

MCLE Self Study

Client Prep for Custody Mediation

**Edited by Peg Healy
By Tara Fass and Diana Mercer**

Custody mediations and evaluations are critical in contested custody cases, yet clients routinely go into sessions without a basic knowledge about the process and what is expected of them, and often with inflexible positions on custody arrangements. Family lawyers, as advocates and educators, can help clients dig themselves out of entrenched positions, evaluate their goals, and develop a child-centered parenting plan that will get them through the mediation and evaluation process and promote the best interests of their children.

DRESS REHEARSAL

Most custody disputes are resolved in mediation. But custody mediation can also be the dress rehearsal for the child-custody evaluation, because if the case is not settled in mediation, the evaluation process (see Fam C §§3110 et seq.) could be next.

The mediator's job is to reduce acrimony and get the parties to agree to a custody and visitation arrangement that is in the best interest of the children. Fam C §3161; Cal Rules of Court 1257.1. In mediation the current circumstances of the parties is paramount, although parenting history is also material. Although some counties have a written policy permitting "extended" mediation, often the mediation meeting is a one-time appointment that lasts 90 minutes at most, so there's no time to go into the client's past in depth.

However, big-picture information is always used in evaluation. You can help your clients organize their background information and, more important, develop a more objective perspective about their case by creating an overview of the relationship and putting the important events in the parties' and children's lives on several thematic time lines.

In the relationship time line, include when the parents met, when the parents' relationship became serious, when the parents began living together, when the parents got married, when the parents first separated, the total number of separations, the date of the last separation, and whether and when couples or family counseling was ever done. In the parenting time line ask: What was each parent's share of custody during the first six months after separation? From the six-month mark to the end of the first year after separation? When were the significant changes in the amount of time each parent had custody over the next two years? What is the current parenting plan the parents are using?

In the personal time line, ask: Are the children's grandparents living or dead, married or not? If living, where do the grandparents live, and are they a part of the children's lives? How many siblings does the client have, and what is his or her relationship historically and presently with the siblings? What contact does the client have with extended family, and how often? Briefly, what was the client's life like from birth to age 12? From 12 to 18? From 18 to 30? What is the client's educational history? What is the client's work history? What is the client's current living situation, including all the household members? If there are minor children other than those in question, what are the custody arrangements concerning those children? What is the client's drug and alcohol history, including DUIs and hospitalizations, if any? What is the client's domestic violence history? Who was the client's family at these times?

There are certain red flags that mediators and evaluators look for; discuss these with your client in advance. Challenge his or her version of the time line and ask whether the other parent might see the time line and relationship in a different way. Your client's ability to see the situation from the other parent's perspective is an important part of starting to test his or her grip on the reality of the situation and learning to live constructively with it.

Red flags that often appear in the parents' time lines include: different representations about the existing parenting plans; different dates, particularly the date when the relationship became serious; inability to identify troubling aspects of the relationship even in retrospect, particularly if a similar dynamic is present today; glossing over or dismissal of traumatizing history; and inability to put the situation in perspective by recognizing unresolved issues from childhood or family of origin.

Never forget, and never let your clients forget, that presenting themselves as reasonable, articulate, and flexible parents is essential to success in mediation and evaluation, as well as in implementing the actual parenting plan. So remind clients to cooperate with the mediator, tell the truth, and focus on the children's best interests at the mediation. Remind them that they will get their point across better if they don't interrupt, shout, or cry. Tell them to expect that strong feelings may come up: anger, despair, or fear. And remind them that they must speak for themselves, even though counsel is routinely present at the mediation in some counties, under local rule and practice.

Framing the custody conflict in terms of angel versus devil is unproductive, unrealistic, and divisive. If your clients are stuck in that attitude, remind them that unless such a dynamic can be documented, asserting it will likely work against them in the long run and give the impression that they are emotionally out of control. Worse, your clients run the risk of being viewed as abusing a tax-supported service. A client who consistently fails to grasp that concept, or who stays mired in the past, should be referred to a mental health professional.

A PARENTING PLAN

Obviously, the actual parenting plan proposal is very important. Though the client should request as much parenting time as is realistic, you should help the client generate three or four possible plans, ranging from the best-case scenario to a backup plan that is "the nightmare the client can live with." Think in terms of a step-up plan, perhaps starting with less than your client might have hoped for but working into a more desirable plan over time. Take into account each child's general developmental stage and consider having your client consult with a child psychologist to discuss what might be appropriate. Provide names of providers for parent-training courses or other resources to improve parenting skills.

Red flags in the area of parenting proposals include: plans that are not well thought-out or fail to recognize the realities of their lifestyles; plans that don't take into perspective the child's point of view and developmental needs; or plans that aren't based in reality, such as starting parenting duties at 3:00 p.m. when the parent typically works until 6:00 p.m., without providing for childcare.

Ultimately, your client will be asked about his or her concerns regarding the other parent or the proposed parenting plan. Find out these concerns in advance and help your client make a list. Make sure that the client keeps to the present and only includes the past as a prelude to the present. (Dwelling on the past is a definite warning sign, especially if the other spouse has stopped drinking or otherwise worked to improve problems.) List or explain how the other parent might reduce your client's concerns. Then explore what the other parent might raise as a concern

with your client's parenting or parenting plan, and how your client might address those concerns. List relevant skill building your client has done or is willing to do, such as attending parenting classes or anger-management therapy.

Red-flag issues that come up during the formulation of a parenting plan include: negative attitudes, especially failing to recognize *any* positive qualities in the other parent; claiming that the other parent can do little or nothing to repair the damage; lack of perspective on the client's own role in the conflict; and perceiving no room for improvement by either parent.

EVALUATION

You'll need to prepare your client for the evaluator's home visit. Before the visit, do a safety check and make necessary adjustments. The home does not have to be spotless, but sheets should be on the beds. Odors from cigarettes, trash, pets, and diapers should be minimized. A wide variety of fresh and healthy food should be in the refrigerator and cupboards. Everyone who lives in the home should be present for the interview. Anyone who is a frequent visitor to the home may be there at the beginning but should also be prepared to leave approximately ten minutes after the evaluator's arrival.

The television should be turned off as soon as the evaluator arrives. The evaluator should not be offered anything but a glass of water. Let the evaluator choose where to sit and where to talk to household members individually and as a group. Inform the evaluator in advance if a household member needs to be seen first because of a work or school commitment.

REFERENCES

When the evaluator asks for collateral references (sometimes called a custody evaluation witness list), have your client be prepared with names, addresses, telephone and fax numbers, as well as the best time and way to reach them. You may want to speak with the references in advance to make sure they can, in good conscience, say positive things about your client's parenting and that they have had enough contact with your client to comment intelligently. Put the reference into the time line to give the evaluator some perspective on when and how long the reference has known the family. Choose references, including family members, whose observations can corroborate the parenting-plan history as well as a parent's good character. Finally, minimize problems with collateral references, including: dates on documents that come from the parents differing from dates on the same document that comes from a reference; and references who fail to back up the referring parent's claims, who barely know the parent, or who haven't observed him or her being a parent.

AFTER THE EVALUATION

The evaluator's confidential report must be filed with the court and served on the parties (if appearing in pro per) or their attorneys at least ten days before the custody hearing. It is not otherwise distributed. It will be used as evidence at the hearing and is technically not binding on the court. Fam C §3111. The parties may object to the contents of the evaluator's report when it is presented to the court (Cal Rules of Court 1257(c)) and even present other evidence or cross-examine the evaluator if permitted under local rules.

Many counties provide for a postevaluation meeting or settlement conference among the parties, their attorneys, and the evaluator. See Alameda County Local Rule 11.4(9); Contra Costa County Local Rule 13.2(I); Orange County Local Rule 703(E)(5); San Francisco County Local Rule 11.30(D). This postevaluation conference gives your client a quick opportunity to hear the results of the evaluation before it's actually put on paper and gives both parents an opportunity and an incentive to return to negotiations or mediation, and settle. It can save the client money,

as it is not necessary to pay for the writing of the evaluation if the matter settles quickly, before the written report is required. Have your client make sure the evaluator knows that he or she is interested in using this service as soon as the evaluator has done the last visit or research on the case, because the custody hearing will come up relatively quickly.

SPECIAL CONSIDERATIONS

In custody matters, Family Code section 3011 requires the court to consider the health, safety, and welfare of the child; the nature and amount of contact with both parents; any history of child abuse by relatives or any caretaker; and any allegations of either parent's substance or alcohol abuse. Typically it is considered to be in the child's best interests to preserve close contact with both parents (Fam C §3020(b)) as well as siblings and other close relationships (see Fam C §3040; *Marriage of Williams* (2001) 88 CA4th 808). The court will consider the child's wishes if the child is "of sufficient age and capacity to reason so as to form an intelligent preference as to custody." Fam C §3042.

Normally the courts encourage settlement, in which the parents stipulate to a custodial arrangement without court investigation or intervention. (There is a presumption in favor of joint custody if the parents stipulate to it. Fam C §3080.) But the court will review a situation even when there is a settlement if the court becomes aware of substantiated domestic violence or substance-abuse allegations. Fam C §3011(e). A court finding of domestic violence within the past five years also creates a presumption against joint or sole custody by the perpetrator that can only be rebutted by a preponderance of the evidence. Fam C §3044.

Therefore, if your client's background includes unflattering elements, it may become important to know whether the case is in a county where the mediator will make a custody recommendation to the court if the parties do not agree. Fam C §3183. That is known as nonconfidential mediation. In contrast, with a private mediator, or in a "confidential" county such as Los Angeles or San Francisco, the mediator does not report back to the court except to report nonagreement. Although the case may proceed to evaluation anyway, confidential mediation gives a client an opportunity to rethink or address the other parent's concerns.

There are some important exceptions to confidentiality even in confidential counties. Therapists, mediators, and other officials may be required to report child abuse or child endangerment to child protective services. See Pen C §11166. Therapists and mediators may have a duty to disclose the existence of threats of death or bodily harm in accord with *Tarasoff v Regents of Univ. of Cal.* (1976) 17 C3d 425. Allegations of sexual abuse or neglect, if made during a child-custody proceeding, are treated very seriously, and subject the accuser to sanctions if the allegations are found to be false. See Fam C §§3027, 3027.1, 3118. And the mediator may recommend appointment of counsel for the minors or appropriate restraining orders. Fam C §§3183, 3184. Note: Recent legislation (SB 174, signed September 30, 2002) may modify the mediator's duty to tell the court why he or she makes such a recommendation and may make more counties' mediation confidential.

In cases of domestic violence, the victim-client is free to decline mediation. However, mediation and evaluation is available that can be tailored to the parties' needs; for instance, through separate sessions and other safety precautions. See Fam C §§3113, 3181 (separate meetings), 3170 (protocols), 6218 (protective order); Cal Rules of Court 1257.2 (protocols). If the client chooses to participate in a joint session, which can be very helpful strategically in revealing the truth about the relationship, he or she may also request the presence of a nondisruptive advocate or support person. Fam C §3182; Cal Rules of Court 1257.2(h).



When a party's mental health is placed at issue, the party may be examined by a qualified expert for discovery purposes. CCP §2032. Though participation in therapy need not be revealed in mediation, it is typically interpreted as a positive fact about a client. Your client's adherence to a therapist's treatment plan and medication instructions can work in his or her favor. The court may also order the parents and the children to participate in outpatient counseling for up to one year (Fam C §3190).

Tara Fass, LMFT, is a mediator who was formerly a mediator and evaluator with the Los Angeles Superior Court Conciliation Court. Diana Mercer is an attorney-mediator in Santa Monica and coauthor of *Your Divorce Advisor: A Lawyer and a Psychologist Guide You Through the Legal and Emotional Landscape of Divorce* (Fireside, 2001). Copyright 2002, Tara Fass and Diana Mercer. Republished at www.dailyjournal.com.