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"Divorce Mediation Basics"

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By

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Jim is the ONLY name listed for Family Law Mediation in Hawaii in both ***The Best Lawyers in America*** and ***The Best Lawyers in Hawaii***[1]

Jim has over 20 years experience as a full-time mediator and arbitrator specializing in difficult and complex family matters.

Jim graduated first in his class from Stanford and Stanford Law School. He was Law Review President and later served as Law Clerk to the Chief Justice of the United States.

Jim is author of "Divorce Mediation Basics" (*The Practical Lawyer,* July 1997); "Guide to Creative Mediation" (*Dispute Resolution Journal,* Spring 1997); and numerous other articles on Family Law dispute resolution.

In its listing of "**The Leading Judges in America**," *Lawdragon Magazine* said:

"When Hawaii couples call it quits, he's the mediator of choice to resolve contentious disputes."

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[1] Honolulu Magazine July 2009

Divorce Mediation Basics

James K. Hoenig

When you need a better way to handle a case for a divorce client, mediation is more often proving to be just the right answer.

A POPULAR TEE SHIRT shows Sir Isaac Newton, sitting under a tree holding an apple. Under the depiction of Sir Isaac is a caption: "Obey Gravity. It's not just the law; it's a good idea." Much the same might be said about mediation in domestic law matters. It's not just a

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mandatory step in many jurisdictions—it's a very good idea for most domestic law cases. In this article, we will explore the what, when, and why of mediation in these cases.

WHY MEDIATE—THE PHILOSOPHICAL AND PRACTICAL REASONS • Divorce and domestic conflict are unpleasant enough by themselves without turning for their resolution to a process which heightens contentiousness and perpetuates problems. Traditional litigation pits spouse against spouse in a battle for children and property which is by its very nature divisive. In court, there appear to be winners and losers, but in reality, all parties (and their children, families, and business associates) may lose. In mediation, the process itself attempts to unite the parties in seeking solutions and in recognizing that the responsibility of children and property may require them to have years more of ongoing contact. Mediation gives them the tools and experience for future collaboration. It allows the spousal relationship to end in a way that permits and encourages the preservation and improvement of future working relationships. Attorneys who have learned to use this process effectively for their clients are coming to be recognized as a new upper tier of domestic relations problem-solvers, whose satisfied clients enthusiastically sing their praises and refer others.

Mandatory Mediation

In many states, mediation is rapidly becoming a required step in divorce proceedings. For example, effective January 1, 1994, Hawaii adopted Rule 2.1 of the Rules of Professional Conduct for attorneys which provides: "In a matter involving or expected to involve litigation, a lawyer should advise a client of alternative forms of dispute resolution which might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought." In a training program entitled *Is ADR Now The Law?* presented jointly by the ADR Section of the Hawaii State Bar Association and the Hawaii Institute for Continuing Legal Education, various speakers explained the evolution of similar rules in other states and highlighted a national trend toward making consideration of ADR mandatory. Copies of the program materials are available through the Hawaii Judiciary Center for ADR, 345 Queen Street, Suite 800, Honolulu, Hawaii 96813, (808) 522-6464.

HOW TO GUIDE A CASE INTO MEDIATION • There are two important steps in guiding a case toward mediation: assessing its appropriateness and convincing the client that mediation is the right choice.

Assess Appropriateness

The way that mediation is first suggested—to the client and to the other side—can help set the stage for

success. Of course, in jurisdictions like Hawaii you can point out that you are in effect required to discuss mediation as an alternative to litigation. But a more positive approach is better. Describe the process and make clear that mediation is a "no lose" option (since it neither forecloses litigation nor interferes with that process) with substantial potential benefits. For a helpful checklist to assess the appropriateness of mediation in a particular case, see Peter Adler, Mike Broderick, and Tom Crowley, *What is Gained and What is Lost,* Haw. B. J. 12 (July 1993). Interestingly, the article's description of the type of case in which "mediation may work" fits just about any divorce case:

- The parties have, want, or may need to have ongoing relationships of some sort;
- They have a mutual interest in a relatively swift resolution;
- Litigation appears long, expensive, and risky for both;
- Both feel they are being pushed into litigation by a whirlwind of accusations and arguments;
- Although they have strong emotions, mediation would allow them a process to vent negative feelings and then look more objectively at ways to meet underlying interests;
- Time is important; and
- A good mediator is available to help them communicate.

When Not To Mediate

Although you should consider the advantages of mediation in every case, there are some cases in which the procedure is not the best choice. Mediation may not be appropriate in cases in which:

- There is a serious power imbalance or indications of abuse (of either spouse or children);
- One party's claim or defense is frivolous and can easily be disposed of in court; or
- There is a compelling reason why one party wants to delay resolution.

On balance, except for cases involving abuse, it is difficult to find a domestic case which mediation would not help.

Explain Advantages to Client

In discussing the advantages of mediation with a client, you may want to divide them into two broad categories: practical advantages and emotional advantages.

Practical Advantages

The practical advantages to explain to the client include the following:

- Because mediation can usually be concluded in a compact timeframe, it will generally cost far less than litigation. With less delay, confusion, and uncertainty about the outcome, the parties can more swiftly (and without as much emotional damage to them-

selves, their family members, friends, and business associates) get on with making a living and living their lives;

• Because mediation is voluntary, and either party can terminate the process at any time, neither party is able to intimidate, exploit, or manipulate the other;

• Mediation helps parties to recognize their own and each other's legitimate needs, and to design options which reconcile and meet those needs;

• In mediation, parties can make agreements touching on matters which would not be resolved by a court and can fashion creative business, financial, tax, and family solutions which would be beyond the power of the court to impose;

• A mediation agreement can (and should) include provision for a pre-agreed process to resolve future disputes, including documentation, implementation, and modification of the original agreement;

• The mediation agreement does not become final and binding until the parties understand it, agree to it, sign it, and it is reviewed and approved by their respective attorneys. Court approval is also necessary, but only rarely will the court interfere with what the parties have agreed upon; and

• Parties are much more likely to comply with the terms of an agreement they have worked out themselves than one imposed by the court. The risk of post-divorce litigation is thus greatly reduced.

Emotional Advantages

The emotional advantages for the client include the following:

• Parties emerge from mediation with their dignity and self-respect intact. Neither party emerges from mediation feeling the need to "get even" or the fear that the other party feels such a need;

• Because the parties can express their emotions during the mediation in the presence of each other and of a respected neutral, the process of mediation provides a level of emotional vindication which is impossible to obtain in court. It is not therapy, but it is therapeutic;

• Mediation is forward-looking. It does not involve assessment of blame, but rather focuses on meeting real needs and on future working relationships between the parties; and

• Mediation improves communication and understanding. This is especially vital when the parties will necessarily have future business or parenting relationships.

Suggesting Mediation

The concern often arises that suggesting mediation to the other side will somehow be seen as "weakness." That concern is easily overcome. First, you might call the other attorney and refer to the applicable rules of

professional conduct or clearly stated court preferences that mediation be considered. If there is concern about such a direct approach, you might request the judge to suggest mediation or you might call an administering agency, which will itself make the suggestion. (Having the neutral third party make the suggestion that the case "appears appropriate for mediation" eliminates the concern of an appearance of weakness. Agencies which administer ADR processes will sometimes provide that service at no charge, as well as free consultation services in which an experienced mediator will meet with an attorney or client to discuss how the process works and what it can be expected to do for the parties.) As mediation has become more mainstream, the perception of weakness in suggesting mediation has diminished considerably.

SELECTING A MEDIATOR • Because many of the advantages of the mediation process depend on the skill of the mediator, careful attention to the selection process is critical to success. There are no nationally recognized training, certifying, or licensing agencies for mediators. Many mediators are attorneys, but many of the best mediators are not attorneys. As with most professions, word-of-mouth is probably the most helpful way to find a good mediator. Considerations should include experience, reputation, qualifications (including training), subject matter knowledge, and personality.

What To Look For

An effective advocate, concerned with carefully selecting the mediator, should carefully review any potential mediator's resume and focus on at least the following five elements:

• Training and experience in the process of mediation. The skills of a good mediator, while natural to some, still need to be shaped and sharpened through training and experience. Although there are no nationwide standards and no nationally recognized training agencies, there are numerous private ADR providers and state-related agencies which provide training;

• Technical knowledge regarding the subject matter of the underlying dispute. Although a truly proficient mediator may do well without knowing the technical and/or legal aspects of disputes, parties usually find that a mediator possessing knowledge of the legalities, practices, and nuances of the matters involved will expedite the process;

• The "presence" or "gravitas" of the mediator is perhaps the most important yet most difficult element to understand and evaluate. The respect which the mediator generates, the trust the parties place in the mediator's opinions and suggestions, and the mediator's ability to build rapport

can and often do result in success where another mediator may have failed;

• Genuine optimism that settlement *is* possible, even in the face of apparent impasse, and tenacity in keeping the parties talking are important characteristics of a successful mediator. Even when there is great disparity between the parties' positions and high emotional conflict, a mediator's ability to keep the parties talking about possible solutions often leads them to discover unexpected common interests and concerns. Continuous optimistic engagement in the process can ignite the spark necessary to fire the settlement process; and

• Adherence to a published set of ethical standards.

PREPARING FOR MEDIATION • Because mediation is an informal, loosely structured process which does not require presentation of evidence and which often occurs relatively early in the life of a dispute, it is easy to be lulled into the belief that preparation is not important and need not be carefully done. Wise counsel will, however, remember Thomas Alva Edison's observation: "I find I am most lucky when I am best prepared." At a minimum, there are four steps to take in preparing for mediation.

Step 1: Develop a Coherent Theory of the Case

First, develop the same kind of coherent theory of the case that you would for trial: What happened, and how does each piece of evidence fit into that construct?

Step 2: Focus the Client

Second, make sure the client has focused on the following questions and that both you and your client understand the answers:

• What is the most important element of a satisfactory resolution? This may be tangible, such as a specific piece of property, or intangible, such as an agreed-upon process for shifting visitation arrangements;

• What non-monetary considerations are so important to you that you would willingly compromise monetary expectations to receive them?

• What do you think is the most important thing the other party wants? Are you prepared to give it? In exchange for what?

• What would you like your life to look like five years from now? Ten years? What can be done in the mediation agreement to help with that?

These questions are very different from case evaluation questions. Instead, they are focused on unearthing the information that will help you to find effective, creative, meaningful, long-term solutions and, most important, to find the answer that best satisfies your client.

Step 3: Evaluate the Case with the Client

Third, case evaluation is important, and reasonable expectations of probable outcome should no agreement be reached will play a part in the willingness to reach agreement. Therefore, consider with the client and be prepared to discuss with the mediator the following issues:

• Best case scenario—what is the most you can reasonably hope to be awarded at trial *and* the probable outcome of such an award? Would it be complied with? Would the other party appeal?

• Worst case scenario—what might the other party reasonably be awarded if he or she prevails at trial? This is especially important, as it allows you to be candidly realistic with the client without diminishing the psychological anchor of being the client's protector and advocate;

• What do you *really* want out of this mediation? What are your most basic needs, hopes, fears? Right now? In five or 10 years from now?

• What would you take and still feel you could live with the outcome?

• What offer would you like to put forward first?

The first two items relate to the possible outcomes in litigation, and careful, objective consideration of those possibilities is very useful in making the last three items far more reasonable and realistic.

Step 4: Help the Client To Prepare a Statement

Finally, help the client to prepare an opening statement for the first joint meeting of the mediation. Having the client rather than counsel present the opening statement is important for several reasons. It personalizes the case and the client's positions. It provides a "day in court" catharsis for the client which often, by itself, enables the client to satisfy emotional needs long enough to deal objectively with the issues. It provides counsel (and the other side) an opportunity to see how credible and persuasive the client will be on the stand should the case go to trial. It provides the mediator an important opportunity to start building rapport and trust through active listening while the client is making the statement.

HELPING THE CLIENT DURING MEDIATION • By encouraging the fullest participation of which the client is capable, you can emphasize the client's control of the process and investment in the outcome. This requires that you put aside any personal feelings about the desirability of "winning," or "beating" your opponent, and focus only on getting the desired resolution for the client.

Keep it Moving

During breaks, and while the mediator is meeting privately with the other side, stay focused on the matter at hand and use the time to consider steps which might be helpful, such as the following:

- Ask the client what he or she thinks is going on with the other party. The client knows the other party well and may have some useful insight into what is motivating him or her and what might induce him or her to move toward a more favorable agreement;

- Speculate with the client on possible solutions and explore options, even if they seem unlikely at the time; and

- Be aware that the client may need to take a walk and just relax a little. Attorneys are usually used to much more concentrated pressure than are their clients.

Finally, staying hopeful and optimistic that settlement *can* be reached, and looking for ways to solve problems that crop up along the way, will add to the client's confidence that counsel is working with him or her to reach a resolution.

Helping the Mediator To Help Your Client

Using the mediator's assistance in presenting your case to the other side and helping to persuade them of its merits – and the merits of agreeing to what you want – requires planning and an understanding of how the mediation process works. Mediation works best when the parties and counsel are fully candid, open, and trusting with the mediator. The more open and honest the parties are with the mediator, the more likely they are to achieve a satisfactory resolution. The better the mediator understands what each party truly wants out of the resolution, the more creative and persuasive the mediator can be in helping to craft a resolution that works.

Let Your Client Talk to the Mediator

If you let your client do most of the talking, the mediator will be better able to focus on the client's needs and interests. Unless the mediator specifically asks you to discuss the legal issues and positions and demands, avoid taking strong positions or "posturing" the case. And when you do explain your legal position, do so in as informational and nonconfrontational a way as possible. This not only works better as a way to educate your opponent and the mediator; it also preserves the cooperative character of the mediation process. Always be prepared to do this in the course of mediation. It is often useful to think of the mediator as your advocate with the other side and to enlist his or her help in planning the presentation of vital information during the mediation. Presenting information in mediation is a matter of demeanor, confidentiality, and timing.

Timing

Timing is vitally important to the process of "trading" concessions. The mediator can help you to determine when the time is right to make a particular concession, thus increasing the chance that the other side will concede something to you. Demeanor is important to achieve the maximum effect with the opposing party. Whether to present arguments emotionally or in a matter-of-fact manner depends on what will work best to educate the other side and obtain compromises and concessions. Likewise, whether to use new or "surprise" information is a matter to discuss with the mediator, so you can get an idea of whether it will move the case forward.

Educating the Mediator

If you sense that the mediator does not fully understand the law or facts, educate the mediator gently—to maintain rapport—and clearly, to assist the mediator in conveying your position on the law and facts clearly to the other side. Lastly, at the conclusion of every caucus (a private meeting between the mediator and one party to the dispute) it is important to review with the mediator anything that has been discussed and which you want to keep confidential from the other side.

AGREEMENT • At the conclusion of a successful mediation, the parties usually sign a memorandum setting out at least the basic terms of their agreement. Given the realities of mediation, it is rarely possible to work out all of the detailed language necessary for the complete agreement (or a stipulated decree) immediately at the conclusion. The session probably won't end until late, the parties will be exhausted, and support staff will probably have gone home hours earlier. But before the parties or their lawyers leave, everyone should sign a memorandum of understanding covering all of the issues. You can prepare the memorandum in a format similar to a stipulated court order, and once everyone is satisfied with the language, conclude with a formal signing and handshakes.

Add a Dispute Resolution Clause

Finally, since no decree has yet been invented which is not subject to different interpretations or later disputes about how to implement it, the settlement agreement (and final decree) should include a further dispute resolution process for any disputes arising out of the agreement or decree. Consider a two-step mediation/arbitration process to resolve any potential misinterpretations, ambiguities, implementation problems, or later conflicts.

WHY FAMILY LAW PRACTITIONERS ARE INCREASINGLY ENTHUSIASTIC ABOUT MEDIATION • The advantages the client may obtain through mediation are clear, and the favor with which courts are increas-

ingly viewing mediation is clear, but what about its advantages for the family law practitioner?

Dress Rehearsal

At the very minimum, mediation gives you an opportunity to organize your case, try it out on a knowledgeable neutral, and obtain valuable early evaluation and assessment from the mediator. An attorney whose client insists on harboring unreasonable or unrealistic perceptions, positions, or expectations often obtains tremendous assistance from the mediator in helping to educate and move the client. A client may also be more reasonable with the mediator than with his or her own attorney and thus provide an opportunity for the mediator and attorney working together with the client to come up with a better resolution than would be possible without the mediator's help.

Time and Money

Obviously, there is a time value to money, and settlements (and fees) received immediately have more value than those received after a year of trial (or in five years, after the appeals). Although divorce clients tend not to be repeat clients, satisfied clients do tend to be enthusiastic fans of the lawyers who got them good results relatively painlessly, and referrals account for a large percentage of family law business.

CONCLUSION • As the swinging pendulum of social mores moves back toward making marriage work and as the divorce rate begins to decline, a new class of domestic relations problem-solver has begun to obtain a larger percentage of the shrinking divorce litigation pie. Those who know how to use mediation effectively will acquire a desirable community reputation as being among that new class. And if any further reason for using mediation in domestic cases were needed, practitioners might also look to the autobiography of Gandhi, in which he said: "I realized that the true function of a lawyer was to unite parties riven asunder. The lesson was so indelibly burnt into me that a large part of my time during the 20 years of my practice was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby—not even money, certainly not my soul." What better reward could counsel have than to serve the client's best interests in a manner that also serves the soul!

PRACTICE CHECKLIST FOR

Divorce Mediation Basics

Divorce clients often need something less stressful and confrontational than the traditional litigation process. For a high percentage of cases, mediation really is a better way.

- To guide a case toward mediation:

☐ Assess its appropriateness. When the applicable rules do not require you to use mediation, you should still strongly consider it for cases in which the parties have a need for continued contact, have a mutual interest in a swift resolution, litigation would be expensive and mutually risky, both would benefit from a controlled opportunity to vent feelings, and in which time is important. On the flip side, avoid mediation when there is a serious power imbalance or evidence of abuse, your opponent's claim could be easily disposed of in court, or a delay can benefit your client;

☐ Explain the advantages to your client. Practical advantages include a swifter, more efficient proceeding over which the parties have more control, a forum in which neither can intimidate the other, and the opportunity to fashion more creative remedies. The emotional advantages for the client include a chance to achieve a level of emotional vindication, but while focusing meeting the parties' legitimate needs; and

☐ Suggest mediation to your opponent. If you have reason to believe that your opponent might perceive the suggestion as an admission of weakness, be ready to point to a few judicially stated endorsements of the procedure.

- Select the right mediator. Look for:

☐ Mediation training and experience;

☐ Familiarity with a specific set of mediation rules;

☐ Experience in family law;

☐ A trustworthy presence; and

☐ Genuine optimism that settlement is possible.

- Prepare carefully for mediation:

☐ Develop a coherent theory of the case, just as you would for a case going to trial;

☐ Get the client ready. He or she needs to focus on what would constitute a satisfactory solution overall. Ask the client to consider what he or she would be willing to bargain over, and what is not negotiable;

☐ Evaluate the options in light of litigation alternatives. What is the best case scenario? What is the worst? And what does the client really want out of the mediation?

☐ Help the client to prepare an opening statement. This will help both of you by sharpening the issues and by giving the client something to say directly to the mediator, thus giving the mediator a clear idea of the client's true position.

- Help the client during mediation. Ask what he or she thinks is going on with the other party, and to suggest possible solutions as the mediation progresses.

- Help the mediator to help your client. If you sense that the mediator has misinterpreted either your client's desires or your legal position, take the time to clear the matter up as diplomatically as possible.

- When you reach an agreement, reduce it to a written memorandum of understanding immediately. Let the other contractual formalities wait—just be sure to get the substantive points nailed down as quickly as possible.