

**MEDIATION MASTERY: MAXIMIZING EFFECTIVE MEDIATION  
TECHNIQUES**

A Presentation by  
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# An adversarial process is not helpful for most families

- Intense conflict arises when parents fight over the children
- A focus on right and wrong veers away from parents cooperating
- A win-lose perspective usually does not benefit the family as it attempts to restructure
- A litigation process promotes fault finding rather than understanding and cooperation.
- Many parents can reach agreements and co-parent with a little support and help
- There are a few parents whose conflict is entrenched, who require a court to intervene and who will consume their own financial resources in the process. These families often include parent(s) with personality disorders, substance abuse, domestic violence histories and the like.

# Divorce to the Death

- The core of separation and divorce is emotional
- Courts are better suited to evidentiary findings than emotional resolutions
- Parents seeking vindication from the court are often disappointed but do not know how to turn off the “fight”
- Our family law system is designed to deal with the “death match” including very costly litigation which consumes the family’s resources and often uses lawyers who take on the personalities of their clients.
- The court system is structured for the 10% of those who are engaged in intractable conflict. This influences outcomes for the majority of families who do not need this approach.



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# Types of Mediation

- Transformative Mediation- empowers the parties to resolve their issues
- Facilitative Mediation- mediator guides parties by giving them the tools to reach outcomes
- Evaluative Mediation- the mediator needs to learn as much as possible about the parties, their children and the impediments to settlement. Then the mediator uses his/her experience to lead and take control of the process to guide the parties to a fair resolution. The mediator must have an awareness of his/her express and implicit biases.

# Choosing the Right Mediator

- Developing Trust
- Using same mediators
- Problems caused by unskilled mediators
- Mediators giving legal advice vs. opinion?
- Documenting agreements vs. advising on bad agreement
- Mediator needs to analyze the agreement from perspective of the court

# Virtual vs. In-Person Mediation

- Virtual mediation may make it feasible for people to be together who might not otherwise be comfortable participating together in a mediation
- Time and cost savings by eliminating travel
- What about mediating in person? Pros/Cons?
- Mediating in the same space (virtually or in person)

# CFI and PRE Reports

May (and should) a CFI or PRE Report be provided to a mediator without an agreement from the other side?

This is something that they should request guidance from the court on.

Address it in the CFI/PRE Motion or proposed order when the CFI/PRE is appointed.

# Confidentiality

“Everything you tell me is confidential”

vs.

“Unless you tell me otherwise, I assume I can share everything with the other side.”

What is your obligation to disclose information? C.R.C.P. 16.2

What is gained by not disclosing relevant facts?

# Top tips for Mediation Prep

Choosing the right mediator.

Attorneys should submit a mediation statement.

Asset/Debt Spreadsheet!

Prepare with your client for mediation just as diligently as though you would prepare for trial.

Understand all the issues in the case before mediation.

Benefit of contacting the mediator prior to mediation.

The benefits of the mediator meeting with both attorneys during mediation.

Be thoughtful and deliberate about who attends mediation and clear with the other party and the mediator. Will it be useful or a hindrance?

# Delays in obtaining a hearing or “I have a hearing in Douglas County in March 2025!

From the beginning, counsel should emphasize settlement to his/her client

Be a problem solver for your clients: Access to Courts is difficult and there are greater hurdles in litigation

Judges will tell you that very few cases actually need to be tried. Most should settle.

Don't be a  
horse's...



Ask the mediator for an opinion—is  
your position unreasonable?

# Mediation Without Attorneys

What to do when your client wants to save \$\$ by attending mediation alone?

Effectively mediating with pro se opposing parties

Non-Contested Hearings

# Problems with Agreements

- File Asset/Debt Spreadsheet to demonstrate to the Court that the agreement is equitable
- What can you do to address:
  - Material Omissions?
  - Unfair Provisions?
  - Unenforceable Provisions?
  - Mistakes?
- Client mental capacity during mediation—what do you do if your client shows up drunk or high?

80113. The parties agree that the property will be the sole and separate property of Petitioner and she will be solely responsible for the outstanding mortgage balance on the property. Respondent will quit claim title to the property to Petitioner. Petitioner will continue to reside in the marital residence until the youngest child graduates from high school. During the time she resides there, she will be solely responsible for the maintenance and upkeep of the property and payment of the first and second mortgages. When the youngest child graduates from high school, the property will be put on the market and sold. At the time of the closing of the sale of the property, the proceeds from the sale will be divided equally between the parties.

**D. Retirement Plans:**

The parties will divide retirement plans, as accrued up until the filing of the divorce in October of 2011, 70/30. Seventy (70) percent of plan will be retained by owner of the plan and thirty (30) percent of the plan will go to the other party.

(b) LEGAL REVIEW

[REDACTED] attended mediation pro se. We agree that the signed agreement is subject to our respective attorneys' review to be completed within 10 business days of the signing of the document; that only those provisions that are legally inadvisable shall be renegotiated in mediation with the same mediator within 2 weeks; that such objections shall be in written form by the objecting party's attorney and sent to the other party with proof of delivery or proof of attempted delivery, and that objections to the signed agreement by one of the parties shall not bar enforcement of that agreement unless those objections are fully supported by the written and signed statement of their attorney.

[REDACTED]

Enforceability?

Confidentiality issues?

# Med/Arb: When is it appropriate?

- Med/Arb has the advantage of giving the parties the opportunity to resolve disputes with a judge entering orders
- If the mediation format does not work, the parties have the option of moving to an arbitration process which they design
- The process may be formal and conducted much as a court trial, or can be informal with relaxed rules of evidence
- The key is that they parties with counsel's help, get to design the process that they are most comfortable with
- The med/arb process must be designed to protect each party's due process rights
- Med/Arb allows the parties to get a resolution without having to use the formalities of a courtroom process

# Med-Arb: Mediator to Arbitrator Metamorphosis

Issues when the mediator is named as arbitrator?

What signals the shift from mediation to arbitration?

Due process obligations of mediator?

# Domestic Violence

- When is it appropriate to mediate?
- Protection Orders
- Choosing a mediator with experience in handling DV issues
- Advising client of applicable law related to decision-making

# ENA—The Process

- It involves the parties and counsel meeting with a team comprised of a mental health professional and an attorney
- Counsel for the parties act as coaches for their respective clients
- The team models listening as the parties meet in one room.
- Each is given an opportunity to speak. Accusations are not permitted, but concerns, such as alcohol abuse are addressed
- After listening to both parties, the team recesses to discuss what was heard and to formulate questions. The team may also be ready to make recommendations.
- ENA is acceptable and can replace mediation as a court ordered form of ADR

# Early Neutral Assessment

- ENA is a Way to Meet the Needs of Parents and Children
- ENA gives parents a non-threatening confidential place to communicate, listen and hear the other parent
- Parents need a process early in the court cycle before conflict is entrenched

# Early Neutral Assessment

- Attorneys need to help parents understand the impact of high conflict on their children
- ENA empowers parents to find ways to co-parent and adjust to changes brought by separation and divorce
- The professionals provide accurate, neutral and trustworthy information
- Parents need to receive realistic advice of what is in their children's best interests and what a likely result would be in Court

# Think creatively

- When you transition to a problem solving attorney, you get to nurture your creative self
- Challenge one another to think about what happens when the attorneys are done, the court process ends and the family must move forward
- Operate on the principle of doing no harm, rather than leaving no strategy untried
- Be willing to think outside of the box to help families resolve the issues surrounding the restructuring of relationships.

# Judicial Perspective—Partial Settlements

- JTMC
- Use your time wisely
- Get your orders faster

# THE END

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