

Co Mediation: The Tug of War Between Product and Process

By Diana Mercer, copyright 2005
Diana Mercer
Attorney-Mediator
Peace Talks Mediation Services
8055 W. Manchester Ave., Suite 201
Playa del Rey CA 90293
(310) 301-2100

Diana Mercer, Attorney-Mediator, is the founder of Peace Talks Mediation Services in Los Angeles (www.peace-talks.com) and the co-author of *Your Divorce Advisor: A Lawyer and a Psychologist Guide You Through the Legal and Emotional Landscape of Divorce*, (Fireside 2001).

Why co-mediate? Why divide a fee that either professional might be able to garner on his or her own? Nearly 5 years after our first co-mediation, we wouldn't do it any other way.

When we first started out, we divided the tasks. The clients went to the attorney-mediator for the financial part, and to the therapist-mediator for the parenting plan. What we quickly learned was that although each professional was a trained mediator, that the emotional issues around money were more adeptly dealt with using the therapist-mediator, and that as much as a parenting plan is about child development, it's just as much about the attendant legal issues surrounding custody. We spent as much time getting each other up to speed on the client's case as we'd spend in an actual mediation session, or so it seemed.

Over time, it became clear that cases actually progressed faster and more efficiently when we worked together in the room. When clients were high conflict, we needed the second set of eyes to keep an eye on the temperature in the room. With lower conflict clients, one of us could run child support calculations or start a draft of the parenting plan while the other mediator kept the discussion going. When an emotional issue came up around what sounded like a purely financial discussion, the therapist-mediator was already in the room, and when a legal custody question came up during a parenting discussion, the attorney-mediator was already there, too.

We feel that a therapist and a lawyer working together provide the fullest view possible of the divorce process. While divorce mediation is a product-oriented service, *e.g.*, clients need an agreement and appropriate court paperwork to finalize their divorce with the court, it's just as much, if not more, of a process-oriented service, *i.e.*, the psychological divorce. Using both types of professionals, we feel we help clients navigate both sides of the issues. Even

with the slightly higher fees, many clients find that they resolve their cases faster and more thoroughly than if just or a lawyer or just a therapist mediated with them alone.

To put this a little more technically: The product-oriented part of the service comes from the left hemisphere of the brain, and the process-oriented part of the service comes from the right hemisphere of the brain. To reach a solid agreement, parties must access both right and left hemispheres of their brains. Put simply, by combining our skills as a “left brain” lawyer, and a “right brain” therapist, we enlist clients to navigate through both brain hemispheres to reach an agreement. We think of this as a form of ‘balancing the brain.’

Our understanding of divorce as both a traumatizing and re-traumatizing event is influenced by the work of therapist Leonore Terr, Ph.D. and high conflict divorce researcher, Janet Johnston, Ph.D. Divorce often reopens an earlier wound, whether it’s from a previous divorce, a difficult childhood, a poor example from one’s own parents, other misfortunes, abandonment and losses or combination of these elements. Impasses often result from unresolved emotional issues. As much as the parties may need their legal divorce, without paying appropriate attention to the psychological right-brain divorce a suitable, longstanding agreement is unlikely.

On a more practical note, knowing how emotional this process can be for clients, we feel strongly that clients should not ever sit by themselves. Clients typically have very little patience for the caucus process if they are physically left alone. If represented they can sit with their attorney during a caucus, and then this is less of an issue. That said it’s helpful to have a mediator in each caucus room even when attorneys are present. Access to telephones, computers, assigning work to do or tasks to complete doesn’t seem to solve this problem, at least not in our experience. Two mediators allow us physical as well as mental proximity to clients so that we can stay with and track their progress while in caucus.

Product vs. Process, and Pacing a Case

The *Product* that clients need is the legal divorce. That consists of the left-brain paperwork and settlement documents. The *Process* they go through to get there is the balancing of the logic of the left brain functions with the right-brain psychological divorce—that’s in a mourning phase – the grief, disbelief, anger, upset and ambivalence that comes with the death of the marriage.¹

¹ Think DABDA, as set out by Elisabeth Kubler-Ross, in *On Death and Dying* (Scribner, reprint edition 1997). Although divorce isn’t the same as dying, it’s very much a loss and is mourned in much the same way.



8055 W. Manchester Ave., Suite 201
Playa del Rey, California 90293
310-301-2100 Fax:310-301-2102
Email: diana1159@aol.com
www.peace-talks.com

Diana Mercer, Esq
Attorney Mediator

Tara Fass, LMFT
Therapist-Mediator
Lic. #MFT 35078

In most divorce cases, there's a tug of war that goes on between the left-brain product (the part the lawyers are focused on) and the right-brain process (the part which most clients are focused on). By rushing either the process or the product, by valuing the left-brain over the right-brain, or by not attuning to what each side is going through, the settlement process falters.

For mediators, the critical challenge within this product vs. process issue is giving clients what we call the **optimal range of contingency**, which is a term coined by English psychoanalysts and infant attachment researchers Beatrice Beebe, Ph.D. and Frank Lachmann, Ph.D.. We define optimal contingency as giving clients what they ask for *and* what we know they need in a timely fashion. We also have to do this in a way that they can take in and won't reject. A client may ask for a quick mediation session that results in an easy agreement, yet without having the underlying discussions about what's bringing them to impasse, we haven't served what we know they need. As most mediators know, the "quick and easy" agreement is also the agreement, which quickly falls apart when put into practice by the parties.

It is the job of the seasoned mediator through case management to regulate the flow of difficult subject matter to know when to slow down to attend to the process that then clears the path to proceed in a sound way with the task-oriented business of building the agreement. We do this through co-mediation.

As much as co-mediation has been of service to our clients, it's also been of service to us as professionals. We learn so much from each other, borrowing from each other's professional training and background, becoming better mediators in the process.