

# CONFIDENTIAL MINI CHILD CUSTODY EVALUATIONS<sup>1</sup>

Forrest S. Mosten

## CHAPTER OVERVIEW

Child-focused professionals have long pointed out the inefficiencies and harm that the adversary court system can have on parents and children going through divorce. Mediation is touted as a beneficial process to resolve child custody disputes based on the variables of reducing harm to children and to the ongoing parenting relationship, maintaining privacy and confidentiality, obtaining a speedy resolution, and leaving control of parenting decisions to the parties themselves. However, while mediation has a very high settlement rate, parties often need or want the input of a child development professional before being able to reach a consensual agreement.

In many jurisdictions, common practice is to encourage or compel the parties to attempt mediation. If mediation does not produce an agreement, rather than go directly to court, attorneys, mental health professionals, and judicial offices encourage or compel the parties to undergo a formal child custody evaluation prior to having the matter heard by a judge.

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<sup>1</sup> I wish to acknowledge the invaluable contribution of two clinical psychologists to my thinking on this subject. My wife, Dr. Jody Mosten, was by my side on December 7, 1991 when I laid out my ideas for this concept during a 10th birthday party for her son Derek between rides at Universal Studios. As Jody has done in every writing, teaching, and practice area since then, she has been my loving partner supporting, prodding, editing and enhancing every aspect of my professional and personal life. Since 1991, Derek, a has graduated college, and Jody has herself become a practicing therapist helping individuals and couples during and after divorce.. I also am appreciative to my longstanding professional relationship with Dr. Mary Lund as co-mediator, reciprocal consultants, and co-teacher/trainer in a variety of subjects and venues. Mary has influenced my approach to helping families. Mary was instrumental in refining the CME concept including many ideas in this Chapter and first co-presented with on CME at Breckinridge, Colorado at the AFCC Evaluation Conference, September 10, 1996.

The popularity of the child custody evaluation process is based on a desire to spare families from the courtroom. If a contested hearing is inevitable, however, the formal evaluation is not without its flaws and many critics have argued that while helpful to the court in gathering data and offering recommendations, the formal custody evaluation may cause its own separate harm to divorcing families.

This chapter will explore the use of an alternative process that is designed to provide parties with the informed consent and at the same time will provide parties with control over their decisions, lessen parental conflict, keep parties out of court, and reduce overall costs. Since the seminal article on the subject published by this author in the *Conciliation and Court Review* (now *Family Court Review*) in 1994<sup>2</sup>, the Confidential Mini Evaluation (CME), the CME has been the subject of professional and academic literature, presentations at professional conferences, and has been part of court programs and used frequently by lawyers, mental health professionals and mediators as an option to either court litigation or formal evaluation. As the Confidential Mini Evaluation can be

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<sup>2</sup> See the following by the author on CME-- **Mosten, Forrest “Confidential Mini-Evaluation,”** *Family and Conciliation Courts Review*, Vol. 30, No. 3, (July 1992).

**Mosten, Forrest Complete Guide to Mediation**

**Mosten, Forrest Unbundling Legal Services**

**“The Lawyer’s Role During Agreement-Making,”** *American Journal of Family Law*, (Spring 1997).

**“Mediation and the Process of Family Law Reform,”** *Family and Conciliation Court Review*, October 1999.

used in both the court and private sectors, practice forms and other tools will be provided to initiate the process in either setting.

3

### ORIGINS OF THE CONFIDENTIAL MINI-CONFIDENTIAL

The key role of family courts is to protect the rights of children and to make decisions for parents who cannot or will not make decisions themselves in respect to decision making and parenting arrangements for their children. While many family court judges have little or no formal training or practice experience when they start their assignment, even judges who were themselves practicing lawyers favor eliminating decisions by having the parties come to their own agreements. If a parenting issue comes on the docket, judges want the input of experts to provide input for their decisions and to give their decisions objectivity and a source of accountability.

A central way that courts try to eliminate decisions is to require court mediation before hearing a matter. Some judges require mediation several times during a case as new issues or problems develop between the parties or new process interventions may change the situation. Mediation can be ordered prior to making temporary orders, again prior to trial, or prior to any modification. In the same way, the following types of disputes may be ordered back to mediation: interim orders for visitation for discussion, special holiday or vacation disputes, requests for geographical relocation, or a claim of abuse or violence that might occur during the proceedings.

While confidentiality was initially a foundational aspect of mediation, some jurisdictions have removed the confidentiality and mediators have been permitted, encouraged, and sometimes required to provide a recommendation directly to the court if the parties do not reach agreement in court ordered mediation. Despite a California Supreme Court case affirming confidentiality as central to the state's policy of mediation (*Foxgate v. Bramala*), court rules permit mediators to "report" recommendations based on communications (including admissions, offers, behavior) of the parties. In essence, in reporting counties (well over 50% of jurisdictions within California), the mediators perform mini-mini non-confidential evaluations for parties ordered to mediation. This process has evoked considerable criticism but due to the need and desire of family judicial officers to clear their dockets and get information about disputing parents quickly and from "an expert," mediator reporting is part of the family law landscape for the indefinite future in California.

Notwithstanding this spillover between mediation and evaluations<sup>4</sup> the formal custody evaluation is the process of choice for judicial officers, lawyers, and parties to meet court requirements for expert information before deciding parenting issues. Depending on the jurisdiction, custody evaluations may be initiated by agreement of the parties<sup>5</sup> or court order. Court orders may be based on

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<sup>4</sup> (note: Courts also have the option to order appointment of a lawyer to represent the child, appoint a parenting coordinator (special master) to act as an umpire (with opportunities to mediate) on day to day decisions and make a recommendation to the court if one party disputes the decision, or a guardian ad litem for the child to make independent decisions for the child. The exploration of these and other alternatives are beyond the scope of this Chapter but deserve investigation as options to the evaluation process, either confidential or non-confidential.

<sup>5</sup> Consensual custody evaluations are generally initiated by parents represented by family lawyers. While these stipulated evaluations may be started during custody litigation, skilled and child oriented family lawyers may agree to an evaluation prior to any pending court proceedings or before the issue is brought

a request of one party over the objection of the other or by the court itself on its own. Consensual custody evaluations are generally initiated by parents represented by family lawyers. While these stipulated evaluations may be started during custody litigation, skilled and child oriented family lawyers may agree to an evaluation prior to any pending court proceedings or before the issue is brought before the court. Such stipulated evaluations may be used to provide a preview of a court result and the evaluator's results are used as a platform for a negotiated result.

As my 1992 article on this process is credited with helping launch the

CME, let me share the case that stimulated the concept.

In 1991, I was representing Mom in a geographical residence dispute. The

parties had lived in Oceanview<sup>6</sup>, located approximately 120 miles from

Los Angeles. Mom relocated to LA with her son Josh, 10 and daughter,

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before the court. Such stipulated evaluations may be used to provide a preview of a court result and the evaluator's results are used as a platform for a negotiated result

<sup>6</sup> The name of the town, number of children, and other facts are fictional to protect confidentiality of the family

Sarah, 8. The parties' oldest son, Chad, 14, stayed in Oceanview with Dad. Mom wanted all 3 children to live in LA and Dad wanted the 2 boys to live with him.

The case was filed in Los Angeles but Dad's deposition was set in Oceanview. While taking a deposition is a customary task for most family lawyers, I was very conflicted about starting the deposition in this any other parenting matter. I was very nervous driving during the two hour trip from my home to Oceanview. From my experience, I knew that not only would tensions rise and the parenting relationship be at greater risk when one party is threatened, but once answered, the testimony would be part of the family history forever. Regardless of whether this particularly challenging issue would be resolved, Dad would never forget the deposition experience and when I would be long removed from this family, Mom, Dad, and the three children.

So, I wanted to use the opportunity to have both parties and lawyers together to try and negotiate a resolution or design a process to do so. The problem was: I didn't have any ideas how to do it. Mom was adamant about the children being kept together with her. So as I drove into Dad's lawyer' (Jim)'s parking lot, I was in a state of confusion and stress (unshared by my client who was waiting for me to uncover the smoking gun that would permit her to keep her children).

The reporter arrived. We gathered in the conference room. Dad was sworn in. It was my turn to start the deposition. Nothing came out. I turned to Jim, and asked if I could speak to him for a moment.

We went into his office and I asked him: Jim, is there some compromise that Dad can live with because Mom is very set on her position. Would you take some time to talk to Dad—perhaps since there are two boys, we could work toward a settlement in which there could be an automatic re-evaluation when Josh turned 12 years old. Jim, a competent and caring family professional, said he would speak to Dad.

Thirty minutes went by, then forty-five, and then an hour.

After an hour and ten minutes, Jim emerged and said: “Woody, I’m sorry, but Dad feels he already compromised since Mom is the one who moved and he has been willing to let Sarah stay with Mom. He is not willing to go any further and in fact will be asking for all 3 children to stay in Oceanview if the case goes to trial. Let’s start the deposition.”

My palms were really sweaty now—I looked down at my notebook of prepared questions and could not read a thing. Desperate situations often call for desperate proposals I then turned to Jim and Dad and asked: What if we picked a therapist to meet with the parties, children and significant others for one day next week and asked him/her to make a verbal recommendation to the parties based on the best needs of the children. The recommendation would be confidential and neither party would be bound to accept it. If either party rejects the recommendation, either party would

be free to initiate another full comprehensive evaluation and whatever was said in the first evaluation could not be mentioned, including the first recommendation. We could then have the deposition either before or after the first quick evaluation.

Much to my surprise, Dad said yes. Frankly, I then had to work with Mom to make sure that she would agree with the delay of the deposition and the limitations and confidentiality of the process.<sup>7</sup>

Postscript: We found a highly regarded evaluator, Dr. Macmillan who was sufficiently flexible to work with the attorneys in customizing a one day process. Jim and I made sure that we would be there at the end of the day so we could hear Dr. Macmillan's oral findings and recommendations directly and could be with our clients to comfort and strategize once the news came in. The recommendation was for all three children to remain with Mom and re-evaluate in one year. During the school year, the children would be with Dad 2-3 weekends per month. Total cost: \$1500.

Dad would not accept the recommendation from the mini-evaluation.

We then agreed for a full comprehensive evaluation with another highly regarded evaluator, Dr. Watson. All tests were given, the parties sent documents. The written report was 105 pages, it took 4 months, and cost \$22,000. The recommendation was the same, except that Dad would have the children only 2 weekends per month.

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<sup>7</sup> These challenges and others of the CME will be discussed below



Dad would not accept the recommendation from the comprehensive- evaluation and Jim set the matter for trial. A week later, Mom and Dad had coffee at Starbucks and agreed for Chad to stay with Dad and the two younger children would stay with Mom. Dad would have all three children 3 weekends per month and they would re-assess after the school year.

The year went by, the parties kept their agreements, and at the end of the year they revised the plan for Josh to live primarily with Dad and each parent had two weekends per month with all three children. The parties never stepped inside a courtroom and the children are now all finished with college and have good relationships with both parents and with each other.

## **CONFIDENTIAL MINI CHILD CUSTODY EVALUATIONS: DESCRIPTION AND GOALS**

The CME differs from the comprehensive custody evaluation in that it is confidential, truncated, and the evaluation is customized to meet the needs of the parties.<sup>8</sup>

**Confidential:** The court and any comprehensive evaluator are never apprised of the communications, findings, or recommendations of the

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<sup>8</sup> EDITOR: In order to avoid repetition throughout the book, chapter authors have been requested not to describe the formal child custody evaluation process in each chapter.. For an overview discussion on Comprehensive Child Child Custody Evaluations, please see pages\_\_\_\_\_.

Mini-Evaluator. This confidentiality encourages parties to take the step of trying the mini process and cutting out important evaluation tools (that might affect the result) without having the information or recommendations be revealed in a subsequent evaluation or court hearing. This confidentiality should be incorporated in a stipulation filed in court, or held by the parties to be filed later if necessary. The parties are always free to waive or amend the confidentiality at the beginning or after the evaluation is complete in order to avoid having to undergo and pay for an entirely new evaluation and utilize the results in a subsequent evaluation or court hearing.<sup>9</sup>

**Mini:** In legal access terms, the parties “unbundled” the full package of tasks involved in the evaluation process. Parents can select discrete tasks for the evaluator—they can pick what they need and want.

**Evaluation:** Unlike mediation, the parties seek an outside evaluation/recommendation from a neutral expert. However, unlike the comprehensive model in which the Evaluator speaks through the written report, in the mini-process, the evaluator speaks directly to the parties and can have a conversation with them explaining his/her reasoning and concerns for the children. This conversation can also include the attorneys, significant others, and a mediator (see below).

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<sup>9</sup> Similarly, it is also possible for parties to contract for a comprehensive evaluation and agree to its confidentiality. However, given the resources devoted to the comprehensive model and the higher conflictual nature of parties in most custody battles, such stipulation for confidentiality is rarely undertaken. It also should be noted that parents entering this adversarial process often “over-value” their own strengths and downplay their own weaknesses causing an unrealistically positive forecast. This over optimism about a positive result lessens incentives to keep the matter confidential and increases negative reactions and resulting family conflict if the results are different than anticipated.

## Benefits of the CME

- **Speed**—Just as research demonstrates that early use of mediation increases its effectiveness and resulting party satisfaction, the CME can produce similar benefits of early resolution. While leadtime of several days or even a week may be unusual, arranging and completing CME within a month is easily within realistic expectations. If the CME is the last step on the dispute resolution highway, such a fast process can help a conflicted family accelerate their healing and return to a normal baseline of functioning on a variety of levels.<sup>10</sup>
- **Control**—Rather than surrendering the set up of the process to the expert evaluator<sup>11</sup>, the parties retain control over selecting the help they need at a price and time line that they need. As in any unbundled situation, the consumer depends on the professional to help diagnose the problem and recommend a course of action. For example, after hearing the concerns of the parties involving credibility and character, the evaluator might recommend a battery of psychological tests to help sort out the positions. In the CME process, the parties are encouraged to ask the evaluator how the various tests will help, how long they will take to set up and administer, and what the cost will be. The parties will then make an informed decision together.
- **No Risk**—Due to the confidentiality of the process, parties can undergo the process and obtain information without the fear that adverse findings or

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<sup>10</sup> See Hutchins-Cook, Divergence During Divorce in Mosten, Complete Guide to Mediation (ABA, 1997) at p 65.

<sup>11</sup> See Guideline 8 of the Guidelines for Child Custody Evaluations in Divorce Proceedings (49 American Psychologist, 1994, p677-680: “The Scope of the Evaluation is Determined by the Evaluator Based on the Nature of the Referral Question”. (Emphasis added)

recommendations will ultimately be considered by the court. This helps both parties. The party who wants to expose the problems of the other parent can do so and perhaps use that leverage to negotiate a favorable parenting agreement without making it public that could cause the problem parent to retaliate or give up seeing the children---both harmful options. It also benefits the “accused” parent who can sign on for the CME to seek exoneration by the evaluator. If that happens, it strengthens the hand of the “accused” parent. If the accusation is supported by the evaluator’s findings, the “accused” parent can either try again with a comprehensive evaluation or cut losses and try to make a deal.

- Lower Conflict Between the Parents---The CME permits the parents and their attorneys to work together to set up this process. This reduces the negative reaction caused by resisting a motion for the evaluation or being ordered to participate in an evaluation by a judge. In Getting to Yes terms, the parties are able to separate the People from the Problem. The parties are better able to acknowledge a reasonable difference in parenting values or decisions without it necessarily turning into a maelstrom.<sup>12</sup> One of the key long range benefits of reducing conflict during the evaluation process is that the healing process has a better head start since less damage to the family may have occurred.
- Reduced Cost—Since the evaluator spends less time, direct fees to the neutral evaluator are reduced. In addition, there are lower costs for attorneys to prepare, consult with, and advocate for the parties. Most importantly, since the parties are selecting their evaluator and designing the process, they will be

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<sup>12</sup> See Janet Johnston, *Impasse of Divorce*,

more likely to accept a recommendation which would eliminate subsequent expensive litigation.

## **CME IN PRIVATE MEDIATIONS**

Although the concept was conceived during a high stakes geographical relocation litigation case (see origins of CME), mediation may be the best setting for the CME. Since parties voluntarily opt in to the private mediation process, they have a high motivation to stay in the process until a settlement is reached. When impasse occurs, if parties are shown a way to stay in mediation and still resolve the impasse, they often will take advantage of that option—CME offers this option.

### Mediator Can Assess the Need for Custody Evaluation

As positions harden dispute good faith discussion to attempt to resolve parenting issues, the mediator may be able suggest the CME as an option rather than terminating the mediation. The benefit of structuring the CME within mediation rather than referring it out is that the mediator can assist the parties in structuring the CME. Conflicted parents are not only inexperienced in setting up such a process but have their own differences that prevent cooperative decision making. The mediator can help provide process expertise and facilitation skills to assist the parties in focusing on their common interests to avoid litigation and obtain input from an evaluator quickly, competently, and at a reasonable cost.

### Mediator Can Help Set Up and Structure CME

The first step is selecting an evaluator. Due to experience in the field, the mediator identify possible candidates, obtain resumes and other background material, and

set up the selection process. Even if parties are ready to delegate the selection to the mediator, the neutral has a responsibility to make sure the parties have sufficient information about the candidates to have an opportunity for input before a decision is made.

Another option for evaluator selection (that has been used successfully) is to invite two or three potential evaluators to a mediation session so that the parties can personally meet the candidates and make a personal judgment if they wish to have this professional talk with their children and make recommendations that can affect their family. The mediator helps the parties decide whether they will pay the professionals for their time to participate in these “interviews and to help them prepare questions to ask.

After the interviews, the mediator facilitates a discussion comparing and contrasting the evaluator candidates and helps surface the strengths and weaknesses of each evaluator. The parties can also decide which of the candidates they wish to have conduct the CME and which candidate they wish to keep in reserve to conduct a comprehensive evaluation after the CME, if one should be necessary.

Once an evaluator is selected, the mediator can help negotiate the terms of the evaluator’s engagement letter or contract. In essence, the mediator is representing the interests of the parties and make sure they do not conflict with the financial or professional interests of the evaluator.

#### Mediator Coordinates CME Feedback Process

A key function of the mediator can be to organize the CME so that the mediator, parties, lawyers, and spouses/significant others to be present when the evaluator gives his oral feedback. Since a benefit of the CME is avoiding the written report that polarizes

positions, it is critical that sufficient time and structure be planned so that evaluator can thoroughly review observations, findings, and recommendations. The parties and attorneys must have an opportunity to ask questions and express concerns so that the evaluator can respond. This interaction session is important to permit parties to feel heard and be part of the process that affects their family.

#### Mediator Facilitates Negotiations on Outstanding Issues and Drafts Agreement

While a court is free to disregard or modify the written recommendations of an appointed comprehensive evaluator, judges generally affirm most if not all of the evaluator's recommendations, for reasons discussed above. In the CME, the parties are bound only by their consensual agreements. If they choose to contest certain aspects of the CME oral report, the discussion can continue in mediation with or without the presence of the evaluator to resolve the remaining issues. Once resolved, the mediator can incorporate the agreements in a Memorandum of Understanding or Court Order<sup>13</sup> that can be reviewed and revised by attorneys and filed with the court or held for adoption by the parties without a court order.

### **CME IN THE COURTHOUSE**

In an effort to assist judges obtain expeditious information, often the day of a hearing, some jurisdictions offer mini-evaluations, particularly for pro se litigants.<sup>14</sup> The

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<sup>13</sup> Jurisdictions differ significantly in the right of a mediator to draft final documents. See Utah, New York, California

<sup>14</sup> These court mini evaluations are also called Limited Scope Child Custody Evaluations or Focused Child Custody Evaluations. These court mini-evaluations may cover several issues or be restricted to a single issue. These "same day evaluations" should be contrasted with custody evaluations conducted by court staff or contracted mental health professionals that might include home visits, interviews with collaterals, observational interviews, psychological testing, and other processes leading to an evaluator's findings and recommendations. See Leslye Hunter, Editor, Special Issue on Mental Health Evaluations in Child Custody Disputes, 43 Family Court Review 191 (April 2005).

parties generally do not have a choice of evaluators or are unable to negotiate effectively with each other to select one.

The process is generally determined by the appointed evaluator without input from the parties. The evaluator's work is limited by time, staff or court protocol, or the customary way that the evaluator works.

If the mini-evaluation occurs on the same day as court ordered mediation or a court hearing, the parties may not know prior to arriving at court that a mini-evaluation will take place. The mini-evaluation can be ordered by the court over objection of one or both parties. As indicated earlier in this chapter, the majority of mediators in California take on this mini-evaluation role themselves.

As is indicated here, a court mini-evaluation is rarely a confidential mini evaluation: the evaluator is free, encouraged, or even ordered by the court to share impressions, findings, and recommendations based on hurried interviews with the parties, and ps a phone call or two to collateral witnesses. The order rendered by the court based on the mini-evaluator's oral or short written report, often with little or not testimony from the parties, may not only establish a status quo for the parties, but also gives a first impression to the judge that might shape the rest of the case.

### **CME IN LAWYER-LAWYER NEGOTIATIONS IN BOTH TRADITIONAL AND COLLABORATIVE SETTINGS**

When lawyers currently think of custody evaluations, the comprehensive model is generally selected---mostly because lawyers may not be aware of the CME process or confuse it with court mini-evaluations which lack procedural safeguards as discussed above. As more lawyers receive direct training in CME



process or in mediation and collaborative law that favor client driven processes, the CME will be raised as an alternative more frequently. As with mediation, once informed about this option and its benefits, this author predicts that lawyer negotiation will follow the trend of mediators to initiate the CME as first step of the evaluation process before initiating a more comprehensive model.

#### Role of Lawyers at a CME Feedback Session

In orienting clients as to what to expect during the feedback session, lawyers can start by explaining what role they will play.

Silent Observer and Advisor --Perhaps the most important role a lawyer can undertake is to be present and at the side of his/her client while the evaluator presents observations, findings and recommendations. It is emotionally excruciating to hear negative details about one's parenting, affirmation's of the other parent's positive attributes, and recommendations that fall short or are opposed to what a parent wanted or expected out of the evaluation. The lawyer can be an agent of reality in being able to offer the parent a balanced accurate view of the evaluator's results. Further, by using reframing and active listening skills, the lawyer can demonstrate empathy for what the client is going through and offer hope and strategy to plan the next step.

Advocate—The lawyer can use questioning skills and advocacy skills in questioning the evaluator about the basis for recommendations, pointing out the need for clarification, and interactively presenting information that the evaluator might have missed or given too little or too much weight. Evaluators expect this vigorous dialogue and parties appreciate the support and added input.

Resource for the Family By hearing the evaluator's feedback and integrating the neutral's views with the facts, goals, and requests of their clients, lawyers can help the family by offering reality as to what can be expected if they proceed to a comprehensive evaluation or court process. Lawyers also are excellent sources for ideas and alternatives that both parties can consider with the mediator. Given that both parties may be emotionally fragile, the lawyers can be available to prepare clients for future mediation sessions, serve as coaches outside the sessions, and even attend the sessions with their clients if the parties choose.

### Conclusion

The CME is a vibrant and evolving process that offers parents and children a safe and productive venue to obtain invaluable expert information and prevent further escalation of family conflict. The roles of the court, mediators, attorneys, and evaluators are different from traditional processes so that these professionals need training and education to maximize their positive participation and help divorcing families. Further research and study on CME is needed to develop new strategies and interventions to improve the process, limit the potential procedural abuses of mini-evaluations in the court house, and to provide data of how this process is operating in a variety of locales and models.