

REPRESENTING YOUR CLIENTS IN MEDIATION: EFFECTIVELY SETTING UP A MEDIATION

By

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REPRESENTING YOUR CLIENTS IN MEDIATION: EFFECTIVELY SETTING UP A MEDIATION

By

FORREST S. MOSTEN,¹ CFLS

When I first started practicing law in 1972, few lawyers had any training in serving as a neutral mediator or as a client's representative in mediation, either in the session itself or as an unbundled coach outside the room. Today, it is not a question whether a family lawyer favors or dislikes mediation—court rules and client preferences make mediation either a requirement or a preferred option in most family law cases.

A mediator is in the catbird seat to observe how lawyers conduct themselves in mediation. This section of the Symposium materials is designed to give you a head start in improving your strategies in representing clients who participate in mediation and developing a tool box of skills and approaches that will maximize the outcome for your clients.

I. PREPARING TO BE AN EFFECTIVE LAWYER IN MEDIATION

The good news is that everything you have learned as a family lawyer can be applied to representing clients in mediation. Clients need your family law substantive expertise and your knowledge of the court process and personnel to help them discover their BATMA's.¹ Your

¹Derived from the negotiation classic, *Getting to Yes: Negotiating Agreement Without Giving In* by **Roger Fisher and William Ury** (Penguin Books 1983), BATMA stands for the Best Alternative to a Mediated Agreement. In short, if your client cannot cut a deal in mediation that he/she can live with, you will need to explain what the client faces in result and transaction costs if the matter is litigated and what is the *best* result possible. **BATMA** should be contrasted with WATMA (Worst Alternative to a Mediated Agreement) or MLATMA (Most Likely
(Footnote continued on next page)

ability to gather and organize facts as well as provide sources for expert information is invaluable to informed decision making. And, your experience in drafting and negotiating make you an important resource for your client and for the mediator.²

The best mediation lawyers bring more to the table as well. If you have completed training as a mediator³ or collaborative lawyer,⁴ you will have a better understanding of how mediation works. You can attend classes in dispute resolution and even earn a Certificate or MA in Conflict Resolution at Pepperdine's Straus Center for Dispute Resolution or other local university.⁵ Local bar associations and the Southern California Mediation Association⁶ have evening and daylong programs on mediation that will be invaluable in educating you about this process and the law surrounding mediation.⁷

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Alternative to a Mediated Agreement). By comparing the BATMA, WATMA, and MLATMA, clients can receive a *range* of possibilities if the mediation does not result in an agreement.

²See **Harold Abramson**, *Problem-Solving Advocacy in Mediations: A Model of Client Representation* (Sp. 2005) 10 HARV. NEG. L.REV. 103; **John W. Cooley**, *Mediation Advocacy* 2nd Edition (National Institute of Trial Advocacy 2002).

³LACBA's Dispute Resolution Services offers Basic and Advanced Mediation Courses (www.lacba.org). The Association for Conflict Resolution approves trainings in family mediation (www.acresolution.org). A variety of mediation trainings can be found on www.mediate.com.

⁴See: International Academy for Collaborative Professionals (www.collaborativepractice.com) and the Los Angeles Collaborative Family Law Association (www.lacfla.org). See also **Forrest S. Mosten**, *Collaborative Divorce Handbook: Helping Families Without Going to Court* (Jossey-Bass 2009) and **Pauline Tesler**, *Collaborative Law* 2nd Edition (ABA 2008). See also the evolving drafts of the **Uniform Collaborative Law Act** (<http://www.nccusl.org/Update/CommitteeSearchResults.aspx?committee=279>).

⁵For a comprehensive list of graduate dispute resolution programs and trainings, see Appendix 5 in **Forrest S. Mosten**, *Mediation Career Guide* (Jossey-Bass 2001).

⁶See www.scmmediation.org.

⁷For an overview of law on cases in which mediation issues have been litigated, see **James Coben and Peter N. Thompson**, *Disputing Irony: A Systematic Look at Litigation About Mediation* (Sp. 2006) 11 HARV. NEG. L.REV. 43. California is also developing significant law around mediation. For example, issues of admissibility regarding documents prepared for

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The field of mediation is growing. The ABA Section on Dispute Resolution has an annual conference drawing over 1000 lawyers who attend days of workshops on a variety of topics.⁸ The Association of Family and Conciliation Courts (AFCC) has local and national conferences involving family lawyers, judges, therapists, custody evaluators, mediators, and court staff.⁹

More and more family attorneys are specializing in non-court representation (Collaborative Law, Cooperative Law, and other “solicitor” oriented practitioners) and some experienced family lawyers refuse to take on adversarial engagements. Many clients, referral sources, and mediators recommending consulting attorneys for mediation parties receive comfort in referring to these mediation-representative specialists since they have no incentive

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mediation were discussed in *Rojas v. Super. Ct. (Coffin)* (2004) 33 Cal.4th 407 [15 Cal.Rptr.3d 643] and **Laura A. Stoll**, “*We Decline to Address: Resolving the Unanswered Questions Left by Rojas v. Superior Court to Encourage Mediation and Prevent the Improper Shielding of Evidence*” (August 2006) 53 UCLA L.REV. 1549. See also *In re Marriage of Kieturakis* (2006) 138 Cal.App.4th 56 [41 Cal.Rptr.3d 119], holding that a presumption of undue influence cannot be used for Marital Settlement Agreements reached through mediation and *Wimsatt v. Super. Ct. (Kausch)* (2007) 152 Cal.App.4th 137, in which the mediation confidentiality was applied to telephone conversations and emails shortly before a mediation session as well as the mediation briefs. See also *Simmons v. Ghaderi* (2006) 143 Cal App.4th 410 [49 Cal.Rptr.3d 342], review granted December 20, 2006, which permitted the introduction of evidence in which “confidentiality of communication within the mediation” was not at issue and that confidentiality would “allow a disgruntled litigant to use the shield of mediation confidentiality as a convenient place behind which to hide facts, although indisputably true, she no longer believes are favorable.” See *Estate of Thottam* (2008) 165 Cal.App.4th 1331, in which a chart developed in mediation initialed by the parties without the “magic words” pursuant to *Evidence Code (“EvC”) section 1123* was held to be a binding settlement agreement. Finally, see *Cassel v. Super. Ct. (Wasserman, et al.)* (2009) 179 Adv.Cal.App.4th 152 [101 Cal.Rptr.3d 501], in which the Court of Appeal (2nd District) refused to extend mediation confidentiality to lawyer-client communications during a mediation outside the presence of the mediator. On February 4, 2010, the California Supreme Court granted review in *Cassel*.

⁸See www.abanet.org/dispute.

⁹See www.afccnet.org. AFCC’s journal, Family Court Review, is a must read for lawyers who want to maximize their knowledge about ADR and divorce research.

to take the matter to litigation—if that happens, these non-court lawyers must refer the matter out and they lose the client!

You can represent clients in mediation either as part of your full-service representation as counsel of record or as an unbundled attorney consultant coach. Recent California Court Rules and Court Forms permit you to limit the scope of your representation vertically by task (possibly just attending a mediation session or reviewing the agreement) or by issue.¹⁰ The Los Angeles Superior Court and the Family Law Section of Los Angeles County Bar have endorsed the use of unbundled/limited scope/discrete task/coaching legal services following the lead of the California State Bar, the Santa Clara County Bar Association, and the American Bar Association.¹¹

Although the State Bar Board of Legal Specialization has not yet made ADR Lawyer an approved category, you should be aware of the educational and practice requirements that might be considered for such specialization and that you can work toward in developing your skills in representing clients in mediation.¹²

¹⁰In its Rules of Court in effect July 1, 2003, the California Judicial Council promulgated that lawyers making limited court appearance with proper notice can withdraw without leave of court if the proper Judicial Council issued forms are filed and served. See the approved court form, **Notice of Limited Scope Appearance** in the [Appendix](#) of these materials. See also **ABA Model Rule of Professional Responsibility, rule 1.2(c)**: “A lawyer may limit the scope and objectives of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.”

¹¹See [Appendix](#) for Full Resolution approving Unbundled Legal Services. See also **Forrest S. Mosten**, *Unbundled Legal Services* (ABA 2000); **Forrest S. Mosten**, *Unbundling Legal Services to Help Divorcing Families* in *Innovations in Family Law Practice* (Kelly Browe Olson & Nancy Steegh eds. 2008); and www.unbundledlaw.org.

¹²See **Forrest S. Mosten**, *Proposed Standards for ADR Lawyering Legal Specialization* (2004) set out in the [Appendix](#) of these materials.

II. SETTING UP THE MEDIATION¹³

A. Selecting the Mediator

Once a decision has been made to mediate, the natural next step is determining who that mediator will be. The task of the family lawyer is to advise the client about the importance of selecting the appropriate mediator and to take steps that will insure a fair process that will be in the interest of the client.

1. *Let the Other Spouse/Counsel Nominate a Mediator*

As in most process decisions involved in setting up a mediation, if the other spouse or attorney proposes a mediator, you should consider accepting the mediator proposed by the other side unless other factors compel a different choice. Schooled in the trench-warfare mentality of litigation, family lawyers are accustomed to haggling for tactical advantage over even the most technical issues. Unlike judges and arbitrators, mediators do not make decisions. Instead of constantly trying to improve your client's position, your test should be: If it doesn't hurt my client, "let it go." This is a novel and frightening approach for many family lawyers.

What if the other lawyer has worked with this mediator ten times? What if the other lawyer is a golfing buddy with the mediator? What if the mediator's offices are close or even in the same building (or even suite) as those of the other lawyer? Several safeguards built into mediation favor "letting it go." Mediators build their practices based on their reputations for neutrality and fairness. Most mediators are zealously committed to preserving this reputation.

Mediators have a growing obligation to disclose prior contacts with lawyers and parties. Such disclosure itself should give your client a feeling of comfort concerning the mediator's integrity.¹⁴

¹³The remainder of this article contains material adapted and abridged from **Forrest S. Mosten**, *The Complete Guide to Mediation* (ABA Family Law Section 1997).

¹⁴See Model Standards for Mediators (2005) approved by American Bar Association, Association for Conflict Resolution, and American Arbitration Association at www.abanet.org/dispute. See also Model Standards for Divorce and Family Mediators, www.afccnet.org. For a collection of ethics opinions on mediation, see <http://www.abanet.org/dispute/clearinghouse.html>.

If the mediator ever does display bias toward the other side, you can end the mediation the next minute. While it is true that such delayed termination could result in wasted fees for mediation and possibly hurt settlement momentum, it is generally more important to get the mediation started.

Finally, if anyone expresses any concerns regarding bias, the mediator will be consciously on guard and may even increase vigilance for fairness. Since the other lawyer proposed the mediator, you and your client can gain comfort that if the mediator presses the other spouse during the mediation, the mediator will be respected and given increased credence.

2. *Nominating Mediator Candidates*

Generally, the mediation set-up process is facilitated when the party or lawyer most resistant to commencing mediation has the option of nominating the mediator. However, often the resisting lawyer may be inexperienced in mediation and may not have personal knowledge to make a nomination. In addition, that lawyer may be busy (or lazy) and willing to let you make the nomination. In such situations, you should be careful not to abuse the trust reposed in you by the other side (regardless of the motive). You should discuss your intended process with the other lawyer and attain consent along the way rather than be accused of dropping any surprises. Working with the other lawyer as an ally starts with the selection process and can continue until the settlement agreement is signed, and beyond.

Identify the type of mediator background and style that would most suit the parties and the nature of the issues involved.¹⁵ You should assemble background on each of several possible mediators (three is a good number), with a gender mix, if possible. In addition to a curriculum vitae and the mediator's standard mediation agreement,¹⁶ you should request a sample of articles written by or about the mediator and the mediator's promotional materials.

You should send the nominations with a cover letter making it clear that the other party has the unilateral right to choose among the mediators proposed and can feel free to reject

¹⁵Styles of mediators are not static. The same mediator may differ from case to case, issue to issue, or even have different styles for each of the parties or attorneys. Professor Leonard Riskin has developed a grid indicating that mediators may be elicitive or directive in their approach to clients or facilitative or evaluative as to their treatment of issues. See **Leonard I. Riskin**, *Replacing the Mediator Grid Orientation, Again: The New New Grid System* (September 2005) 23 *Alternatives to the High Cost of Litigation* 127-132.

¹⁶See sample Mediation Agreement in the [Appendix](#) to these materials.

all three and that others names can be provided. The letter should also contain a full disclosure of your past professional and personal involvement with each of the nominated mediators. If there are any pending court hearings, you should indicate a willingness to continue the dates of the hearings, preserving the status of any current orders, retroactivity, or other issue that is necessary for the protection of the clients. Finally, it is helpful if you offer the other party an opportunity to interview any or all of the nominated mediators (with your client paying half the cost). Of course, your client should also have the right to interview the mediator finally selected by the other party.

In brief, you should make it clear that you and your client are interested in initiating mediation and in working with the other party and counsel without having to maintain total control of the process.

B. Approving the Mediation Agreement

Most (if not all) competent mediators require the parties to sign a mediation contract before meeting with any of the parties. Such an agreement further protects confidentiality,¹⁷ spells out the mediator's basic rules, and provides for payment of the mediator's fee. While every clause is subject to negotiation, the "Let It Go" standard also applies here. Mediation agreements may vary from mediator to mediator. The agreement should be reviewed closely by your client and you so that the text and consequences are understood. However, unless the agreement contains language that is prejudicial to your client or omits some protection that cannot be dispensed with or obtained down the road, usually it is far better to quickly sign the agreement and move to the next stage of the mediation.

C. Telephone Conference Call

At a minimum, counsel should arrange to have a joint conference call to set up the date(s) of the mediation, briefing schedule, determine who should be at the table, how food is to be arranged, the timing of the day, and other administrative details.

D. Setting the Date for the Mediation

The goal should be to set the mediation for the *earliest* possible date, allowing sufficient time for the parties and counsel to adequately prepare. The lawyers' attitudes toward mediation

¹⁷See *Foxgate Homeowners' Assn. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1 [108 Cal.Rptr.2d 642, 25 P.3d 1117] and *Eisendrath v. Super. Ct.* (2003) 109 Cal.App.4th 351 [134 Cal.Rptr.2d 716]; see also *Evidence Code* ("EvC") sections 1119 and 1123.

are just as important as openings on everyone's calendars. Lawyers who are experienced in representing clients in mediation understand that the probability of success at the mediation itself is very high if it is scheduled before further acts of posturing or conflict (involving parties or counsel) can dilute or extinguish any interest to sit down and reach resolution. Actually, the long wait for an appointment with a courthouse mediation (in the Conciliation Court of Los Angeles, the wait it is currently over eight weeks) or an impending hearing date may be the primary motivation to initiate private mediation. If you are going to be meeting with the mediator with your client and/or be present at the mediation sessions, from the date of agreement to mediate, two to six weeks should be the range of waiting time until the mediation commences. If the parties will be mediating without lawyers, it is often possible to commence mediation within a few days.

E. Format of Session

There are two general formats in family law mediation: the single session or multi-session options.

1. Single Session Format

In the single session model, parties and counsel (generally) meet at the appointed date and time and either mediate until an agreed upon end time (unless agreement is reached sooner) or until an agreement is reached or impasse on one or more issues blocks further progress. Sometimes exhaustion, need for further information or reflection, or other reasons cause the mediation to adjourn for the day, with a set date agreed upon to finish up the agreement. Mediators differ as to whether the mediation session concludes when a document is drawn up and signed by the parties or merely an agreement in principle is reached on all issues with the drafting to follow.

2. Multi-Session Format

In the multi-session model, after the preliminary orientation sessions and any preliminary private sessions, the parties and mediator (and lawyers if they will attend sessions) work out a schedule of sessions ranging from one and one-half hours to four hours in length. The goal for each session is to accomplish as much as possible with the understanding that the parties will continue their work and continue meeting until all of the issues have been resolved. Between sessions, the parties will gather documents, meet together to resolve defined issues (e.g., personal property or holiday schedule), wait for expert reports such as home appraisals or accountings, meet with their consulting lawyers, think about the issues, plan negotiation strategy, and reevaluate underlying priorities and positions. To increase productivity of the recess periods between sessions, many mediators send the parties (and lawyers, if agreed) summary letters or minutes of the prior session setting forth tentative agreements reached, areas of continuing differences, concerns of the parties, homework, observations of the mediator on both the substantive issues and on the mediation process.

As in most models, the two major formats are subject to innovative alteration or may even be combined into a hybrid format. For example, the parties alone may commence mediation in a multi-session format. When the parties get close to final agreement and need a little boost over the last hurdle, a single closing session with counsel may be scheduled. On the other side, if the parties meet with their counsel in a single session, it may be discovered that the parties work together better than anticipated. In such situation (or just to save money), it may be agreed that the parties will meet in multi-session format with the mediator without counsel, each side reserving the right to include counsel down the road.

F. Cost and Who Pays

The two variables of the total fee are (1) the complexity of the legal and financial issues and (2) the emotional and negotiation chemistry of the parties. High assets may not necessarily mean a prolonged mediation, particularly when there is not a community business and most of the assets are in cash or other liquid assets that are not difficult to value and allocate. A negative asset case may be far more difficult as every dollar may affect basic living needs. If parties are mid-scale in both complexity and style, I generally estimate one full day for a single session or three to six shorter scheduled sessions. For every two-day mediation, there are an equal number of half-day mediations. While complex and emotional cases may take over ten sessions, it is more frequent that parties without children, complex assets, or difficult dynamics can be wrapped up in one to three sessions. In the multi-session format, I estimate one hour of outside mediator time for every two hours in session to telephone the parties and counsel, contact experts, draft summary letters, and review correspondence and other documents sent by the parties.

Who will pay the mediator's fees is often a subject of major negotiation. As this topic usually comes up early in the discussions, the common options are :

1. Each Party Pays Half the Total Fees

Many mediation experts believe that the contribution of the parties should be equal to give each spouse an equal stake in the outcome of the mediation and also to level out imbalance of power so that the less affluent spouse need not be apprehensive that the mediator might kiss the hand that feeds the kitty. Variations include reserving final allocation of the mediator's fee to be negotiated within the mediation or decided by the court, if necessary. The spouse unable to pay could receive a preliminary advance distribution from the marital estate or even a personal loan from the other spouse to pay the fees. Of course, parties could borrow or otherwise obtain fees from extended families or by other means. Many mediators accept credit cards and the parties could then negotiate that debt along with their other debts.

Even if the parties agree to pay equally, it may be necessary to negotiate if the obligation is joint and several (causing one spouse to pay the bills of the other defaulting spouse) or whether the mediator has to look to each spouse separately for that spouse's share of

the bill. Of course, just as when lawyers arrange other services and experts, it is better practice for the clients to be directly and exclusively financially liable for the mediator's fees rather than having the lawyers be responsible.

2. Each Party Pays Proportional to Their Respective Gross Incomes

Under this option, there are unequal contributions to the mediator yet each spouse has some stake. If one spouse is totally without funds, the other spouse may pay or merely advance all of the mediator's fees. In such a situation, there may be resentment on the part of the paying party and fear about fairness on the part of the spouse paying less than half or nothing at all. In the same vein, professional mediators are quite accustomed to these unequal payment arrangements. In my own experience as a mediator, once retained, I rarely, if ever, think about how much each side is paying and can state unequivocally that I never favor the party paying the bill while it is current. (I do admit to negative countertransference against the spouse(s) who do not pay as promised, which can affect the impartiality and effectiveness of the mediation.)

G. Site of Mediation

The mediator's office is the obvious first choice—it is neutral. Some mediators do not have offices, rent only their working space without access to sufficient breakout rooms or other amenities, or reside in other cities and are traveling to your locale to mediate this dispute. In such situations, parties with sufficient means may elect to rent space at a hotel, another ADR firm, court reporter's office, or other space in order to insure neutrality. Perhaps one lawyer has access to a colleague's office that can be used. Again, the "Let It Go" mantra should be invoked. If the other lawyer has sufficient space and wants to host, be willing to travel there. However, a number of logistics agreements should be worked out. The mediator should have exclusive use and control over a room of sufficient size to accommodate all parties, counsel, and others present for the mediation. The room should contain a white board, flip chart, or other settlement inducing features that the mediator might request. The visiting lawyer and party should have use and exclusive use over another room. The mediator, visiting lawyer, and client should all be given access to telephones and fax facilities (at their own cost). They should be assured that their messages and delivered documents will be given promptly, with confidentiality protected. The hosting attorney should commit to not taking telephone calls, going through mail, directing staff, or otherwise conducting office business that would interfere with the mediation. In short, like other process issues, it is important to discuss any concern that might make anyone uncomfortable and attempt to approximate a neutral setting to the best possible extent.

H. Food and Drink: Agents of Collaboration

It is harder to hate those with whom one has broken bread. The arrangements for providing caloric and tasty sustenance should be discussed explicitly and not left for the day of the mediation.

The following discussion is directed toward the single session format. In the multi-session model, the meetings are generally at the mediator's office which is accustomed to providing drinks, cookies, candies and other tidbits. During daylong sessions, there are usually four feedings: breakfast, lunch, mid-afternoon snacks, and evening food. Some lawyers have been known to arrange for champagne to celebrate the signed agreement, but usually everyone is too tired to participate with gusto.

Space permitting, the ideal set-up is to have a neutral food room into which all parties and lawyers can enter at anytime to replenish their plates. The host is responsible for having the food set up, ice freshened, and clean-up completed. Some of the most important settlement discussions are initiated casually while participants engage in the common goal of enjoying the repast.

Who is to arrange and pay for this catering? I usually suggest that the lawyers be given the responsibility of arranging the meals. The office host may provide local purveyors and caterers. I have had many lawyers report that the task of arranging and feeding both parties and lawyers felt good and contributed to the day's settlement success.

I. Preliminary Private Sessions

After having an orientation meeting jointly with both parties (or a conference call with the attorneys as discussed above), the mediator will meet with each party individually for a private 90-minute session (if the consulting lawyer attends, two to two and one-half hours are reserved for the private session). During the private session, clients are encouraged to raise any concerns they may have about the mediation process, the behavior and attitude of the other spouse, and their views about the emotional, parenting, or financial issues in the mediation. This time is used for the mediator to learn the facts of the case and to help the clients prepare for the negotiations by gathering up documents, getting information from professionals and institutions (bank records, insurance rates, retirement benefits, listing reimbursement claims, etc.). A major benefit of these sessions is for the mediator to start playing the role of agent of reality and testing each side's position with legal information, research findings, and practicality. The mediator helps each spouse plan how to achieve their goals, discussing how some goals may conflict, and exploring options and reassessing positions. The mediator may also start pointing out to each spouse the areas of commonality and values that the parties share. These private sessions can be used to teach basic negotiation skills and help each side think about what they want to present during the joint session and how to make such presentation. Finally, with the hope that such private time has increased trust and comfort level

and demonstrated that the mediator will truly listen to and understand their underlying concern, the mediator can assure both parties that if either feels the need for additional private time during or between sessions, the mediator is available to both of them.

One task of the consulting lawyer is to help the client decide how to request that the mediation commence: with the parties jointly sitting with the mediator or with preliminary private sessions. If private sessions are agreed upon, you can orient your client about what can be accomplished and help your client be prepared to articulate concerns and develop goals and positions subject to the mediator's input. If you attend the private session, you can be a resource and supporter for your client by raising issues they may be forgotten, asking questions that the client has previously asked you, articulately presenting the client's position from your perspective, and raising your own concerns as consulting lawyer about the process or the negotiation. For example, you may wish to reaffirm that all tentative and preliminary agreements are to be subject to the overall agreement which you, as consulting attorney, wish to carefully review. You may wish to emphasize your desire to receive all summary letters or other correspondence directly, your availability to the mediator, and your commitment to be an ally to the mediator throughout the process.

Sample Mediation Notebook Contents

1. Tax Returns – Personal
2. Tax Returns – Corporate
3. Cash Disbursements Analysis Reports
4. Summary of Household Expenses
5. Summary of Child-Related Expenses
6. **Schedule of Assets and Debts**
7. Notes and Thoughts from WIFE
8. Narrative from HUSBAND Regarding the Management of the Community Estate
9. Real Estate Deeds
10. Deal Memorandum and Employment Contract
11. Loan
12. Greenpeace Donation
13. Pension Plan
14. Corporate Records
15. Furniture

J. Mediation Briefs

Generally, briefs are utilized in the single session format, but nothing prevents counsel from agreeing to submit briefs in the multi-session format as well. Lawyers who have not participated in mediations may treat the use of briefs as perfunctory or be wary of presenting all legal theories and supporting facts. This wariness may be caused by a trial lawyer's desire to preserve the surprise factor or a pessimism about the possibilities of success in mediation combined with desire to keep legal bills low on what is seen as a noble yet probably useless exercise.

Once mediation has been agreed upon or ordered by the court, it should be viewed by lawyers as the last dispute resolution process in the case. Rather than viewing mediation as a preliminary hoop to try out before preparing for trial, mediation should be seen as the end game—the process during which the case will be settled. Research on the success rate of mediation and testimonials back up this more hopeful view. Therefore, if briefs are utilized, you should not hold back; research and careful drafting should be employed to craft the mediation brief as a tool of persuasion. However, the persuasion should not be directed to the mediator, or even to the opposing lawyer. In mediation (as in all negotiations), the real judge, the last decision maker, is the other spouse. The mediation brief should be drafted with the other spouse in mind: what will persuade that party? The brief should also be submitted far enough in advance for the other spouse to discuss it with his/her lawyer, accountant, family, and other people he/she respects. Many lawyers agree that the mediation brief can be sent directly to the other spouse to expedite the reflection and reassessment process and to absolutely confirm that the briefs will be seen and studied by the parties themselves.

Setting up the mediation properly and preparing for it diligently will not only increase the odds for success but will expedite the settlement making process that will reduce conflict and lower the parties' costs, increase client satisfaction, and improve rate of payment and future referrals for your practice.

ENDNOTE

- 1 Forrest S. Mosten is Past Chair of the ADR Committee of LACBA's Family Law Section and was a member of the Section's Executive Committee from 2001-2007. He is a Certified Family Law Specialist and has been mediating in private practice since 1979. He limits his family law practice to mediation, collaborative and unbundled representation of high conflict and complex legal matters as well as Premarital and Postmarital Agreements. He never goes to court. He has been named 2010 Super Lawyer in Family Law and one of California's Top 25 Family Mediators by the Daily Journal. Mr. Mosten is on the faculty of UCLA School of Law where he teaches mediation. He is the author of *Complete Guide to Mediation* (ABA 1997), *Unbundling Legal Services* (ABA 2000), *Mediation Career Guide* (Jossey-Bass 2001), numerous articles on mediation and his newest book, *Collaborative Divorce Handbook: Effectively Helping Divorcing Families Without Going to Court* (Jossey-Bass 2009). Mr. Mosten has received awards for his work in mediation and legal access from LACBA (Conflict Prevention Award), Beverly Hills Bar (President's Award), Southern California Mediation Association (Peacemaker of the Year), and the American Bar Association (Lifetime Achievement Award in Legal Access and Lawyer as Problem Solver Award). He can be reached at www.MostenMediation.com.

Appendix A

PRACTICE TIPS

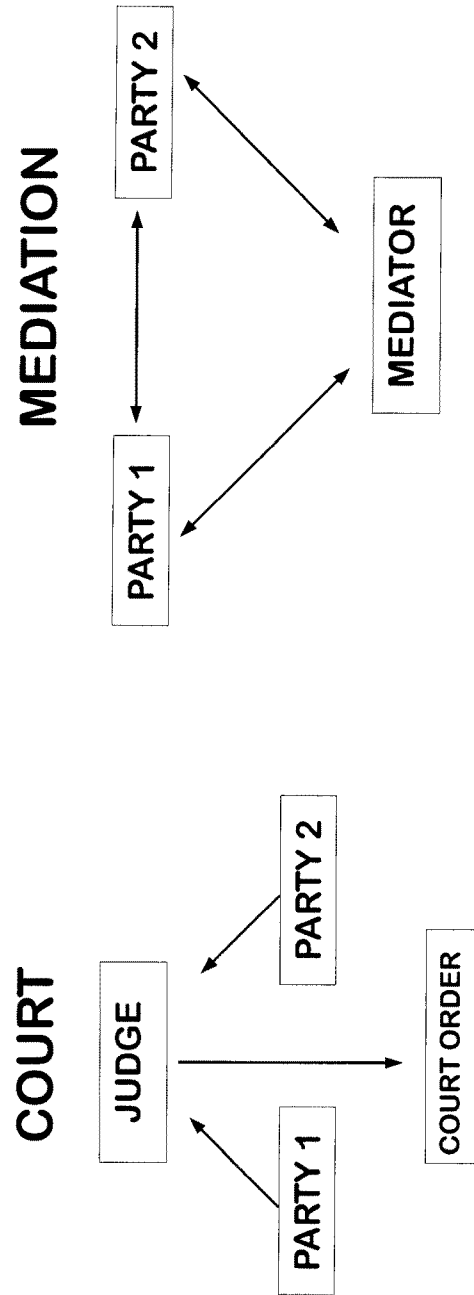
1. Take care in selecting the mediator;
2. Unless clearly incompetent, unqualified, or biased, agree to the mediator proposed by the other party;
3. “Let Go” of unimportant issues in setting up the process—let the other side win; Reassure your client that flexibility is not weakness;
4. Establish a collaborative team approach with the opposing lawyer in setting up the mediation; you are both allies in the quest for amicable resolution—even if you differ on the issues or on your views of the parties;
5. Make it easy for the other side to try mediation; provide full background of proposed mediators, disclosure of your past contact, give the other side wide control, and be willing to continue court actions to schedule the mediation;
6. Educate client and opposing party and lawyer about the 85-90% success rate in private mediation—about 60% in court annexed mediation;
7. Do not cut corners in preparing for the mediation—success depends on it;
8. Schedule the mediation as quickly as possible with sufficient time for preparation—2-6 weeks should be the range;
9. Select the best mediator the parties can afford—be willing to compromise that choice in order to get the mediation going faster;
10. Explain the difference between the single session and multi-session mediation formats and propose the format or hybrid that best serves your client;
11. Use the time between sessions to the client’s advantage—review the negotiation process, gather documents, revise positions, and prepare for the next session;
12. Schedule sufficient time for each mediation session;
13. Be sure that your client is clear how much the mediator is being paid, when payment is due, what the client is paying for, and what additional fees are expected and when;
14. Define allocation of payment between the parties;

15. Try to use a neutral site, but “Let It Go” if the other lawyer wants to host;
16. Take care to arrange for food and drink and determine who will make arrangements;
17. Discuss the advantages of having a private session with each side before commencing the mediation;
18. Discuss the advantages of having you attend the sessions; and
19. Direct your mediation brief and your verbal presentation to the other party—not to the opposing lawyer or mediator.

COMMUNICATION WITH PARTIES

Appendix B

COMMUNICATION WITH PARTIES IN MEDIATION



COURT: Parties do not have open Direct Communication with each other or the judge

MEDIATION: Parties speak Directly with each other and with the Mediator
Mediator Facilitates—Parties retain the control to agree or to terminate Process

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Appendix C

SAMPLE MEDIATION AGREEMENT

LAW AND MEDIATION OFFICE OF

Forrest S. Mosten*

*CERTIFIED FAMILY LAW SPECIALIST
CALIFORNIA BOARD OF LEGAL SPECIALIZATION

11661 SAN VICENTE BOULEVARD, SUITE 414
LOS ANGELES, CALIFORNIA 90049-5118

LOUIS M. BROWN CLIENT LIBRARY

+ ADVANCED PRACTITIONER
ASSOCIATION FOR CONFLICT RESOLUTION

TELEPHONE (310) 473-7611
FACSIMILE (310) 473-7422

E-Mail: MOSTEN@MEDIATE.COM
WWW.MOSTENMEDIATION.COM

MEDIATION AGREEMENT

I have read the attached Mediation Agreement completely and understand its contents. I have initialed each page to indicate my understanding and agreement of the terms.

I wish to initiate mediation with Forrest S. Mosten and agree to the provisions and financial arrangements set forth.

Hourly Rates:
Forrest S. Mosten: \$
Mediation Assistant: \$

Date

Party

Date

Party

Dated

By:

Mediator

MEDIATION AGREEMENT

I.

ESTABLISHMENT OF MEDIATION RELATIONSHIP

The undersigned wish to retain the services of FORREST S. MOSTEN to mediate disputed issues. The Mediator is an attorney licensed to practice in the State of California working as a sole Mediator or working conjointly with a professional from another discipline (e.g., a therapist, clergy and/or accountant). All references to “Mediator” apply both to the lawyer Mediator and any other professional serving as Mediator, consultant, assisting the mediator or communicating with the parties in respect to the Mediation.

The parties acknowledge that the Mediator has discussed the advantages and disadvantages of the Mediation process and compared that process with being represented by separate attorneys or having the issues resolved through negotiation between lawyers or by a judge in the court.

II.

RIGHT OF INDEPENDENT COUNSEL

During the Mediation, the parties are each encouraged to consult independent counsel at any time. Each party is entitled to the confidentiality of the attorney/client relationship in respect to any communication with an independent attorney. In particular, the parties should consult independent counsel prior to signing any final Agreement.

III.

MEDIATOR REPRESENTS NEITHER PARTY

The parties acknowledge that the Mediator does not represent the interests of either party and is not acting as an attorney. The parties acknowledge that the purpose of Mediation is to facilitate the ultimate resolution and agreement between the parties regarding the issues, problems, and disputes presented in Mediation and that the Mediator does not act as an advocate, representative, fiduciary, or counsel for either party.

IV.

IMPARTIALITY OF MEDIATOR

The parties acknowledge that, although the Mediator will be impartial and that the Mediator does not favor either party, there may be issues in which one party may be reasonable and the other may not be reasonable. The Mediator has a duty to assure a balanced dialogue and to diffuse any manipulative or intimidating tactics.

CONFIDENTIALITY

The Mediator agrees to keep all communication from either of the parties confidential in respect to any third persons, unless express verbal consent is given by both parties. However, for the purpose of facilitating communication and resolving differences between the parties, each party specifically authorizes the Mediator to meet individually with either party, and each party waives the right of confidentiality vis-à-vis the other party in respect to any telephonic or personal communication by one party with the Mediator. Therefore, the Mediator may meet with one party without the presence of the other, but any communication received in such individual sessions may be disclosed to the non-present party at the Mediator's discretion. Such disclosure of communications is to preserve the neutrality of the Mediator. Each party understands that if either party has a concern as to whether a fact or communication should be shared with the Mediator, the party must weigh the increased possibility for resolution of the dispute by sharing communication with the Mediator compared to revealing confidential information to the other party. The parties each waive their right of confidentiality with the Mediator, and authorize the Mediator to share all communications with the other party.

The parties agree that **Sections 1119, —1121, —1122, —1123, —1125, —1126, —1128** are affirmed as the rules of our Mediation and the sections are set forth here.

Mediation Confidentiality—Evidence Code Section 1119

- (a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.
- (b) No writing that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.
- (c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.

Disclosure of Physical and/or Sex Abuse

The Mediator shall not maintain confidential from the other party, or from appropriate third parties, any communication from any party that indicates to the Mediator any of the following:

- 1) Ongoing physical abuse of one party;
- 2) Ongoing or past physical violence or sexual abuse of a minor child;
- 3) The intention of one party to commit a criminal act endangering the other party or any third party. The parties acknowledge that although the Mediator is an

attorney licensed in the State of California, communications made in mediation are not protected by the attorney-client statutory privilege and confidentiality that would apply if the Mediator were acting in the role of attorney and they release and hold Mediator from any civil liability or professional ethical violations for disclosing such communication as a Mediator which would be privileged of confidentiality.

Mediator reports and communications—Evidence Code Section 1121

Neither a mediator nor anyone else may submit to a court or other adjudicative body, and a court or other adjudicative body may not consider, any report, assessment, evaluation, recommendation, or finding of any kind by the mediator concerning a mediation conducted by the mediator, other than a report that is mandated by court rule or other law and that states only whether an agreement was reached, unless all parties to the mediation expressly agree otherwise in writing.

Disclosure by Agreement—Evidence Code Section 1122

A communication or a writing that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, if either of the following conditions is satisfied:

- (1) All persons who conduct or otherwise participate in the mediation expressly agree in writing, to disclosure of the communication, document, or writing.
 - (2) The communication, document, or writing was prepared by or on behalf of fewer than all the mediation participants, those participants expressly agree in writing, to its disclosure, and the communication, document, or writing does not disclose anything said or done or any admission made in the course of the mediation.
- (b) If the neutral person who conducts a mediation expressly agrees to disclosure, that agreement also binds any other person designated by the mediator to assist in the mediation or to communicate with the participants in preparation for a mediation.

Written settlement agreements reached through mediation—Evidence Code Section 1123

A written settlement agreement prepared in the course of, or pursuant to, a mediation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if the agreement is signed by the settling parties and any of the following conditions are satisfied:

- (a) The agreement provides that it is admissible or subject to disclosure, or words to that effect.
- (b) The agreement provides that it is enforceable or binding or words to that effect.
- (c) All parties to the agreement expressly agree in writing.
- (d) The agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.

When mediation ends—Evidence Code Section 1125

- (a) A mediation ends when any one of the following conditions is satisfied:
 - (1) The parties execute a written settlement agreement that fully resolves the dispute.
 - (2) An oral agreement that fully resolves the dispute is reached.
 - (3) The mediator provides the mediation participants with a writing signed by the mediator that states that the mediation is terminated, or words to that effect.
 - (4) A party provides the mediator and the other mediation participants with a writing stating that the mediation is terminated, or words to that effect. In a mediation involving more than two parties, the mediation may continue as to the remaining parties or be terminated in accordance with this section.
 - (5) For 10 calendar days, there is no communication between the mediator and any of the parties to the mediation relating to the dispute. The mediator and the parties may shorten or extend this time by agreement.
- (b) For purposes of confidentiality, if a mediation partially resolves a dispute, mediation ends when either of the following conditions is satisfied:
 - (1) The parties execute a written settlement agreement that partially resolves the dispute.
 - (2) An oral agreement that partially resolves the dispute is reached.
- (c) This section does not preclude a party from ending a mediation without reaching an agreement. This section does not otherwise affect the extent to which a party may terminate a mediation.

Effect of end of mediation—Evidence Code Section 1126

Anything said, any admission made, or any writing that is inadmissible, protected from disclosure, and confidential before a mediation ends, shall remain inadmissible, protected from disclosure, and confidential to the same extent after the mediation ends.

Irregularity in proceedings—Evidence Code Section 1128

Any reference to a mediation during any subsequent trial is an irregularity in the proceedings of the trial. Any reference to a mediation during any other subsequent noncriminal proceeding is grounds for vacating or modifying the decision in that proceeding, in whole or in part, and granting a new or further hearing on all or part of the issues, if the reference materially affected the substantial rights of the party requesting relief.

VI.

RIGHT OF MEDIATOR TO WITHDRAW

The Mediator will attempt to resolve any outstanding disputes as long as both parties make a good faith effort to reach an agreement based on fairness to both parties. Both parties must be willing and able to participate in the process. The mediated agreement requires compromise, and both parties agree to attempt to be flexible and open to new possibilities for a resolution of the dispute. If the Mediator, in his or her professional judgment, concludes that agreement is not possible or that continuation of the Mediation process would harm or prejudice one or both of the participants, the Mediator shall withdraw and the Mediation shall conclude.

VII.

FOLLOWING THE INSTRUCTION(S) OF THE MEDIATOR

The parties agree to follow the instructions of the Mediator throughout the Mediation process. Such instructions are designed to insure that both parties receive full disclosure and development of factual information and that each party has an equal understanding of such information prior to reaching an agreement. Such instructions may include, but are not limited to: seeking advice from independent counsel; making available children, family members or other persons available for participation in Mediation; providing financial information, such as pay-stubs, bank statements, tax returns or other records; contacting and/or retaining independent experts or third parties (e.g., appraiser, therapist, doctor, employer, escrow, banks and/or stock brokers); or, anything else reasonably calculated by the Mediator to insure fairness in the Mediation process.

If either of the parties fails to follow the Mediator's instructions, each party agrees that Mediator may withdraw forthwith and both parties agree to release, hold harmless and indemnify the Mediator from any claim or liability for refusal to continue the Mediation.

VIII.

TERMINATION OF MEDIATION WITHOUT CAUSE

The Mediation may be terminated without cause by either party at any time. No reason must be given, either to the other party or to the Mediator. A decision to terminate Mediation must be made in writing. Mediation may not resume following said notification, unless expressly authorized by both parties.

Upon termination of Mediation for any reason, the Mediator agrees not to counsel either party or represent either party against the other, in any court proceeding, adversary negotiation, or for any other reason involving a dispute between the parties.

IX.

VOLUNTARY DISCLOSURE OF POSSIBLE PREJUDICIAL INFORMATION

The parties agree that, while Mediation is in progress, full disclosure of all information is essential to a successful resolution of the issues. Since the court process is not being used to compel information, any agreement made through Mediation may be rescinded in whole or in

part if one party fails to disclose relevant information during the Mediation process. Since the voluntary disclosure of this information may give one party an advantage that may not have been obtained through the traditional adversarial process, the parties agree to release and hold harmless the Mediator from any liability or damages caused by voluntary disclosure of prejudicial information in the Mediation process that may be used in subsequent negotiations or court proceedings. The Mediator has no power to bind third parties not to disclose information furnished during Mediation.

X.

THE MEDIATOR SHALL NOT TESTIFY

Pursuant to Evidence Code section 1127, the parties agree not to call or subpoena the Mediator to testify at any court proceeding nor to produce any document obtained or prepared from any Mediation session without the prior written authorization of both parties. If either party issues a subpoena regarding the Mediator or his or her documents, that party shall pay the Mediator his or her current hourly rate for all hours expended and shall pay all reasonable attorney fees of the other party in respect to the response, compliance, or resistance of said subpoena.

XI.

THE MEDIATOR DOES NOT PROMISE RESULTS

Each party acknowledges that, since Mediation is a process of compromise, it is possible that either party might agree to settle on terms that might be considered to be less favorable in comparison to what the party *might* have received from a judge after a contested court hearing, or through negotiation in which one or both of the parties have retained legal counsel. The Mediator makes no representations that the ultimate result would be the same in kind or degree as might be concluded through negotiation or a contested trial on one or all of the issues. Any questions concerning fairness should be addressed to the Mediator as they occur. In addition, the spouses should consult with independent legal counsel to review compromises made during the course of Mediation, and all provisions of a final agreement prior to executing the Marital Settlement Agreement and other court documents.

XII.

FILING OF COURT DOCUMENTS

Once an agreement is reached, in whole or in part, or at any time the parties desire to file any court documents to confirm the agreement and to obtain court order or judgment based thereon, the parties understand that the Mediator may not represent either party in a court of law. However, the parties agree that if the parties are represented by counsel, or act as their own attorney(s) In Pro Per, the parties may authorize FORREST S. MOSTEN to neutrally prepare court papers and to monitor all paperwork through the court system. In performing such work, Forrest S. Mosten is performing his Mediator function and will take no action without the mutual agreement and authorization of both parties.

XIII.

REIMBURSEMENT OF COSTS

The parties agree to reimburse the Mediator for any and all costs expended on behalf of the parties that are authorized in advance by the parties. In addition, at the Mediator's option, in place of and instead of charges for domestic telephone calls and long distance telephone calls (not to exceed \$20 per month), postage, mileage, parking and in firm photocopying or reproductions, a surcharge to the client's bill of 4% of the hourly billings per month for said client may be included. Examples of non-included costs are photocopying provided outside the office, messenger and delivery service costs, attorney service costs, witness and expert fees,

deposition reporter fees, filing fees and domestic long distance telephone calls exceeding 20 minutes and international telephone calls, which charges shall be itemized on the client's monthly statement in addition to the monthly surcharge.

XIV.

BOTH PARTIES ARE RESPONSIBLE FOR FEES

The parties hereby agree to be jointly and severally responsible for the fees of Mediators and staff of Forrest S. Mosten. If, for any reason, the fee of the Mediator is not paid within fifteen (15) days of billing, the Mediator reserves the right to unilaterally refuse to render any further professional services for the parties. The parties agree that, in addition to the payment of any agreed upon fees, each of the parties shall be liable for any costs of collecting the total amount of the fee, including reasonable attorney fees for collecting said fees.

XV.

FEES AND SERVICES

The services of the Mediator include, but are not limited to: Mediation sessions with either party; telephone or office conferences with either party or with third parties; coordination and referral with other resource persons; drafting of letters or court documents; other services performed by the Mediator or behalf of the Mediation.

Time for the Mediators and staff is charged in minimum increments of .20 hours, as set forth in the Schedule.

XVI.

REPLENISHABLE DEPOSIT

Prior to commencing the Mediation, the parties each agree to pay an initial deposit. Parties shall deposit with Mediator an advance deposit to be credited against client's final bill. Parties will pay Mediator monthly in full for services rendered during that month within 15 days of billing. At completion of Mediator's work with parties, the retainer will be credited towards parties' final bill and the remainder will be refunded to the parties.

XVII.

BILLINGS

a) Mediator shall render to parties statements on a monthly basis setting forth an itemized detail of the services rendered on their behalf for fees and reimbursements to which Mediator is entitled on account of services rendered under this Agreement. The amounts indicated to be due and owing on statements shall be paid forthwith and in any event not later than 15 days after each statement is rendered. Mediator's invoice shall clearly state the basis thereof, including the amount, rate and basis of calculation (or other method of determination) of Mediator's fees.

b) Parties and Mediator agree that it is impossible to estimate how much the Mediator's fees and costs will be in advance and, therefore, no prediction of the total bill can be made.

c) If any bill is not paid in a timely manner, parties agree to pay finance charges at the rate of one percent per month on the outstanding balance.

d) Set payments on a monthly basis can be arranged by agreement of the Mediator and parties, in minimum amounts set forth on the Schedule.

e) If either of the parties makes an appointment with a Mediator and cancels less than twenty-four hours in advance of said appointment, the parties will be charged the full cost of the appointment. For example, if the appointment is scheduled for 3 hours, you will be billed for all 3 hours if you fail to cancel the appointment within twenty-four hours.

XVIII.

BINDING ARBITRATION

a) All disputes between the parties and the Mediator regarding any aspect of our professional relationship will be resolved by binding arbitration administered through the Los Angeles County Bar Association pursuant to Sections 1280 *et seq.* of the Code of Civil Procedure and not by litigation in court. By this provision, we are both giving up our right to have any such dispute decided by a judge or a jury and we are each giving up the right of appeal.

b) The prevailing party in any arbitration between us will be entitled to reasonable attorney's fees and costs. Any litigation or arbitration between us will take place in Los Angeles County and California law will apply.

c) It is important for you to know that, under current California law, a mediator has complete immunity from suit regarding negligence or malpractice or any other cause of action. This means that you cannot sue our firm or any Mediator or staff member for any damage to you arising out of the Mediation relationship.

d) Before signing this Agreement you have a right to consult an independent attorney about the legal consequences to you of signing this Agreement and specifically waiving the right to use the courts in any fee dispute and using arbitration instead.

XIX.

MEDIATOR'S FEES

Should it be necessary to institute any legal action or arbitration for the enforcement of this Agreement, the prevailing party shall be entitled to receive all court costs and reasonable attorney's fees incurred in such action from the other party.

XX.

RETURN OF CLIENT'S FILE

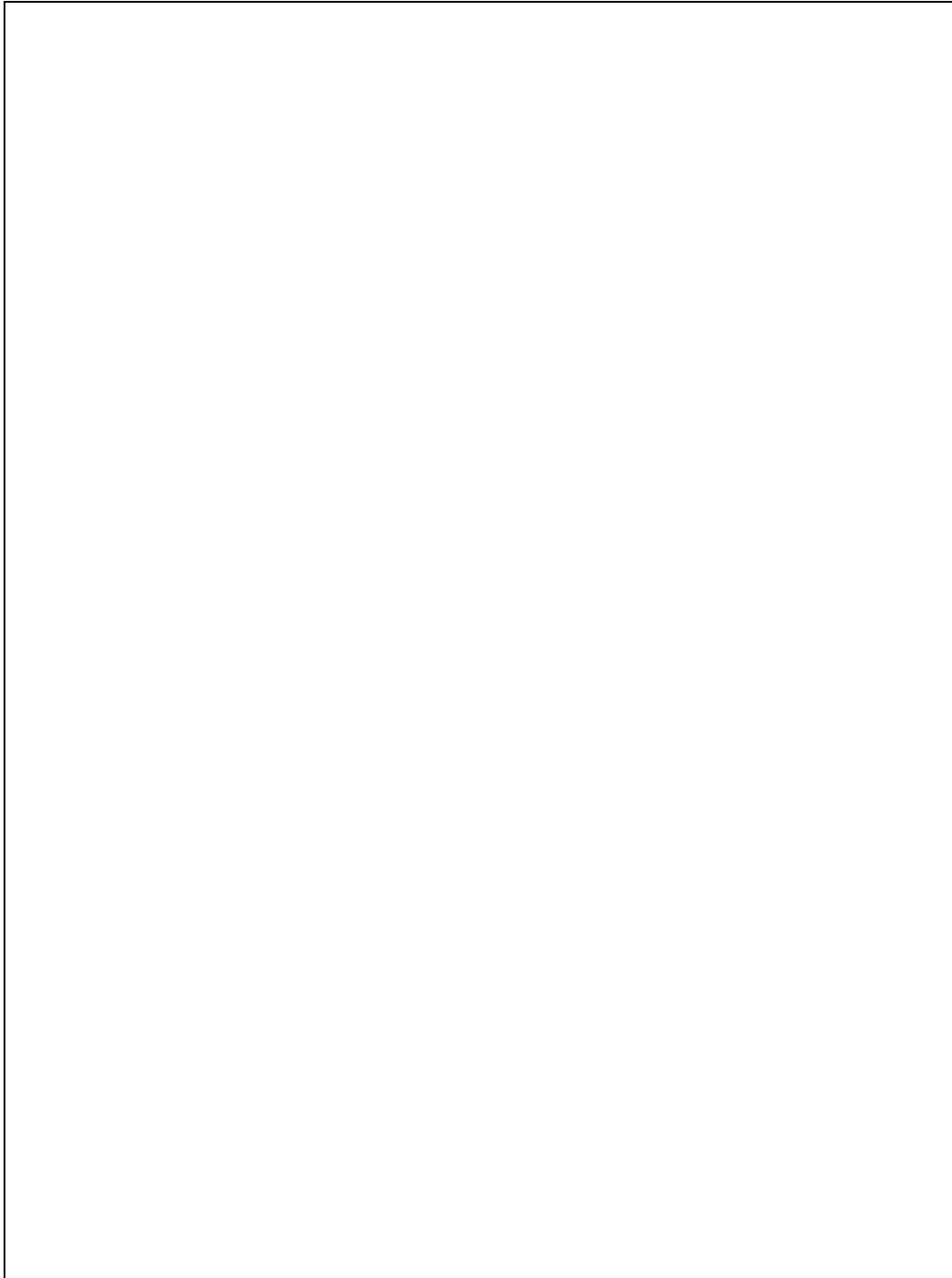
Throughout the Mediation, Mediator shall send parties copies of work produced. Before giving documents to the Mediator, parties should make copies so that at all times parties have a duplicate file. Due to a limitation of storage space, at the conclusion of the matter for which Mediator is engaged, both parties shall have the right to possession of the entire client file including documents produced by the Mediator and other parties and all client personal and business documents, except Mediator work product (notes, memoranda, and the like). Any email communication between the parties and the Mediator shall not be part of the file that will be returned to the parties. Parties should save all such communication either on a computer or print out copies. **If WITHIN 60 DAYS FOLLOWING THE LAST MEDIATION SESSION OR CORRESPONDENCE TO OR FROM THE MEDIATOR**, the parties do not pick up file at the parties' expense (Mediator will not pay messenger or pay to copy the file), Mediator has the right to destroy the file and all of its contents without further notice to the parties. If the parties do not agree as to which party should take the file, the Mediator shall hold file for a maximum of 90 additional days to permit the parties to resolve the issue of possession of the file by voluntary agreement or court order. At the expiration of this additional 90-day period, Mediator has the right to destroy the file without further notice.

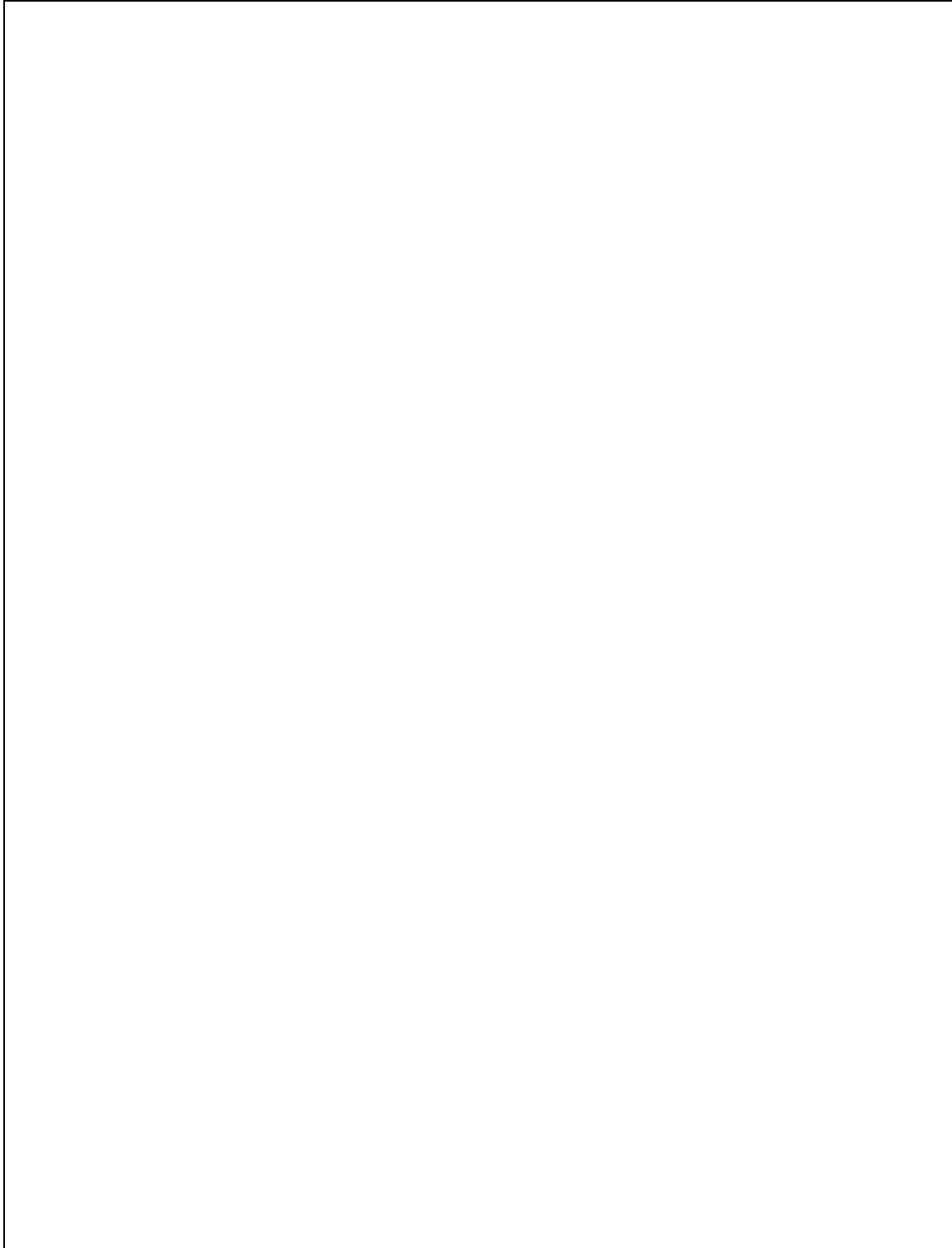
EXECUTION OF MEDIATION AGREEMENT

By signing this Mediation Agreement, each party agrees that he or she has carefully read and considered each and every provision of this Agreement and agrees to each provision of this Agreement without reservation.

Appendix D

NOTICE OF LIMITED SCOPE REPRESENTATION





Appendix E

SAMPLE PROPOSED REQUIREMENTS FOR ADR LAWYER SPECIALIZATION

DEFINITION OF ADR LAWYERING SPECIALIST

ADR Legal Practice is the practice of law dealing with all aspects of advising and representing clients in mediation, arbitration, collaborative law, and other ADR processes, as both counsel of record and/or in an unbundled manner as defined by *California Rules of Court*. Other ADR Processes include, but are not limited to: neutral fact finding, mini-jury trial, private judging, early case evaluation, non-judicial case management, conflict prevention and dispute system design. Attorneys serving as neutrals are not covered by this certification.

TASK REQUIREMENTS FOR CERTIFICATION AS ADR LAWYERING SPECIALIST

An Applicant must demonstrate that within the five (5) years immediately preceding the initial application, he or she has been substantially involved in ADR Legal Practice, which shall include actual experience in the following areas:

- Representing Clients in Court Mandated Mediation;
- Representing Clients in non Court Mandated Mediation arbitration, Collaborative Law Sessions, or other ADR Processes;
- Negotiating, reviewing and drafting ADR arrangements including setting up mediation, arbitration, collaborative law , and other ADR processes;
- Negotiating, reviewing, and drafting terms of settlement within mediation, collaborative law, and other ADR processes; and/or
- Negotiating, reviewing and drafting future dispute resolution clauses for contracts and settlement agreements.

A prima facie showing of substantial involvement in the area of ADR Legal Practice is made by completion of at least two of the following categories:

- Principal counsel in twenty-five (25) Court Mandated Mediations involving at least 1 session with parties and counsel for minimum of at least three (3) hours in duration;
- Principal counsel in twelve (12) Mediations (not mandated by a court) resulting in a written Memorandum of Understanding or Settlement Agreement involving at least 1 session with parties and counsel for a minimum of at least three (3) hours in duration;

- Principal counsel in twelve (12) Collaborative Law Proceedings resulting in a written Settlement Agreement involving at least 2 sessions with parties and counsel for a minimum of at least three (3) hours in duration per session;
- Principal counsel in twenty-five (25) Court Mandated Arbitrations involving at least 1 session with parties and counsel for minimum of at least three (3) hours in duration;
- Principal counsel in twelve (12) Arbitrations not mandated by a court resulting in a written decision involving at least 1 session with parties and counsel for minimum of at least three (3) hours in duration;
- Principal counsel in twelve (12) Other ADR Process matters resulting in a written agreement or decision involving at least 3 hours per matter;
- Principal Counsel in fifty (50) matters of Unbundled Representation of Pro Per parties participating in mediation involving at least two (2) hours per matter;
- Principal Counsel in fifty (50) matters involving Conflict Prevention Legal Services involving at least two (2) hours per matter;

Principal Counsel is the attorney who spends a majority of the time on a case in the activities of preparation, review, and providing ADR Legal Services to a client. There can be only one principal counsel per case.

EDUCATIONAL REQUIREMENT FOR CERTIFICATION

An applicant must show that, within the three (3) years immediately preceding the application for certification, he or she has completed not less than forty-five (45) hours of activities specifically approved for ADR Legal Practice as follows in addition to completion of a minimum of 50 hours of mediation training as a neutral, *or* 25 hours of mediation training *and* 25 hours in collaborative law training, *or* 25 hours of mediation training *and* 25 hours of arbitration law training:

Not less than four (4) hours in interviewing and advising clients on alternatives to litigation;

Not less than ten (10) hours in negotiation planning and strategic interventions;

Not less than (20) hours in mediation advocacy *and/or* advanced collaborative law training, *and/or* advanced arbitration training, *and/or* advanced training in other ADR processes;

Not less than three (3) hours in unbundled legal services and/or other legal services for unrepresented persons;

Not less than four (4) hours in ethical issues involved in ADR Legal Practice; and

Not less than four (4) hours in law office management supporting ADR Legal Practice.

Appendix F

OVERVIEW OF FAMILY LAW ADR OPTIONS

FAMILY LAW ADR OPTIONS

INSIDE COURTHOUSE

Conciliation Court

Custody Evaluation

Mandatory Mediation –
Property and Support

Meet and Confer Requirements

Special Masters or Referees

Mandatory Settlement Conference

Conference in Judge's Chambers

PRIVATE SECTOR

Self-Help

Informal Third Party Assistance

Individual Divorce Counseling

Non-Profit Mediation Centers

Lawyer Mediators

Binding Arbitration

Med-Arb and Arb-Med

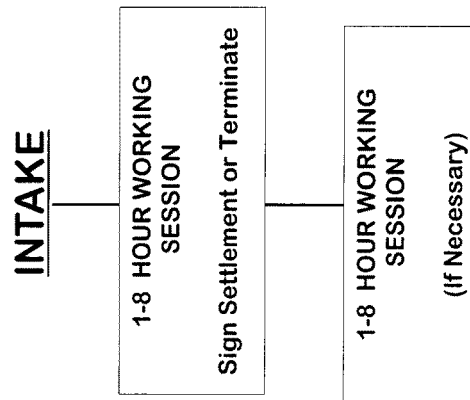
Private Trials

MEDIATION FORMATS

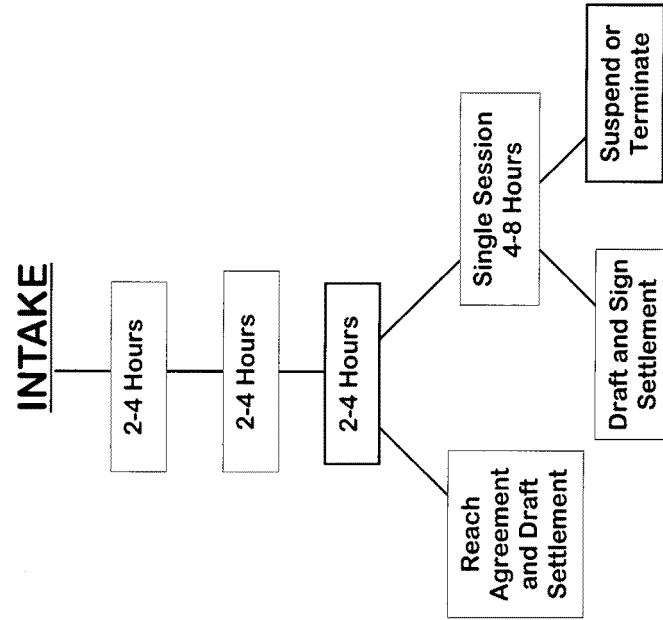
Appendix G

SAMPLE MEDIATION FORMATS

Single Session



Sequential Session

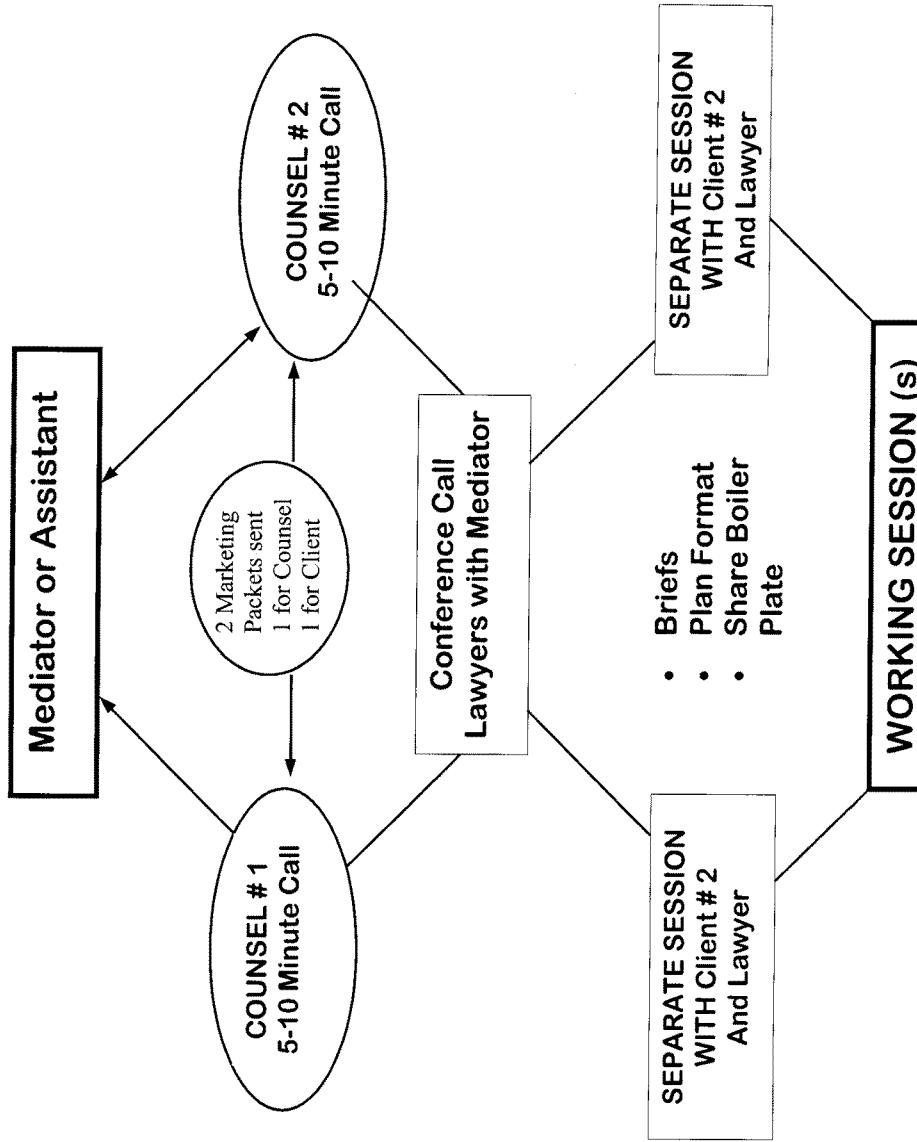


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Appendix H

SAMPLE MEDIATION INTAKE MODEL WITH COUNSEL INVOLVED

INTAKE WITH COUNSEL



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Appendix I

JOINT RESOLUTION OF THE LOS ANGELES COUNTY SUPERIOR COURT JUDICIARY, THE LOS ANGELES COUNTY BAR ASSOCIATION, AND THE FAMILY LAW SECTION OF THE COUNTY BAR ASSOCIATION REGARDING LIMITED SCOPE REPRESENTATION, COMMONLY KNOWN AS “UNBUNDLING”

(Passed April 19, 2005)

WHEREAS, the judges of LOS ANGELES County Superior Court and the attorneys appearing in those courts continue to work together on ways to improve equal access to the courts for all people, and

WHEREAS, judges and attorneys recognize the growing problem of members of our community unable to afford legal representation in the civil courts, especially in the area of family law, and

WHEREAS, there is a high number of self-represented persons in Family Court who face complex and varied custody and financial issues, and

WHEREAS, limited scope representation permits a person to hire an attorney to assist with specific tasks on one or more issues in a case, while the client continues to represent him/herself in all other aspects of the case, thereby limiting the cost of legal assistance, and

WHEREAS, recent developments, including the enactment of new California Rules of Court provide guidance for attorneys offering limited scope representation in Family Court, have made the concept of limited scope representation readily available for attorneys to offer, and

WHEREAS, limited scope representation presents a way for the courts and attorneys to work together toward assisting parties with limited financial means in handling their legal matters,

THEREFORE BE IT RESOLVED THAT,

- **The LOS ANGELES County Superior Court supports limited scope representation in family law cases, and will honor agreements made by attorneys to provide limited scope representation, and will not expect an attorney to go beyond the limits set by the attorney’s contract with his or her client.**

- **The LOS ANGELES Bar Association supports limited scope representation, and will assist attorneys through training, and will establish a limited scope representation panel for the Bar Association Lawyer Referral Service.**
- **The Bench and Bar will work together to inform the public of the availability of limited scope representation.**

Appendix J

SELECTED BOOKS AND ARTICLES ON COLLABORATIVE LAWYERING AND MEDIATION¹

Books and Articles on Collaborative Practice

- Abney, S. R. *Avoiding Litigation: A Guide to Civil Collaborative Law*. Victoria, B.C.: Trafford Publishing, 2006.
- American Bar Association. Standing Committee on Ethics and Professional Responsibility. "Ethical Opinion 07-447. Collaborative Law." Chicago: American Bar Association, 2007.
- Beckwith, S. S. "The Collaborative Lawyer as Advocate: A Response." *Ohio State Journal on Dispute Resolution*, 2003, pp. 497-504.
- Brumley, J. P., and Fairchild, L. *Divorce Without Disaster: Collaborative Law in Texas*. Dallas: PSG Books, 2004.
- Bryan, K. "Why Should Businesses Hire Settlement Counsel?" *Journal of Dispute Resolution*, 2008, 2008(1), 195-202.
- Cameron, N. J. *Collaborative Practice: Deepening the Dialogue*. Vancouver, B.C.: Continuing Legal Education Society of British Columbia, 2004.
- Chrisman, O. P., Cox, G. G., and Novotna, P. "Collaborative Practice Mediation: Are We Ready to Serve This Emerging Market?" *Pepperdine Dispute Resolution Law Journal*, 2006, 6(3), 451-464.
- Cox, G. G., and Matlock, R. J. "Peacemakers and the Law: The Case for Collaborative Law." *Texas Wesleyan Law Review*, 2004, 11, 45-69.
- Cox, G. G., and Waters, Y. R. "Penetrating the Walls: Overcoming Barriers to the Proliferation of Collaborative Practice in Underserved Communities." *Collaborative Review*, 2008-2009, 10(3), 11-17.

¹Reprinted with permission, **Forrest S. Mosten**, *Collaborative Divorce Handbook: Helping Families Without Going to Court* (Wiley, 2009).

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