote the best interests of children; and
- reduce the economic and emotional costs associated with the resolution of family disputes.

Participants decide

Self-determination is the fundamental principle of family mediation. Voluntary settlements reduce the emotional and economic costs of resolving family disputes. Divorcing couples often feel that once litigation starts, it quickly caroms out of control. Decisions are made for them—by lawyers, judges, and custody evaluators. They feel little control or no "voice" in the outcome and often describe themselves as bystanders in their own divorce. Mediation limits intrusion into the family through court orders, promotes family autonomy, and allows participants to craft agreements that reflect their own family needs and values.

Children's best interests

Divorce and separation can be a chaotic time for families. While the marriage or partner relationship is ending, parental responsibilities continue, often for years. Parents will need to communicate about the children and their activities, schedules, school work, recreational activities, health care, and much more. Mediation provides parents with the opportunity to forge a new relationship based on the continuing parental relationship rather than on spousal ties. Mediation can reinforce what parents continue to have in common—their children—and send a potent message to children that they still have two parents who are working together on their behalf. During a time of conflict and strife, mediation can be a safe harbor for parents who want to get beyond their differences for their children's sake.

For many parents, marital conflicts seem all consuming. There is little debate, however, that prolonged conflict over issues relating to divorce or separation can seriously damage children emotionally, economically, socially, and educationally. Through mediation, parents can begin to see that they have common interests, want similar things for their children, and can collaborate about parental matters.

Mediation is generally in the best interests of children because it emphasizes self-determination, voluntary agreements, conflict containment, and a shift in focus from parents' self-interest to children's interests. Parents are able to think "outside the box" and develop parenting plans that are unique and reflect their family traditions and idiosyncracies. Mediators can help parents gain access to community resources and use child development information in their decision-making. Parenting plans can be revised as a child's needs change and as parental circumstances evolve over time. Unlike court orders, which tend to be cast in concrete, mediated agreements can be flexible, recognizing that family circumstances change over time.

Reducing costs

When compared with the adversarial process, mediation generally results in greater consumer satisfaction, less expense, and a more cooperative relationship between the parents. Studies show that parents in mediation resolve disputes more quickly than do parents in litigation. Mediated agreements tend to be more specific and detailed than stipulations negotiated by attorneys alone, and mediated agreements often result

in higher levels of contact with children and higher rates of compliance with parenting plans and child support.

Many parents recognize that they are angry and hostile. They also acknowledge that the legal process often reinforces those feelings. Even parents who fail to reach a mediated agreement are more likely to settle prior to trial than are parents who litigate.

Entering mediation

The *Model Standards* rely on the principle of "informed consent." This means that participants must be educated about mediation as an option and that they should make an informed choice before forgoing the benefits and costs of litigation.

The *Model Standards* require participants to be fully informed about the nature of mediation and consent to participate in it. They require the mediator to "facilitate the participants' understanding of what mediation is and assess their capacity to mediate before the participants reach an agreement to mediate." The mediator also must conduct an introductory orientation, which includes a detailed description of what mediation is and how it differs from other dispute resolution processes, and informs the participants that they are entitled to seek independent advice

from lawyers and other professionals during mediation.

Qualifications

The *Model Standards* are based on the understanding that mediation is a dispute resolution process and not mental health therapy, counseling, or legal services. The standards define a mediator's qualifications in functional terms, starting with the premise that family disputes have legal, mental health, dispute resolution, and cultural dimensions and that a mediator must be familiar with all of them.

The *Model Standards* identify four basic qualities a mediator should have: (1) knowledge of family law; (2) knowledge of and training in the impact of family conflict on parents, children, and others, including knowledge of child development, domestic abuse, and child abuse and neglect; (3) mediation education and training; and; (4) the ability to recognize the impact of culture and diversity on families. Consumers should ask potential mediators to discuss any training or experience that prepares them to meet these challenges.

Fairness

Mediators promote a fair and balanced negotiation process. The *Model Standards* set forth procedures that make it less likely that an unscrupulous participant will use mediation to take advantage of the other participant. For example, the rules require the mediator to be alert before mediation begins and throughout the process to the participants' capacity and willingness to mediate.

The mediator must facilitate full and accurate discovery and disclosure of information so that the participants can make informed decisions. This is designed to ensure informed decision-making and may include encouraging participants to consult with appropriate experts.

The *Model Standards* require the mediator to consider suspending or terminating mediation "if the participants are about to enter into an agreement that the mediator reasonably believes to be unconscionable." He or she must inform participants of their right to independent legal counsel and to have their counsel participate in mediation. Consumers should be wary of engaging a mediator who discourages them from retaining consulting counsel.

Neutrality

The *Model Standards* require the mediator to be neutral toward the parties and the mediated outcome; hence the mediator has no real or potential conflict of interest. For example, a mediator should not mediate a dispute involving a business partner or family member for fear of being perceived as favoring one party over the other. Likewise, a mediator should not provide mediation to anyone for which he or she has provided other professional services, such as marriage or individual counseling or legal services.

Although an experienced mediator may intellectually separate prior professional services from mediation, the parties may not, and their perceptions are as important as reality. A mediator's prior relationship with one or both parties may haunt mediation if either party perceives that the mediator is not acting impartially. For example, one party may suspect that a lawyer who has drafted a will for the parties has financial information that may prejudice a mediated property division. Another party may perceive that a mediator who once provided marriage counseling to the parties may be biased in favor of the other spouse.

Neutrality also requires that the mediator not lead the parties toward a particular outcome, such as selling the house or joint custody. The participants are responsible for the outcome, not the mediator. Despite these cautions, a mediator must ensure fundamental fairness and a careful and reasoned consideration of options. A mediator should not, for example, sit idly by while one party attempts to intimidate the other into a settlement or passively facilitate an agreement that is unlikely to be upheld over time. In such a circumstance, a mediator may advise the parties to seek legal counsel and terminate the process.

Confidentiality is a central principle of the *Model Standards* and the *Uniform Mediation Act* (UMA), endorsed by the National Commission on Uniform State Laws and the American Bar Association. Mediators shall not testify in court for or against a party and shall not disclose the parties' mediation discussions. The only exception is to protect the safety of children and participants. A mediator is required to report incidents of child abuse, neglect, a credible threat of imminent danger to a party, or a threat of suicide.

Communications between participants and the mediator must be confidential for the same reason that communications between a patient and a doctor or an attorney and a client are confidential—to promote candor and open discussion. Confidentiality promotes the exchange of information and the discussion of options without fear that something said will come back to haunt one in future litigation.

Confidentiality also ensures that the mediator will focus on dispute resolution rather than on future litigation testimony. A mediator who expects to be subpoenaed to testify will be forced to gather information to support his or her testimony rather than to facilitate a discussion of shared interests. Participants who know that a mediator may be called to testify or make recommendations to the court may try to manipulate the mediator. Confidentiality helps to ensure that mediation will not degenerate into an adversarial process.

In recognition of this need for con-

fidentiality, many states have enacted protective legislation. Before initiating mediation, participants should ask the mediator whether such provisions apply. If statutory protection or administrative rules do not exist, participants should ask the mediator what protections can be put in place in the agreement to mediate to protect the confidentiality of the process.

Children and third parties

The *Model Standards* do not definitively state whether children should participate in mediation. Instead, they rely on parental decisions. The *Model Standards* state that children should not participate in mediation except in extraordinary circumstances and with the consent of both parents and any court-appointed representative for the child. The mediator should inform parents of their full range of options (e.g., that children may participate personally and directly or indirectly through a letter or an advocate or representative) and the pluses and minuses of each option.

The *Model Standards* do not preclude the participation of others, such as new spouses, grandparents, other relatives, and live-in companions. The rules state clearly that 'nonvoting' individuals may be allowed to participate only by unanimous consent of the parties and the mediator, thus underscoring the consensual nature of mediation and preempting any grandstanding or power imbalance.

Domestic abuse and child abuse

The *Model Standards* provide concrete guidance in confronting domestic abuse and child abuse and neglect in mediation. Domestic abuse is defined to include "issues of control and intimidation." The standards explicitly state that some cases are not suitable for mediation because of safety, control, or intimidation issues.

Mediators are required to adopt a four-part approach to domestic violence: training, screening, safety precautions, and reporting.

1. *Training.* Mediators must be trained to recognize and address domestic violence and child abuse and neglect before undertaking any mediation in which those elements are present.

2. *Screening.* Mediators must make reasonable efforts to screen for domestic abuse. A family mediator must be trained to recognize the symptoms of domestic abuse and respond with appropriate safety measures.

3. *Safety precautions.* Mediators must structure the process to ensure the physical safety of participants. If domestic violence exists, the *Model Standards* provide a list of interventions that mediators may employ to ensure victim safety, including:

- Establish appropriate security arrangements;
- Hold separate sessions;
- Allow a friend, representative, advocate, counselor, or attorney to attend mediation;
- Encourage participants to be represented throughout mediation by an attorney, counsel, or an advocate;
- Refer the participants to appropriate community resources; and
- Suspend or terminate the process, taking appropriate steps to protect the safety of the participants.

4. *Reporting.* The *Model Standards* modify guarantees of confidentiality in light of the vital public policy to protect participants and the process from abuse. Mediators are required to inform participants of any reporting requirements before mediation begins, such as the requirement to report child abuse and neglect. The mediator also must report a participant's threat of suicide or of violence to the targeted person and appropriate authorities if the mediator believes a threat is likely to be acted on and disclosure is permitted by law. Finally, the mediator should consider suspending or terminating mediation if "the safety of a participant or the well-being of a child is threatened."

The future

The *Model Standards* are a commitment by the mediation profession and the organized bar to continuously improve the path of peacemaking for families and children. The court system and the organized bar recognize that participants in family disputes benefit from high-quality mediation. Indeed, all available research indicates that as lawyers become more familiar with family mediation, their support for it grows. For example, a recent survey of the Florida bar (a state with a long history of mandatory mediation in child-custody disputes) reveals that 91 percent of Family Law Section members described the positive impact of mediation on the family court. The development of *Model Standards* will help continue this positive trend by generating more public confidence in the process and the mediation profession. ■

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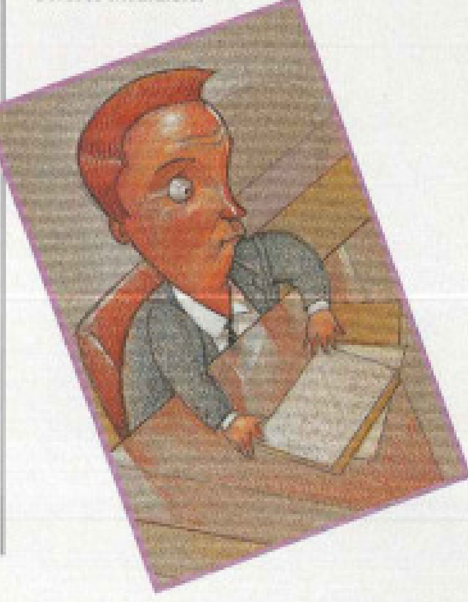
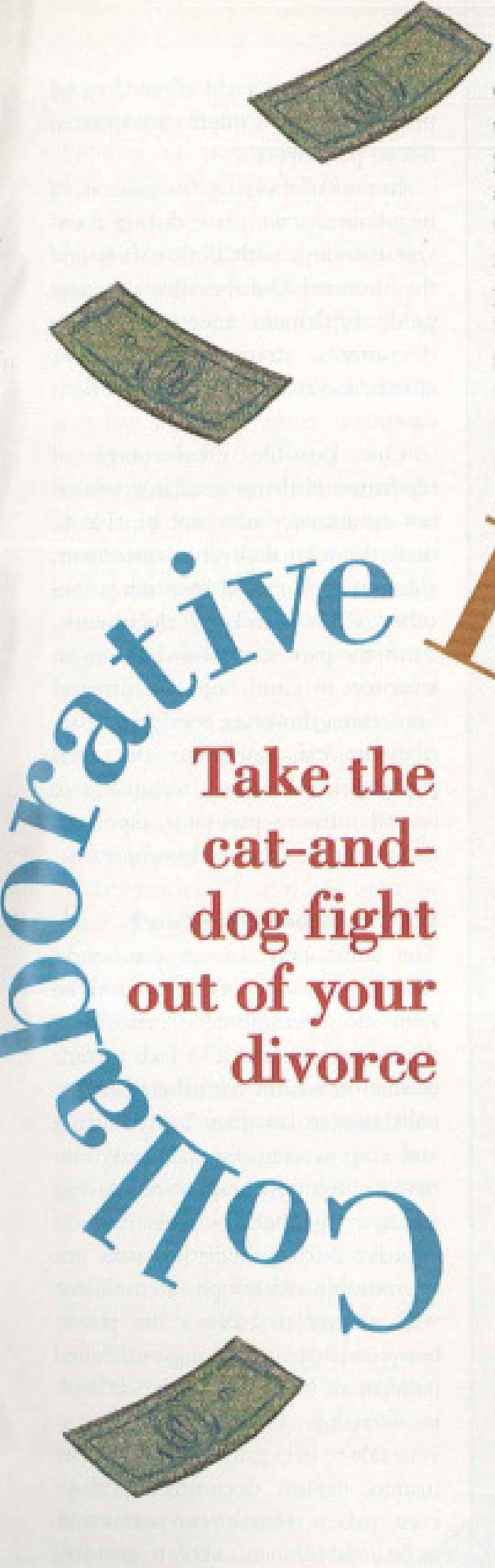
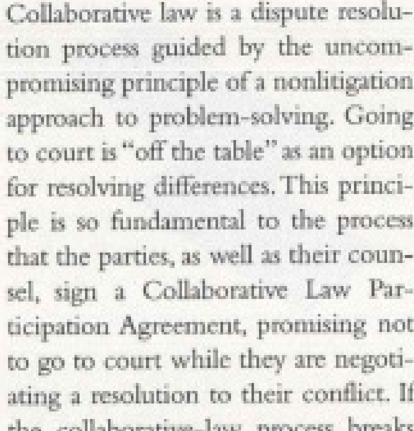






Collaborative Law

Take the cat-and-dog fight out of your divorce

BY RITA S. POLLAK

Collaborative law is a dispute resolution process guided by the uncompromising principle of a nonlitigation approach to problem-solving. Going to court is "off the table" as an option for resolving differences. This principle is so fundamental to the process that the parties, as well as their counsel, sign a Collaborative Law Participation Agreement, promising not to go to court while they are negotiating a resolution to their conflict. If the collaborative-law process breaks down because one party or his or her attorney feels compelled to litigate, the collaborative counsel who represents that party must withdraw. The Collaborative Law Participation Agreement states explicitly that collaborative counsel is hired for the sole purpose of negotiating a settlement and not for representing the client in court.

Once the threat of litigation is gone, a profound change takes place in participants and their lawyers. Suspicion, fear, mistrust, and other barriers to settlement are replaced by cooperation, information sharing, and creative problem-solving.

What is collaborative law?

Although collaborative law has been applied mostly to divorce cases, it is effective in other disputes involving parties who need to maintain ongoing relationships, such as in a family-owned business. Each collaborative-law participant is accompanied to all settlement discussions by a trained, skilled lawyer who will evaluate the client's legal problem and assist in its resolution. The parties' lawyers work together to provide agendas for four-way settlement meetings; to set realistic deadlines for document exchanges; and to create a safe, open, and fair environment for resolving conflicts.

Whereas litigation often leads to acrimony and mistrust, not only between the parties but between their lawyers, collaborative law encourages mutual respect with an open, full exchange of settlement proposals. The process works because attorneys are trained to listen to their client's needs and interests, while at the same time demonstrating concern for the other party's needs and interests. Although each attorney represents his or her own client first and foremost, both attorneys are focused on resolving the problem to the benefit of both clients and to the benefit of their children.

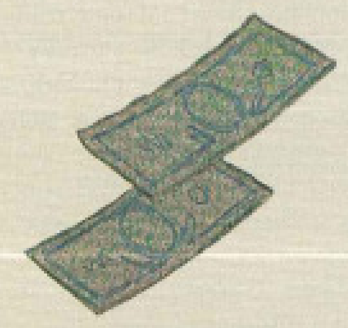
In traditional litigation, the parties prepare their cases to persuade the judge that only their view has merit. All actions are driven by that goal. In a collaborative case, facts and figures need not be manipulated because the parties will not present their case to a judge. The collaborative process is based on the parties' understanding of each other's point of view; this, however, does not mean they will agree on everything. One of the main reasons the process works so well is that understanding one another's needs and interests facilitates settlement, enhances trust, and reduces hostility.

How does collaborative law differ from mediation?

Collaborative law differs from mediation in several important ways. First, the collaborative client can rely on his or her lawyer every step of the way. In mediation, the parties have the option of being represented by counsel. Although most separating or divorcing partners chose to hire an attorney or coach to guide them through the mediation process, some decide to represent themselves, perhaps consulting with an attorney only on select issues or at the end of the mediation.

Unlike collaborative counsel, a mediator cannot represent either party or give legal advice. A mediator can provide only legal information. Some mediators permit attorneys to be present throughout the mediation;

Divorce Mediation Resources on the Web



BY LAURA W. MORGAN

http://www.divorce-without-war.com/
This site provides information on mediation and other more general topics, such as symptoms typical of a troubled marriage and the importance of getting professional help, understanding how the mediation process works, and how to locate a mediator.

http://www.divorceinfo.com/mediation.htm
This site explores the difference between mediation and arbitration, how to find a mediator, why mediation works, the different styles of mediation, how to prepare for mediation, and how much mediation will cost.

http://www.divorcehq.com/mediation.html
This site explains what mediation is and how to decide if it's right for you, what to expect from the process, what issues are best resolved this way, and what to look for in a mediator. The site includes a discussion of collaborative divorce, a directory of mediators, tips on mediation, and hiring an attorney.

http://www.divorcenet.com/mediate/mediation.html
This site archives articles on mediation, everything from how it works to selecting a mediator and frequently asked questions.

http://www.divorcelinks.com/mediationlinks.html
This site provides federal and state divorce links (to all 50 states), includes lawyers who provide divorce-related legal advice, mediators, divorce-related nonprofit organizations and associations, state and federal resources, and a divorce-related bookshelf.

http://www.mediate.com/
This site includes articles on mediation, including "The 10 Biggest Mistakes Lawyers Make in Mediation," as well as tools for the parties, standards of practice for mediators, mediator referrals, and a fill-in-the-blank consumer survey. Included are articles in Spanish. ■

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many do not. Even if allowed to be present, attorneys often are requested not to participate.

In the collaborative law process, all negotiations take place during four-way meetings with both parties and their counsel. Collaborative attorneys guide settlement meetings, gather documents, strategize with their clients, and manage the flow of their cases.

One possible disadvantage of mediation is that a mediator who is not an attorney may not be able to draft the formal divorce agreement, along with financial statements and other court-mandated documents. Thus, the parties may need to hire an attorney to finish up the divorce. Sometimes, however, mediation participants can complete the final paperwork themselves, using one of several software programs, especially if the case is a reasonably simple one.

Why collaborative law?

The collaborative-law process works well for many types of clients. For those who are uncomfortable articulating their own interests in a face-to-face mediation session with their partner, collaborative law may be reassuring and empowering. For partners who have not felt fully empowered during the marriage, being self-assured and assertive during mediation may not be possible. Although a mediator will attempt to balance the power between participants, long-established patterns of behavior can be difficult to overcome. Having an attorney at your side to help gather financial information, explain documents, perhaps even make a referral to an accountant or financial planner, is likely to give you the confidence you need to participate fully in decision-making.

Likewise, the collaborative process might be the best option when one partner gives the appearance of having more influence, power, or information than the other

by virtue of being an attorney, accountant, financial planner, psychologist or psychiatrist, or other professional. Any relationship with a history of even subtle emotional or verbal abuse inhibits equal participation in mediation settlement discussions and makes the collaborative process preferable.

Another important consideration is what happens when mediation breaks down. Parties who have been represented by counsel during mediation may keep their attorneys and move on to litigation. Their counsel may prepare for trial with knowledge gained through mediation. By contrast, if the collaborative-law process breaks down, collaborative attorneys must withdraw, and the parties must retain new counsel. Documents gathered during the collaborative process cannot be used by successor counsel in any litigation unless by agreement of the parties. Documents must be "discovered" again according to the time constraints and procedural rules of the court.

If an issue remains unresolved during the collaborative process, the parties may hire a mediator to help them resolve it alone or with their attorneys. Likewise, the parties may hire an arbitrator to resolve a contested issue. Acting much like a judge, the arbitrator will listen to both sides and then decide, for example, how to divide assets and liabilities or how much time each parent will spend with the children. Ideally the arbitrator will be trained in collaborative techniques.

My attorney's role

Attorneys have an ethical obligation to represent their clients vigorously and completely. Although it may appear that your attorney is being sympathetic to your partner's point of view, remember that your attorney is modeling respectful and open listening. Affirming what your partner has said does not mean that your attorney agrees with your partner's position or that he or she is abandoning your position. Because all four of you are trying to solve the same problem, your partner or your partner's attorney might just have an idea worth considering.

Remember too that communications between you and your attorney are confidential, unless you instruct your attorney otherwise. Because the goal of collaborative law is frank, candid, and honest negotiations (all words found in the Participation Agreement), you and your attorney must carefully evaluate whether you can withhold information while still upholding collaborative-law principles. For example, disclosing a past affair to your lawyer but not your partner may not affect the fair outcome of your case. Thus, withholding it will not compromise the collaborative-law process.

Special training

If you choose collaborative law, you should hire an attorney trained in the process. Although most attorneys are adept at negotiating settlements, the techniques, protocols, and documents that make this process work are vital to its success. Sometimes, one partner chooses a trained collaborative attorney after the other party has already selected a litigation-oriented divorce lawyer. In such a case, the collaborative lawyer must decide whether to attempt to work with the untrained attorney.

What are the risks?

As with any process, collaborative law does, on rare occasion, break down. When that happens, the financial and emotional costs can be significant. The party who withdraws from the process must find new counsel. Discovery must begin again, and new experts must be engaged or new values determined. The emotional costs of starting over are a serious deterrent to opting out of the process.

If, despite the consequences, one attorney feels compelled to withdraw or one party fires his or her attorney but wants to hire new collaborative counsel, the other party may retain his or her collaborative attorney and continue the process. However, if the opting-out party initiates litigation, the other party must seek litigation counsel as well. If that happens, both collaborative attorneys, as part of the Participation Agreement, have pledged to facilitate a smooth transition.

The benefits

Collaborative law is the wave of the future. No other alternative process has caught on so quickly or been adopted with such enthusiasm. Mediation enthusiasts struggled for years to gain acceptance, while attorneys resisted the movement even more than consumers.

In collaborative law, attorneys need not "give up" their clients to the mediator. Instead, they form a partnership with their clients to reach a nonlitigated settlement. The adversarial process is designed to drive a wedge between whatever remains of the marital and parental relationship. The opportunity for mutual trust and respect is shattered by trial preparation, interim court appearances, and the trial itself. Sometimes one spouse is called to testify against the other, making the case by exposing a spouse's weaknesses, mistakes, misdeeds, and failures; all are fair game for public display. After such a wrenching experience, a healthy, respectful postdivorce partnership has little hope of succeeding.

At the moment, this movement is being driven by lawyers who want to offer an alternative to litigation. To find out whether collaborative law is available in your area, look in the *Yellow Pages* under "Attorneys" for mention of collaborative law or look on the Internet for an organization

or association, such as masscollaborativelawcouncil.org. There are organizations in California, Connecticut, Florida, Massachusetts, Minnesota, New Hampshire, Ohio, Wisconsin, Texas, and Canada, and many others are being formed. Consumers also can generate interest and excitement about collaborative law by demanding it from attorneys in their area.

Choosing a collaborative-law attorney is the same as choosing any other professional. Get referrals from friends, family members, colleagues, and acquaintances who have participated in the process. No matter who refers you, interview one or more attorneys to make sure that his or her style is compatible with yours. Websites generally list the attorney's credentials and years of experience, but remember: If collaborative law is new to your area, you may be your attorney's first collaborative case, and that's OK. Look for an attorney who inspires your confidence; has been trained in collaborative-law protocols; is a good listener; is going to be a good advocate for you; and is someone who understands your needs, interests, and goals.

On occasion, your partner or spouse may select a collaborative attorney before you find one; sometimes that attorney has had exceptionally good experiences with certain colleagues. You can choose to interview an attorney recommended by your partner's attorney, or not.

The collaborative-law process feels like a breath of fresh air. The goal of maintaining a respectful, ongoing postdivorce relationship, especially but not exclusively between parents, requires that everyone behave with restraint and respect. ■

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