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Supporting Parent-Clients in Mediation of Child Custody Disputes

Andrew Schepard

*Parents facing custody disputes want to find alternatives that are good for the children.
Mediation is one of the best.*

LAWYERS WHO SUPPORT their divorce clients—and thus their client's children—through the mediation process act in the highest traditions of our profession. In effect, these lawyers help shield children from the combat zone of parental warfare. It is entirely possible for lawyers to use mediation in a way that simultaneously protects a client's legal position and looks to the long-term best interests of their children. This article summarizes the problems faced by children of divorce and the pervasive

growth of child custody mediation. It then presents a hypothetical lawyer-client/parent dialogue on the subject of child custody mediation, illustrating how a lawyer might wish to present the option of child custody mediation to a client.

THE IMPORTANCE OF CHILD CUSTODY MEDIATION • More than 1.5 million children annually experience their parents' divorce, a number more than double that of the past generation. Hundreds of thousands of parents make

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the difficult decision to divorce, weighing the pain that they will cause their children against the important personal reasons driving them apart. High-conflict parents are the exception rather than the rule in the population of parents who divorce or separate. Usually, parents adjust to the emotions and conflicts created by divorce after several years and develop a tolerable relationship with a former spouse. Many divorcing and separating parents have heard of mediation from media reports and friends, and ask their lawyers about it; many others have to participate in mediation whether they want to or not, because of legal mandates.

There is a major reason for the pervasiveness of mediation of child custody disputes. The overwhelming empirical evidence demonstrates that the intensity of parental conflict is the key to a child's adjustment to the transitions of divorce. The problems of children are particularly acute if their parents are in prolonged high conflict. Simply put, highly conflicted divorcing and separating parents put their children at much greater risk because of their conduct. In most cases, children are better served if parents divorce in a restrained, civilized manner that ends the marriage with some dignity while giving children the freedom to have meaningful post-divorce relationships with both parents.

This is where mediation fits into the picture, as it promotes conflict-reduction and stable parent-child relationships better than adversarial courtroom combat. Most parents say they want to behave responsibly toward their children; mediation gives them a dispute resolution process that can help them achieve that goal. The imaginary dialogue that follows shows how a lawyer can reinforce the better instincts of their

divorcing clients through support of the mediation process.

MEDIATING A CHILD CUSTODY DISPUTE: QUESTIONS AND ANSWERS •

Let's take a hypothetical divorcing couple, Bertrand and Giselle Warner. Giselle and Bertrand are in dispute about custody and visitation arrangements for their 10-year-old daughter, Christina. Bertrand recently asked Giselle whether she would agree to mediation of their child-related disputes. Here are some of Giselle's questions to her lawyer, and the answers the lawyer who wants to support the mediation process might provide.

Q: "What Is Mediation?"

A: "A mediator is a trained, neutral third party whose aim is to help you and Bertrand manage your negotiation process toward a voluntary agreement. The mediator will help the two of you identify the issues to resolve and structure the process for resolving them. The mediator is trained to facilitate communication, promote understanding, focus you and Bertrand on your and Christina's interests, and seek creative solutions if you are deadlocked. Mediation is not an adversarial process. You do not 'win' or 'lose' in mediation—you try to reach acceptable (not perfect) agreements. Unlike arbitrators or judges, mediators do not make decisions for you after presentation of evidence. They try to facilitate an agreement between you."

Q: "Is Mediation Likely To Benefit Christina and Me?"

A: "The sooner you and Bertrand reduce your conflict and stabilize your parenting relationship, the more likely Christina will feel support-

ed by both of you and the more likely you both are to be effective parents. Mediation promotes conflict resolution and should help you and Bertrand improve your communication about Christina. Mediation will probably help if the conditions are right. By that I mean you and Bertrand have to be competent to participate in the process, you both must participate in it in good faith, and your lawyers—and the others whose opinions you value—must support what you are doing. Your overall goal for mediation should be to develop a post-divorce parenting plan that provides Christina with the resources and support of both her parents. Prolonged conflict between you and Bertrand could hurt her emotionally, interfere with her education, and jeopardize her economic security. This kind of conflict will make it almost impossible for either of you to parent effectively.”

Q: “Will Mediation Help To Make the Divorce Easier—or Shorter?”

A: “Mediation can help you achieve a more stable parenting relationship and better communication. Studies report that parents who opt for mediation reach resolution of their disputes more quickly than litigation parents. They take less than half the time to produce a parenting plan, and spend less money in doing it. [See Joan B. Kelly, *A Decade of Divorce Mediation Research: Some Answers and Questions*, 34 Fam. & Concil. Cts. Rev. 373 (1996) (short summary of research results with citations).] Even parents whose mediation fails to produce an agreement are more likely to settle before trial than parents who go straight to litigation. The studies also report that mediated agreements have other good results. It’s more likely that the children will have contact with both parents following divorce, and

that the parents will comply with the agreement. When parents mediate, they tend to produce agreements that are more specific and detailed than those negotiated by attorneys alone.”

Q: “What Course Do I Take if I Decide Against Mediation?”

A: “Litigation—or negotiation before or after litigation begins—is our other alternative. Cases can be settled after litigation begins. It is possible that Bertrand’s lawyer and I can negotiate a settlement without extended litigation or even before mediation. I can consult with the other lawyer if you’d like to explore settlement possibilities.”

Q: “So Which Is Better—Mediation or Litigation?”

A: “Litigation has its benefits. You may feel vindicated if you defeat Bertrand in court and litigation will certainly result in a clarification of your legal rights in a formal court order. A court order may change the balance of power in your negotiations with Bertrand. If, for example, you win a temporary order that you are Christina’s sole custodian pending trial, Bertrand will be limited to visitation rights and the court will be unlikely to change the legal rights in the temporary custody order without important new information. You will thus have a leg up in negotiations with Bertrand. Additionally, court orders may be the only way to control irresponsible or immoral behavior by Bertrand, such as failure to pay child support or threats of violence. Of course, he may use litigation for that purpose, too. Finally, litigation may be the only option if your case raises an important legal issue that the courts have not yet resolved or if

you have widely different versions of key factual events."

Q: "It Sounds Like Litigation Might Be Better. Why Should I Opt for Mediation?"

A: "Because of Christina. Litigation about Christina can have very serious negative consequences for her. Once custody litigation starts, it is often difficult to stop it; it becomes a process of mutual assured destruction, and escalates out of control. During litigation, you and Bertrand will each portray the other in the worst possible light and force your friends, family, and perhaps Christina to choose sides. Insults exchanged in court papers or hearings as the litigation process heats up are not easily forgotten, and make settlement negotiations much more difficult."

Q: "How Nasty Do You Think Litigation Might Get?"

A: "Parents often feel that after the litigation process starts, it quickly caroms out of control. Decisions are made for them—by lawyers and judges and custody evaluators—rather than by them. [See *Parenting Our Children: In the Best Interests of the Nation, Report of the U.S. Commission on Child and Family Welfare* 38-39 (Sept. 1996) (reporting survey results where 50-70 per cent of parents characterized the legal system to be 'impersonal, intimidating and intrusive').] I have heard parents describe custody litigation as a whirlpool sucking them into an abyss against their will. Moreover, the results of custody litigation are unpredictable—so much of the ultimate decision is in the discretion of whatever judge is assigned to your case and the custody evaluator's recommendation. Finally, even if you achieve a litigation 'victory' you will

not eliminate the need for you and Bertrand to have a relationship about Christina after you leave the courtroom. You will both be her parents forever."

Q: "If I Do Choose To Mediate, Do I Have To Deal with Bert Face-to-Face?"

A: "Yes. Mediation requires that you speak for yourself and respond to Bertrand's proposals in the presence of the mediator, rather than my doing the talking for you. In thinking about mediation, you have to think about your ability and willingness to engage Bertrand in such face-to-face dialogue. If you are uncomfortable negotiating directly with Bertrand, mediation may not be for you. You should remember, however, that no matter what process you use to settle your disputes about Christina with Bertrand, he will be involved in Christina's life after the dispute is settled but I will be out of the picture. I will not be able to speak to him for you forever. It may make sense for you to mediate your disputes about Christina with him now to begin to set a pattern for your communications after divorce while a third party is present to help shape those patterns."

Q: "Don't Women Get Taken Advantage of in Mediation?"

A: "Some have suggested that mediation is not in the best interests of women because they have fewer resources and are more likely to make compromises for the sake of their children than men, and that they are thus easy targets for unscrupulous manipulation. [See Penelope Eileen Bryant, *Reclaiming Professionalism: The Lawyer's Role in Divorce Mediation*, 28 Fam. L. Q. 177 (1994).] I am skeptical of such broad gender-

based generalizations. In my view the balance of bargaining power between spouses is highly individual and unique. I can report that there is no empirical evidence to support the argument that mediation tends to force women to give away custody benefits or that men engage in strategic bargaining during mediation that forces women to trade financial for custody 'rights.' Indeed, in most studies, men and women express approximately equal satisfaction with mediation as a dispute resolution process. Furthermore, women report that mediation is helpful to them in 'standing up' to their spouses, and rated themselves more capable and knowledgeable as a result of participation in mediation. [See Kelly, *supra*, at 377-78 (describing numerous studies).]

"So far, I see no indication that you are incapable of mediating your disputes with Bertrand. A history of drug or alcohol abuse for either of you would worry me. So would a history of domestic violence, which would lead me to have great concern for your safety and for that of Christina. [See *id.* at 380-81 (brief summary of research results concerning mediation and domestic violence calling for dialogue and research); see also Alison E. Gerencser, *Family Mediation: Screening for Domestic Abuse*, 23 Fla. St. U. L. Rev. 43 (1995).] In any event, as we will discuss, since I will be working with you throughout the mediation process and monitoring its progress carefully, the risk of an improvident agreement because of a disparity of bargaining power between you and Bertrand is reduced.

"Ultimately, your decision to try mediation should be based on shared values between you and Bertrand about what you want for Christina. You are a loving and responsible parent and what happens to Christina is obviously

very important to you. I hope Bertrand agrees with these sentiments and that you value his role as Christina's father, despite your marital differences. If you do, a serious attempt at mediation can benefit all of you."

Q: "Is the Mediation Confidential?"

A: "It is very important that you and Bertrand feel free to speak candidly during mediation without anything said being used in later court proceedings against either of you. Some states guarantee the confidentiality of mediation by statute, while other states do not. Standards of practice for mediators, however, generally require mediators to preserve the confidentiality of mediation proceedings except if disclosure is required by law as when child abuse is revealed during mediation proceedings. [See *Proposed Standards of Practice for Lawyers Who Conduct Divorce and Family Mediation*, Standard VII (ABA Family Law Section Task Force, July, 1997).] They also generally require a mediator to be presented with a court order (which, in turn, requires notice to the participants before it is issued) before he or she breaks the confidentiality of mediation proceedings. We will thus have an opportunity to contest any proposal to breach confidentiality before it occurs. We will also insist on a confidentiality agreement with Bertrand and the mediator before entering into mediation.

"Since we are in a state that does not provide statutory assurance of the confidentiality of mediation, I cannot give you an absolute guarantee that what transpires during mediation will never be disclosed in court. My experience is, however, that mediators take their obligations of confidentiality seriously and courts do not break the confidentiality of the mediation process lightly. I think overall that the assur-

ances of confidentiality, while not absolute, are strong enough to proceed with mediation."

Q: "How Do We Select a Mediator?"

A: "We are not in a state that mandates mediation of child-related disputes. If we were, the court system would assign us to a mediator whose qualifications the court (or statute) would establish. Our mediation is voluntary. We have to look to the private mediation market and try to identify someone well qualified to undertake the mediation upon whom you and Bertrand agree.

"We have a wide variety of candidates for the mediator. Again, unlike elsewhere [see Fla. Stat. Ann. §44.106 (1998) (requiring the Supreme Court to establish qualifications for mediators in court connected programs)], in our state 'mediator' is not a licensed profession; anyone can hang out a shingle and call him or herself one. The absence of professional licensing complicates our search for a mediator."

Q: "Well, What Kind of Credentials Will the Mediator Have?"

A: "Most mediators are, however, licensed in other professions—law, mental health, or accounting, for example. I am generally more comfortable with mediators who are licensed professionals. Licensure in a profession provides some assurance of accountability through state regulatory procedures and knowledge in at least an aspect of the problems that you and Bertrand will be discussing during mediation. The lack of standardized credentialing for mediators, however, also means we will have to make a choice about the kind of professional background we want in our mediator. A lawyer-mediator, for example, should be famil-

iar with relevant legal doctrines concerning child custody and be able to draft an agreement. A therapist-mediator should be especially knowledgeable about the family and emotional dynamics involved in your disputes and proposed parenting plans. In child custody matters, I have had good experience with a co-mediation lawyer-therapist team that brings a broad range of skills to the process."

Q: "How Expensive Is It To Use a Mediator?"

A: "We will have to pay the mediator's fees that vary depending on the mediator's expertise, estimate of time required, and complexity of the matter. We are bringing an additional professional into the dispute resolution process who expects to be compensated. Fees are, of course, a real-world constraint on identification of an ideal mediator. They may, for example, prohibit engaging the services of a mediation team, but it is a concept worth exploring."

Q: What Else Should We Look for in a Mediator?

A: "Besides professional licensing, there are other guideposts to evaluate a particular candidate's background and qualifications to serve as your mediator. Completing focused, high-quality training is a threshold requirement for any candidate for mediator.[See Forrest S. Mosten, *The Complete Guide to Mediation: The Cutting Edge Approach to Family Law Practice* 197-221 (1997) (description of family mediation training programs).] We will also inquire whether the candidate has ties to the professional mediation community. Some national mediator associations have, for example, established qualifications and standards for mediators. The Academy of Family Mediators ('AFM'), for ex-

ample, requires a significant training program and practice experience before accepting an applicant as a practitioner member. Membership in a mediation related organization such as the Association of Family and Conciliation Courts ('AFCC') helps insure a mediator's access to developments in the field. A number of professional organizations including the Family Law Section of the American Bar Association, AFM and AFCC have adopted standards of practice for mediators designed to insure high quality, ethical practice. Any candidate for mediator should subscribe to those standards. We also will want to inquire about the mediators' experience and seek references from others who have used the mediator's services before settling on a candidate."

Q: "Do Mediators Go About the Process in the Same Way?"

A: "No. In selecting a mediator, we also need to inquire about the mediator's approach to her task—a subject about which there is great diversity within the developing profession. Mediation is a very different process depending on who the mediator is and what her approach is to the task. Some mediators, for example, believe that they should not express their own views of what a court would do in the participants circumstances and simply facilitate a settlement; others believe they should provide an evaluation of the likely if the dispute is litigated. [See *id.* at 22-25 (description of various approaches to mediation); see generally Robert A. Baruch Bush & Joseph P. Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (1994).] Ultimately, we will have to ask ourselves what we want from a mediator and will need to identify

one with whom you and Bertrand are both comfortable."

Q: "What Role Will Lawyers Play in the Mediation Process?"

A: "A final important factor in selecting a mediator is her attitude toward the involvement of lawyers. Mediators' attitudes on this subject also differ widely. Some—lawyers as well as non-lawyers—actively discourage the involvement of counsel in the mediation process. They believe that lawyer involvement in mediation interferes with the parties' self-determination. Some take this view so far as to discourage participants from consulting lawyers during the mediation process. After an agreement is reached, mediators of this persuasion tell participants that review of the agreement by lawyers is an impediment to ultimate settlement and try to drive a wedge between lawyer and client."

Q: "Should We Avoid a Mediator Who Wants To Keep the Lawyers Out of the Process?"

A: "I think we should not engage any mediator who wants to exclude lawyers from the mediation process or who undermines lawyer-client relationships. True, there are some lawyers who actively subvert mediation efforts through highly adversarial and combative behavior. Again, however, I am troubled by blanket generalizations. Moreover, lawyer attitudes are improving as mediation becomes better known and the profession's standards are raised. In my view, reflexive anti-lawyer attitudes in the mediation community are a mistake and discourage the widespread referrals by lawyers of disputes to mediation. Studies have shown that as lawyers become more familiar with family me-

diation they become supportive of the process. [See Craig A. McEwen et. al., *Bring in the Lawyers: Challenging the Dominant Approaches to Insuring Fairness in Divorce Mediation*, 79 Minn. L. Rev. 1317, 1367-68 (1995) (comparative survey of Maine lawyers who participate in that state's mandatory mediation program with New Hampshire lawyers which does not mandate lawyer participation in mediation).] Many concerns about potentially unfair and improvident agreements in mediation are eased by lawyer participation."

Q: What Role will You Play in My Mediation?

A: "I view myself as your coach rather than a participant. My job is to prepare you for what you have to do, monitor the process to ensure it is achieving its goals, and to review and confirm agreements. If you want (and with Bertrand, Bertrand's counsel, and the mediator's agreement), I will attend mediation sessions and may participate as appropriate. If you and I decide I should not attend, I will, of course, want to carefully review any agreement with you before it is made final. Ultimately, however, you and Bertrand are the primary participants in the mediation process. My job will be to prepare you to speak for yourself and to respond to Bertrand's initiatives. Here are some of the tasks I will help you with before, during and after mediation

"In preparation:

- Help you to understand the differences between litigation and mediation;
- Explore what the law is governing your disputes about Christina, how a court will handle the case and what the likely outcome would be;
- Review what the mediation process will be like;

- Develop concrete proposals to be presented at the mediation sessions and supporting rationales in terms you can present in a rationale, low-key style;
- Try to anticipate what proposals Bertrand will make and how you can respond to them; and
- Try to decide if Christina will take part in the mediation process in any way (something that generally should not occur without great thought, and your and Bertrand's agreement).

"During mediation:

- Review what transpires at each session with you in detail (some mediators write a summary of a session to the parties and their counsel for this purpose);
- Develop strategy and proposals in response to what has transpired so far;
- Help prepare any information requested by mediator, such as proposed parenting plans; and
- Help decide if any expert information (a forensic evaluation) would be helpful to the mediation process.

"Before final agreement:

- Review memoranda of understanding and draft agreements before they are made final and signed.

"Overall, in my role as mediation coach, I will provide as much support for you as I can through the mediation process. Working together, we will try to produce a constructive dialogue for Bertrand and you, but most importantly, Christina."

Q: "What Can I Hope for if the Mediation Is Successful?"

A: "You and Bertrand will have developed a parenting plan that can be incorporated into a

court order. A word about drafting agreements resulting from mediation: If our mediator is a lawyer, I may suggest that he do a first draft of the final agreement for review by myself and Bertrand's lawyer. There are many important details to be resolved in converting an agreement in principle in mediation into a final written document. Some lawyers insist that a lawyer for one of the parties do the first draft. I disagree. If a lawyer for one side does the first draft of the final agreement, despite good intentions, the details of the draft tend to favor the side the lawyer represents. Lawyer-mediators tend to be fairly skilled in agreement drafting. Because they are neutrals, their first drafts tend not to favor either side on key matters. A 'neutral' first draft of a final agreement, in my experience, tends to reduce the possibility that the agreement in principle will fall apart in the process of converting it to writing. So long as the mediators' draft is thoroughly reviewed by counsel for each side, I prefer the mediator do the first draft of the final agreement and make changes based on counsel's comments. Recent standards of practice for mediators endorse this procedure." [See *Proposed Standards of Practice for Lawyers Who Conduct Divorce and Family Mediation, Standard VII H* (ABA Family Law Section Task Force, July, 1997).]

Q: "Suppose Mediation Fails—Then What?"

A: "You probably define 'failure' as not reaching a final agreement. I don't necessarily agree. Defining failure is a question of values. Even if you and Bertrand do not reach agreement, as a result of mediation you and he will have narrowed your differences and have clearer knowledge of what divides you. Most importantly, you can both say that you made the strongest possible effort to avoid potentially disastrous custody litigation for Christina's benefit. Your risk is disappointment and expense; the upside is a successful childhood for Christina despite your and Bertrand's divorce."

CONCLUSION • Overall, the role of the lawyer in supporting a parent in mediation is to effectively promote the private settlement of disputes by encouraging problem solving rather than finger-pointing. Mediation is not an inherently "anti-lawyer" process; lawyers who want to best serve their clients, must, however, change their goal from a "victory" in court to encouraging effective parental problem-solving and compromise. There is a long tradition in the legal profession of the lawyer as problem-solver, one in which a lawyer who supports a client in mediation comfortably fits.