

# 13

## Mediation and Family Law

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## I. An Overview of Family Mediation

- A. [13.1] Introduction
- B. [13.2] What Is Family Mediation?
- C. [13.3] What Are the Benefits of Family Mediation?
  - 1. [13.4] Privacy
  - 2. [13.5] Control
  - 3. [13.6] Convenience
  - 4. [13.7] Economy
  - 5. [13.8] Timeliness
  - 6. [13.9] Self-Determination
  - 7. [13.10] Mutual Respect
- D. [13.11] When Is Mediation Not a Good Idea?
- E. [13.12] How Can Attorneys Assist Their Clients in Choosing a Family Mediator?
  - 1. [13.13] Securing Information from Professional Organizations
  - 2. [13.14] Asking the Prospective Mediator Questions
  - 3. [13.15] Matching the Mediator's Style to the Client's Needs
  - 4. [13.16] Determining the Mediator's Fee and Charges
  - 5. [13.17] Seeking Word-of-Mouth Reviews and Recommendations
- F. What Is the Role of a Mediator in Family Matters?
  - 1. [13.18] Maintaining Neutrality
  - 2. [13.19] Providing Information
  - 3. [13.20] Understanding the Dynamics of Mediation
  - 4. [13.21] Maintaining Confidentiality
  - 5. [13.22] Resolving Custody and Visitation Disputes
  - 6. [13.23] Recording the Participants' Agreement
- G. [13.24] What Are Impediments to a Good Result?
  - 1. [13.25] Power Struggles
  - 2. [13.26] Threats
  - 3. [13.27] Placating
  - 4. [13.28] Lying/Fraud
  - 5. [13.29] Giving Up Too Soon
- H. [13.30] Will the Agreement Survive the Legal Test?
- I. How Is a Family Mediation Conducted?
  - 1. [13.31] The Process
  - 2. [13.32] The Issues
    - a. [13.33] Grounds
    - b. [13.34] Child-Related Issues
      - (1) [13.35] Custody and visitation
      - (2) [13.36] Child support and expenses

- c. [13.37] Financial Issues
  - (1) [13.38] Short-term childless marriages
  - (2) [13.39] Short-term marriages with children in common
  - (3) [13.40] Marriages “‘til the children are grown”
  - (4) [13.41] Long-term marriages
- J. [13.42] What Is Contained in the Memorandum of Agreement?
- K. [13.43] How Can Attorneys Assist Their Clients in the Mediation Process?
- L. [13.44] What’s Happening in the Courts?
  - 1. [13.45] Statutory Authority for Court-Ordered Mediation
  - 2. [13.46] Programs in Specific Circuits
    - a. [13.47] First Circuit
    - b. [13.48] Third Circuit
    - c. [13.49] Fifth Circuit
    - d. [13.50] Sixth Circuit
    - e. [13.51] Ninth Circuit
    - f. [13.52] Eleventh Circuit
    - g. [13.53] Thirteenth Circuit
    - h. [13.54] Sixteenth Circuit
    - i. [13.55] Seventeenth Circuit
    - j. [13.56] Eighteenth Circuit
    - k. [13.57] Nineteenth Circuit
    - l. [13.58] Twentieth Circuit
    - m. [13.59] Twenty-First Circuit
    - n. [13.60] Cook County Circuit
  - 3. [13.61] Supreme Court Rule 99
- M. [13.62] What Is the Bottom Line?
- N. Sample Forms
  - 1. [13.63] Personal Data and Information
  - 2. [13.64] Agreement To Mediate
  - 3. [13.65] Guidelines for Mediation
  - 4. [13.66] Mediation Financial Disclosure





## I. AN OVERVIEW OF FAMILY MEDIATION

### A. [13.1] Introduction

Family mediation, much like negotiation and the adjudicatory process, has existed to resolve intra-familial conflict since the dawn of human society. It was usually informal in nature and conducted by a parent, sibling, trusted neighbor, or tribal elder. Until recently, it was more a personal service than a recognized profession since a profession by definition requires specialized knowledge or training of its members and adherence to a code of ethics. In the past, its practitioners were mostly “do-gooders” or other well-meaning members of the community possessing no particular skills or education who offered their services (and advice) without fee to couples or families in distress.

However, with the explosion of divorce litigation and its rising costs, together with an expansion of information in the fields of law, mental health, and the social sciences, family mediation has become a respected profession and a valued component of a multidisciplinary dispute resolution system, attracting lawyers, therapists, social workers, clergy, and other professionals to its roster.

### B. [13.2] What Is Family Mediation?

Family mediation

is a process in which a mediator, an impartial third party, facilitates the resolution of family disputes by promoting the participants’ voluntary agreement [or “self-determination”]. The family mediator assists communication, encourages understanding and focuses the participants on their individual and common interests. The family mediator works with the participants to explore options, make decisions and reach their own agreements. The Symposium on Model Standards of Practice for Family and Divorce Mediation, *Model Standards of Practice for Family and Divorce Mediation, Overview and Definitions*, p. 1 (Aug. 2000) (available on-line at 64.226.141.200/docs/resources\_model\_mediation.htm).

### C. [13.3] What Are the Benefits of Family Mediation?

Mediation adherents maintain that neither court litigation nor negotiation by attorneys provides the combination of benefits presented by mediation in family matters. Nor does arbitration hit the mark. If binding at all, it is binding only on the parties and not on the court. Any decision by the arbitrator must still pass judicial muster after a review of the evidence regarding its lack of unconscionability and its being in the best interests of the child or children. It is still an imposed resolution by an outsider in a family situation, and it does not contribute to enhanced communication skills by the parties nor to a growth of understanding in any future relationship between them.

Proponents of family mediation point to several benefits of mediating family issues as opposed to subjecting them to contested litigation or even to lawyer-conducted negotiation.

### 1. [13.4] Privacy

Mediation proceedings are conducted in private settings away from the glare of publicity and the anxiety of public proceedings. Discussions, which are apt to become heated, contentious, or personally embarrassing, are limited to the participants and are conducted beyond the prying eyes of the general public. The opposing parties, their attorneys or special advisors when needed, and the mediator are the only persons present during the discussions. There is no court reporter and no public record of the statements made or issues debated. Statements made during mediation are generally protected against public disclosure by statutory provisions or by confidentiality agreements between the parties. Moreover, concessions made toward achieving settlement may not be used against either party. In the usual case, any disclosures of information by the mediator to third persons must be authorized by both parties or ordered by a court. Mediation provides an additional benefit by insulating the parties' children in divorce cases from the details of their parents' disagreements.

### 2. [13.5] Control

Mediation allows both parties to negotiate and control the outcome of their settlement rather than to have the outcome of their dispute imposed on them by the court or negotiated solely by their attorneys. Further, because family disputes involve ongoing relationships, it is important that the parties not be so emotionally bruised by the process that they cannot deal with each other in the future on a rational and civil basis. Mediation allows the disputants full control of the outcome so as to generate a resolution they all can live with and provides a model for the amicable resolution of future disputes. Although a negotiated divorce settlement must still be approved by a judge, it certainly lessens the risk of receiving a judgment unacceptable to both spouses from a "stranger" not privy to their needs were the matter to be submitted to a judge for decision. Also, an agreed divorce proceeding avoids the necessity of further litigation and the risk of appeals inherent in taking a divorce to trial.

### 3. [13.6] Convenience

Court hearings are scheduled only when the court has the time to hear the matters to be presented and when both attorneys and witnesses are available at the same date and time. Additionally, negotiations by attorneys are scheduled only when both attorneys can match their available times. On the other hand, mediation discussions are set at the convenience of the parties, making it easy to schedule around business, family, or child care responsibilities. In contested divorce proceedings, all parties face the unpredictable nature of court scheduling, leading to uncertainty, lost time, and additional costs when both partners and their attorneys must wait for a hearing. To accommodate their clients, most mediators have the flexibility to provide mediation at times other than weekdays or traditional office hours and to engage in marathon sessions with the parties when necessary.

### 4. [13.7] Economy

When both parties agree to work together toward a common goal and share expenses, costs are considerably less than in a typical contested trial. Mediation can help parties conserve marital assets and avoid the high costs of legal fees associated with extensive research, investigation of

income and assets, prolonged hearings on motions, depositions, and trials. In a trial, additional costs also may accrue for fees to experts for each side, such as accountants, business evaluators, economists, real estate and personal property appraisers, physicians, psychologists, and psychiatrists. Mediated divorces are certainly less likely to go to appeal or incur the expenses of retrial. Finally, even if mediation is not fully successful, the conclusions and findings concerning the shared experts and joint witnesses can be used to provide a basis for agreement on certain issues in further proceedings. Also, the parties may limit the contest to only those issues on which they have not yet reached agreement, thus reducing the time, expense, and emotional fatigue expended in protracted litigation.

#### **5. [13.8] Timeliness**

Mediation hearings can be scheduled at the parties' convenience to continue until all issues are resolved. They are not dependent on finding available time on a crowded court calendar. When a settlement has been reached, a court hearing can be scheduled to complete the process within a few days. Most complex divorces take many months, and many may extend for years. A prolonged divorce depletes assets, hinders progress in business and other financial matters, and limits both parties' opportunities for personal growth. Certainly, the parties deserve to get on with their lives. Also, children are sure to benefit from a timely and fair custody settlement determined without acrimony.

#### **6. [13.9] Self-Determination**

During mediation, each spouse learns to communicate his or her desires and feelings with the assistance of the mediator. The ability to communicate is important for managing future relations between ex-spouses, especially when children are involved. Because divorce does not end either partner's role as a parent, they must be able to communicate within that sphere with sensitivity and without rancor.

#### **7. [13.10] Mutual Respect**

Mediation hearings are conducted with dignity and mutual respect. The mediator will use his or her skills to focus on the positive aspects of the relationship between family members to achieve a fair settlement. By mediating a settlement, both parties can avoid the public embarrassment, acrimony, character assaults, and other emotional stresses usually associated with a hotly contested trial.

#### **D. [13.11] When Is Mediation Not a Good Idea?**

Mediation presumes opposing parties with access to information who freely negotiate on a "level playing field." If any of these conditions are absent or compromised, the mediation process will not be perceived as fair and should not be undertaken. Therefore, mediation is not a good idea when (1) either party is under the influence of alcohol or other incapacitating drugs, (2) either party is a victim of chronic or recent domestic violence and/or abuse and is therefore unable to negotiate on his or her own behalf, (3) either party refuses to negotiate in good faith, or (4) it becomes apparent that a party is hiding assets or secreting income. See §§13.104 — 13.111 for further discussion of impairments to mediation.



**E. [13.12] How Can Attorneys Assist Their Clients in Choosing a Family Mediator?**

Unlike most other professionals, family mediators come from many fields of study and have varying degrees of education and training. They have had different employment and varying experiences before becoming mediators and have spent different amounts of time in the practice. Some have had special training in the area of family mediation, and some lack this training, having begun their practice in other areas of dispute resolution. Illinois does not require a mediator to be certified as a family mediator or even a general mediator in order to hold him- or herself out as a qualified mediator although there is presently an effort to do so. The ADR and Family Law Sections of the Illinois State Bar Association have proposed legislation to the Illinois General Assembly designed to provide recognition to mediators meeting certain standards and allowing those mediators to advertise themselves as "certified." Also, the National Conference of Commissioners on Uniform State Laws has undertaken to prepare uniform standards and rules regarding mediation and mediators that it ultimately intends to propose to the various state legislatures. Until then, all mediators stand equally uncertified under Illinois law.

Although persons may hold themselves out to be mediators whatever their educational background, *professional* family mediators generally come from two main disciplines: mental health and law. While at first blush it may appear that the two fields are miles apart in outlook and attitude, both fields have produced excellent family mediators. Mental health professionals — psychiatrists, psychologists, and social workers — have an understanding of human behavior that they apply to assist the parties in their negotiations, while family lawyers, with their knowledge of the requirements of law and their experience of having dealt with the myriad problems that couples encounter in the dissolution of their marriages, can assist the parties in much the same fashion. Individual mediators vary in skills and experience, and there are no hard and fast rules for choosing a mediator. Referring lawyers in the past felt more comfortable referring custody and visitation issues to mediators with a mental health background and financial and taxation issues or matters involving particular legal issues to a mediator with a family law background. In all fairness, however, there is much informational cross-pollination between the two disciplines the longer the mediator is in the practice.

**1. [13.13] Securing Information from Professional Organizations**

Such information comes mainly from professional organizations and their journals and conferences, which provide the family mediator with a continuing professional education. The major national professional organizations providing representation and information to family mediators are the following:

American Academy of Matrimonial Lawyers (AAML)  
150 N. Michigan Ave., Suite 2040  
Chicago, IL 60601  
312/263-6477  
Fax 312/263-7682  
E-mail: office@aaml.org  
Web site: www.aaml.org.

American Bar Association (ABA) Section of Dispute Resolution  
740 Fifteenth St.  
Washington, DC 20005  
202/662-1680  
Fax 202/662-1683  
E-mail: [dispute@abanet.org](mailto:dispute@abanet.org)  
Web site: [www.abanet.org/dispute](http://www.abanet.org/dispute).

ABA Section of Family Law  
750 N. Lake Shore Dr.  
Chicago, IL 60611  
312/988-5603  
Fax 312/988-6800  
E-mail: [familylaw@abanet.org](mailto:familylaw@abanet.org)  
Web site: [www.abanet.org/family](http://www.abanet.org/family).

Association for Conflict Resolution (ACR)  
1527 New Hampshire Ave. NW  
3rd Floor  
Washington, DC 20036  
202/667-9700  
Fax 202/667-1968  
Web site: [www.acresolution.org](http://www.acresolution.org)

The ACR is the successor organization formed by the merger of three ADR organizations: the Academy of Family Mediators (AFM), the Conflict Resolution Education Network (CRENet), and the Society of Professionals in Dispute Resolution (SPIDR).

Association of Family and Conciliation Courts (AFCC)  
6515 Grand Teton Place, Suite 210  
Madison WI 53719-1048  
608/664-3750  
Fax 608/664-3751  
E-mail: [afcc@afccnet.org](mailto:afcc@afccnet.org)  
Web site: [www.afccnet.org](http://www.afccnet.org).

The major statewide organizations providing representation and information to family mediators are the following:

Chicago Area Chapter of the ACR  
P.O. Box 13, Cary, IL 60013, 847/615/7220  
E-mail: [llaibly@aol.com](mailto:llaibly@aol.com)  
Web site: [www.spidrchicago.org](http://www.spidrchicago.org)

This is the successor organization to the SPIDR Chicago Area Chapter.

Illinois Chapter of the AAML  
130 E. Randolph Dr., Suite 1200  
Chicago, IL 60601  
312/861-4600  
Fax 312/861-4666.

Illinois Chapter of the AFCC.

For information, contact Robert K. Downs, 1010 Lake St., Suite 620, Oak Park, IL 60301, 708/848-0700, fax 708/848-0029.

Illinois State Bar Association (ISBA) Section on Alternate Dispute Resolution  
Illinois Bar Center  
424 S. Second St.  
Springfield, IL 62701-1779  
217/525-1760  
Fax 217/525-0712  
E-mail: [info@isba.org](mailto:info@isba.org)  
Web site: [www.isba.org](http://www.isba.org).

ISBA Section on Family Law.

See ISBA contact information above.

Mediation Council of Illinois (MCI)  
60B Terra Cotta Ave.  
PMB 146  
Crystal Lake, IL 60014  
312/641-3000  
E-mail: [skzingery@aol.com](mailto:skzingery@aol.com)  
Web site: [www.mediationillinois.org](http://www.mediationillinois.org).

In addition, the Center for Analysis of Alternative Dispute Resolution Systems (CAADRS), 11 E. Adams St., Suite 500, Chicago, IL 60603-6302, 312/922-6475, fax 312/922-6463, e-mail [caadrs@caadrs.org](mailto:caadrs@caadrs.org), is a research organization that provides much useful information about mediation.

Many of the above organizations have certain requirements for admission and most have ethical standards to which their members are required to adhere. Some also have referral lists based on geographical location that describe the mediators and list their professional backgrounds.

## 2. [13.14] Asking the Prospective Mediator Questions

It would be well to inquire of any prospective family mediator

- a. what his or her educational background is and which educational institution(s) have awarded what degrees;

- b. what special training he or she has received in family mediation, including how long a course of study and who the trainers were (most approved courses are at least 40 hours in duration);
- c. how long he or she has been practicing family mediation and how many mediations have resulted in agreement;
- d. to what professional organizations the mediator belongs and how he or she keeps current in the field; and
- e. whether the mediator has written any articles in professional journals or delivered any lectures or papers at professional conferences.

Privacy considerations may prevent the mediator from providing access to clients who participated in successful mediations, but there should be no reluctance on the part of a mediator in providing answers to the above questions.

### 3. [13.15] Matching the Mediator's Style to the Client's Needs

It is also well to bear in mind that different mediators have different styles of mediation, and one should attempt to match the style of the mediator to the needs of the client. Generally, the mediator's style is based on his or her philosophical approach to mediation. These attitudes fall on a spectrum from "facilitative" to "evaluative." In its purest form, mediators practicing in the facilitative mode provide no information or comment on the issues under discussion, believing their strict neutrality will better enable them to assist the couple in reaching agreement. In the evaluative mode, mediators provide information but not advice and may report what other couples have done under similar circumstances without advocating a position. Mediators tend to favor one mode or the other, although some take a middle ground or vary their conduct as they believe the situation requires. A professional mediator should understand the difference in practice between these two modes and be able to indicate where on the spectrum his or her conduct lies.

### 4. [13.16] Determining the Mediator's Fee and Charges

Family mediators should always attempt to satisfy any inquiries from prospective clients regarding the basis of their fees or charges. It should be understood what services are to be provided, whether compensation would be based on an hourly or other basis, whether a retainer is required and in what amount, and what portion of the retainer is refundable if unearned. Most family mediators in Illinois charge on a per-hour basis, and fees may run from less than \$100 per hour in less populated areas to several hundred dollars per hour for experienced family mediators in urban locations. Some academic institutions and charitable organizations provide mediation services on a sliding fee scale, and certain legal providers such as the Legal Aid Bureau of Metropolitan Family Services (14 E. Jackson St., Chicago, IL 60604-0225, 312/986-4200) and the Legal Assistance Foundation of Metropolitan Chicago (312/341-1070) offer free mediation services to indigent couples undergoing divorce. Most private mediators will be happy to explain the mediation process and their charges to interested couples and provide a one-hour face-to-face interview without fee.

## 5. [13.17] Seeking Word-of-Mouth Reviews and Recommendations

Before concluding the discussion of how attorneys can assist their clients in choosing a family mediator, it is important to note the great value of word-of-mouth reviews and recommendations from persons who have participated in sessions with a particular mediator and from lawyers whose clients have done so. While their reports may be somewhat biased depending on the ultimate result of the mediation, their observations may be quite valuable regarding the mediator's methodology or attitudes and may help in deciding whether a particular mediator is the appropriate person to handle a given matter.

## F. What Is the Role of a Mediator in Family Matters?

### 1. [13.18] Maintaining Neutrality

First and foremost, the role of the mediator is that of an absolute neutral — the mediator must not only *be* impartial but must also *appear to be* impartial. Any possible conflicts of interest or potentials for bias reasonably known to the mediator should be disclosed to the participants. However, the participants are free after such disclosure to retain the mediator by an informed, written waiver of the disability unless the conflict or bias clearly impairs the mediator's ability to be neutral. In that case, the mediator should withdraw and not begin or continue the mediation.

### 2. [13.19] Providing Information

Although a mediator must at all times be neutral, he or she must be an *informed* neutral; that is, he or she must be able to explain the process to those involved and also facilitate the parties' understanding of the options available to them in reaching agreements on the issues in dispute. The mediator may provide the parties with general legal information regarding the matters under consideration, *e.g.*, the possible income tax deductibility of maintenance and/or combined maintenance and child support versus the nondeductibility of child support alone. The mediator may also point out the effect of income tax obligations and maintenance payments on child support guidelines. However, the mediator cannot give legal advice — that is, advise either party what path to take. Legal advice should be given to the parties only by their lawyers.

The reasons for these requirements are clear. The family mediator should structure the mediation process so that the participants make decisions based on sufficient information and knowledge. At the same time, the mediation is based on the principle of self-determination by the parties, and it is not the mediator's role to overcome that well-established principle. Admittedly, there are times when the line between legal information and legal advice is very thin, but a good mediator is constantly aware of the difference and will follow his or her ethical mandate in the practice.

### 3. [13.20] Understanding the Dynamics of Mediation

The expertise demanded of the mediator is that he or she will conduct the mediation process toward resolution with an acute awareness of the dynamics of negotiation. Clients should expect the mediator to so conduct the mediation process and so order the issues to be addressed as to

give the participants the greatest chance for success. To the extent that the mediator continues to build the participants' trust in his or her ability to remain neutral yet assists them to subject their proposals to the test of fairness by restating them in a different context, the prospects for a successful conclusion are enhanced. On the other hand, if the mediator is unable to develop a strategy based on his or her observation of the couple's interaction or tends to take sides or belittle the proposals of one of the participants, the mediation is likely to fail.

#### 4. [13.21] Maintaining Confidentiality

A family mediator should maintain the confidentiality of all information acquired in the mediation process. He or she should not use such information for personal benefit and should not reveal such information unless required by law or by the agreement of the parties. Note, however, that a lawyer-mediator is required under the Illinois Rules of Professional Conduct to report to the Attorney Registration and Disciplinary Commission (800/826-8625 or 800/252-8048) any information not otherwise protected by law that comes to light and reasonably shows that another lawyer has committed a criminal act or an act of dishonesty, fraud, deceit, or misrepresentation. Illinois Rule of Professional Conduct (RPC) 8.3. Mental health and social worker mediators, on the other hand, are required under the terms of the Abused and Neglected Child Reporting Act, 325 ILCS 5/1, *et seq.*, to report to the Department of Children and Family Services (at the child abuse hotline, 800/252-2873) any evidence that a minor has been neglected or physically or sexually abused. Good practice would suggest that such ethical obligations, which may breach confidentiality, be explained to the participants before the mediation gets underway and be incorporated into the mediation agreement.

#### 5. [13.22] Resolving Custody and Visitation Disputes

A mediator can be of great assistance in helping couples in dissolution matters to resolve custody and visitation disputes in the best interests of the child or children and to assist them in designing parenting agreements that are flexible enough to provide for each parent's changing conditions and the child or children's growing needs.

#### 6. [13.23] Recording the Participants' Agreement

A mediator is generally expected to record the agreement of the participants in some detail so that their respective attorneys can advise them independently as to the legal consequence of the agreement and, if the parties persist in the agreement, then convert the mediation agreement into a marital settlement agreement and proposed judgment to be presented to the court. However, for the mediator to go forward and undertake to prepare the marital settlement agreement or proposed judgment is a risky business. A nonlawyer mediator may be charged with the unauthorized practice of law for drafting a legal document. Even lawyer mediators may find their good intentions the subject of a malpractice suit suggesting that the legal language used in the document benefited one participant above the other beyond what that other believed was the agreement.

## G. [13.24] What Are Impediments to a Good Result?

During the course of negotiations, the parties may have differing points of view and conflicting "bottom line" results that they have set for themselves and beyond which they are not prepared to go. This is all part of the negotiating process and presents no particular difficulties since perspectives may change and agreements may emerge throughout the mediation process. However, impediments may arise that bar a successful conclusion when one or both participants have agendas that focus on matters outside of solving the problem at hand. Essentially, these impediments may be categorized as power struggles, threats, placating, lying/fraud, and giving up too soon.

Any of these impediments may arise at any time during the negotiation. The success of the mediator in overcoming these impediments is a product of his or her experience in mediation, his or her knowledge of the legal options or alternatives, and his or her innate interpersonal skills.

### 1. [13.25] Power Struggles

The problem of power struggles arises when one or both of the participants view the mediation as a struggle for control and attempt either to establish control over the issues or to prevent the other party from asserting control. Thus, the mediation becomes a battlefield on which the substantive issues are sacrificed to the procedural ones of who decides what, when, and how much. In this type of situation, participants may fail to reach agreements in their own best interests because they were suggested by the other side or because the other side benefits as well. An experienced mediator will use this opportunity to assert his or her own control over the process and, by obtaining the parties' trust in his or her neutrality, direct their energy toward resolving their dispute.

### 2. [13.26] Threats

Some spouses see the use of threats as a technique for gaining additional leverage. Threats may be with regard to financial matters ("You'll never see that money" or "I'll quit work and start writing my novel") or child-related matters ("If it takes everything I've got, you'll never see the kids again" or "I'm not paying child support so that she can use the money"). Usually, these threats are made outside of the mediation process, but sometimes they carry over in the form of "reminders" that cause the other spouse to remember the threats made. A mediator must be vigilant to uncover such threatening actions and, if necessary, to separate the parties. The mediation can then continue with the mediator caucusing between the spouses and defusing the threats by alluding to the role of the courts.

### 3. [13.27] Placating

Placating is the opposite of using threats. Here, one participant does not want to harm the other spouse, hurt his or her feelings, or cause him or her to become angry. Sometimes, placating arises from remorse or guilt; many times, it results simply from wanting peace. A good mediator will recognize placating and strongly suggest that the participants consult their lawyers before further agreements take place.

#### 4 [13.28] Lying/Fraud

The impediment of lying/fraud is more difficult to detect than some of the others. Sometimes it involves **sexual** or physical abuse of a child or children; most often it involves hiding assets or undisclosed **sources** of income. In the first instance, the parent may be persuaded to have the situation **assessed** by a qualified professional; hidden assets may be addressed by a provision in the agreement that any newly discovered assets will be divided 50-50 if they were overlooked in response to a **request** for disclosure but will go to the other party if a court finds them to have been hidden. **A** person who has hidden nothing should have no objection to such a provision.

#### 5. [13.29] Giving Up Too Soon

Most **mediations** are a series of disagreements that lead the participants to an earnest search for ways to **break** the deadlocks and resolve the issues. Each mediation has its own timetable depending on the number and complexity of issues and the attitudes of those attending. For those who **unrealistically** expect the mediator to force an early agreement, the passage of time may result in **early** frustration, particularly when they are underwriting all or some of the mediation expenses. A **perceptive** mediator will recognize the signs of early frustration, explain the process more **thoroughly**, and underscore the benefits of mediation when contrasted with a lengthy, drawn-out court fight. Once the parties are back on track, experience suggests that the negotiations then **quicken** their pace.

#### H. [13.30] Will the Agreement Survive the Legal Test?

By **adroit** fashioning of options and alternatives in dealing with financial matters, by concentrating on the needs of the parties and the current availability of monetary resources, and by continually suggesting that the parties consult with their respective attorneys, an experienced mediator can lead the parties away from wandering into the thicket of unconscionability. Usually that is not a problem because the parties are quick to assert their demands for an equitable share of the family assets.

More often the problem will arise in the area of "the best interests of the child." It often occurs that in working out their child-related arrangements, the parents will focus on their own convenience rather than the child's needs. The parents need to be reminded that whatever they decide regarding their child's custody, visitation, or support will face judicial scrutiny and that a judge may not concur that their arrangements are in the best interests of the child, particularly when each parent is anxious to share exactly 50 percent of the child's time, when the parents will shuttle the child back and forth over long distances, when the parents do not take into consideration the child's age-appropriate needs, and when the parents agree to a substantially less-than-guideline figure for child support without a reasonable basis for the court to adopt it. Additionally, it is always a good idea when the parents have agreed to joint custody for the mediator to review with them the usual provisions of a joint parenting agreement so that they are prepared to discuss their views with their attorneys.



## I. How Is a Family Mediation Conducted?

### 1. [13.31] The Process

A divorce mediation is usually initiated by one of the spouses (usually the one most interested in going forward with the dissolution process) calling the mediator with a series of questions. If the questions are answered satisfactorily, and if the spouses have agreed, the spouse calling will make an appointment for both spouses to attend an information session without a charge. In some cases, such as when one spouse is not living in the state or within the local venue, a conference call or two separate informational telephone sessions will replace the face-to-face informational meeting.

When prospective clients enter the mediator's office, they will notice the casual and informal atmosphere. In many mediators' offices, environmental factors such as lighting, color, and sound have been designed to present comfortable, nonthreatening surroundings. After the prospective clients have each filled out preliminary personal information forms (see the sample in §13.63), they are ready to meet with the mediator. Seated around a circular table with the mediator, the parties discuss the process, express whatever reservations or concerns they may have, and inquire about fees in order to satisfy themselves that this is the right course of action for each of them. The mediator should inform them that it is important that they receive independent legal counsel during the mediation process and independent representation in court. If the mediator is a lawyer, he or she should also inform them that, being neutral, he or she cannot provide them with legal advice and he or she, and anyone from his or her firm, cannot represent both or either of them in court or in the future in any matter related to this mediation.

During this preliminary period, the mediator carefully observes the interaction of the couple. If they are willing to take the next step, the mediator will ask their permission, which is usually granted, to speak to each person out of the presence of the other. In all other conversations (unless there is an issue of safety), communications with either party are usually conveyed to the other. However, in private conversation, the mediator can access the past behavior of the parties — how they resolved arguments and whether there has been any abuse of alcohol or drugs, any domestic violence or harassment, any prior contact with the courts, etc. This is the time to find out both parties' views on the breakdown of the marriage and to determine whether both parties are at the same stage in going forward to a dissolution of their marriage. Sometimes one or both of the participants are reluctant to divorce or will blame the other for causing the break-up of the marriage and want to use the mediation process to punish the other. The mediator should early on disabuse the clients of this attitude since it is counterproductive. If mediation has a theme, it is that it looks to the future to resolve a problem rather than focusing on the past to determine who caused it.

The mediator can also learn from the parties at the initial session what they believe are prior agreements as to certain of the issues and what they believe will be the most difficult areas of negotiation. If after these interviews the mediator believes that there are no safety problems and that both parties are fully capable of negotiating on their own behalf, the mediator will report to the couple that if they are still on board, the mediation can proceed.

It is at this point that the mediator will submit to the couple for their consent and signature the mediation agreement, which typically sets forth the mediator's responsibility, the parties' responsibilities, an explanation of the mediation process, and the fees and costs of mediation. See the sample mediation agreement in §13.64. Questions may arise at this time regarding the wording of the agreement, and all such questions should be answered fully by the mediator. No promises should be made by the mediator as to the length of the process, the final costs of mediation, and whether all issues will be resolved since these matters for the most part are dependent on the actions of the parties. Most lawyer mediators, as well as some nonlawyer mediators, require a retainer fee, which may be equally divided between the parties, paid fully by one of the participants, or apportioned as otherwise agreed. Other mediators are satisfied to charge the clients at the beginning or end of each day's session.

If the parties and the mediator are agreed at this point, they will proceed to discuss in greater detail the rules of mediation, which may be reduced to writing and require a sign-off by each of the parties. See sample guidelines for mediation in §13.65. After the parties have signed all the documents and the financial arrangements are concluded, mediation begins.

When mediation commences, the rest of the first session is used to determine whether there are issues that have already been agreed on; to review the issues to be mediated; and to discuss the information by way of lists, statements, evaluations, and other documents that will be needed by or be helpful to the disputants. As the parties approach the end of the session, the mediator will attempt to work out a schedule for the following sessions that is convenient for the parties.

Some mediators schedule sessions in two-hour increments, following the adage that "the brain cannot absorb beyond what the seat can endure." Beyond two hours, concentration tends to fall off. However, in sessions of less than two hours, too much time is spent catching up from last time and less is accomplished. When the parties are about to leave, they may be handed financial statement forms asking them to report their income, expenses, assets, and liabilities (see sample in §13.66, which is modeled after Cook County Circuit Court Rule 13.3). Using such a form makes it easier for the parties' lawyers to help them fill it out and makes it available to the lawyers in the event any court action is necessary. Unless the parties are in a hurry, they should be given two or three weeks to gather the information needed before the negotiation commences.

Before beginning negotiation, everyone involved must remember that the parties are negotiating "in the shadow of the courthouse." That is, unlike many other types of mediation that can be settled without ever having to go to court, divorce mediation requires that the court give permission to divorce and approve the settlement. And while the parties know also that the only alternative to an amicable settlement approved by the court is a contested trial in which the outcome will be decided essentially by a stranger (the judge) and that it will certainly be costly in terms of time, money, and emotional stress, they don't know just how it will end and what the risk factors might be. That is why many parties approach mediation with one eye on doing what is fair and equitable and one eye weighing the risks of trial on the issues. An experienced mediator understands this fact and will urge such parties to consult with their lawyers to learn what their chances would likely be if the matter went to trial. An experienced family lawyer is extremely helpful in this type of cost-benefit risk analysis.

## 2. [13.32] The Issues

When mediation begins, the mediator, with the assistance of the parties, attempts to identify the unresolved issues. It is always best to start out with the issue easiest to resolve, thus giving the couple confidence in their ability to work together to solve problems and allowing them the courage to consider compromise in more difficult circumstances. Assuming that all issues are unresolved, the mediator often will group the issues as follows:

- a. Grounds
- b. Child-related issues
  - (1) Custody
  - (2) Visitation
  - (3) Child support and expenses
    - (a) Present support
    - (b) Medical expenses
    - (c) Insurance to guarantee support
    - (d) College expenses
- c. Financial issues
  - (1) Equitable distribution of property
  - (2) Equitable distribution of debt
  - (3) Maintenance (spousal support)
  - (4) Tax consequences

**EXAMPLE:** For purposes of the following discussion, assume that a middle income couple intending to dissolve their marriage of 20 years have three children, two boys, age 15 and 10, and a girl, age 12. Both spouses are gainfully employed: the husband is a dentist, and the wife manages a boutique but does not own it. One boy is in high school, and the other two children attend a neighborhood grammar school. The parties live in a suburban community in a house valued at \$200,000 with a \$100,000 mortgage; they have retirement plans valued at about \$150,000 each; and they have a combined income of about \$150,000 per year and no savings other than their retirement accounts. The children have U.S. savings bonds designated for college from the oldest to the youngest of \$20,000, \$15,000 and \$10,000. The parents each have an automobile, which is driven to work. The husband is 55 years of age, and the wife is 52. Assume also that the parties see the mediation as leading to an amicable divorce and that they treat each other in a kindly and friendly manner, which is not always the case.

a. [13.33] *Grounds*

When a couple begins the mediation in an amicable mood, the mediator may want to suggest first discussing grounds and then reel off a litany of possible grounds. Usually one party or the other will ask about “no-fault” divorce, in which case the mediator should explain that what people call “no-fault” is really the ground of *irreconcilable differences*. The statutory definition may be read and the couple asked if it fits their circumstances, that is, whether they can truthfully allege it as a ground. The consequences of the irreconcilable differences ground regarding separation can then be discussed and a determination made as to whether the couple may qualify. If there is any question as to qualification, they should be urged to consult with their lawyers. The couple will select the grounds they are most comfortable with, and — lo and behold — they have reached their first agreement.

It should be noted, however, that discussing grounds first doesn’t always work. If the mediator knows that there has been a breach of fidelity in the relationship, he or she should avoid discussing grounds until the couple is more comfortable with the mediation process because if grounds are discussed first, the injured spouse will want to label the other an adulterer or adulteress and the hostile feelings resulting from that discussion will set the negotiations back immensely and may even terminate the mediation. Therefore, in such a circumstance it may be better to talk about child-related issues first.

b. [13.34] *Child-Related Issues*

The couple should be reminded that even though they will no longer be husband and wife after the divorce, they will be parents forever. The concept of the “best interests of the child” should be explained to them, and they should be asked to consider what it means — that is, that it doesn’t mean the parents’ best interests or the parents’ convenience but what is *really* in the best interests of the child or children involved.

(1) [13.35] *Custody and visitation*

In deciding custody, which would be better labeled as “parenting responsibility,” the choices are limited: sole custody to one parent or the other; joint custody, with joint legal custody in both parents and primary residential custody in one or the other; or shared custody, with primary custody in the residential parent and changes in residence by the child or parents on alternating days, weeks, half-year periods, seasons, etc. Discussions regarding custody should consider the age of the child involved, the prior conduct of each parent in raising that child, the most recent situation regarding the child, whether there is a need for stability and what the stabilizing factors are, whether there is a neighborhood school and what the child’s needs there are, whether the child has any special needs, what the future living arrangements will be, whether one parent is likely to remarry and whether there is a new family for the child to adapt to, whether there are sibling relationships to consider, what the working hours of the parents are and how much time each parent will have to spend with the child, whether a parent travels a lot, whether a housekeeper or nanny is needed for the child, whether there are any difficulties in either parent’s relationship with the child and/or any mental health or addiction problems that may affect the child, and, considering everything, what is in the “best interests of the child.”

Discussion on this issue can be lengthy if the parties have not discussed it before, particularly if a parent has a hidden agenda that gives that parent having custody of a child or the other parent not having custody a particular personal meaning. All these areas should be explored with the parties in an effort to reach agreement. If there are still strong disagreements as to what is in the child's best interests, the parties may agree to consider the advice of a neutral mental health expert. A child psychologist or psychiatrist can be agreed on in advance by the parties to report these conclusions and recommendations to the parties for consideration. Usually, there is also an agreement that the parties will or will not allow the expert to testify if there is a trial.

**EXAMPLE:** In the scenario set out above, the husband and wife have agreed that there should be joint legal custody with primary residential custody with the wife and that the parents will sign a joint parenting agreement setting forth their responsibilities. Note that joint custody requires that a joint parenting agreement be executed and that it contain a provision requiring the parties to submit any child-related disagreements to alternate dispute resolution before bringing the matter to court. In this case, the husband and wife have also agreed to allow the children to choose which parent they will live with after emancipation and during their college years. Since the primary residence has been determined, the husband has a right of visitation (or access). The husband would like to spend weekends with the children, but as a dentist, he works Saturdays, and the couple recognizes that the children are in their early to mid-teens and their activities with their friends are very important to them, so they have agreed that the husband may have the children stay with him every Saturday night and Sunday and that he may visit with them one evening a week except when a child has a special event.

Often visitation schedules are worked out with calendars and a large easel board so that the couple can visualize the arrangement. Beyond weekly visitation schedules, it is usual that the children will celebrate their birthdays with both parents, spend Father's Day and the father's birthday with the father, spend Mother's Day and the mother's birthday with the mother, and divide up major holidays such as New Year's, Easter, Memorial Day, July 4th, Labor Day, Halloween, Thanksgiving, and Christmas in alternating years. Usually the children will spend one two-week period during their summer vacations with one parent and a similar two-week period with the other parent.

Many noncustodial parents want to have a completely flexible schedule or no schedule at all that grants them "reasonable and liberal visitation." Unfortunately, that arrangement allows a manipulative parent to play mind games with the other parent or, worse yet, with the children. Parents who insist on a completely flexible schedule should be urged to work out a visitation schedule as a back-up in case of future disagreements and to try to stick to it as best they can so the children can count on it and make their plans with friends accordingly. This recognizes that the two parents can work out changes when necessary to accommodate each other or to accommodate the child.

## (2) [13.36] Child support and expenses

The nonresidential custodian of a child is required to provide child support according to statutory guidelines. If the parties have been briefed by their attorneys before entering this phase, the mediator's job is an easy one since the parties are already aware that the court will require good reasons to award child support above or below the guideline figures.

EXAMPLE: Since the wife is the residential custodian of the children in the scenario set out above, the husband is required to provide child support to the wife according to the statutory guidelines. Since there are three children, the husband will owe guideline child support in an amount equal to 32 percent of his income from all sources less the statutory deductions. Because the husband is self-employed and does not pay himself on a biweekly or semi-weekly basis, the guideline figure is based on his average monthly income. It would then be up to the parties to decide if he pays the child support amount directly to the wife.

After child support has been assessed, the parties must then decide who will be responsible for ordinary and extraordinary medical expenses and medical insurance and how much insurance the noncustodial parent should carry to ensure that the minor children will continue to be supported in case of his or her disability or demise. Another issue to be discussed is who takes the dependant deduction and child care credit for the children. Usually, that is resolved in favor of the person who can derive the most benefit from the deductions or credit.

Most couples in mediation want their children to have the advantages of a higher education and will agree to contribute to each child's four-year college education on a pro rata basis in proportion to his or her income at that time. Some couples are more generous, providing for graduate school as well as out-of-state venues, and some couples are more controlling, restricting the location and cost, requiring parental approval, or requiring the child to maintain a certain grade point average.

When the issues are child-related, the divorcing parents can usually be persuaded to focus on the needs of the child and to work together to fashion an agreement that truly considers the best interests of the child. By appealing to the couple's image of themselves as selfless individuals who are committed to their child's physical, mental, emotional, and moral health, the mediator can transform the parents from warring spouses into cooperating partners. But such cooperation does not always translate when shifting to financial topics.

*c. [13.37] Financial Issues*

The discussion of money matters comes with a great deal of emotional baggage because *money matters*. For some, money represents the security needed for a future life; for others, money is a reward earned for prior hard work and sacrifice; for still others, money gives present status; and for an angry few, the extraction or deprivation of money is punishment to an errant or neglectful spouse. Before commencing any discussion of financial issues, a wise mediator will do well to determine what money really means to each of the parties when exploring "the bottom line." An unusual attitude toward money will call for fashioning a more creative solution that is equitable in view of the couple's circumstances but that also satisfies the couple's emotional needs.

In addressing the financial issues, it would be well for the mediator to tailor an approach to the parties based on the length of the marriage and the varying needs of each spouse. For convenience, four categories could be used:

1. short-term childless marriages;
2. short-term marriages with children in common;

3. marriages “‘til the children are grown”; and
4. long-term marriages.

(1) [13.38] Short-term childless marriages

In short-term childless marriages of less than five years, the issues are usually easy to articulate: (a) does each partner keep his or her nonmarital property (brought into the marriage or gifted but kept separate) or is there some property transfer from one to the other and, if so, in what amounts; (b) is there a 50-50 split of the marital property or is some other proportion used; (c) how is the marital debt divided; and (d) is there a need for maintenance, and, if so, how much and for how long?

In short-term childless marriages, the couple often comes to the table viewing their marriage as a “mistake” and wanting to get on with their lives and to continue whatever careers they were engaged in before or during their marriage. Not burdened by child care concerns, they can step back immediately into their former employment. Unless there is a health problem, the need for maintenance is minimal if it is needed at all. If all is well between them, there is usually an agreement to split the assets and the debts 50-50 and to waive the payment of maintenance.

(2) [13.39] Short-term marriages with children in common

Short-term marriages with children in common (not children by a prior marriage, unless adopted by the present spouse) are more difficult to assess. The same issues arise as in the childless short-term marriage except that child support issues become merged with other financial issues and provision must be made for the spouse who is no longer gainfully employed because of child-rearing responsibilities. Here, maintenance is a larger issue in terms of both length and amount. Since there is a child or children, child support in the statutory formula amount is guaranteed until the youngest child reaches 18 or is otherwise emancipated. However, since the marriage is short-term, maintenance is most often agreed to on a short-term basis unless child support becomes merged with the maintenance obligation to form an unallocated maintenance payment, securing certain income tax benefits to the responsible spouse and perhaps encouraging the maintenance provider to be more generous in either length of time or amount. In this case personal debt will be divided 50-50 but mortgage debt will be assumed by whoever gets the title to the house, and car loans and similar debt will be assumed by whoever retains that property. Usually each spouse will retain his or her own 401(k), IRA, or pension unless there is a large discrepancy in the marital portion, in which case the wealthier spouse may transfer a part to the other spouse through a qualified domestic relations order (QDRO).

(3) [13.40] Marriages “‘til the children are grown”

Marriages “‘til the children are grown” (five to twenty years) follow much the same negotiations as short-term marriages with two major differences: (a) there has been a longer commitment to the marriage on the part of one or both of the partners, together with a greater expectation of enjoying the benefits of the accumulated assets; and (b) the parties have had a

longer time to accumulate assets (and debt), so there is more to fight about. If there are children, that adds to the issues in dispute, but it also adds to the likely success of the mediation, for, as any mediator will concur, the more issues there are, the more maneuverability there is and the more likely it is that the parties will reach an agreement.

(4) [13.41] Long-term marriages

The financial issues addressed in the mediation of long-term marriages (over 20 years) focus primarily on the equitable division of substantial assets, the assumption of debt, the assurance of future and retirement income, and protection against medical disability. At this time of their lives, the parties were counting on enjoying the fruits of their labor, and they are bewildered, somewhat angry, or bitter. Many times, they are in denial, putting the brakes on the whole mediation process. In this situation, it is well to go slowly, first getting small agreements and not broaching major issues until the parties are ready. Support agreements can be reached on a temporary basis until the parties are ready to tackle the issues of their future residences, relationships, and income requirements. Distribution of assets and the payment of accumulated debt can come later unless there is some particular urgency. By approaching these matters tactfully, the parties become more confident of their goals, and agreements can be reached in a more comfortable and supportive environment. Additionally, the parties have more time to confer with their attorneys and to receive legal advice.

**EXAMPLE:** In the continuing scenario, the couple has been married for 20 years. They have stayed together until the children were grown, but they have grown apart into their separate routines. Financially they are looking forward to a comfortable future, but it is unlikely that they will become really wealthy. Their immediate financial concerns are setting up separate residences and providing for their children's college educations. The parties have previously agreed on a visitation schedule, that custody will be joint, and that the primary residence will be with the wife. The husband will pay child support. Based on an annual net income from his practice of \$90,000, he would probably be responsible for child support in the amount of \$1,500 a month. However, he and the wife are focused on the children's college education. Rather than reduce child support to allow the husband to contribute to each child's education fund, the parties will agree that the husband will provide \$1,500 a month in unallocated maintenance (fixed) for ten years with the wife agreeing to contribute \$200 a month to the 12-year-old's college account and \$150 a month to the 10-year-old's college account. The husband and wife will take the dependency exemption and child care credit for the two boys and the girl in alternating years. The husband will deduct the maintenance, and the wife will declare the income, but at a lower tax rate. The children would be expected to attend a four-year state funded college or university unless they could provide the difference in the tuition through a scholarship, a loan, or summer employment. The husband will quit-claim his interest in the house to the wife, who will assume the mortgage. She will refinance the debt to stretch out the payments until age 62 (also ten years), when social security will kick in and she will be able to pay off the mortgage more rapidly or create additional investment capital. With child support and maintenance of \$1,500 a month for the next ten years, together with her gross income of \$5,000 a month from her business, she and the children should be able to maintain close to the same standard of living. The husband at approximately \$6,000 a month in income (after maintenance is deducted) should also be able to live comfortably in his own residence. Each of the spouses will keep his or her own automobile, and each will retain his or her own pension fund to supplement social security when the time comes.



**J. [13.42] What Is Contained in the Memorandum of Agreement?**

Having concluded negotiations regarding both child-related issues and financial matters and having inquired of the wife whether she wishes to resume her name before marriage, it falls to the mediator to note the agreements reached by the parties in a memorandum of agreement.

First of all, it must be said that a memorandum of agreement in family mediation is not an agreement in the same sense as in other forms of mediation nor a legal document. It is merely a compilation of notations by the mediator of the agreements reached by the parties during the mediation process. To the extent that the parties are committed to their agreements in lieu of continuing contest and confrontation, the agreements will survive. The purpose of the memorandum of agreement is to record in general terms (though in some detail) the agreements that the parties have reached. It is then the job of their respective attorneys to draft the appropriate legal documents based on those general agreements and submit them to the parties for their final acceptance and signatures.

In conformity with this philosophy, some family mediators prepare a memorandum of agreement listing all of the agreements reached by the parties based on their notes and records but do not ask for the parties' signatures. The belief is that the parties feel less pressured in reaching their agreements when their signatures are not required and, contrary to popular belief, are *more* committed to the agreements they have reached, particularly as to those agreements that govern their future relations.

Although each memorandum of agreement is tailor-made to fit the parties' circumstances, in order to assist the attorneys some mediators organize the memorandum to follow the usual form of the marital settlement agreement. This allows the lawyers for the parties to have a better understanding of the extent of the agreements reached and makes their task a little easier.

**K. [13.43] How Can Attorneys Assist Their Clients in the Mediation Process?**

In response to a greater use of mediation in family law matters, many practitioners have dug in their heels against their clients' use of the process or have sought to undermine it, fearing that mediation would diminish their primary role in family law matters or cut into their income in individual cases. On the other hand, lawyers who have referred their clients to mediation find that the billing hours they have lost are the administrative ones (supervising discovery, etc.), that the negotiations are far less confrontational and stressful, and that their satisfied clients have referred other clients who have heard the good reports and are interested in using mediation in their family law matters.

The preamble to the Illinois Supreme Court Rules of Professional Conduct concludes that "it is the duty of all lawyers to seek resolution of disputes at the least cost in time, expense and trauma to all parties and the courts," thus bearing witness to the overriding nature of this ethical obligation. It is but a short jump from here to a malpractice suit from a client contesting major fees and claiming that alternative processes for resolving the dispute were available at far less cost in time, expense, and trauma but were not disclosed.

An attorney can assist the family mediation process at various times during the proceedings and in many ways, including the following:

1. The attorney should recognize family mediation as an effective dispute-resolving process that offers many advantages to those in the throes of family crisis and upheaval. The attorney should be knowledgeable about mediation, understand its best uses, recognize when it is undesirable, and have a good working knowledge of the dynamics involved. Much information can be obtained from books and articles written on the subject by mediation professionals, from educational videotapes, and from seminars on the subject. A knowledgeable attorney can greatly assist the client and the mediator by describing to the client the various steps in the mediation process and establishing in advance a strategy to reach a satisfactory accord.

2. The attorney should be willing to recommend family mediation to clients in appropriate cases. The attorney should take into consideration not only the immediate financial consequences of the expected result but also the negative impact of contested litigation on the emotional wellbeing of the client. Furthermore, the lawyer should understand that mediation has additional benefits when the parties have children in common and will be required to deal with each other in the future.

3. The attorney should point out to clients when mediation would not be a good idea. Mediation is not always the best method to resolve a family dispute. For example, a client may need the protections of the court or require a sheriff outside the door when negotiating, either party may be incapable of negotiating because of ongoing alcohol or drug use or because of chronic physical or emotional abuse, or a party may be hiding assets or be untruthful in disclosures to the extent that only court sanctions can enforce the honest exchange of information.

4. The attorney should be prepared to provide legal advice as the mediation progresses. Arrangements can be made with the mediator or the client that no agreement will be reduced to writing without the client having sufficient opportunity to confer with a legal advisor.

5. The attorney should review the memorandum of agreement with the client and clarify its content. Knowing the legal consequences of certain words or concepts, the lawyer should make sure that the agreement accurately reflects the client's understanding and that the document would be interpreted similarly by a court.

6. The attorney should confer with opposing counsel to resolve any continuing disagreements regarding language. It is certainly more cost-effective for the attorneys to resolve these issues by a telephone call than for the clients to continue negotiations on such matters.

7. If an agreement has been reached, the attorney should prepare the appropriate documents for execution by the parties. In dissolution of marriage cases, a lawyer is best qualified to prepare proposed and final marital settlement agreements and a proposed dissolution of marriage judgment. In addition, the lawyer may be called on to prepare waivers of two-year separation and agreements for direct payment, quit-claim deeds, transfers of title, releases and hold-harmless agreements, pledge forms, IRS forms, qualified domestic relations orders, child support orders, qualified medical child support orders, and other court documents as may be required. In family matters that do not need court approval, the lawyer may be required to prepare settlement agreements and other contractual documents.

8. When it is necessary to obtain court approval, the attorney should be prepared to draft the necessary legal documents and make sure the necessary parties have been served or otherwise have submitted to the jurisdiction of the court. Only a lawyer can provide the professional competence necessary to properly handle what are essentially legal matters.

9. When court proceedings have commenced, the attorney should advise the court of the status of mediation or that the matter has settled.

10. In court proceedings that require court approval, the attorney should schedule a hearing in the assigned courtroom to prove-up the matter and obtain a signed judgment.

In view of the many responsibilities that fall on the shoulders of the family law attorney in family mediation matters, it can hardly be maintained that the lawyer has been relegated to a minor role. Rather, the family law attorney should be seen as a key player in the dispute resolution team consisting of attorneys, clients, the mediator, and other contributing professionals as needed (*e.g.*, accountants, tax attorneys, appraisers, and psychologists and other mental health professionals).

#### L. [13.44] What's Happening in the Courts?

In response to what is seen as the increasingly contentious nature of the dissolution process, and in an effort to protect the children of divorcing parents from the effects of "no-holds-barred" litigation, courts around Illinois have instituted family mediation programs. Some are court-annexed and court-funded, with the mediators being court employees, and others are court-sponsored, allowing qualified private mediators to be selected from an approved list. The first such court-sponsored program was initiated by the Circuit Court of Cook County in 1966 when it established a Conciliation Service to mediate custody and visitation issues for divorcing parents in the Domestic Relations Division. The Service started out with 1 counselor and soon expanded to 3 full-time and 1 part time employees. Over the years, the operation has expanded its service to include parentage cases and other family matters, has changed its name to the Marriage and Family Counseling Service, and has grown to include up to 24 mediators, including both lawyers and mental health therapists, on its roster. It is court-funded, mandatory upon court order, and provided without cost to the litigants.

##### 1. [13.45] Statutory Authority for Court-Ordered Mediation

Statutory authority for courts to order mediation in family matters can be found in §102 of the Illinois Marriage and Dissolution of Marriage Act (IMDMA), 750 ILCS 5/101, *et seq.*, which provides that the IMDMA's purposes are to

(3) promote the amicable settlement of disputes that have arisen between parties to a marriage;

(4) mitigate the potential harm to the spouses and their children caused by the process of legal dissolution of marriage;

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(7) **secure the maximum involvement and cooperation of both parents regarding the physical, mental, moral and emotional well-being of the children during and after the litigation.** 750 ILCS 5/102.

Several of the IMDMA's substantive provisions also provide statutory authority for family mediation. Section 404(a) states that "[i]f the court concludes that there is a prospect of reconciliation, the court, at the request of either party, or on its own motion, may order a conciliation conference." Section 404.1(a) states that "[i]n an action for dissolution of marriage involving minor children, or in a post-judgment proceeding involving minor children, the court may on its own motion order the parties, excluding the minor children, to attend an educational program concerning the effects of dissolution of marriage on the children, if the court finds it would be in the best interests of the minor children." Section 508(c)(4) states that "[n]o final hearing under this subsection (c) is permitted unless any controversy over fees and costs (that is not otherwise subject to some form of alternative dispute resolution) has first been submitted to *mediation*, arbitration, or any other court approved alternative dispute resolution procedure" with certain specified exceptions. [Emphasis added.] Section 602.1(b) states that any joint parenting agreement "shall further specify a procedure by which proposed changes, disputes and alleged breaches may be *mediated* or otherwise resolved" and that "[f]or the purpose of assisting the court in making a determination whether an award of joint custody is appropriate, the court may order *mediation*" [Emphasis added.] Finally, §607.1(c) regarding enforcement of visitation orders and visitation abuse states that "[a]fter hearing all of the evidence, the court may order ... [c]ounseling or *mediation*." [Emphasis added.]

## 2. [13.46] Programs in Specific Circuits

At present, there are at least 14 circuits in which all or some of the counties provide for some form of family mediation. A summary of each of these circuits' general provisions follows.

### a. [13.47] First Circuit

By Administrative Order entered August 30, 1999, the First Circuit allowed its judges at their discretion to order mediation when issues of custody or visitation are contested. The order is effective circuit-wide but includes no standards or procedures.

### b. [13.48] Third Circuit

According to Third Circuit Rule 2.04, when the court has notice that there is a dispute as to child custody, the judge can consider the advisability of ADR and direct one or both of the parties to deposit a reasonable portion of the expenses to be incurred.

### c. [13.49] Fifth Circuit

By the terms of Fifth Circuit Rule VIII, parties who are parents of minor children must, prior to the entry of a judgment for dissolution of marriage, file with the court a certificate showing completion of an approved parent-child counseling program. However, for good cause shown, the court may waive or extend the time for completion and certification.

d. [13.50] *Sixth Circuit*

Under Sixth Circuit Rule 7.1(b), the court (countywide) may order mediation if the custody of children of the parties is in dispute, with costs to be paid by one or both of the parties.

In Champaign County, the court established, by Administrative Order of January 30, 1987, the Champaign County Court-Referred Divorce Mediation Program with detailed standards and procedures. The Administrative Order provides that no divorce case, including post-judgment matters, involving contested custody or visitation issues will be set for hearing without a mediation assessment. The evaluation is mandatory, although further participation is voluntary. The mediators are selected by agreement of the parties from a list of court-approved mediators having the required qualifications. Mediators' fees are paid by the parties, but mediators are required to have sliding-scale fees and, when directed by the court, to serve pro bono on a revolving basis. Mediators' ethical responsibilities are also spelled out in the order. The sessions are confidential but not privileged, and there is no referral if there is impairment. If a mediation is successful, the mediator will provide the parties and the court with a memorandum of understanding summarizing the agreements reached. If the mediation fails to result in agreement, the mediator will report only that mediation was unsuccessful. Also included in the Administrative Order is a provision requiring parents of minor children under 17 to attend the Children First parenting education program.

e. [13.51] *Ninth Circuit*

Under Ninth Circuit Rule G-5A5, in language similar to the broad terms employed in the Third Circuit provision, judges are permitted to consider the advisability of ADR when there is a child custody dispute.

f. [13.52] *Eleventh Circuit*

Under the provisions of Eleventh Circuit Rule 105C (affecting Livingston, McLean, and Woodford Counties), in any matrimonial case involving contested issues of child custody or visitation, the court may order the parties to mediation prior to setting the matter for hearing. "Standards and Procedures for McLean County Court-Referred Divorce Mediation" are to be found in Appendix D to the Eleventh Circuit Rules. There is a court-approved list of mediators who provide their services for a flat fee or an hourly fee on a sliding scale. Mediation is mandatory for a three-hour evaluation and voluntary thereafter. There is no referral if there are allegations of child abuse in the petition for dissolution or if any party suffers severe emotional difficulties, is chemically dependent, or is not capable of making or complying with an agreement.

g. [13.53] *Thirteenth Circuit*

Thirteenth Circuit Administrative Order 2000-35 establishes the Parent Conflict Resolution Services Program for the circuit. The Administrative Order allows a judge to order mediation in contested child custody and/or visitation proceedings. It anticipates that the issues will be resolved in six hours or less, but the sessions can be extended on a voluntary basis. A professional fee is charged for the services.

*h. [13.54] Sixteenth Circuit*

Sixteenth Circuit Rule 15.22 provides for a Family Mediation Program that allows a judge to refer to mediation custody, visitation, removal, and noneconomic child-related issues. The court may refer other family matters if the parties and their attorneys agree. Mediators must have a degree in law or a graduate degree in one of the behavioral sciences, have proper mediation training, be in good standing in their profession, and provide proof of malpractice insurance. Mediators are prohibited from providing future representation or professional services for any party. Parties do not choose their mediator; the mediator is chosen by computer in Kane County and by the judge presiding on the case in Kendall and DeKalb Counties. The mediator is required to report to the court within 60 days whether a settlement has been reached (and attach a copy of the memorandum of understanding) or, if not, whether additional sessions are recommended. The mediator is also required to report to the court the number and duration of the sessions conducted and whether psychological evaluations are recommended. Mediators' fees are limited to \$125 per hour, and a \$300 advance is required. The court can allocate costs between the parties. Parties may be required to pay for individual sessions beyond the retainer, and if they do not, the sessions may be suspended. Parents are required to complete the Kids Count parenting education program before starting mediation.

*i. [13.55] Seventeenth Circuit*

Seventeenth Circuit Administrative Order 4.14 with attached rules creates the Family Mediation Program. It allows for court-referred mediation in contested matters involving custody, visitation, and removal of children from the state. The parties may choose to mediate other issues, including child support and child-related expenses. Here the burden is on the objecting party to show the matter ineligible for mediation by filing an affidavit with specific facts. Mediation may be suspended or terminated after three hours of mediation or sooner for cause, which may include bad faith, that the prospects of agreement are unlikely, that the needs of the children are not being considered, or that a party does not understand. It may also be terminated earlier if the dispute is resolved or if there is evidence of child or spousal abuse in the recent past or on an ongoing basis, that a party is chemically dependent to the extent that it interferes with mediation, or that a party is emotionally or mentally impaired to the same extent. If a party's physical safety is jeopardized, there are safety protocols to be initiated. The mediations are confidential. Counsel or support persons are not present but may be available for consultation. Co-mediation (two mediators in one room) or shuttle mediation (one mediator in two rooms) may be employed. A mediator may be removed from the referral list for good cause shown. The parties select the mediator and pay the mediator's usual fee. If there is need for pro bono services or a reduced fee, the court will make the choice. As in the Sixteenth Circuit, the mediator must meet the minimum qualifications provided in the Family Mediation Program rules.

*j. [13.56] Eighteenth Circuit*

Eighteenth Circuit Rule 15.18 sets up a Mediation and Evaluation Program that allows a judge to refer to mediation cases involving contested issues of parental responsibility, custody, visitation, removal, access to children, or other noneconomic issues. The rule provides that there shall be no hearing on these issues without the parties first participating in mediation unless good

cause is shown. However, this is not required if an impairment exists as set forth in the rule. Moreover, a mediation may be terminated if an impairment is later discovered. Prior to mediation, a parenting education class (entitled "Caring, Coping and Children") is required. The mediation must take place in DuPage County unless the parties agree otherwise. The hearings are confidential, but the mediator is required to report child abuse and threats of death or great bodily harm. Mediators also have minimal reporting requirements. The mandatory three-hour limit may be extended by the court or upon agreement of the parties. The court sets a 45-day status date that also may be extended. Comparative fees are set on a basis of three hours of hearing and one hour of administrative endeavors. The parties may be required to pay at each session. Mediators agree to mediate at least four pro bono cases a year, and they must satisfy educational requirements in law or the behavioral sciences, have an office in DuPage County, and have a current malpractice insurance policy in effect. Ethically, they must disclose any conflict of interest, mental health professionals cannot provide counseling or therapy, and attorney mediators may not represent either party in dealings with the other. See §§13.98 — 13.103 for more on the DuPage County mediation program.

*k. [13.57] Nineteenth Circuit*

Nineteenth Circuit Rule 11.05 allows each county to provide procedures for conciliation, mediation, advice to the court, and other devices either by court rule or by administrative order. Rule 11.05A creates a Family Court Referral List for Lake County only. Rule 11.05A(D) authorizes Lake County judges hearing custody or visitation cases to refer such matters to attorney mediators or others on the Family Court Referral List who qualify as to minimum educational and training requirements, maintain a primary office in Lake County (this requirement does not apply to attorneys), are willing to provide services without a fee or at a reduced fee, and will make reasonable efforts to complete the matter within eight hours. The mediators must screen for impairments that pose a safety risk or undermine the abilities of the parties to negotiate in good faith and terminate the mediation if any such impairments are found. No mental health mediator may provide counseling, and no attorney mediator is allowed to represent either party in any dispute between them.

Mediation in McHenry County is governed by Part 18 of the Nineteenth Circuit Rules, which provides for a Family Division Mediation Program. The rules require that the assigned family division judge shall order mediation of any contested issue of parental responsibility, custody, visitation, or access to children and prohibit the scheduling of a hearing on the issues until the mediation process has been concluded and the outcome reported to the court. The rules mandate at least three one-hour sessions, which may be extended by the court. The rules follow generally the requirements of the Sixteenth, Seventeenth, and Eighteenth Circuits. One notable addition is the requirement that the mediator keep the mediation files separate from all other files in the office. The McHenry County rules are much more detailed than the rules of the other circuits and provide ample guidance to the judges, attorneys, and mediators relying on their provisions. Like the rules in other circuits, they provide safeguards in case of impairment, offer confidentiality and privilege to the participants, list the bases for termination, provide personal safety protocols, and spell out the duties of the mediators. The rules provide for both salaried employees whose services are free and court-approved private mediators whose hourly fees will not exceed the amount set in the mediation order. Private mediators are also required to provide reduced rates in a reasonable number of matters involving parties with financial hardship.

l. [13.58] *Twentieth Circuit*

Twentieth Circuit Rule 8.01, which applies to the entire circuit, provides that a judge may order the parties to mediation when there is notice of a dispute regarding child custody. Rule 8.07 requires both parties in St. Clair County to attend the Children First parent education program before any order is entered in any custody case and the noncustodial parent to do the same in any visitation matter. Obtaining the certificate is not waived except for unusual hardship. In Monroe, Perry, Randolph, and Washington Counties, the parenting education requirements are as directed by the presiding judge of the county. Rule 8.08. The mediation portion of Rule 8.01 has been expanded by Administrative Order 92-19, which establishes the Mediation Program of the Twentieth Judicial Circuit. It authorizes judges in any county in the circuit to refer parties to a minimum of three hours of mediation when there are outstanding issues of custody, visitation, or removal from the state. The sessions are confidential and, unless agreed by both parties, legal counsel are not present but should review the agreement before the client signs. The mediator must have either a license to practice law or a masters degree in one of the behavioral sciences, have 40 hours of approved family mediation training, and carry current professional malpractice insurance. The mediator is selected by the parties from a court-approved list. If the parties cannot agree, the family court judge will make the selection. If the mediation is successful, the mediator will draft a memorandum of understanding and may draft the mediated agreement if asked by the parties and their counsel. The parties may voluntarily extend the mediation sessions unless the court believes it to be a delaying tactic. If the parties have no counsel, the mediator must inform the court when reporting but may not refer the parties to any specific attorneys, only to an attorney referral service established by the court or bar. This circuit allows a mediator to inform the parties if he or she believes any agreements are not in the best interests of the children, and the mediator is further permitted to terminate the proceedings if the final agreement is basically unfair.

m. [13.59] *Twenty-First Circuit*

Twenty-first Circuit Rule 8.2(k), which applies circuit-wide, specifically provides that except by leave of court no post-judgment matters involving custody or visitation will be set for hearing when a joint parenting agreement requires the parties to employ mediation and no mediation has occurred. In addition, the court may halt proceedings unless a certificate has been presented showing that mediation has taken place.

Part 9 of the Twenty-first Circuit Rules was adopted March 17, 1997, and applies only to Kankakee County. It authorizes judges of that county to refer to mediation matters involving child custody, visitation, and removal from the state. Parties may further agree to mediate child support, child-related expenses, or any other issues. The parties may select the mediator from a court-approved list, but if they cannot agree, the court will choose the mediator. The mediation should be terminated or refused when there is evidence of an impairment that would affect the ability of any party to represent him- or herself, for example, family violence or intimidation, substance abuse, or mental illness. If mediation is appropriate, the court may order a minimum of two hours of mediation with a report in 30 days. However, the parties may extend the mediation sessions on a voluntary basis. The sessions are confidential. Attorneys and support persons are not allowed to attend. The mediator is ethically bound to withdraw from an unfair settlement. By



rule, both co-mediation (two mediators in one room) and shuttle mediation (one mediator in two rooms) are permissible. Referral to social services also is permissible. Upon successful completion of the mediation, the mediator will provide the parties and the court with a written summary of the parties' agreement for review by the parties' attorneys and for submission to the court for approval. Here also the parties have a responsibility to pay the fee agreed on at the start of mediation. Kankakee County also requires mediators to be available on a rotating basis to accept financial hardship cases pro bono or at a reduced fee when directed by the court.

n. [13.60] Cook County Circuit

Although the Cook County Circuit was the first to recognize mediation as a court-approved method to help resolve family law disputes and has the most extensive program, the language of the governing rules is arguably the most simple and direct. Rule 13.4(f) directs the Marriage and Family Counseling Service to provide qualified mediators to the court's mediation program. Rule 13.4(g) creates the Mediation Program and (1) provides for no less than one screening interview and more sessions as deemed appropriated by the mediator (usually two-hour sessions) and declares the sessions to be privileged and confidential; (2) provides that every contested child custody case shall be directed to mediation and that contested visitation matters may also be so assigned; and (3) provides that post-judgment matters involving child custody, visitation, or removal of a minor child from Illinois may be directed to mediation at the discretion of the judge. Referral by the judge to private mediation is allowed under Rule 13.4(f)(iv) upon the request of any party, with the costs to be apportioned. All other operating procedures are the subject of written protocols of the Marriage and Family Counseling Service, which are handed to mediation participants to inform them of the process they are about to undergo and advise them of their rights and responsibilities.

3. [13.61] Supreme Court Rule 99

Illinois courts have recognized the authority of the circuits to require family mediation programs. The court in *In re Marriage of Duffy*, 307 Ill.App.3d 257, 718 N.E.2d 286, 291, 240 Ill.Dec. 805 (2d Dist. 1999), stated:

**In Illinois, many judicial circuits provide for mediation of domestic relations matters by local rule, pursuant to their authority to regulate dockets and calendars. . . . Several circuits allow mediation at the discretion of the trial court. . . . Other circuits have made mediation mandatory and require leave of court to set a hearing without completing mediation. . . . The adoption of these rules reflects a growing recognition by the Illinois courts that mediation is a useful method of resolving custody and visitation disputes without subjecting the parties to the expenses and hostility inherent in the traditional adversarial process. [Citations omitted.]**

However, as can be seen from the forgoing descriptions, local rules differ substantially in describing the matters available for mediation, the procedures to be employed, the qualifications and ethical standards of the mediators, the fees and costs imposed, the extent of confidentiality offered, and the effects of impairment on the process. Although some circuits have attempted to write standards and procedures similar to those of neighboring circuits, that has not always been the case.

Proponents of mediation have long hoped for some uniform standards among the various circuits in Illinois regarding the processes and procedures employed. There also has been a movement to certify qualified mediators. Until now, neither the legislature nor the Supreme Court has chosen to act. However, on April 11, 2001, the Illinois Supreme Court promulgated new Rule 99, which provides:

**Rule 99. Mediation Programs.**

(a) **Applicability to Circuits.** Mediation programs may be undertaken and conducted in those judicial circuits which, with the approval of the Supreme Court, elect to utilize this procedure and in such other circuits as directed by the Supreme Court.

(b) **Local Rules.**

(1) Each judicial circuit electing to establish a mediation program shall adopt rules for the conduct of the mediation proceedings. Prior to the establishment of such a program, the Chief Judge of the circuit shall submit to the Supreme Court for its review and approval, through its Administrative Office, rules governing the operation of the circuit's program. A circuit operating a mediation program on the effective date of this Rule may continue the program for one year after the effective date of this Rule, but must, within 90 days of the effective date of this Rule, submit for the Supreme Court's review and approval the rules under which the mediation program is operating. Any amendments to approved local rules must be submitted to the Administrative Office for review and approval prior to implementation.

(2) At minimum, the local circuit court rules shall address:

- (i) Actions eligible for referral to mediation;
- (ii) Appointment, qualifications and compensation of the mediators;
- (iii) Scheduling of the mediation conferences;
- (iv) Conduct of the conferences;
- (v) Discovery;
- (vi) Absence of party at the conference and sanctions;
- (vii) Termination and report of mediation conference;
- (viii) Finalization of agreement;
- (ix) Immunity and confidentiality;

(x) Mechanism for reporting to the Supreme Court on the mediation program.

It is fervently hoped that the Illinois Supreme Court, in approving rules for mediation in the various circuits, will act with an eye toward establishing uniformity in as many of the circuits and in as much of the process and procedures as is feasible, to the benefit of both the practitioner and the consumer.

M. [13.62] What Is the Bottom Line?

It is clear that mediation offers many benefits in resolving family law disputes. But is mediation a total replacement for the adversary system or merely a partner in reducing acrimony and promoting cooperation, a partner dedicated to the fair and voluntary resolution of outstanding issues? Professor Jay Folberg of the University of San Francisco School of Law answered the question in a paper prepared for the Midwinter meeting of the American Bar Association Section of Family Law, St. Thomas, V.I. (Jan. 1983):

Increased use of divorce mediation would not remove the courts from the divorce process and would not entirely eliminate adversarial proceedings. We know that some cases cannot be settled or mediated. There must be a fair and credible forum with procedural safeguards and rules to assure the peaceful resolution of disputes for parties who are unwilling or unable to make cooperative decisions or to recognize the benefits that may come from a less coercive process. The threat of court litigation, with all the human and material expense that it requires, may be the very element that will help some parties cut through their egocentric near-sightedness to see that their self-interests, as well as the interest of the family, may be promoted through mediation rather than a court fight.

Obviously, the courtroom must be available as a last resort to enforce a just result; but overall fairness and practical wisdom require that mediation be available as a first step.

N. Sample Forms

1. [13.63] Personal Data and Information

SCHILLER, DUCANTO AND FLECK FAMILY MEDIATION SERVICES  
CHICAGO, ILLINOIS

1. Name \_\_\_\_\_  
*Last*
*First*
*Middle (maiden)*

Home Address \_\_\_\_\_ Home Phone \_\_\_\_\_  
*Street*

\_\_\_\_\_ Work Phone \_\_\_\_\_  
*City*
*State*
*Zip*

2. Date of Birth \_\_\_\_\_ Age \_\_\_\_\_

3. Date of Marriage \_\_\_\_\_ Place of Marriage \_\_\_\_\_

4. Children of Current Marriage

<i>Full Name</i>	<i>Date of Birth</i>	<i>Residing With</i>
------------------	----------------------	----------------------

_____	_____	_____
_____	_____	_____
_____	_____	_____

5. Children of Previous Marriage/Relationship

<i>Full Name</i>	<i>Date of Birth</i>	<i>Residing With</i>
------------------	----------------------	----------------------

_____	_____	_____
_____	_____	_____
_____	_____	_____

Are you currently receiving support for these children? \_\_\_\_\_ Yes \_\_\_\_\_ No

Are you currently paying support for these children? \_\_\_\_\_ Yes \_\_\_\_\_ No

Are you currently paying maintenance to a former spouse? \_\_\_\_\_ Yes \_\_\_\_\_ No

6. Are you and your current spouse living together now? \_\_\_\_\_ Yes \_\_\_\_\_ No

Date of separation \_\_\_\_\_

7. Other than your children and/or your spouse, are there any people living with you now?  
\_\_\_\_\_ Yes \_\_\_\_\_ No. If yes, list their names and their relationship with you.

\_\_\_\_\_

\_\_\_\_\_

8. Are you employed?  Yes  No

If yes, give name of employer \_\_\_\_\_

Address of Employer \_\_\_\_\_  
*Street City State Zip*

Job Title \_\_\_\_\_ Nature of Job \_\_\_\_\_

Date Hired \_\_\_\_\_ Current Salary \_\_\_\_\_

9. Highest level of education attained \_\_\_\_\_

Field(s) of study \_\_\_\_\_

10. Do you have an interest in reconciliation?  Yes  No

As far as you know, does your spouse?  Yes  No

11. Are you presently seeing a counselor or therapist?  Yes  No

If yes,  Individual  Joint  Family

Please list name of counselor or therapist. \_\_\_\_\_

12. Have you previously seen a counselor or therapist?  Yes  No

If yes,  Individual  Joint  Family

13. Do you anticipate a dispute about custody of the children?  Yes  No

14. Do you presently have an attorney?  Yes  No

If yes, \_\_\_\_\_  
*Name Address Phone*

15. Are there joint bank accounts to which your spouse has access?  Yes  No

16. Does your spouse have credit cards you are responsible for?  Yes  No

17. Do you have a will?  Yes  No

18. How did you learn about the Schiller, DuCanto and Fleck Mediation Services? (Give name and relationship, where applicable.)

Note: Because a mediator is NEUTRAL, he or she does not represent the interests of one side over the other and cannot give legal advice to either side. Therefore, when consulting a mediator, no attorney-client relationship exists and your statements ARE NOT PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE.

Date \_\_\_\_\_ Signature \_\_\_\_\_

2. [13.64] Agreement To Mediate

SCHILLER, DUCANTO AND FLECK FAMILY MEDIATION SERVICES  
CHICAGO, ILLINOIS

Benjamin S. Mackoff  
Director, Family Mediation Services  
200 N. LaSalle St. Suite 2700  
Chicago, IL 60601  
(312) 641-5560 FAX (312) 641-6361

AGREEMENT TO MEDIATE

DATE: \_\_\_\_\_

To: \_\_\_\_\_:

\_\_\_\_\_:

You have each agreed to participate in mediation in order to resolve certain issues or matters between you, specifically, with regard to the dissolution of your marriage. You have requested that Schiller, DuCanto and Fleck provide mediation services to assist you. This agreement is to confirm our understanding and is effective when signed by you and when we receive the retainer fee we have agreed upon.

1. THE MEDIATOR'S RESPONSIBILITY

1.1 Facilitation. The Mediator shall be responsible to aid and facilitate the informed and voluntary resolution of the issues you have presented and such other issues as may arise during the course of the mediation. He will work on behalf of each of you to assure that you have sufficient information and are aware of the available options to make effective decisions.

**1.2 Neutrality.** Regarding your individual interests or desires, the Mediator's attitude will necessarily be neutral. Although he may comment on the reasonableness or fairness of certain positions you may take, he has no authority to decide or determine the issues for you, nor will he make a recommendation as to the appropriate settlement to any court or any person or agency outside of the mediation process.

**1.3 No Legal Advice.** While the Mediator is a lawyer and may offer legal information, he will not provide legal advice or legal representation to either of you at any time during or after the mediation process. You are strongly encouraged to consult with your own independent counsel at any time during the course of the mediation process and particularly before signing any final agreement.

**1.4 Final Memorandum.** After the final mediation session, the Mediator will prepare a written memorandum setting forth your decisions, understandings, and proposed agreement in plain language for review with your attorney.

**1.5 Ethical Standards.** Schiller, DuCanto and Fleck's mediators follow the Standards of Practice set out by the Academy of Family Mediators and the Mediation Council of Illinois. Copies of those standards are available upon request.

## **2. THE PARTIES' RESPONSIBILITY**

**2.1 Full Disclosure.** You are each required to prepare and submit to the Mediator and to each other complete and accurate information relevant to the issues (as determined by the Mediator), including financial statements together with any and all other supporting documentation called for by the Mediator. Since you are not using court processes to compel information, either of you may rescind any agreement made through mediation if the other party fails to disclose relevant information during the mediation process.

**2.2 Good-Faith Participation.** You both understand and have agreed that we shall meet together regularly, generally in two-hour sessions. While I have given you an estimate of how long this process should take, the number and length of the sessions may vary depending on the circumstances and complexity of the issues to be decided. Both of you acknowledge by signing this Agreement To Mediate that you have been provided with copies of our Guidelines for Mediation and understand that, in agreeing to mediate, you become obligated to follow those rules in good faith.

## **3. THE MEDIATION PROCESS**

**3.1 Confidentiality.** Both of you expressly understand and agree that any statements made during the mediation process by either of you shall be considered confidential in respect to third persons. Any communication to the Mediator by one spouse outside the presence of the other shall be disclosed to the absent spouse unless both specifically agree otherwise. Neither of you shall request that the Mediator testify or that any notes or records prepared by the Mediator for the mediation process be used or admitted as evidence in any legal proceeding. The Mediator will disclose no statement made in mediation by either of

you without your express permission except when he reasonably believes that abuse or neglect of a minor child has taken place, he concludes that a breach of confidentiality is necessary to prevent death or bodily harm, or he is otherwise compelled by any court or administrative agency.

**3.2 Right of Party To Withdraw.** The mediation may be terminated by either of you at any time. No reason need be given, either to the other spouse or to the Mediator. Notification to terminate mediation must be in writing. Mediation may not resume following such notification unless expressly authorized by both of you.

**3.3 Right of Mediator To Withdraw.** The Mediator will attempt to resolve any outstanding disputes as long as both of you make a good-faith effort to reach a fair agreement. At any time that the Mediator concludes that it is not possible to reach agreement, or that continuation of the mediation process would harm or prejudice either or both of you, the Mediator shall withdraw and the mediation shall conclude. You both agree to release and hold harmless the Mediator for such action.

**3.4 Court Approval.** Both of you understand that, while the mediation process can lead to a settlement of issues, it is not a complete substitute for the legal process in dissolution of marriage matters. It will still be necessary for a court to review your final agreement.

#### **4. FEES AND COSTS OF MEDIATION**

**4.1 Professional Fees.** Benjamin S. Mackoff has been designated as your Mediator. You have agreed to pay an hourly rate of \$\_\_\_\_\_ per hour for his services, which include not only his conduct of the mediation session but also any other time expended in the preparation or completion of the mediation process. If you do not appear for a mediation session, you will be charged for the full two-hour period unless you have reset the appointment or given written notification to terminate at least two full working days before the session was to begin. Services performed on your behalf will be billed at a minimum fee of three tenths (3/10) of an hour. If the service takes longer than three tenths (3/10) of an hour, time will be charged at increments of one tenth (1/10) of an hour. The Mediator's fee is separate from fees for accountants, evaluators, legal counsel, or other independent experts with whom you may consult, and you will pay those fees directly.

**4.2 Retainer.** You have paid \$\_\_\_\_\_ as an initial retainer fee. As time is expended, this amount will be credited, based on the appropriate rate, for the services performed.

**4.3 Billing.** You will be billed monthly for the time expended and for any costs incurred on your behalf for expedited service, long distance communications, travel, or other extraordinary expenditures that you have requested or agreed to. You may request an itemized statement at any time. Payment in full of any balance due, after the retainer has been credited in full, is expected within 15 days of your receipt of the monthly statement unless special arrangements have been made. If payment of the monthly balance remains



outstanding for 30 days, Schiller, DuCanto and Fleck reserves the right to suspend mediation sessions until payment is current. In any event, all fee charges must be paid in full before the draft of the final memorandum is delivered to you. An unpaid balance of 90 days or more will be subject to interest charges of 1% per month (12% per annum).

4.4 Disputes. Should you have any concerns about the nature or quality of the mediation services or fees, you are encouraged to raise those issues directly with the Mediator. If we cannot resolve those issues, then we all agree to mediate those issues in good faith with a professional mediator chosen by you from a list provided by the Mediation Council of Illinois before pursuing other legal remedies.

I look forward to working with you. Should this letter accurately reflect our understanding, please sign your names in the spaces provided below. You will each be given a copy of this letter for your records.

Sincerely,

SCHILLER, DUCANTO AND FLECK

BY: BENJAMIN S. MACKOFF

AGREED:

\_\_\_\_\_  
Name

\_\_\_\_\_  
Name

\_\_\_\_\_  
Name

3. [13.65] Guidelines for Mediation

SCHILLER, DUCANTO AND FLECK FAMILY MEDIATION SERVICES  
CHICAGO, ILLINOIS

GUIDELINES FOR MEDIATION

1. Definition of Mediation. Mediation is a process under which an impartial person, the Mediator, facilitates communications between the parties to foster reconciliation, encourage settlement, or promote understanding among them. The Mediator may suggest ways of resolving the disputes, but may not impose his/her own judgment on the parties as to how the issues should be resolved.

2. Agreement of the Parties. Whenever the parties have agreed to mediation, they shall be deemed to have incorporated these guidelines into the terms of the mediation agreement.

**3. Consent to Mediator.** The parties consent to the appointment of the person named as Mediator in their case. The Mediator shall not act as an advocate for either party but shall act as a facilitator toward the resolution of the issues in dispute. The Mediator shall use his/her best efforts to assist the parties in reaching a mutually acceptable settlement.

**4. Conditions Precedent to Serving as Mediator.** The Mediator shall not serve as a Mediator in any dispute in which he/she has any financial or personal interest in the outcome of the mediation. Before accepting the appointment, the Mediator shall disclose any circumstances likely to create a presumption of bias or prevent a prompt meeting with the parties. In the event that the parties disagree as to whether the Mediator shall serve, the Mediator shall not serve.

**5. Authority of the Mediator.** The Mediator does not have the authority to decide any issue for the parties, but will attempt to facilitate the voluntary resolution of their dispute by the parties. The Mediator is authorized to request documents, conduct joint and separate meetings with the parties, and offer suggestions to assist the parties to achieve settlement. If necessary, the Mediator may also obtain expert advice concerning technical aspects of the dispute, provided that the parties agree and assume the expenses of obtaining such advice. Arrangements for obtaining such advice shall be made by the Mediator or the parties, as the Mediator shall determine.

**6. Commitment To Participate in Good Faith.** While no one is asked to commit to settle his/her case in advance of mediation, all parties commit to participate in the proceedings in good faith with the intention to settle, if at all possible.

**7. Parties Responsible for Negotiating Their Own Settlement.** The parties understand that the Mediator will not and cannot impose a settlement in their case and agree that they are responsible for negotiating a settlement acceptable to them. The Mediator, as an advocate for settlement, will use every effort to facilitate the negotiations of the parties. The Mediator does not warrant or represent that settlement will result from the mediation process.

**8. Privacy.** Mediation sessions are private. All parties able to negotiate for themselves may attend mediation sessions. Other persons may attend only with the permission of the parties attending and with the consent of the Mediator.

**9. Civility.** The parties are encouraged to participate actively in the mediation process and are expected to speak for themselves. Mediation is based on the premise that agreement may be reached through respectful communication. Demeaning language and/or abusive behavior will not be tolerated.

**10. Time and Place of Mediation.** The Mediator shall fix the time of each mediation session. The mediation shall be held at the office of the Mediator, or at any other convenient location agreeable to the Mediator and the parties, as the Mediator shall determine.

**11. Identification of Matters in Dispute.** Prior to the first scheduled mediation session, each party in separate sessions shall inform the Mediator of his/her position with regard to the issues that need to be resolved and any perceived obstacles to settlement.

**12. Confidentiality.** The parties shall maintain the confidentiality of the mediation proceedings and shall not relay, or introduce as evidence in any arbitration or administrative, judicial, or other proceeding, (a) views expressed or suggestions made by another party with respect to a possible settlement of the dispute; (b) admissions made by another party in the course of the mediation proceedings; (c) proposals made or views expressed by the Mediator; or (d) the fact that another party had or had not indicated willingness to accept a proposal for settlement made by the Mediator.

**Third-Party Disclosures.** Confidential information disclosed to a Mediator by the parties or by witnesses in the course of the mediation shall not be divulged by the Mediator to any person not related to the mediation proceedings unless otherwise required by law or ordered by the Court. All records, reports, or other documents received by a Mediator while serving in that capacity shall be confidential and not divulged by the Mediator to any person not related to the mediation proceedings. The Mediator shall not be compelled to divulge such records or to testify with regard to the mediation in any adversary proceeding or judicial forum.

**Extra-Mediation Disclosures.** Except as provided in the Agreement To Mediate, confidential information disclosed during the course of the mediation to a Mediator by the parties, witnesses, or persons not involved in the mediation process shall not be divulged by the Mediator to any person not related to the mediation proceedings, but may be disclosed to the parties and their attorneys.

**Issue and Position Disclosures.** Confidential information disclosed during the course of the mediation by a party or his/her attorney to the Mediator regarding the party's ultimate settlement proposal on any issue shall not be disclosed by the Mediator to the other party or his/her attorney.

**Confidentiality Violation Sanctions.** Any party that violates this agreement shall pay all fees and expenses of the Mediator and other parties, including reasonable attorneys' fees incurred in opposing the efforts to compel testimony or records from the Mediator.

**13. No Stenographic Record.** There shall be no stenographic record made of the mediation proceedings.

**14. No Service of Process at or Near the Site of the Mediation Session.** Neither party shall cause to be served any subpoena, summons, complaint, citation, writ, or other process at or near the site of any mediation session on any party, witness, or expert entering, attending, or leaving the session.

**15. Termination of Mediation.** The mediation shall be terminated (a) by the execution of a settlement agreement by the parties; (b) by declaration of the Mediator to the effect that further efforts at mediation are no longer likely to be productive; or (c) by a written declaration of a party or parties to the effect that the mediation proceedings are terminated.

**16. Exclusion of Liability.** The Mediator is not a necessary or proper party in judicial proceedings relating to the mediation. Neither the Mediator nor any law firm employing the Mediator shall be liable to any party for any act or omission in connection with any mediation conducted under these rules.

**17. Interpretation and Application of Rules.** The Mediator shall interpret and apply these rules.

**18. Fees and Expenses.** The Mediator's hourly fee shall be agreed on prior to mediation and shall be paid by a retainer fee in advance of the mediation. The expenses of representatives, advisors, or witnesses for either side shall be paid by the party producing such persons. All other expenses of the mediation, including fees and expenses of the Mediator, and the expenses of any witnesses and the costs of any proofs or expert advice produced at the direct request of the Mediator, shall be borne equally by the parties unless they agree otherwise.

Received and accepted this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_

4. [13.66] Mediation Financial Disclosure

SCHILLER, DUCANTO AND FLECK FAMILY MEDIATION SERVICES  
CHICAGO, ILLINOIS

IN RE: The Marriage of \_\_\_\_\_

Form submitted by \_\_\_\_\_

MEDIATION FINANCIAL DISCLOSURE FORM A

Statement of Income and Expenses

In accordance with our Mediation Agreement, dated \_\_\_\_\_, 20\_\_, I hereby submit an accurate listing of my monthly income and expenses and state that the information contained herein is true and correct as of \_\_\_\_\_, 20\_\_.

Name \_\_\_\_\_ Telephone no. \_\_\_\_\_

Address \_\_\_\_\_ Soc. Sec. no. \_\_\_\_\_

\_\_\_\_\_ Date of birth \_\_\_\_\_

Date of marriage \_\_\_\_\_ Date of dissolution of marriage, if applicable \_\_\_\_\_

Is there now pending in any court an action for separate maintenance or declaring your marriage invalid or dissolved? \_\_\_\_\_ If your answer is yes, please identify the court and provide the case number: \_\_\_\_\_

Minor and/or dependent children of this marriage:

\_\_\_\_\_ age \_\_\_\_\_ residing with \_\_\_\_\_

\_\_\_\_\_ age \_\_\_\_\_ residing with \_\_\_\_\_

\_\_\_\_\_ age \_\_\_\_\_ residing with \_\_\_\_\_

\_\_\_\_\_ age \_\_\_\_\_ residing with \_\_\_\_\_

\_\_\_\_\_ age \_\_\_\_\_ residing with \_\_\_\_\_

Current employer: \_\_\_\_\_ Address: \_\_\_\_\_

Self-employment: \_\_\_\_\_ Address: \_\_\_\_\_

Other employment: \_\_\_\_\_ Address: \_\_\_\_\_

\_\_\_\_\_ Check if unemployed.

Number of paychecks per year (please check): 12 \_\_\_ 24 \_\_\_ 26 \_\_\_ 52 \_\_\_

Number of exemptions claimed: \_\_\_\_\_

Number of dependents claimed: \_\_\_\_\_

Gross income from all sources last year: \_\_\_\_\_

Gross income for all sources this year through \_\_\_\_\_ : \$ \_\_\_\_\_  
(Date) (Amount)

*NB: If an item of income or expense is other than monthly, please indicate the yearly total divided by 12.*

**A. STATEMENT OF INCOME**

**1. Gross Monthly Income**

- a. Salary/wages/base pay \_\_\_\_\_
- b. Overtime/commission \_\_\_\_\_
- c. Bonus \_\_\_\_\_
- d. Draw \_\_\_\_\_
- e. Pension and retirement benefits \_\_\_\_\_
- f. Annuity \_\_\_\_\_
- g. Interest income \_\_\_\_\_
- h. Dividend income \_\_\_\_\_
- i. Trust income \_\_\_\_\_
- j. Social Security \_\_\_\_\_
- k. Unemployment benefits \_\_\_\_\_
- l. Disability payment \_\_\_\_\_
- m. Workers' compensation \_\_\_\_\_
- n. Public Aid/food stamps \_\_\_\_\_
- o. Investment income \_\_\_\_\_

- p. Rental income \_\_\_\_\_
- q. Business income \_\_\_\_\_
- r. Partnership income \_\_\_\_\_
- s. Royalty income \_\_\_\_\_
- t. Fellowship/stipends \_\_\_\_\_
- u. Other income (specify) \_\_\_\_\_

**TOTAL GROSS MONTHLY INCOME:** \_\_\_\_\_

**2. Additional Cash Flow (Monthly)**

- a. Spousal support received from prior judgment(s) or support order(s) \_\_\_\_\_
- b. Spousal support voluntarily provided \_\_\_\_\_
- c. Child support received from prior judgment(s) or support order(s) \_\_\_\_\_
- b. Child support voluntarily provided \_\_\_\_\_

**TOTAL ADDITIONAL CASH FLOW** \_\_\_\_\_

**3. Required Monthly Deductions**

- a. Federal tax (based on \_\_\_\_\_ exemptions) \_\_\_\_\_
- b. State tax (based on \_\_\_\_\_ exemptions) \_\_\_\_\_
- c. FICA (or Social Security equivalent) \_\_\_\_\_
- d. Medicare tax \_\_\_\_\_
- e. Mandatory retirement contributions required by law or as a condition of employment \_\_\_\_\_
- f. Union dues (name of union): \_\_\_\_\_
- g. Health/hospitalization premiums \_\_\_\_\_
- h. Prior obligations(s) of support actually paid pursuant to court order \_\_\_\_\_
- i. Expenditures for repayment of debts that represent reasonable and necessary expenses for the production of income (identify) \_\_\_\_\_

j. Medical expenditures necessary to preserve life or health \_\_\_\_\_

k. Reasonable expenditures for the benefit of the child and the other parent exclusive of gifts (for noncustodial parent only) Identify and itemize: \_\_\_\_\_

TOTAL REQUIRED DEDUCTIONS FROM INCOME: \_\_\_\_\_

NET MONTHLY INCOME: \_\_\_\_\_

**B. STATEMENT OF MONTHLY LIVING EXPENSES**

**1. Household**

a. Mortgage or rent (specify) \_\_\_\_\_

b. Home equity payment \_\_\_\_\_

c. Real estate taxes, assessments \_\_\_\_\_

d. Homeowners or renters insurance \_\_\_\_\_

e. Heat/fuel \_\_\_\_\_

f. Electricity \_\_\_\_\_

g. Telephone (include long distance) \_\_\_\_\_

h. Water and sewer \_\_\_\_\_

i. Refuse removal \_\_\_\_\_

j. Laundry/dry cleaning \_\_\_\_\_

k. Maid/cleaning service \_\_\_\_\_

l. Furniture and appliance repair/replacement \_\_\_\_\_

m. Lawn and garden/snow removal \_\_\_\_\_

n. Groceries, food, household supplies, etc. \_\_\_\_\_

o. Liquor, beer, wine, etc. \_\_\_\_\_

p. Other (specify) \_\_\_\_\_

SUBTOTAL HOUSEHOLD EXPENSES: \_\_\_\_\_



**2. Transportation**

- a. Gasoline \_\_\_\_\_
- b. Repairs \_\_\_\_\_
- c. Insurance/license/vehicle stickers \_\_\_\_\_
- d. Payments/replacement \_\_\_\_\_
- e. Alternative transportation \_\_\_\_\_
- f. Other (specify) \_\_\_\_\_

**SUBTOTAL TRANSPORTATION EXPENSES:** \_\_\_\_\_

**3. Personal**

- a. Clothing \_\_\_\_\_
- b. Grooming \_\_\_\_\_
- c. Medical (after insurance proceeds):
  - (1) Doctor \_\_\_\_\_
  - (2) Dentist \_\_\_\_\_
  - (3) Optical \_\_\_\_\_
  - (4) Medication or medical appliances \_\_\_\_\_
- d. Insurance:
  - (1) Life (term) \_\_\_\_\_
  - (2) Life (whole) \_\_\_\_\_
  - (3) Medical/hospitalization \_\_\_\_\_
  - (4) Dental/optical \_\_\_\_\_
- e. Other (specify) \_\_\_\_\_

**SUBTOTAL PERSONAL EXPENSES:** \_\_\_\_\_

4. Miscellaneous

- a. Clubs/social obligations/entertainment \_\_\_\_\_
- b. Newspapers, magazines, books \_\_\_\_\_
- c. Gifts \_\_\_\_\_
- d. Donations, church/religious affiliations \_\_\_\_\_
- e. Vacations \_\_\_\_\_
- f. Other (specify) \_\_\_\_\_

**SUBTOTAL MISCELLANEOUS EXPENSES:** \_\_\_\_\_

5. Dependent children's expenses:

(Name)	(Age)
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

- a. Clothing \_\_\_\_\_
- b. Grooming \_\_\_\_\_
- c. Education:
  - (1) Tuition \_\_\_\_\_
  - (2) Books/fees \_\_\_\_\_
  - (3) Lunches \_\_\_\_\_
  - (4) Transportation \_\_\_\_\_
  - (5) Activities \_\_\_\_\_

**d. Medical (after insurance proceeds):**

(1) Doctor \_\_\_\_\_

(2) Dentist \_\_\_\_\_

(3) Optical \_\_\_\_\_

(4) Medication \_\_\_\_\_

e. Allowance \_\_\_\_\_

f. Child care/after-school care \_\_\_\_\_

g. Sitters \_\_\_\_\_

h. Lessons and supplies \_\_\_\_\_

i. Clubs/summer camps \_\_\_\_\_

j. Vacation \_\_\_\_\_

k. Entertainment \_\_\_\_\_

l. Other (specify): \_\_\_\_\_

**SUBTOTAL CHILDREN'S EXPENSES:** \_\_\_\_\_

**TOTAL MONTHLY LIVING EXPENSES:** \_\_\_\_\_

**C. DEBT SERVICE EXPENSES**

**D. STATEMENT OF HEALTH INSURANCE COVERAGE**

Currently effective health insurance coverage \_\_\_\_\_ Yes \_\_\_\_\_ No

Name of insurance carrier \_\_\_\_\_ Policy or group no. \_\_\_\_\_

Type of insurance \_\_\_\_\_ Medical \_\_\_\_\_ Dental \_\_\_\_\_ Optical

Deductible: Per individual \_\_\_\_\_ Per family \_\_\_\_\_

Persons covered \_\_\_\_\_ Self \_\_\_\_\_ Spouse \_\_\_\_\_ Dependents

Type of policy: \_\_\_\_\_ HMO \_\_\_\_\_ PPO \_\_\_\_\_ Full indemnity

Provided by: \_\_\_\_\_ Employer \_\_\_\_\_ Private policy \_\_\_\_\_ Other group

Monthly costs: \_\_\_\_\_ Paid by employer \_\_\_\_\_ Paid by employee

\$\_\_\_\_\_ for dependents

\$\_\_\_\_\_ for myself

**NET MONTHLY INCOME:** \_\_\_\_\_

**TOTAL MONTHLY LIVING EXPENSES:** \_\_\_\_\_

**DIFFERENCE BETWEEN NET INCOME AND EXPENSES:** \_\_\_\_\_

**LESS MONTHLY DEBT SERVICE** \_\_\_\_\_

**INCOME AVAILABLE PER MONTH** \_\_\_\_\_

The foregoing Financial Disclosure Statement has been carefully read by the undersigned who states under penalties as provided by law that he/she has knowledge of the matters stated and that the statements set forth in this Affidavit are true and correct, except as to matters specifically stated to be on information and belief, and as to such matters the undersigned certifies as aforesaid that he/she believes them to be true.

Subscribed and Sworn to before me

\_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Notary Public

\_\_\_\_\_  
Signature of Party

\_\_\_\_\_ Petitioner \_\_\_\_\_ Respondent

\_\_\_\_\_  
Type or Print Name