

## Ethical Issues in Family Law Mediation

A Conversation with  
David Littman, Kevin Sidel  
and the Family Law Section

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## Two's Company

Can and should friends or family attend mediation? Can the mediator prevent third parties from attending? Does it matter if the parties are in the same room or separate rooms?

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**CFI and PRE Reports**

May (and should) a CFI or PRE Report be provided to a mediator?

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**Confidentiality**

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

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**Mediator’s Duty to Report**

A mediator is not a mandatory reporter under C.R.S. 19-3-304(2).  
A mental health professional acting as a mediator is a mandatory reporter under C.R.S. 19-3-304(2)(n).

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### Whose Mediation is it Anyway?

Differentiating between an offer made by an attorney and an offer made by a party.

Active participation by attorneys during mediation.

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

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Don't be a horse's...



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A Room of One's Own?

Mediating all together or in separate rooms? The pros and cons.

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Capacity Questions

In collaborative law situations  
In traditional mediation situations

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Unbundled Legal Services

The issues and pitfalls in the mediation context.

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A self-evident truth:

All Mediators are not Created Equal

The duty of a family law attorney when referring a client to mediation or selecting a mediator. Attorney-mediators vs. non-attorney mediators.

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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.

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**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.

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(b) LEGAL REVIEW

\_\_\_\_\_ 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. \_\_\_\_\_

Enforceability?

Confidentiality issues?

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### The Drafting Conundrum

Are there ethical concerns with a mediator creating a Separation Agreement or Parenting Plan rather than an MOU? Is the issue the same if the mediator is an attorney or a non-attorney?

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### Future Litigation Avoidance

The mediator's responsibility if:  
Material Omissions?  
Unfair Provisions?  
Unenforceable Provisions?

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**Dude, Where's my Attorney?**

If parties attend mediation without their counsel, should they sign an agreement?

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**The Catch-all Provision**

"Any dispute(s) concerning the language or agreements in this MOU shall be submitted to binding arbitration with [the mediator] to serve as arbitrator."

Have you solved a problem or created a new one?

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