DIVORCE MEDIATION

A GUIDE FOR LITIGANTS AND LEGAL PROFESSIONALS

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I.

INTRODUCTION

Parties and attorneys involved in family law matters are not only encouraged but in some cases are required to participate in mediation.

The purpose of this guide is to inform parties and attorneys of available options for resolution of cases without resort to the judicial process.

In court, both attorneys and parties are subject to rulings by judges. Often, judges are appointed without regard to a family law background.

As a result, critical issues, such as child custody, support and property get resolved by someone who is not only unfamiliar with the parties but in some cases with the law.
There are, of course, experienced and excellent family law judges who go to great lengths to obtain the training necessary to try divorce cases at a high level.

Unfortunately, due to budget cuts and heavy caseloads, even the best family law judges find themselves overwhelmed by the daily volume of matters they must handle.

Add to this the stress of acrimonious parties going through such a life trauma, and it is easy to see how judges become short-tempered.

They want to see your cases settle more than anyone. As a result, many states have laws designed to encourage settlement and penalize, or sanction, parties and attorneys who fail to make good faith efforts to settle.
In some cases, judges do not have time to read your paperwork in advance of your hearing. This can result in a continuance or a ruling based on limited argument.

Even if the judge is experienced in family law and has read your paperwork, the law gives each judge broad discretion.

This means that, as between one best case scenario and another, the judge can rule as he or she pleases so long as there is substantial evidence to support the ruling.

Judges are also human, and in some cases, the personality or appearance of one or both parties may impact a court ruling in family law.

Finally, even if the judge, attorney and party are all on the same page, the other party can still appeal the ruling. Once at the appellate level, anything can happen.
One of the greatest deterrents to family law litigation is the cost involved. The party must either risk not having an attorney or must pay an attorney to drive to and from court and wait for the case to be called.

In some cases, the judges do not have time to hear your matter or find the papers inadequate, resulting in a continuance and a waste of time and money.

Add to this the cost of exhibits, papers, reporter’s transcripts, filing and other court fees, litigants can spend tens of thousands of dollars arguing over the same amount of money.

If there are experts involved, such as a forensic accountant, vocational evaluator or custody specialist, the costs can double or triple once at the litigation stage.
For these reasons, and to avoid the uncertainty, stress, time and aggravation of going to court, settlement has become the preferred method of resolving divorce cases and other family law matters.

Unfortunately, parties and attorneys can face challenges attempting to settle family law matters by themselves.

Sometimes, this is because the parties still have unresolved personal issues and grievances.

In other cases, the attorneys may differ in how they view the law and facts of each issue involved.

A mediator can provide space for parties who have ongoing personal issues and lend an ear not always possible in a courtroom.
Unlike judges, mediators can give full attention to your case, saving substantial time and money.

It is not uncommon for family law cases to be fully resolved in one day of mediation.

Even cases that do not settle in a single mediation session often get resolved shortly thereafter with follow up efforts.

Unlike the seriousness of appearing in court, it is possible for mediation sessions to include appropriate humor and a casual atmosphere.

Family law mediation can result in more customized solutions than judges are able or even permitted to achieve.

Best of all, the mediation process gives the parties a sense of dignity and control over their personal and financial futures.
II. MEDIATOR SELECTION

When parties choose litigation, they may be required to attend mediation for custody and financial issues.

In such cases, the mediator is selected by the court, leaving parties no choice and forcing them to adhere to a strict schedule.

If a mediator has been selected for you by the court, the power of the mediator may depend on the local rules in your area.

In some counties, custody mediators can make recommendations to the court in the event you do not settle.

These are referred to as “recommending mediators” in “recommending counties.” In such cases, the mediator has considerable power to influence the judge.
As a result, parties involved in custody mediation with a recommending mediator must be careful to present a professional case both on paper and in the mediation.

Depending on the mediator, attorneys may or may not be allowed in the custody mediation session required by the court.

Whether the court mandated mediator can make recommendations or not, it is in the parties’ and children’s best interests to resolve their custody disputes in mediation.

Studies have shown that parents who litigate custody do more harm to children than previously thought. Only where the child’s health, safety or welfare is at risk should custody litigation be considered.

In addition to custody, courts often have volunteer settlement attorneys to assist with financial issues.
Voluntary settlement attorneys can be excellent, but their caseloads can be heavy, and you may find yourself waiting for your case to be called, only to have the issues addressed in a rush and hurried fashion.

If the parties are fortunate and wise enough to select the mediation process before going to court, they can have total control over the mediation process.

The first step in this process is selecting a mediator. There are many factors for the parties to consider in selecting a mediator.

There are three different types of family law mediators: Former family law judges, family law attorneys, and mediators who are neither judges nor attorneys.

Depending on your case and the issues involved, any one of these options may be best for you.
In general, though not always, private judges tend to be more expensive than an attorney or non-attorney mediator.

Some private judges are independent and set their own rates while others belong to larger dispute resolution centers who set rates for the judges.

Appointing a private judge as a mediator has several advantages to consider. If your case involves a high level of conflict, it may be in both parties’ best interests to appoint a private judge for two reasons.

First, the private judge will carry a level of clout and strength that may be required to persuade a high conflict spouse to settle.

Second, private judges can act both as a mediator and, if the parties agree, as an arbitrator to decide issues that cannot be agreed upon.
The private judge does not have to be appointed as an arbitrator before mediation. Instead, the parties can give mediation a try first, and if the case settles in part but not in whole, they can consider using the private judge as an arbitrator to decide remaining issues.

This approach can often be much more efficient and cost-effective than resorting to court where more formal requirements push costs higher than they need to be.

The private judge will already be familiar with your case and will not have to re-learn the law or facts. The issues will be decided much more quickly than if they were tried in a traditional courtroom. A disadvantage to using a private judge as both mediator and arbitrator is the possible use of confidential information learned during mediation.
Another concern with private judges is that each tends to have his or her own point of view with respect to certain issues.

As is the case with public judges, private judges tend to have a particular approach in resolving various issues.

For example, your private judge may be less keen on the need for spousal support than the actual public judge in your case.

Such a judge, in a capacity as mediator, may be challenged in trying to persuade the potential support obligor to pay a fair share.

Because few of them practiced family law as lawyers before they became judges, private judges are not always in the optimal position to assess what another judge might do in the same situation.
As one private judge candidly remarked, “If you give the same facts to five different judges, you will have five different results.”

If the cost of a private judge is more than the parties want to invest, or if the parties are concerned about the potential bias or preferred approach private judges may have, family law attorney mediators are an excellent alternative.

As with private judges, not all family law attorneys make great mediators, and not all of them have the same level of expertise.

Because family law issues are complex, and because the law is ever-changing, the attorney mediator should have specialized knowledge in the field.

Some states, such as California, have a legal specialization in family law requiring a written examination and years of training.
A certified family law specialist is a must if you are selecting an attorney mediator to assist in the resolution of a family law case.

In fact, attorneys who are certified in the field often possess greater knowledge than family law judges who are never required to take or pass a family law examination.

This is especially true for newer judges and less true for more experienced judges who have spent years reading legal briefs.

One advantage of a family law attorney over a private family law judge is that most attorneys have appeared in various courts before various judges.

This gives the attorney mediator a wider range of possible outcomes than a private judge whose own personal rulings may be the key barometer of possible outcomes.
If your state or country does not feature a certified family law specialist designation, there are other means of identifying family law expertise.

The American Academy of Matrimonial Lawyers and the International Academy of Matrimonial Lawyers are organizations that feature family law attorneys with high levels of knowledge and experience.

The third and final category of family law mediators is comprised of those who do not practice law but nevertheless assist parties in resolving family law disputes.

In certain situations, parties may prefer to hire a mediator who is not a judge or an attorney. While lower cost is a prime factor, there is a substantive reason why, in some cases, such a mediator is a better choice.
Child custody is a key area of dispute that may benefit greatly from a non-attorney mediator. As alluded to earlier, most courts require custody mediation.

In such cases, a non-attorney mediator with expertise in child development is used. This can either be a Marriage and Family Therapist or a Psychotherapist.

In addition, the primary issues in dispute may be financial. In such cases, a forensic accountant can be selected not only as the expert for both parties but also as mediator to resolve disputes involving child support, spousal support, business valuations and the division of all other property.

A final factor to consider in selecting a mediator is temperament. Each mediator is a person with unique communication styles and attitudes. Find the right fit for you.
III.

MEDIATOR SUBMISSIONS

Once you have selected a mediator, it is time to arm the mediator with information as to what each party desires.

Every mediator has a different attitude as to the level of formality each requires in connection with pre-mediation documents.

Some mediators require sophisticated mediation briefs. Others accept letters, and still others are fine with a brief e-mail with a general statement of issues.

If a mediator requests a mediation brief, you should consult the mediator or the local rules of your court in order to determine the appropriate format. A standard introduction to a mediation brief for Los Angeles County, California appears on the next page.
IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

WENDY JONES,
   Petitioner,

v.

HANK JONES,
   Respondent.

CASE NO. BD 100000

PETITIONER’S MEDIATION BRIEF

I. 
STATISTICAL FACTS
Date of Marriage: January 1, 2000
Date of Separation: December 31, 2014
Minor Children: Bobby Jones, Born February 14, 2005
                 Gabby Jones, Born July 4, 2008

II. 
ISSUES
A. Child Custody and Visitation
B. Child and Spousal Support
C. Division of Property
D. Attorney’s Fees
IV.

MEDIATION LOGISTICS

One of the most important factors in a mediation session is the positioning of the parties and, if represented, the attorneys.

Many divorce cases involve conflict and unresolved personal issues. Ideally, parties to a divorce would each seek therapy and counseling before initiating the divorce.

Unfortunately, most divorce litigation is commenced before one or both parties are anywhere near the final stages of healing.

Additionally, one or both parties to the divorce may be suffering from mental health and/or personality disorders.

Some of these disorders may arise from the trauma of the divorce while others may pre-exist the divorce or even the marriage.
If one or both parties are represented by counsel, it is important for the mediator to consult with the attorney or attorneys to assess the level of hostility.

If the parties are unrepresented, the mediator should discuss individually with each participant his or her level of comfort in having a mediation in the same room as the other party.

If more serious issues are present, such as a mental health disorder that may affect the safety of each party, the mediator may want to insist on individual therapy before beginning mediation.

Even in cases where the parties do not appear to be hostile toward each other, the best practice is to have separate spaces for each party during the mediation.
This will ensure that each party can be fully candid with the mediator about various issues in dispute.

Assuming the mediator has reserved sufficient spaces for the mediation, the first step in the mediation process is to meet the parties and, if represented, their attorneys.

This usually takes place in one location so that a general feeling of comradery can be established between all involved.

During this meeting, the mediator should explain that the process is confidential, that facts revealed during the mediation cannot be disclosed in court or otherwise, and that the purpose of the mediation is to explore a resolution of issues in the best interests of each party and, if they have children, in the best interests of the children involved.
V.

CHILD CUSTODY

In most states, mediation is required in cases involving child custody and visitation. Each state has different standards for child custody and visitation.

Most states focus on the best interests of the child or children involved. Also, most states favor frequent and continuing contact between each parent.

There are two types of child custody in most states: legal custody and physical custody.

Legal custody refers to the ability of each parent to make decisions regarding the health, education and welfare of each child. Physical custody refers to the amount of contact between each parent.
The term “visitation” refers to a specific schedule each parent has with each child.

In most states, joint legal custody, or shared decision-making, is most common.

In order to establish a case for sole legal custody, a parent would have to prove that the other parent is either unfit to make such decisions or has committed child abuse or acts of domestic violence.

Where both parents have similar work schedules and live near each other, it is not uncommon for the court to award equal or 50%-50% physical custody.

Where parents live separate and apart in different cities, states or countries, a joint physical custody arrangement is impossible in all but rare cases.
If the parties both live in the same place but one parent wants to move to a different place, the circumstance is often referred to as a move-away.

In such cases, courts look to a number of factors including the best interests of the child or children, the impact the move would have on the non-moving parent, as well as the reasons the move-away parent has for requesting the change—i.e., a change in jobs for his or herself or a new spouse or the desire to move closer to family.

Move-away cases often give rise to the court’s decision to order a more formal child custody evaluation.

In such cases, a child psychologist can be consulted to assist with mediation of this dispute so that a unilateral recommendation is not the sole arbiter of the child’s future.
Where a move-away or allegations of child abuse or domestic violence are not present, most child custody issues can be resolved by a lawyer or judge mediator.

Common school year schedules include one week on, one week off, 2-2-3 with one parent having physical custody of the child on Mondays and Tuesdays and the other parent having physical custody of the child on Wednesdays and Thursdays, with each weekend alternating from Friday to Sunday.

Most holidays and vacations are split equally unless one or both parties have a specific religious or other basis for other holidays or an unequal schedule.

If one parent works and the other does not, the non-working parent may be given primary physical custody with alternating weekends and a weeknight to the other.
VI.

CHILD SUPPORT

Most states have adopted uniform guidelines for determining the amount of child support awarded.

As a result, it is fairly easy to determine a fair and equitable child support amount. There are cases, however, where one or both parties are either unemployed, under-employed or not reporting all income.

In such cases, a vocational or forensic expert may be needed to help determine an appropriate income level for each parent.

In addition to setting a guideline child support amount, a judge or mediator may adjust for fluctuating income or bonuses.

Costs for child care, private school and extracurricular activities may be factored in.
SPOUSAL SUPPORT

Also referred to as alimony, spousal support is awarded in cases where one party’s actual earnings or earning capacity exceed that of the other.

This may result from one parent never attaining education, training or experience. It may also result from one parent spending time raising a child or children.

Other factors a court will examine in order to determine spousal support will be the age and health of each party, the assets and debts of each party, and the balance of hardships to each party.

Unlike child support, spousal support is normally ordered as taxable to the recipient and tax deductible for the payor.
In mediation, parties can agree to a lower monthly amount of spousal support that is non-taxable to the recipient and non-deductible for the payor.

This may result in a win-win solution not available in court because the payor enjoys a less strenuous monthly cash flow and the payee does not have to pay taxes.

Parties in a mediation can also agree to spousal support that is non-modifiable as to amount and/or duration.

In marriages of less than 10 years, and in the absence of a disability, most judges will set a fixed termination date for spousal support.

In marriages of longer than 10 years, the duration of spousal support can be left open to a future change in circumstances.
Either way, there tends to be a great deal of uncertainty and the need for future litigation to modify spousal support.

By agreeing to an amount that cannot be modified by amount and/or duration, the parties can avoid the expense of attorney’s fees and costs in the future.

Additionally, the parties gain the added reassurance of certainly and being able to financially plan for the future.

The single best reason to settle spousal support is that judges tend to differ widely in terms of how each views the concept.

Some judges believe strongly in spousal support while others believe it to be nothing more than a crutch too heavily relied upon.

Settling ensures that neither party is adversely affected by a judge’s philosophy.
VIII.

PROPERTY DIVISION

The character and division of property is different in each state. Some states have a community property system while others have an equitable distribution system.

In either case, courts tend to have broad discretion in terms of how they characterize and apportion assets.

As a result, it is in each party’s best interests to divide property in a fair and equitable manner to avoid the expense and uncertainty associated with trial.

In court, judges are generally required to order property sold and proceeds divided in cases where a buy-out is not immediately feasible.
In mediation, parties have far greater flexibility in terms of the timing of any sale of an asset and the terms of a buy-out.

In many cases, one asset is more valuable to a party than another even though they may be equal on paper.

This provides an opportunity for a win-win solution at mediation that would not be available in court.

If the value of a business is at issue, a forensic accountant can be helpful. If the value of a house or other real property is at issue, a real estate appraiser can assist.

There are also appraisers of personal property of all kinds. Alternatively, parties can agree to sell various assets and divide the proceeds, thereby bypassing the need for appraisers.
IX.

ATTORNEY’S FEES AND COSTS

One of the aspects of a divorce case most impacted by the decisions of parties is the amount of attorney’s fees and costs.

If parties choose to litigate their dispute in court, they are almost guaranteed higher attorney’s fees and costs than if they settle.

Although mediation adds some cost to the resolution of issues, this cost is far less than the cost of discovery and litigation that often repeats itself as time goes on.

Like building a house, the sooner your case is completed, the less it will cost, and the longer it goes on, the more it will cost.

Mediation provides a faster and far less expensive way to resolve issues than court as all reputable attorneys can attest.
With respect to the cost of mediation, this is generally paid equally by both parties unless one party makes substantially more or has substantially greater assets than the other and is not paying support to make up the difference.

Similarly, attorney’s fees and costs are generally apportioned by courts based on ability to pay. However, a parties’ litigation conduct may also be a factor for the court.

So, for example, if one party is taking the other to court constantly and without good cause, the court may sanction that party based on the attorney’s fees paid to defend against the frivolous conduct.

Unfortunately, it usually costs money to request sanctions, and not all sanctions are sufficient to cover this cost. Mediation gets each party off the endless sanction wheel.
X.

FINAL DIVORCE DOCUMENTS

Each state has different standards and requirements for submitting the final divorce documents.

All states have procedures allowing for an agreement between the parties to be an integral part of the divorce documents.

Whether one of the attorneys or the mediator prepares the divorce documents does not ultimately matter.

Logistically, some private judges only prepare deal point memoranda and require the attorneys to work together on the final divorce documents.

This procedure, unfortunately, results in parties signing one document only to have to sign another.
To avoid having to sign multiple forms, it may be helpful to have the mediation at the office of one of the attorneys.

This will enable the attorney’s staff to create a final divorce document during the mediation process that can be updated and finalized before the mediation concludes.

XI.

POST-JUDGMENT MOTIONS

The final divorce documents usually resolve all of the issues between parties. However, circumstances often change after the divorce.

This may include re-marriage, loss or gain of a job, omitted assets, moving and new issues involving children.

As with your case in general, mediation is an appropriate way to resolve motions.
Your final divorce document can include a provision for mediation as a starting point before a party files a post-judgment motion.

Alternatively, before either party files a post-judgment or pre-judgment motion, the option of mediation should be discussed.

The adversarial nature of opposing parties and attorneys means that lawyers and parties often take positions unfavorable to the other side, resulting in animosity.

A mediator eliminates the power of this dynamic by giving validation to each party’s position while keeping everyone objective and focused on creative solutions.

In court, a great argument is rewarded. In mediation, a great solution is rewarded. Even if you do not settle in mediation, you will learn about your case and your position.
XII.

ABOUT THE AUTHOR

Matthew R. Bogosian is Certified as a Family Law Specialist by the State Bar of California, Board of Legal Specialization.

In 1993, he graduated *magna cum laude* from the University of California at Los Angeles with *Departmental Honors* in Linguistics and was inducted into the *Phi Beta Kappa* academic honorary society.

In March 1996, Mr. Bogosian completed 40 hours of training in Divorce Mediation at the Straus Institute for Dispute Resolution.

In 1997, he earned a Juris Doctor of Law and a Certificate in Dispute Resolution from Pepperdine University School of Law and received the American Jurisprudence Award in Negotiation and Settlement.
Mr. Bogosian served as an associate attorney at Morrison & Foerster LLP in Los Angeles and at Nordman, Corman, Hair & Compton in Ventura County.

Mr. Bogosian has litigated over 3,000 family law matters and has mediated over 2,000 family law matters in his legal career.

As both a child and parent of divorce, Mr. Bogosian is personally and intimately familiar with the unique emotional strains involved in family law matters.

As Adjunct Professor of Mediation and Divorce Mediation at Pepperdine University, Mr. Bogosian’s goal is to empower lawyers, judges and litigants to resolve disputes in a dignified and amicable manner.