Instructor Bio.

Mr. Kincaid has practiced law for more than 30 years and his practice emphasis is Divorce and Family Law Mediation. He has mediated nearly 700 divorces. He is a Fellow in the American Academy of Matrimonial Lawyers, and as such, is recognized as one of the country's finest divorce lawyers. He has been repeatedly recognized by his peers as a Kansas "Super Lawyer" in the area of Family law. He is certified by the State of Kansas as a Domestic Mediator and has completed an internship with Johnson County Domestic Court Services. He is a member of the Family Law Bench Bar Committee of the Johnson County Bar Association where he assisted in drafting the current Family Law Guidelines and is a member of the Ethics Committee. He is a former Barrister in the Earl O'Conner Inns of Court and a member of the Kansas Bar Association. As a trained mediator, Mr. Kincaid helps families avoid the traditional adversarial approach to separation, divorce and other family issues. Mr. Kincaid has been trained in Collaborative Law. In 2010, Mr. Kincaid was recognized as one of the most outstanding graduates from Olathe High School. Mr. Kincaid helped to start the Changing Lives through Literature Program and has served as the Chairman of the Optimist Oratory Contest.

Mr. Kincaid lives on a farm in western Johnson County that has been in his family for five generations. Creative writing and running are his hobbies. He has completed several marathons and has written five novels: *Death Walk at Acoma* (Sunstone 1991); *A Dog Named Christmas* (Random House 2008); *Christmas with Tucker* (Random House 2010); *A Christmas Home* (Random House 2012); and *Tantric Coconuts* (Random House 2014). The Hallmark Hall of Fame produced *A Dog Named Christmas* and it aired on CBS in the fall of 2009 and thereafter received a Genesis Award from the Humane Society. *Christmas with Tucker* premiered on the Hallmark Movie Channel (HMC) on November 25, 2013 and was the most watched original movie premier in HMC network history. Mr. Kincaid is a pet adoption advocate and frequent guest blogger on Petfinder.com.

Course Outline.

I. Introduction to Domestic Mediation.
   A. What and why we do what we do.
   B. Who we are doing it for—Client demographics and why they matter.

II. Review of Mediation Techniques and Procedures

   A. What is mediation?
   B. Opening Monologues.
   C. Framing Issues/ Asking Questions.
   D. Generating Options
   E. Reaching Agreements.

III. Getting to the First Meeting
   A. Finding not just clients, but the right clients.
   B. Webpage marketing and content.
   C. Office Configuration.
   D. Appointment Confirmation.
   E. Agreement to Mediate-what should go in it?

IV. The First Meeting.
   A. Finding Your Mediation Voice/ Getting the Client Comfortable.
   B. Executing an Agreement to Mediate
   C. Opening Monologue tailored to the Client's needs.
   D. Client History and background—*Mediating Dangerously*.
   E. Sizing up the client's needs.
   F. Expanding on the role of outside counsel.
   G. Temporary Orders and why we avoid them.
   H. Summary of Applicable law: Five Areas where we primarily work.
      i. Joint Custody and Parenting Plans
      ii. Child Support/College/life insurance/Payment Center
      iii. Division of Assets (martial and non-martial)
      iv. Division of Debts, including income tax considerations.
      v. Maintenance.
   I. Developing an Agenda
   J. Exchange of information and explanation of DRA and Spreadsheets
   K. Begin exploring the settlement terrain.
   L. Assigning Homework.
   M. Setting a budget/explaining billing process.
   N. Mediation Memorandums.

V. The Second Meeting.
   A. Preparing for the Second Meeting
      i. Drafts of documents
      ii. Child Support and Maintenance Calculations

iii. Spreadsheets
iv. Income, Asset and Debt confirmations/getting statement.

B. Rescheduling: be prepared for the clients being unprepared.
C. Review of Tasks and Mediation Memo.
D. Developing Maintenance and Child Support Worksheets.
E. Discussing the Kansas Payment Center.
F. Discussing Furniture and Personal Property.
G. The Transition to Separate Finances
H. Developing Spreadsheets and getting the spouses to "own them."
I. Confirming DRA: Why we need it and what it does.
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K. Reviewing Process to complete agreements and obtain court approval.
L. Review concept of On-Going Jurisdiction for Support
M. Reviewing Estate Planning Consequences of Divorce.

VI. The Final Meeting
A. Executing Documents.
B. Presenting Documents to the Court for Approval.
C. QDRO's, Deeds, Titles and transfers.
D. Future contact with the Mediator/Attorney.

VII. Domestic Mediation: Scenarios for Further Exploration.
A. Move Away Cases
B. Complex Assets Mix and Careful Spreadsheet Preparation.
C. Business Valuations and the Double Dip Problem.
D. Tools for impasse.
E. Caucusing
F. Getting the Attorneys involved or not involved: knowing the difference.
G. Drawing the lines between Lawyer work and Mediator Work
H. Calling Uncle: When and How to Give-up.
I. Communicating with the Court, E-filings.
J. Mediator involvement in Final Hearing.

VIII. Ethics of Domestic Mediation for Lawyers.
Supreme Court Rule 901
Supreme Court Rule 902
Supreme Court Rule 903
Supreme Court Rule 904
Appendix-Lawyer Mediators in Family Disputes.

IX. Particular Ethical Scenario for further Discussion.

Appendix

1. Back Issues of Sensible Separation.

I. Introduction.

What and Why We Do What We Do.

There may only be one good reason to be a divorce mediator. We believe that this is an excellent process that helps people. There are probably easier ways to make money, find prestige or seek ego gratification than divorce work. The most frequent response we get when telling others what we do is: *I'm so sorry.* Obviously, most people think we have an awful job. They're wrong. It's a great job and most of us are pleased to have it! I'm likewise pleased you decided to take this course and hopefully you are (or soon will be) proud to call yourself a divorce mediator, too. As one of my old friends, and a retired mediator, liked to say, when describing mediators, "They're the *good guys*. The ones with the white hats."

After working with what must be approaching 1,000 divorced families over my lengthening career, I can say that there are some rather surprising perks to this job. Sorry, no free parking passes or 401K's, but you can go home every evening with the knowledge that you supervised a very healthy process that allowed decent people, trying hard to do the right thing, to move on with their lives without unnecessary fighting or destructive conflict. Often I hear law firms promise "*We'll fight for you*!" The mediator's advertising copy has a different ring to it. *We'll help you avoid the fight altogether.* We don't just provide legal facts, we suggest, and hopefully model for our clients, adult behavior. In the legal world, we are like the non-evasive physical therapist that helps the patient with strengthening exercises so they can avoid a full blown knee replacement. When we do our work well, there is less suffering in the world, particularly for the children of the families we are assisting. When we do our work well, families do not squander their financial and emotional reserves on unnecessary and avoidable legal costs. Instead, they can apply their often scarce resources to therapy, finding a new home, their children's education and other more valuable and lasting pursuits than receiving a Divorce Decree. This makes our work important and explains why we must strive to do it artfully. I have had a long list of talented teachers and I hope I can pass along in this course in Advanced Domestic Mediation, not only my teachers' wisdom, but also what I have learned on my own. I offer this course not as an authority on divorce mediation, but as a guide who has been down the path many times. Take what works for you; ignore the rest. Every day, I get better at this. So will you. I still have a lot to learn, but instead of lamenting our shortcomings as mediators, we remind ourselves that mediation works more because the process is good and less because the mediator is talented or wise. As divorce mediators, we throw out a

life-line to many drowning families. We can't make them grab it, but we can make sure the cord is true.

Who we represent: the rapidly changing demographics of the average divorce client.

Attached as Appendix 1 is a copy of a newsletter, *Sensible Separation,* that I write for professionals assisting divorcing families. In the first edition is an article about divorce demographics. They are rapidly changing. For instance, there have been a number of studies showing that more and more families decide to go it alone, *pro se.* See, for example, Colorado Report on Pro Se parties, which suggests that the number has doubled in recent years. For a small fee, I was able to track down the Kansas data and it points to a similar trend. A rather shocking 50% increase in the last seven years alone.

DIVORCE + ANNULMENT

DECREE YEAR	TOT #	NUM PRO_SE	PERCENT PRO_SE
2005	8563	1385	16.2
2006	9238	1509	16.3
2007	9428	1498	15.9
2008	9903	1619	16.3
2009	10400	2042	19.6
2010	10641	2142	20.1
2011	10503	2312	22.0
2012	9898	2454	24.8

Source: Kansas Department of Health and Environment
Bureau of Epidemiology and Public Health Informatics

It seems undeniable that marriage and divorce demographics do not support a "growth industry." What that means for us and how we must adapt waits to be seen. Many questions need to be answered. Some are general. Why are families abandoning marriage? Other questions, we need to direct to ourselves. For example, why are families abandoning legal assistance? Is the answer that they cannot afford a lawyer? Or, perhaps, with all of the forms readily available on the internet, it is simply easier to do it themselves. While certainly contributing factors, these are not the explanations I hear daily in my practice. Clients express to me a concern about placing their families in the hands of an advocacy centered system. As attitudes about families and divorce change, what clients expect from us will also change. Mediation is arguably better attuned with these trends than traditional representation.

II. Review of Mediation Techniques and Procedures

1. What is mediation?

> **Rule 901 Court Rules Relating to Mediation**
>
> (a) Mediation under this Rule is the process by which a neutral mediator assists the parties in reaching a mutually acceptable agreement as to issues of a dispute. The role of the mediator is to aid the parties in identifying the issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise, and finding points of agreement. An agreement reached by the parties is to be based on the decisions of the parties and not the decisions of the mediator.

2. Opening Monologues. What has to go in, can go in and probably should be avoided. As you will remember from your Basic Domestic Mediation course, all

mediators are required to explore two areas: confidentiality and the role of attorney. Attorney Mediators must, however go MUCH further:

i. Rule 903: (h) Fees: A Mediator Shall Fully Disclose and Explain the Basis of Compensation, Fees, and Charges to the Parties.

ii. Appendix.

I. THE MEDIATOR HAS A DUTY TO DEFINE AND DESCRIBE THE PROCESS OF MEDIATION AND ITS COST BEFORE THE PARTIES REACH AN AGREEMENT TO MEDIATE.

SPECIFIC CONSIDERATIONS: Before the actual mediation sessions begin, the mediator shall conduct an orientation session to give an overview of the process and to assess the appropriateness of mediation for the participants. Among the topics covered, the mediator shall discuss the following:

A. The mediator shall define the process in context so that the participants understand the differences between mediation and other means of conflict resolution available to them. In defining the process, the mediator shall also distinguish it from therapy or marriage counselling.

B. The mediator shall obtain sufficient information from the participants so they can mutually define the issues to be resolved in mediation.

C. It should be emphasized that the mediator may make suggestions for the participants to consider, such as alternative ways of resolving problems and may draft proposals for the participants' consideration, but that all decisions are to be made voluntarily by the participants themselves.

D. The duties and responsibilities that the mediator and the participants accept in the mediation process shall be agreed upon. The mediator shall instruct the participants that either of them or the mediator has the right to suspend or terminate the process at any time, unless the mediation has been ordered pursuant to K.S.A. 23-601 et seq.

E. The mediator shall assess the ability and willingness of the participants to mediate. The mediator has a continuing duty to assess his or her own ability and willingness to undertake mediation with the particular participants and the issues to be mediated. The mediator shall not continue and shall terminate the process, if in his or her judgment, one of the parties is not able or willing to participate in good faith. The mediator shall be

satisfied that the parties can intelligently and prudently consent to all the waivers involved in the mediation process.

F. The mediator shall explain the fees for mediation. It is inappropriate for a mediator to charge a contingency fee or to base the fee on the outcome of the mediation process.

G. The mediator shall inform the participants of the need to employ independent legal counsel for advice throughout the mediation process. The mediator shall inform the participants that the mediator cannot represent either or both of them in their marital dissolution or in any legal action concerning the mediated issues.

H. The mediator shall discuss the issue of separate sessions. The mediator shall reach an understanding with the participants as to whether and under what circumstances the mediator may meet alone with either of them or with any third party.

I. It should be brought to the participants attention that emotions play a part in the decision-making process. The mediator shall attempt to elicit from each of the participants a confirmation that each understands the connection between one's own emotions and the bargaining process.

J. The mediator shall warn the participants that their interests are in conflict. The mediator shall explain that mediation by an attorney of a dispute between participants whose interests are in conflict is being allowed only because of the participants' consent.

K. The mediator shall inform the participants that neither of them is receiving legal representation from the mediator, that the mediator is not providing the services lawyers typically provide, and that no attorney-client relationship will exist.

3. Mediation Tools: Framing and Reframing Issues/ Asking Questions.

4. Generating Options

5. Reaching Agreements.

III. Getting to the First Meeting.

What can a webpage do for you?

Please visit www.sensibleseparation.com for an example of mine. Goals for my webpage were to establish (i) who I am, qualifications, my level of experience and expertise; (ii) logistical information and pricing; (iii) why mediation might be an attractive alternative; (iv) reducing anxiety about divorce; (v) reducing wasteful time explaining general concepts and forms; (vii) reducing the number of clients that want a free consultation; and (vii) satisfying ethical obligations of disclosure.

Avoiding Problem clients.

Screening to avoid disappointments. Warning signs for families that might not find success in mediation: (a) divorce still too raw for one or both; (b) a clear agenda or desire to manipulate mediation in a way that is not healthy for all parties to the process[1]; (c) a family with little or no trust in each other; (d) bullying; and (e) severe depression, mental illness or other conditions which limit the ability of either party to meaningfully participate. Remember, the client controls the agenda, but the mediator controls the process.

Initial Written Communication with Client.

An example of the initial Email confirming appointment to client is attached as Appendix 2.

The Agreement to Mediate.

See, Appendix 2, for an example of an Agreement. See, also **Standard**s, at Section II, for requirements of the Agreement. Also, consider attaching information on mediation to help client get in the right frame of mind.

IV. The First Meeting.

A. Sizing your family up.

In the beginning, allow your clients to get seated and comfortable. Explain in a very general way why they are here. "It's nice to meet you. I look forward to helping you with your divorce today."

Clients come to us on a spectrum from highly cooperative and thus needing little assistance to down-right broken and needing lots of help. Before you can start in earnest, you need to know where they fit on this spectrum. Mediation is not one size fits all. Your approach and emphasis will vary significantly from client to client. I get this very vital information quickly and in several ways.

I can tell a lot about a separating couple by the seating choices they make when they walk into my office for the first time. I've arranged my office so that the couch is on one wall with two flanking side chairs. See, my webpage, www.sensibleseparation for an example. When the soon-to-be separated couple walks into the room, I let them choose where they want to sit. I know they're in trouble when they each go to opposite side chairs and expect me to sit on the sofa.

Most couples **do sit down together** on the sofa in reasonable proximity of each other and by doing so make a statement that they are willing to sit together (and work together) through the mediation process. If they do, then I can move pretty quickly into the opening monologue. If, however, they seem very angry with each other, avoid eye contact and each go to opposite corners of your office, whether at the first appointment or at any subsequent appointment, then I suggest you prod for an explanation before going any further. The family may very well not be ready for mediation that day.

Prodding the family for an explanation for the tension that appears to exist between them may not seem intuitively wise—at least not at first blush—and therefore deserves an

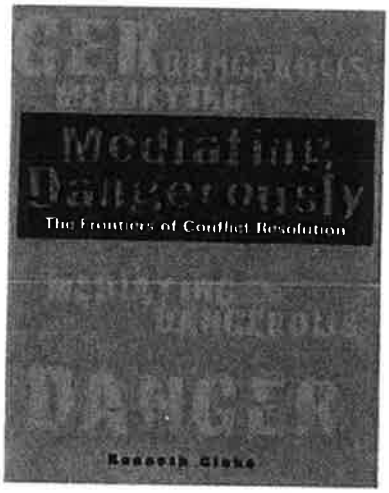
explanation. We're taught to *let sleeping dogs lie!* In his excellent book, **Mediating Dangerously: The Frontiers of Conflict Resolution,**

Kenneth Cloke

ISBN: 978-0-7879-5356-0

272 pages

March 2001, Jossey-Bass



which I highly recommend, Kenneth Cloke makes a convincing argument for "Mediating Dangerously." The concept is worth studying and we'll return to it several times. In general, Cloke argues that we should **not** avoid or ignore the conflict, we need to tune into the sensitive subjects with a view to getting the couple talking about the issues they need to resolve. His premise is that unless you understand what's really going on, you're not likely to be effective. For example, let's assume husband just found out wife was having an affair on the drive to your office. Do you think you're going to get much done with that elephant in the room? Realistically, no. With as much sensitivity as possible, get the issue out in the open and deal with it. "Evan and Evana, I've got to say, you both look like something is really bothering you. Do we need to talk about it before we get started?"

This accomplishes many goals. It signals to the spouses that they can be honest with each other in your office about what is going on with their relationship and that they will be heard and listened to--even when the content is embarrassing and/or hurtful. Families often need ten minutes of catharsis before they can focus. Some call it constructive venting. Finally, it gives you a chance to postpone or shorten the meeting to give Husband a chance to process his hurt before you ask him to dive into a large pile of legal work. It's very frustrating for the mediator to find out at third or fourth meeting that one spouse has a serious drinking problem. If that happens, there is a good chance you were inadvertently colluding with the drinking parent to avoid dealing with this difficult subject. Let the family know that you won't sacrifice honesty for conflict avoidance.[2]

Can this strategy backfire? Of course; it often does and you'll feel pretty stupid when it does.[3] Still, I think it's generally worth taking the chance. More often than not, real work gets done when you're dealing with real issues.

Occasionally, you have couples at the extreme other end of the spectrum. They make you wonder why they are even getting a divorce.

Not long ago, a young couple, Lauren and Walt, both in their early 40s, walked into my office, sat down on the sofa. She held his hand and rested her head on his shoulder. I wasn't quite sure what to make of it. There was a little more intimacy than I was accustomed to seeing. Soon Lauren was crying and, obviously, Walt wasn't doing much better. I wasn't exactly sure what to say. I waited for a few minute and said something like, "So I guess you're here today to discuss a divorce." Lauren said "That's exactly what we don't want to do." At this point, I was confused. Lauren continued, "We don't want to

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[2] The goal of mediation is rarely conflict avoidance. It is healthy conflict resolution.

[3] I remember asking once *what is the problem* only for husband to promptly respond, "Nothing. She's just a raging bitch." To which wife responded with a diminutive description of his boy-parts. That can happen.

be married, but the last thing we want is to be divorced." It was a light moment in the room, and we all laughed. I knew exactly what she meant. Being divorced seems like an ugly and uncomfortable process to be engaged in. At the same time, there are people that can't remain married anymore. Walt said, "We don't have a word for it, do we?" He was right. Gwyneth Paltrow recently championed the words we were struggling to find that day when describing her divorce as a *Conscious Uncoupling*. These are the families that make it all worthwhile. Thankfully, there are plenty of them, too.

B. The Opening Monologue.

Now that you have sized your family up, you can turn to the opening monologue. Some mediators like them short; some like them long. As you might guess, I keep it to the minimum for families that are doing well. And, for families that seem rife with conflict, you might need to work on getting them to "buy into the mediation process." At least, we have to help them get past "blaming and convincing" the worldview that their world has fallen apart and its all you-know-who's fault. To borrow from Ms. Paltrow's terminology, this might be a good place to change consciousness. This is an example of a longer segment of an opening monologue where more work is going be involved. I call it the *Wizard of Oz* metaphor.

> Becoming a divorced person is a daunting and somewhat frightful experience. Like Dorothy in the Land of Oz, all of the rules are different. The judge in the legal system seems like the wizard with all the answers to what's missing in our lives and what's equitable and what's fair. We have a saying in the mediation business, however, that *fair* is the "F" word. Frankly, it's a very subjective concept. What's fair for husband may not be fair for wife, and if you really think about it, what's fair about having to go through the divorce in the first place? As we learned from the Wizard, it ends up that most of the answers that you need to get through this process, you had all along. You just need someone to

remind you. They are the same answers that are applicable to most everything else in life. Treat each other with a decent amount of respect and be honest. If you have them, put your children first and be more generous than you think you have to be. The important point to remember for now is that divorce does not have to be a nasty, contentious, expensive and devastating experience. Like Dorothy, sooner or later, you figure out that's it up to the both of you to do this right. I'm not a Wizard, but I can help you.

I also sometimes ask husband and wife to consider a pie diagram for how divorce often is for other families, but how it could be for them. In the pie diagram, there would be various slices that represent the aspects of divorce problem solving. Those might be financial, children, legal, housing, telling family and friends, moving, to mention a few. In a healthy divorce, no one piece overwhelms the entire pie. It's well-balanced and well-proportioned. In a dysfunctional divorce, the legal slice of the pie takes up too much of the family's time and resources.

V. The Second Meeting.

A. Preparing for the Second Meeting

i. Drafts of documents

ii. Child Support and Maintenance Calculations

iii. Spreadsheets

iv. Income, Asset and Debt confirmations/getting statement.

B. Rescheduling: be prepared for the clients being unprepared.

C. Review of Tasks and Mediation Memo.

D. Developing Maintenance and Child Support Worksheets.

E. Discussing the Kansas Payment Center.

F. Discussing Furniture and Personal Property.

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H. Calling Uncle: When and How to Give-up.

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J. Mediator involvement in Final Hearing.

VIII. Ethics of Domestic Mediation for Lawyers.

Supreme Court Rule 901

Supreme Court Rule 902

Supreme Court Rule 903

Supreme Court Rule 904

Appendix-Lawyer Mediators in Family Disputes.

IX. Particular Ethical Scenario for further Discussion

A. Ethical requirements to define the process and its cost before starting. See, Kansas Standards of Practice for Lawyer Mediators in Family Disputes (hereinafter "Standards"), Section I. Attached as Appendix 1.

B. When to recommend and when to strongly recommend that each party have their own counsel. See, Standards, Section VII, D. We are supposed to encourage our clients to have an attorney, but we can't insist! What's the difference? Particularly troubling cases where you might consider "strongly recommending, but not insisting" would include very high asset cases, complex accounting and tax issues; nuanced legal complexities, and

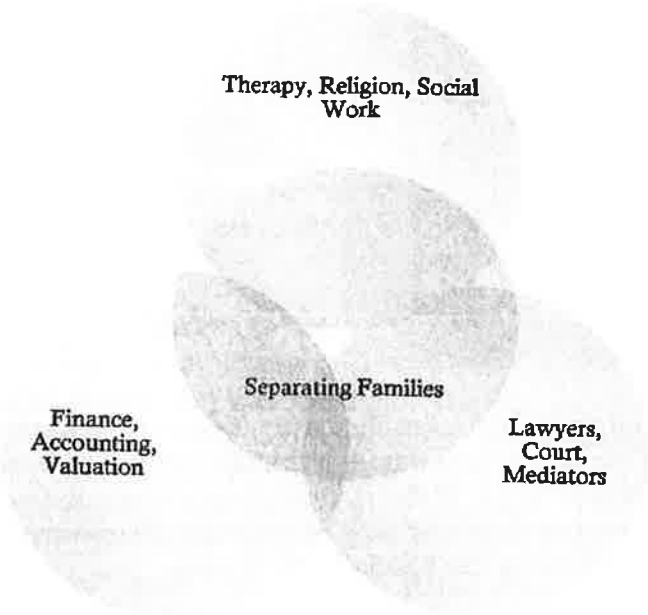
perhaps most important, clients that don't seem to understand or be convinced that the system and process is treating them fairly.

APPENDIX 1

Greg Kincaid-Editor

Winter 2013

SENSIBLE SEPARATION



Sensible Separation is an interdisciplinary newsletter for professionals assisting families with divorce or separation. If you would like to contribute an article, please submit to gkincaid@hrkklaw.com. Another opportunity to share helpful thoughts or insights about our work exists on the *Sensible Separation* FACEBOOK page, which is located at www.Facebook.com/KincaidMediation. We are just getting it started and would appreciate the traffic and any helpful information that you would like to share. For more information about divorce mediation, please visit www.kincaidmediation.com.

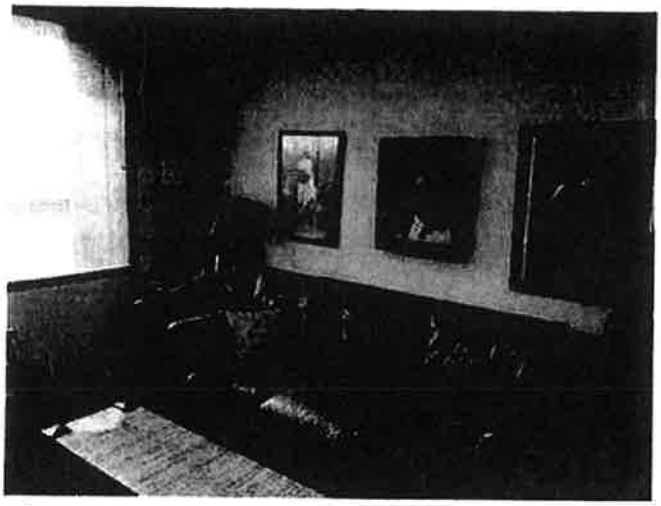
Articles in this issue of *Sensible Separation* include:

Six Holiday Tips For Divorced Or Separated Parents, by Elizabeth Graham

Holidays can be difficult and stressful for families who are experiencing a divorce or separation. We get a lot of messages from our own families as well as from society as to how the holidays are "supposed" to be. If this is your client's first holiday season apart, they may be unsure about what to expect or how to celebrate. Below are a few tips you might be able to offer about handling this special time of year.

1. **Take care of yourself** - make healthy choices during this time of year. Find supportive friends and family members who are positive. Reduce stress by getting enough rest and exercise. Avoid overindulging in eating, drinking, activity and spending.
2. **Plan ahead** - make holiday arrangements with the other parent in advance and confirm in writing. Let extended family members know what your arrangements are.
3. **Be flexible** - consider how you want your children to remember their holidays and be willing to work with the other parent to create happy memories. Be prepared to compromise.
4. **Be respectful** - consider how difficult this is for all family members and demonstrate an attitude of cooperation and problem solving. Encourage extended family to show respect for **all** of your children's family.
5. **Create new traditions and memories** - some familiar traditions may be too painful or not practical to maintain. Let go of what you cannot do and come up with new ways to celebrate with one another. Invite your children's ideas.
6. **Keep your expectations reasonable** - enjoy the moment and invite imperfection into your holidays. Have fun and celebrate!

Liz Graham, LCPC, NCC



Our Modern Family, by Greg Kincaid

Many states collect statistics on a variety of events—birth, death, abortions, marriage and divorce. In isolation, no one family tells the whole story, but viewed collectively, we can see a great deal about the changing shape of our relationships. What you see might surprise you. At least, it did me.

In the State of Kansas, for example, the data has been compiled in the Annual Summary of Vital Statistics. Some of these trends we recognize as being generally true, but until now I could not have quantified them. Unless otherwise indicated, the figures are reported in groups of 1,000 individuals.

More and more people simply choose to not marry. In 1945, the Second World War ended and wedding bells were ringing at a blistering rate of 38 marriages (for every 1000 people). By 1953, the water, while no longer hot, was still tepid. The rate was down to 10 per 1,000 and it remained that way until about 1983, which is about the time I started practicing law. During my legal career, the bell has cracked. We've seen a steady fall to a meager 6.3 in 2012. See, pages 152 and 158 of the Annual Summary of Vital Statistics. The data collected by the Center for Disease Control and Prevention (the CDC) tells a similar story. See, National Marriage and Divorce Rate Trends. For example, in the year 2000 the national rate of marriage was 8.2. A mere 10 years later, in 2010, the rate of marriage had dropped to 6.8. This is nearly a 20% decrease in the rate of marriage in the last decade alone!

Divorce rates remain very high. The CDC data, as well as the Kansas data, supports the conclusion that the rate of divorce remains at approximately half of the rate of marriage. We often hear that divorce rates have been decreasing the last 10 years or so. While this is true, I think we have to be careful about the conclusions we draw from that data. It may be that fewer people are getting divorced for the simple reason that fewer people are getting married. In other words, I'm not sure it would be reasonable to conclude that the declining divorce rate reflects changing attitudes about divorce. If we look at the rate of marriage and compare it to the rate of divorce, they appear to be declining at about the same rate. In fact, according to the Kansas data, the ratio of marriage to divorce in 2012 was 1.9 to 1. See, figure 3 and Tables 74 and 75 of the Annual Summary of Vital Statistics. If anything, this seems to suggest that the odds of a marriage ending in divorce has increased, not decreased.

The number of parents electing to have children outside of marriage is skyrocketing. In 1902, the percentage of births to unmarried women was only about 2%. One hundred years later, that figure is now over 40%. See, Table 30 of the Annual Summary of Vital Statistics.

Families continue to wait longer to get married and are, therefore, older when they divorce. In 2012, the average bride in Kansas was 30.5 years old. The average groom was 32.6 years old. See, Figure 39 of the Annual Summary of Vital Statistics. Figure 40, from the same source, depicts the average age of wives divorcing in 2012 to be 37.8 and husband to be 40.8, as compared to 34.0 for wives and 36.4 for husbands as recently as 1993.

The number of families using lawyers to assist them in their divorce is declining rapidly. When a family elects to proceed without counsel, they are often referred to as *Pro Se*. There have been a number of studies showing that more and more families decide to divorce without lawyers. See, for example, Colorado Report on *Pro Se* parties, which suggests that the number of *Pro Se* divorces has doubled in recent years. I was able to track down the Kansas data and it points to similar trend: a rather shocking 50% increase in the last seven years alone.

DIVORCE + ANNULMENT

DECREE YEAR	TOTAL #	PRO SE	PERCENT PRO_SE
2005	8563	1385	16.2
2006	9238	1509	16.3
2007	9428	1498	15.9
2008	9903	1619	16.3
2009	10400	2042	19.6
2010	10641	2142	20.1
2011	10503	2312	22.0
2012	9898	2454	24.8

Source: Kansas Department of Health and Environment
Bureau of Epidemiology and Public Health Informatics

It seems undeniable that, for many professionals, marriage and divorce demographics do not support a "growth industry." What that means for us and how we must adapt remains to be seen. Many questions need to be answered. Some are general. Why are families abandoning marriage? Other questions, we need to direct at ourselves. For example, why are families abandoning legal assistance? Is the answer that they cannot afford it? Or, perhaps, with all of the forms readily available on the internet, it is simply getting easier to do it themselves. While certainly contributing factors, these are not the explanations I hear daily in my practice. Clients express to me a concern about placing their families in the hands of an advocacy based system. As attitudes about families and divorce change, what clients expect from us will also change.

I hope to further explore these trends in the coming editions of *Sensible Separation.*

New Educational Program for Families at Johnson County Court Services, by Erin Poolman

For years, parents have commented to us that if they had known more, earlier on, about the separation/divorce process, it might have saved their family time, money, and emotional stress. Court Services agreed and, along with the Judges of the Johnson County District Court, Family Division, we developed our newest educational program, *Parents Forever.*

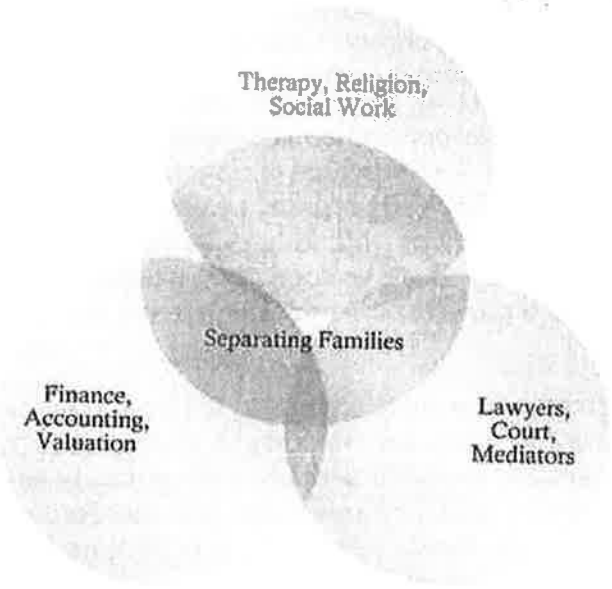
This class replaces the long-standing General Responsibility as Separated Parents (*GRASP)* program once offered by Johnson County Mental Health. *GRASP* provided an invaluable message to parents who were separating or divorcing. Information from the GRASP program was relied upon to develop *Parents Forever.* We too hope to provide early exposure to effective co-parenting skills during an emotional time when parents are dissolving their intimate relationship. It is our hope that by timely educating parents, we will reduce future problems and help to establish positive co-parenting patterns that set the stage for better communication in the years to come.

The two-hour *Parents Forever* course strives to introduce parents to the legal process (now and in the future) and to help them co-parent effectively. Participants are encouraged to consider how separation impacts their children and discover what resources are available to them, both privately and through Court Services. Our program also offers a screening tool for parents and provides feedback to the Court about what resources, if any, may be beneficial to the family. Gathering this information for families while they are still early in the separation process makes it more impactful.

Parents filing new divorce or paternity actions (after paternity is established) in Johnson County are required to attend the class. The Local Court Rule 24, which requires parents to attend GRASP, is still in place, but is in the final stages of being changed to incorporate *Parents Forever* based on approval from the Kansas Supreme Court.

Because this program is still so new, we encourage interested professionals to attend and provide feedback so that we may better serve our families. For more information on class times, days and fees please call Court Services at (913) 715-7400 or find more information on our our Parents Forever website.

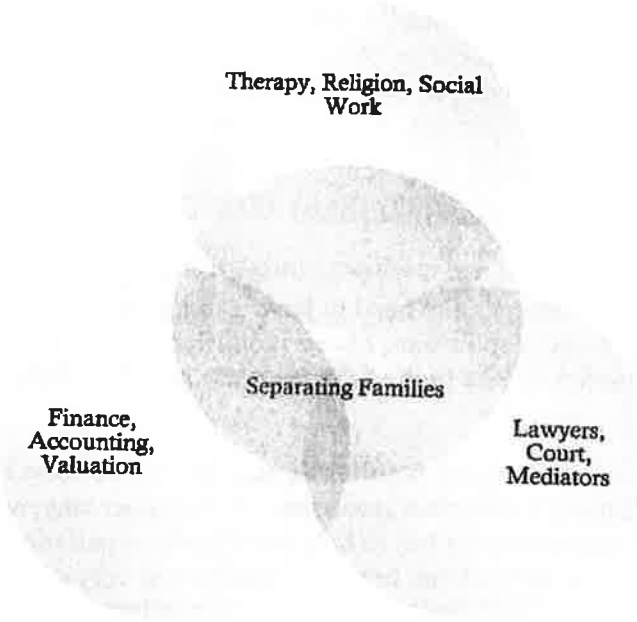
Sensible Separation is a quarterly newsletter offered by Kincaid Mediation. I may be reached at Hubbard, Ruzicka, Kreamer and Kincaid, L.L.C., 130 N. Cherry Street, Olathe, Kansas 66061; (913) 782-2350; gkincaid@hrkklaw.com. My web address is www.KincaidMediation.com.



Greg Kincaid-Editor

Spring 2014

SENSIBLE SEPARATION



Sensible Separation is an interdisciplinary newsletter for professionals assisting families with divorce or separation. If you would like to contribute an article or have an announcement you would like to share, please submit to gkincaid@hrkklaw.com. For more information about divorce mediation, please visit www.sensibleseparation.com. Another opportunity to share helpful thoughts or insights about our work exists on the *Sensible Separation* FACEBOOK page, which is located at www.facebook.com/sensibleseparation. Please visit our site. We are just getting it started and would appreciate the traffic and any helpful information that you would like to share.

Evan Ash- Mediator and Episcopal Priest

I asked Evan Ash to share his thoughts on how the clergy can best serve divorcing families. For many families, this is an important first step.

Honorable Kelly Ryan

Judge Ryan spent four and one-half years on the Family Law Bench. I asked him to ruminate a bit about the experience and why he decided to make a change.

Rob Metcalf, CPA and business evaluator.

Family-owned businesses cause some perplexing issues in a divorce. One is the "double dipping" problem, e.g. using the same stream of income to simultaneously define both the future value of the business and pay the families' current expenses. Rob shares some insights into both sides of the argument.

THE THEORY OF THE CASE

By Greg Kincaid

Successful trial lawyers and fiction writers alike need to have a theory or theme around which they organize their work. Taking this concept one step further, I have identified one theme for the focus of my entire law practice as a divorce attorney and mediator. ***The task of the law is to skillfully balance legitimate, yet often competing, interests.***

The crux of our work--as professionals helping families through a divorce--often comes down to one word in that bold sentence: *legitimate*. Legitimacy exists on a spectrum. Put another way, certain issues or positions are inherently more legitimate than others and it's our job to help our clients or patients to see those differences. Logically, we must constantly ask ourselves how we can best accomplish that very difficult task.

There is a long line of therapists, religious leaders and philosophers that provide a possible answer to that difficult question. The therapists on the list (for example Abraham Maslow, Ken Wilber and James Fowler) would say that the end goal for all of us is to become more adult in our thinking. Read, less selfish and more concerned with others. Basically, the Golden Rule. These scholars have actually charted stages or levels of adult development. The law says that a child becomes an adult when he turns 18. These men believe that becoming an adult has very little to do with age and a lot to do with maturity. Becoming an adult is a process that never really ends. It should be our life goal to progress as far along that path as we possibly can and to help our clients do the same.

If we can agree that the heart of our work is helping our clients and patients to be more adult, how does that change or affect the way we do our work? Perhaps for the marriage therapist it means helping the client or patient to become more self-aware, to help them get beyond their own wounds and injuries, so they can see how their behaviors may be affecting their spouse or children. Certainly, a difficult task.

For legal professionals, we too need to get our clients to understand that it's not just about them and even though we are their advocates we do them no service when we destroy the whole family in the selfish pursuit of their individual needs.

Perhaps the clergy are well-positioned to help divorcing families to pursue legitimate adult interests. I asked Evan Ash to contribute to this edition of *Sensible Separation*. Evan is unique in his skills and background. He is both a priest and a mediator at Johnson County Court Services. Evan's article, I believe, also resonates with this same theme. Evan suggests that the clergy need to askew critical or harsh judgments and instead focus on helping family members to ask the right questions.

The Honorable Kelly Ryan also contributes to this issue. Judge Ryan just ended his tenure as a judge focusing on divorcing families with children. He now has a criminal docket. Among other subjects, he also

stresses how hard it is to balance interests when the parties are stuck in an injured and not terribly adult state of mind.

Finally, I asked Robert Metcalf to take on the tall task of fleshing out some of the complex analysis necessary when valuing a family owned business. You'll see that Robert purposely did not take either side of the "double dip" issue. As you might have guessed by now, the answer is in a proper balancing of both sides of the question!

I hope you enjoy this issue of *Sensible Separation*. Please note that at the end of this issue, I have added an *Announcement* Section. If you have news that is noteworthy or would like to contribute an article that might be helpful to divorcing professionals, please feel free to email me at gkincaid@hrkklaw.com.

I. DIVORCE GUIDANCE FOR CLERGY (AND OTHERS, TOO!)

By Evan Ash, Episcopal Priest and longtime mediator for Johnson County Court Services

When a member of your congregation comes to you seeking pastoral counsel and guidance about marital problems, they are facing a complicated personal crisis. The marriage relationship is unique in that it is primarily based on choice, and when that choice is troubled, it may say more about the chooser (of the divorce) than the chosen. When the level of crisis is presented in the form of questions of separation and divorce, the person seeking divorce may feel both bold and chaotic at the same time. This is a potentially reckless condition that needs gentle guidance and reflection.

As clergy, we have the pastoral opportunity to help that person consider some questions about their marriage journey that has brought them to this moment. Encourage questions:

a) What is missing in the marriage that has brought that person to this moment?
b) What extraneous factors may be contributing to this sense of loss and vulnerability?
c) Have they considered counseling related to the source of vulnerability – personal, faith, interpersonal, financial?
d) If there are children, how will a divorce impact the children?
e) What questions or issues need to be defined to better assess what resources to consider?
f) What would it mean for them to take a chance on their marriage?

Such counsel would be sabotaged if you:

a) Judged the person for their outlook on their situation;
b) Trapped them in their chaos, potentially leaving them to make hasty emotional decisions, or
c) Direct their actions, even if faith based.

Consider this a crisis of faith for the person or they might not have sought your counsel. They see you as a sanctuary where they can wrestle with their soul. You are not the adversary but the mediator. Help them

think and feel beyond the stress that brought them to you. Help them explore the challenge they face with hope, in whatever form it will take for them. Faith is indeed about things not known!

Evan will soon retire from his position as mediator at Johnson County Court Services. On behalf of the thousands of families he has assisted, a hearty thank you is in order.

II. REFLECTIONS FROM THE FAMILY COURT BENCH

By Thomas Kelly Ryan, District Court Judge, 10th Judicial District, Johnson County, Kansas

My judicial career started on November 6, 2008 with an appointment to one of three positions in the Family Court of Johnson County District Court. I had served as a *pro tem* judge for various judges over the course of the previous five years and felt a certain comfort in handling cases on a family docket since that was my primary focus in the private practice of law for 20+ years. Oh, what a surprise I was in for on that cold Friday in November!

There is no real preparation for an attorney who transitions to become a judge, even in working as the substitute or fill-in judge on a sporadic basis. I had experienced the "other side of the bench" in handling hearings and even trials in my numerous appointments to sit for a regular judge while they were on vacation or otherwise unavailable to hear a particular day's docket. Yet, I had no comprehension of the constant stream of litigants and attorneys who file into family courts with their complaints, arguments, anger, anxiety, complaints, fears (rational and otherwise), disputes, complaints, retribution, sniping, grousing and, of course, complaints.

About three weeks into my new position, a wise veteran attorney provided me the insight that nobody else had bothered to mention to me. He asked me if I could remember the certain feeling of freedom that I attained as an "experienced family law lawyer" in being able to choose my clients and withdraw from representation of those persons who I found to be unreasonable or constantly defiant to my voice of reason. "Well, keep that memory because now as a judge, you have to take everybody that comes into your courtroom, be they among the good, the bad or the ugly." I quickly found his wisdom to be true in working with our "frequent filers" and those persons with an amazing reservoir of persistence to seek justice in their case that the judge just never seemed to understand in their previous appearances before my predecessor, Judge Bill Isenhour.

Now, don't think that I am bemoaning the work of a family court judge because I truly enjoyed the work with attorneys and parents in attempting to fashion some reasonable future plan for their family or the resolution of their source of financial distress. Other civil judges (not in Family Court) often complain that they must hear "divorce cases" for a variety of reasons. Contrary to popular opinion, there are many talented and professional attorneys who practice family law here in Johnson County and, after adjusting to the fact of my different relation with these attorneys with whom I previously worked on the other side of cases, I came to a newfound appreciation for the patience and client control methods utilized by my former compatriots with some very challenging personalities and issues in their cases before me. I understood the

parties appearing in court were much more complex and often difficult to manage than how they appeared in the family court forum. The most difficult time to control and handle the client usually occurred in the courtroom.

I realized early on in my judicial work that I could not view attorneys and clients in my own narrow perspective of "how would I handle this client's behavior?" or "I sure wouldn't present my evidence to the judge with (or without) all of that documentation." An appreciation for the tremendous pressure and critical evaluation of a family lawyer's work led me to a more detached viewpoint of cases in my court. My judicial view always accounted for the grind that the attorneys faced in handling even "simple" cases.

However, I came to see a darker side of the practice of family law from a limited number of attorneys who clearly failed to prepare either the evidence or their clients for the likely outcomes resulting from a contentious proceeding in court with the other parent or extended family members. It was evident that I needed to remind attorneys that they hold a higher duty to work diligently for a client who is often operating at a substandard level of comprehension and minimally cooperative attitude when their life is being torn apart, no matter how long the marriage or relationship and without regard to the number or age of their children or the amount in their bank accounts or retirement savings. I hope that my efforts to listen and learn from the litigants in cases before me provided a reasoned and viable result in my decisions which would likely affect these people for the foreseeable and even distant future.

The opportunity to change judicial dockets came my way last summer and I moved to take over a criminal docket when Judge Steve Tatum retired. Many attorneys and plenty of lay people told me "You must be really burned out with that family court docket, since you are 'getting out' of there." I told everyone who made such comments that I was undeniably **not** burned out on family law but, after more than 4-½ years of hearing exclusively family cases, I did not want to **become** burned out on the important issues and decisions that make up every case in our family court. I always reiterated with my MacArthur promise: "I shall return (to family court)!" Naturally, the attorneys would scoff at me and suggest that I was being anything but truthful with that comment. I simply responded with the refrain: "I'll see you back here if you're still practicing family law!"

A wise adage comparing family court and criminal court clientele has been proven true to me in my first six months in this new position: Criminal court has some of the worst people on their best behavior. Family court has some of the best people on their worst behavior. I've come to realize that both areas of law in their essence deal with people and their emotions and actions or inaction. Certain similarities are evident but I know now that the work of attorneys, judges and assorted professionals in family law cases are handling some of the most important aspects of peoples' lives and that the future of our community rests with that important work. I am proud to have served as a Family Court judge and will continue to be involved in our bench/bar activities and handle mediations and settlement conferences of family cases with attorneys and litigants. And beware……. I shall return!!

III. BUSINESS VALUATIONS IN DIVORCE: THE DOUBLE DIP PROBLEM

By Rob Metcalf

In my 19 years as a business valuator in family law cases, an issue frequently arises related to the interplay between the business valuation methodologies applied and the business owner's salary resulting in associated support obligations (I will use the term "support" to include both maintenance and child support payments in this article). This issue has lovingly been termed "the double dip." The short definition of this issue is counting the same income stream twice, once for division of property and the other for determination of support. Any seasoned family law attorney will take one of two positions to advocate for his or her client. This article will discuss the two options or viewpoints related to the double dip issue. While I do not intend to resolve the issue, I do hope to provide a clarifying understanding of its underlying factors.

At the heart of the issue is the application of business valuation methodologies. Because I have been valuing closely held businesses for family law purposes since 1995, I have been on both sides of this debate. Consequently, I am conversant with the underlying topics involved.

The first point to bring to bear is the application of the business valuation methodologies themselves. Three approaches are used by valuators: asset, market and income. Each one of these approaches has multiple methods associated with it.

The first approach is the asset approach. It will look at the tangible assets of a business, adjust the assets to their fair market values and subtract the fair market value of the business's liabilities, either on a going concern basis or on a liquidation basis.

The second approach is the market approach. It employs market multiples from guideline public companies or guideline closely held company transactions and applies these multiples to a level of revenues and/or earnings of the subject business. Because these multiples are derived from non-normalized, operating results (normalization adjustments will be defined below), they would be applied to non-normalized revenues or earnings as appropriate.

The third approach, which I saved for last because it is the heart of the matter, is the income approach. This approach also includes a number of different methods under its banner; however, the methods are based on the same general principles. The subject business's operating results are normalized. Normalized earnings are defined as the "economic benefits adjusted for nonrecurring, noneconomic, or other unusual items to eliminate anomalies and/or facilitate comparisons."[1] A multiple of normalized earnings is derived based on an assessment of the risk of achieving the normalized earnings in future periods and an assessment of the sustainable growth rate of those earnings into perpetuity. One of the most

[1] International Glossary of Business Valuation Terms

prevalent normalization adjustments is the adjustment to owner's compensation.[2] In general, compensation paid to a business's owner consists of two components: compensation for services rendered (otherwise termed "reasonable compensation"[3]). Sometimes, the amount of compensation is determined in the course of tax planning to reduce the amount of tax that an owner will pay. The bottom line is that because owners have control over the compensation that they pay to themselves, this expense account is closely scrutinized by valuators to ascertain whether adjustments to owner's compensation amounts are required.

The question at the heart of the double dip issue is if an adjustment to compensation to a divorcing owner is made, does this "reasonable compensation" amount become the appropriate base from which to calculate support. To state it another way, the purpose of the normalization process is to determine the cash flow available for the hypothetical purchaser(s) under the fair market value standard. The amount of cash flow available assumes a deduction of compensation including only "reasonable compensation." The question then becomes whether the portion of compensation related to the return on investment is included in the value of an ownership interest in a business.

If the value of the business includes the investment return portion of compensation, it is then argued to be unfair to use the actual compensation level, including both portions of compensation previously discussed, in calculating support. The argument from the attorney of the owner spouse is that to do so would be to include the investment return portion in the value of the to-be-divided business interest and then use it again in the computation of support amounts. While not an attorney, it is my understanding that certain courts have adopted this view, e.g., New York in Grunfeld v. Grunfeld, 94 N.Y.2d 696 (2000).

The other side of the argument comes from attorneys representing the non-owner spouse who might state that the concept of business value is entirely separate and distinct from the support calculations. One is an issue related to property division and the other related to spousal support. Again, my understanding is that certain courts have adopted this view as well, e.g., New Jersey in Steneken v. Steneken, 873 A.2d 501 (N.J. 2005).

This view might be supported under the following hypothetical. Owner A owns 100% of a business earning $1,000,000 per year. A earns $400,000 per year and reasonable compensation is estimated at $250,000. Assuming no other normalization adjustments, normalized earnings would be $1,150,000 ($1,000,000 plus $150,000 [$400,000 less $250,000]). If an earnings multiplier of five (5) is used, the value for divorce purposes would be $5,750,000 ($1,150,000 x 5, ignoring any consideration of discounts or tax affecting).

The attorney for non-owner B might argue that support should be based on $400,000 of compensation. How could that argument be made? The attorney might say that A does not intend to sell the business and might own the business for ten (10) years more. If this scenario proved true and the support period was only six (6) years, A will continue to receive $400,000 annually through the entire support period. Would it be equitable for the trier of facts to base support on $250,000 when A will receive $400,000 per year?

And what will occur when A sells the business in ten (10) years? Assuming the business is operating as it was ten years prior, a valuator would make the same $150,000 normalization adjustment and the business would be valued at $5,750,000 and sell for that amount. Under this scenario, to use a support amount of $250,000 because of the double dip argument would shortchange B.

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[2] For purposes of this article to keep our discussion simpler, I will assume a single owner.

[3] Defined as the estimate of what the owner-manager would be paid as an employee, given his/her experience and relative work effort (return on labor), not including disguised dividends or distributions from business (return on investment) from BVR presentation slides "Double Dipping: Incomes, Assets, and Double Counting in Divorce" by Adam John Wolfe, Esq., Stacy P. Collins, CPA/ABV, CFF and Donald J. DeGrazia, CPA/ABV/CFF, September 13, 2013.

What is the alternative argument? Fair market value is normally used as the standard of value in divorce matters in Kansas and Missouri. It is defined as "the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller ... "[4] It therefore assumes a change in hands, i.e. an exchange. It may be appropriate to assume that A has sold the 100% interest in the business and will no longer annually earn $400,000 as an owner but only $250,000 as a non-owner employee.

In addition, it must be noted that valuations are forward looking. What I mean by that is that the valuator may use historical operating results but only as an indication of what the operating results are expected to be in the future. Purchasers do not buy historical cash flows, but the estimated future cash flows of a business. Under the fair market value standard, purchasers are assumed to use the normalized cash flows of a business to pay the derived purchase price. One can see that the period over which normalized cash flows are used to "purchase" the non-owner spouse's business portion will overlap with the period over which support is being paid. The compensation component considered a return of investment will serve double duty during this period of overlap.[5]

The above analysis assumes the use of the income approach only; however, I was intentional when I previously referenced the other two approaches to estimating value, the asset and market approaches. These approaches do not require an adjustment to owner's compensation discussed above. It has been a long-standing requirement of proper valuation practice to use as many methods as appropriate to render a credible conclusion of value. The Uniform Standards of Professional Appraisal Practice (USPAP 2014-2015 Edition) states:

"In developing an appraisal of an interest in a business enterprise or intangible asset, an appraiser must:

(a) be aware of, understand, and correctly employ those recognized approaches, methods and procedures that are necessary to produce a credible appraisal;" [6]

The goal is to harmonize the values derived from the employed valuation methodologies as generally, it is assumed that values derived using appropriate methods ought to result in reasonably consistent values. If that is the case, what implication does that have on the double dip issue? If one method requires an adjustment to owner's compensation and the other one does not, and yet the values confirm one another, does it favor one view of the double dip argument over the other? In my opinion, it favors the view that the adjustment to owner's compensation only reflects the application of a valuation methodology to derive an appropriate value.[7]

Offsetting this view is the fact that when a business sells, the purchase price must be paid in real dollars that must come from a business's earnings. It is assumed that for the period of time over which the purchase price is paid, a working owner will only receive "reasonable compensation" and will not receive the investment return portion of compensation. The purchase price must be paid from the business's earnings even when methods under the asset or market approach are used to determine value.

In summary, the double dip issue comes down to how one looks at the owner's future tenure at the business. If one assumes that the owner will remain with the business and earn compensation as he or she has per the valuation analysis, the non-owner spouse might be shortchanged if the court decides to use only

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[4] The International Glossary of Business Valuation Terms

[5] See Rivers, Jr., Robert J., Esquire, The "Double-Dipping" Concept in Business Valuation for Divorce Purposes, originally published in Section Review, Vol. 8 - No.3 (Mass. Bar Institute 2006).

[6] Standards Rule 9-1(a)

[7] See Morgan, Laura W., "'Double Dipping': A Good Theory Gone Bad," Journal of the American Academy of Matrimonial Lawyers, Vol. 25, 2012, p. 133 - 151.

"reasonable compensation" for support purposes. It must be added that assuming the owner will remain with the business and retain the rewards of ownership may contemplate a value to the holder concept which valuators normally call "investment value" or value to a particular owner.

On the other hand, if one assumes a fair market value standard that posits the sale of the owner's interest as of the valuation date, it would favor the use of "reasonable compensation" for support purposes because that would be the amount assumed earned by the owner as a non-owner employee post-valuation date.

As I stated in my opening paragraph, I did not intend to solve the double dip issue. My hope is that this article has added to your knowledge of the issues involved from a valuator's perspective.

Rob Metcalf CPA/ABV/CFF, CVA, CBA, ASA, MAFF is a partner at Marks Nelson, an accounting and business consulting firm. He specializes in business valuations and litigation support services and administers the MarksNelson business valuation practice. Since 1995, he has been involved in hundreds of valuations of various companies in a wide variety of settings.

IV. ANNOUNCEMENTS.

Johnson County Court Services is looking for a volunteer to help with supervised visitation on Tuesday evenings. If you or someone you know would be interested in working with families in this situation, please contact Erin Poolman at Johnson County Court Services. She may be reached at (913) 715-7481.

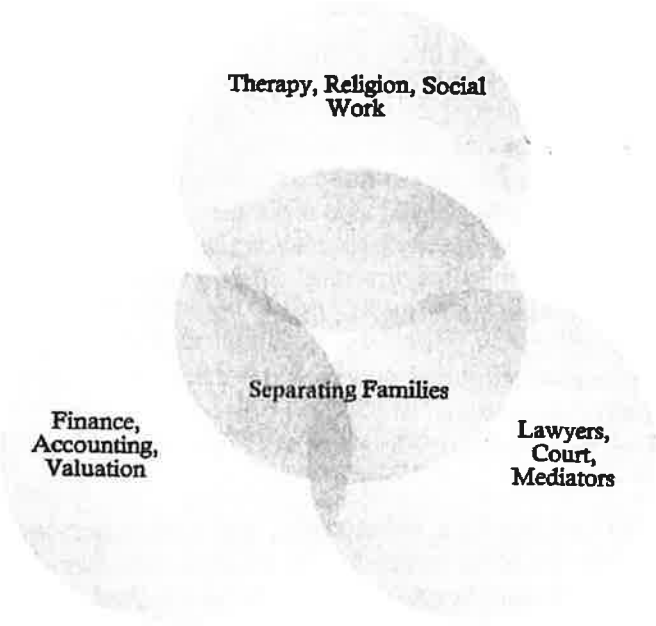
Casa's **Promise of Hope** luncheon is scheduled for Thursday, April 3. Contact Lois Rice at lrice@casajwc.com to reserve your seat or for more information.

Sensible Separation is a Quarterly Newsletter, edited by Greg Kincaid. Submissions are welcome. If you would like to contribute, I may be reached at (913) 782 2350 or at gkincaid@hrkklaw.com. My web address is www.sensibleseparation.com. If you would like to initiate a dialogue, where others can participate, please do so at www.facebook.com/sensibleseparation.

Greg Kincaid-Editor

Summer 2014

SENSIBLE SEPARATION



Sensible Separation is an interdisciplinary newsletter for professionals assisting families with divorce or separation. If you would like to contribute an article or have an announcement you would like to share, please submit to gkincaid@hrkklaw.com. For more information about divorce mediation, please visit www.sensibleseparation.com. Another opportunity to share helpful thoughts or insights about our work exists on the *Sensible Separation* FACEBOOK page, which is located at www.facebook.com/sensibleseparation. Please visit our site. We are just getting it started and would appreciate the traffic and any helpful information that you would like to share.

Honorable Keven O'Grady

Recently an order for Conciliation came across my desk. Judge O'Grady kindly offers a few words on this new program.

Sherri Loveland, Attorney

Sherri is on the Child Support Guidelines Committee and she agreed to do a short interview on the appropriate use of the extended tables.

Greg Kincaid, Attorney and mediator.

As a mediator, I see spreadsheets every day. It is so easy to make mistakes on them. I asked my wife, a CPA, for some tips to help us.

I hope you enjoy this issue of *Sensible Separation.* If you have news that is noteworthy or would like to contribute an article that might be helpful to divorcing professionals, please feel free to email me at gkincaid@hrkklaw.com.

I. EXTENDED CHILD SUPPORT GUIDELINES: USE THEM OR LOSE THEM?

What follows is a brief interview about the use of the extended child support tables with attorney Sherri Loveland. Sherri practices Family Law in Lawrence, Kansas and also serves on the Kansas Child Support Guidelines Committee.

1. Question: Sherri, does either parent have the burden of proof on this issue?

   Answer: Yes and no, the person asking for it, which makes sense, has the burden of proving that using the extended income calculation is appropriate but I have seen judges go both ways. Some judges state that they automatically use the extended income formula because the guidelines say that "all income" means all income (a quote from the guidelines talking about what a court considers in establishing child support) and then it becomes the burden of the defending parent, if you will, to show why this shouldn't happen. This is an area of discretion for the judges where advocacy plays a strong part.

2. Question: Surely, the answer to that question has to be impacted by the amount of money being earned. Wouldn't a parent earning a million dollars a year presumptively be paying more than guidelines support?

   Answer: Yes, that would seem to be how the presumption often works, if there were a presumption. However, there are some judges who adhere to the "two-pony rule" (how many ponies does one child need?) and some judges will draw the line at some amount of support recognizing the support amount calculated does not always translate to a benefit to the child but really translates to maintaining the lifestyle of the custodial parent.

3. Question: If decided on a case-by-case basis, what are the factors the court should consider?

   Answer: Anything pertinent to the finances of the parties, the needs (or lack of need) of the child(ren) and anything that plays into those issues might be a factor. This is a very discretionary aspect of the guidelines

so any relevant factors concerning need of the child vs. a parent's existing obligations, his or her actual ability to pay, structure of their income and assets, lifestyle changes, etc. is fair game.

4. Questions: I find lawyers, judges and mediators doing two worksheets, adding the sums together and dividing by 2. What do you think of that method?

   Answer: I had not heard of that method of calculating support beyond the guidelines but I certainly have no objection to it. With the use of the extended formula being discretionary with the court, any agreed upon method to arrive at a support amount that both parties can settle on which provides for the child(ren) and keeps the parties out of court is certainly a win in my book.

5. Question: Is there any case law out there? I'm not aware of it.

   Answer: I am not aware of any case law that creates any specific perimeters for the use of the extended formula for support. Now that you ask the question, I will probably have to do a search for my own information, but at this moment I am not aware of any specific cases dealing with this.

6. Do you think the Guideline Committee would consider offering some guidance or is that a path they don't want to stray down?

   Answer: We have discussed this, actually, and my recollection is that we have specifically elected NOT to give guidance as we want this to be, and remain, an area where the facts are advocated and the Judges put on their thinking caps and use their discretion. That's not to say we would never look at this but right now we have declined to not define this or set factors to be considered beyond what I have already described.

Thank you! Sherri Loveland practices with the Stevens Brand law firm in Lawrence, Kansas.

II. WHAT IS CONCILIATION AND WHY ARE WE STARTING TO USE IT,
By the Honorable Keven O'Grady.

Conciliation: an Alternative to Mediation.

Most Johnson County family law attorneys know that mediation is generally required before a hearing can be held concerning legal custody or parenting time. There are exceptions to every rule of course (motions to modify ex parte temporary orders being one), but for years the natural progression of almost every case included mediation as a first step. See Local Rule 22. It became clear to mediators, judges and many lawyers that mediation was not always the best option for every family. A slightly more intensive service was needed. "Conciliation" through Domestic Court Services is one such process. Conciliation is another alternative dispute resolution procedure, similar to mediation, which promotes a positive relationship between parents while working towards an agreed resolution of parenting plan disputes. The process can be thought of as another form of mediation but with the added twist that conciliation is non-confidential. Currently mediation in Kansas is defined and controlled by Supreme Court Rule 901, et seq. Supreme Court Rule 902 defines conciliation as "a proceeding in which a neutral person assists the parties in reconciliation efforts." This rule also allows the conciliator more leeway to express alternative options or make suggestions. The 10th Judicial District now joins several other judicial districts in Kansas in utilizing conciliation. It seems that every district implements conciliation in a slightly different manner but the goal is the same for everyone: providing families the first and best opportunities to make parenting decisions for themselves.

The conciliation process, like mediation, begins as an opportunity for parents to make their own decisions in the best interest of their children. The conciliator might be a more active participant in the discussion by suggesting possible solutions and different ways to resolve conflicts. If parenting issues remain unresolved, the conciliator will offer information to the judge identifying the remaining issues and suggesting additional resources might help the parents move beyond their impasse. The conciliator does not recommend a parenting plan to the court or suggest that one parent's particular schedule is better or worse than the other parent. The conciliator might typically identify the special issues vexing the family, list options for additional services and describe each parent's desired plan. If the family appears to be "high conflict", that family can be identified earlier in the case and channeled to appropriate resources with the goal of changing the conflict dynamic before it becomes hopelessly entrenched. The judge can receive information that might help direct the family through the litigation process faster. The ultimate goal is to direct families to the services they need as soon as possible.

Conciliation will normally be ordered as a result of the Parents Forever screening process. Families who self-identify as more conflicted will be recommended for conciliation instead of mediation. The great majority of cases will still go to mediation as it is the most broadly useful tool for the vast majority of families. Attorneys may request conciliation but the courts will often want some reason for not selecting mediation. Updated mediation, conciliation and other forms are available at http://courts.jocogov.org/local_civ22.aspx and http://courts.jocogov.org/local_civ25.aspx.

If conciliation is successful, the process is very similar to mediation. The conciliator will draft an agreement that is then forwarded to the parents for review with their attorneys and submission to the court. The biggest practical difference between conciliation and mediation is that if conciliation is only partially successful, or is wholly unsuccessful, the report to the court goes beyond the simple statement that conciliation was unsuccessful.

The Parents Forever and Conciliation programs are a response to burgeoning domestic court dockets and the heavy emotional and financial toll of protracted litigation on families. The judges of the 10th Judicial

District have approved and promoted the implementation of these two new programs as an opportunity to provide earlier, more efficient and more satisfying resolutions of disputed cases. These new programs also reflect the increasing recognition that courts have an opportunity to render affirmative, constructive assistance to parents and children as they navigate the difficult separation process.

For questions about these programs or any other service or parent education class offered by Court Services the best source is Erin Poolman, Director of Domestic Court Services. She may be reached at (913) 715-7481.

III. SPREADSHEET PROBLEMS; WHY SO MANY ERRORS?
by Greg Kincaid

The financial backbone of most divorce cases is depicted on a spreadsheet. Here, the attorneys, the clients and the judge can look at one piece of paper and determine whether the division of the marital assets and debts is equitable. When done right, it's a great tool. When done poorly, it can be a disaster.

The process of preparing the spreadsheet is not easy, particularly when trained in law and not accounting. Simple math is something we should all be able to do on our own. Accounting is not math and the distinction is easily lost. In my practice as a divorce mediator and attorney, I have repeatedly seen very capable and experienced lawyers make significant errors on spreadsheets. Candidly, I cannot exclude myself from that observation. In fact, I decided to pen this discussion not because I'm better at this than most. I'm not.

Spreadsheet errors understandably upset clients and their expectations. It also puts opposing counsel in an awkward position of having to correct mistakes that might not be in their own client's best interest.[1]

Here are three quick spreadsheet considerations. **One**: There is not a lot of mileage in being a spreadsheet King or Queen. Encourage the client, opposing counsel or, best of all, the client's accountant or financial

[1] By the way, YES, you are ethically obligated to disclose a mistake. KRPC Rule 3.3(3) prohibits a lawyer from introducing evidence he knows to be false. Rule 3.4(1) prohibits a lawyer from concealing evidence from opposing counsel. See, also Rule 4.1, Truthfulness in Statements to Others.

planner, to prepare it. I'm pretty blunt about this. "There are better people to do this then me." Of course, even if someone else prepares the spreadsheet, you still have to understand it. I often prepare my own spreadsheet as a tool to double check that the division is equitable. It's my personal work product and I don't share it. **Two**: If you must prepare and share one with the client, get a written disclaimer. I ask clients to sign, as part of their settlement agreement, a statement that the spreadsheet was prepared with their assistance, review and approval; with information they provided to me which I did not independently verify, and that they were advised to have an accountant review it. **Three**: Make sure you understand the underlying accounting principles. Failure to understand the accounting principles spawns most of our errors. The more complex the asset and debt mix, the more likely it is that errors will be made. My wife, Michale Ann Kincaid, is a tax accountant, at RSM McGladrey. She offered a few tips to help us to better understand the underlying accounting concepts.

There is one easy rule of thumb to help us think about spreadsheets more clearly. Everything on the spreadsheet is owned one-half by each spouse. Assume, for example, that Spouse #1 has $200,000 of assets in the initial division and Spouse #2 received $150,000. Many clients and perhaps even a lawyer or two will compare the balances and conclude that Spouse #2 was shorted $50,000. This is incorrect. The correct equalization payment is $25,000 so that both spouses end up with $175,000 of assets.

Accountants typically do financial reporting on balance sheets and income statements. Spreadsheets are a bit of a variation of the balance sheet concept. They are most definitely not income statements. Avoid putting income-related items on a spreadsheet. A common example of this mistake is placing unpaid child support obligations on the spreadsheet as a marital debt. This is not a marital debt and has no place on the spreadsheet.

Also be careful to not include in the marital asset mix childrens assets, non-marital and premarital property. I've seen spreadsheets that include non-marital assets above the line and then attempt to subtract them later, below the line, as a part of an equalization payment. It's easy to make mistakes using this method.

Our local guidelines suggest that it may be appropriate to treat premarital debt paid off during the marriage as an asset in the debtor spouse's column. This works. I've seen it done a myriad of other ways that don't work. I'd follow the suggestion in our guidelines.

It's perfectly appropriate to tax affect retirement assets so that the court can do an apples-to-apples comparison of the final asset division. Remember, however, when you draft the marital settlement agreement and describe the amount of the retirement account each spouse is ultimately going to receive that you have to "unwind" the tax effect. Put another way, what is on the spreadsheet is not what is in the written document.

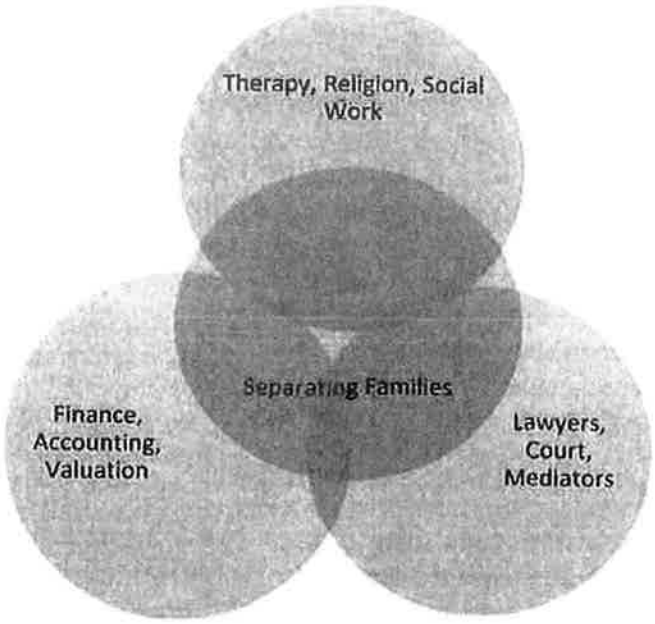
What about marital debts paid off while the divorce is pending? These debts should probably go on the spreadsheet with the balances due on the date of valuation or separation. Often, however, in lieu of making child support or maintenance payments, a spouse is satisfying their maintenance or child support obligation by paying off current obligations as they arise each month. Although most try, it's probably not appropriate to satisfy two different obligations with the same dollar.

Hope that helps. If you have a few tips of your own, please share them at https://www.facebook.com/sensibleseparation

Sensible Separation is a Quarterly Newsletter, edited by Greg Kincaid. Submissions are welcome. If you would like to contribute, I may be reached at (913) 782 2350 or at gkincaid@hrkklaw.com. My web address is www.sensibleseparation.com. If you would like to initiate a dialogue on a issue of interest to you, where others can participate, please do so at www.facebook.com/sensibleseparation.

Fourth Quarter, 2014

SENSIBLE SEPARATION



Sensible Separation is an interdisciplinary newsletter for professionals assisting families with divorce or separation. If you would like to contribute an article, please submit to gkincaid@hrkklaw.com. For more information about divorce mediation, please visit www.sensibleseparation.com. Another opportunity to share helpful thoughts or insights about our work exists on the *Sensible Separation* FACEBOOK page, which is located at www.facebook.com/sensibleseparation.com.

Isolina Ricci, Ph.D.

Dr. Ricci is a leading expert in child custody. She offers her thoughts on *Move Away* cases and the stress it imposes on children.

Professor Linda Elrod.

Professor Elrod offers an excellent summary of the law of *Move Away* cases in Kansas.

Greg Kincaid, attorney and mediator.

In this short note, I set forth three areas of concern when preparing child support work sheets for *Move Away* cases.

This issue of *Sensible Separation* looks closely at Move-Away cases. I reached out to two nationally recognized leaders to help us with this difficult topic. Many thanks to Isolina Ricci and Professor Linda Elrod for their contribution. I finish the issue with a few brief thoughts on child support calculations for Move Away cases.

A Note About Moving Away and Toxic Stress[1]

By Isolina Ricci, Ph.D.

When a child has two involved parents, a move away can change everyday life for each member of the family. Usually, the children will see far less of one parent on a daily or weekly basis during the school year, while the "school year" parent will be both mother and father to the children around the clock. These are major life changes. How can parents help their children manage their level of the anxiety and stress generated by all these changes? Can parents manage their own stress and not overtax the child's natural capacity to bounce back?

Separation and divorce can generate toxic stress or what researchers now call an ACE, or "adverse childhood experience". "What will happen to me?" Say some children. "Did I do something wrong?" "My Dad (or Mom) left. I'm not important enough." "I'm scared". "If they really love me, why are they doing this?" "I don't have my home anymore. Where do I belong?" All ages of children are affected including teens trying to ride the seesaw of their brain's stormy emotional development stage.

Regardless of a parent's verbal assurances, as the changes pile up, so does a child's stress. Then, if there is a move away, this second blow can sometimes be even more stressful than the divorce. The ground beneath their feet can roll and shake. There may be more imposed changes in routines, schedules, climates, possibly schools, friendships, relatives, neighborhoods, and homes. Despite a child's natural resiliency and the magic of today's electronic communications, a child still needs a parent's strong physical presence and parenting skill to manage the heightened stress generated by divorce and the move.

The Up and Downside of Stress. Stress, fear, and anxiety are all normal experiences. The "good" stress of excitement, challenges, and joy are energizing. But, too much anxious or intense stress can be dangerous. We have heard about how chronic stress can weaken an adult's immune system. Now, research shows that chronic or toxic stress places children, most especially the youngest

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[1] Isolina Ricci © 2014

ones, at risk for negatively altered brain functions, immune systems, and hormonal functions.[2] Children's capacity for managing these intense experiences is limited and their internal systems cannot process them safely. Instead, their brains can be altered thereby limiting their future emotional responses, impulse control, and attention. Toxic stress can even modify how a child's DNA is utilized.[3] As adults, they are at greater risk for a series of health problems and other limitations.

Even more worrisome is that toxic stress is not limited to the obvious dangerous or abusive circumstances but can also be found in everyday behavior. For children of divorce, there are daily opportunities for extreme stress. Examples are many: their parents' anxiety, stress, and diminished parenting before and during the divorce; a parent's emotional issues, the move away with its myriad changes, intense hostility or disrespectful behavior by one or both parents, being in the "miserable middle" of parents' arguments or resentments, carrying messages between parents, the worry or the actual loss of frequent contact with a beloved parent, trying to cope with different rules at mom's than at dad's, loss of friends, extended family, a home, school, or neighborhood, and countless more. The American Academy of Pediatrics is clear: a child's brain is exquisitely interconnected with his or her environment and chronic and toxic stress is to be avoided. So what can parents and professionals do? First, take heart. There is a way through this. Here are a few helpful tips.

Quick Tips for Managing Toxic Stress and Easing the Transition[4]

- **Construct a parenting time schedule that is tailored to your child's temperament, level of development and physical constitution or sturdiness (TLC).** For the youngest children, don't ask them to travel to you, go to them. Set up a generous travel fund including emergency travel.
- **Put each child's needs first.** Be even more aware that with change, each child will need different things from you. One may just want the car to explore, while another needs to stay close and be reassured more. Show by your actions, not just words, that they are your priority, that you will always protect and care for them, and that things will work out with time. If you are the parent separated from the children, spend every minute with the

[2] Some of the dangerous and extremely stressful circumstances are unsafe, incompetent, or neglectful parenting, serious mental or emotional disorders, domestic violence (whether or not it was witnessed by a child), stalking, threats, physical and sexual abuse, criminal activity, drug or alcohol abuse, intense parental conflict, and attempts to alienate a child from the other parent.

[3] An extensive list of universities, government agencies, states, research is now focused on ACEs. See more at: http://www.childtrends.org/glass-half-full-the-bright-side-of-aces-research/#sthash.wXrUnDNq.dpuf. Also see, the American Academy of Pediatricians. http://www.aap.org/en-us/advocacy-and-policy/aap-health-initiative.

[4] For more tips, go to www.momshousedadshouse.com, click on "articles and parenting tips" on the left.

children when you are together, especially that first year apart. Don't leave them with sitters or share time with a new love interest. Make trips to see the children your priority. Drop everything when there is an emergency to be at your child's side. Stay connected.

- **Plan Ahead: Get an assessment from a trained professional for both you and your children before the move.** The impact of the move on everyone can be significant. What one person can manage or even welcome, another one cannot. Try to repeat the assessment a year later to capture unforeseen effects.
- **Face the fact that this will likely be a grieving process for the children and the parent without the children.** It can be heart wrenching and long lasting. There can be resentment, depression, and anger, not just sadness. Parents, talk together about how to ease the transition process for the children and each of you.
- **If you are the 24/7 residential parent, plan for the single parenthood experience.** It's essential that you have more relaxed one-on-one time and fun with the children. Take outings, work on projects together. Keep things calm. Avoid violent movies or TV. Be especially affectionate. Discipline may become more of a challenge as a child may be acting out in response to his or her stress. Ask the other parent to back you up with discipline.
- **Review each day with the children.** Have a family ritual where you hear about the day together or at least a private moment with each child. Don't be rushed. Encourage and applaud when a child managed or understood something. With issues, emphasize that tomorrow is another day to start fresh and that things often take time.
- **Keep or develop a daily structure and be consistent-even when you are the long-distance parent.** Structure is a key stress reducer. It feels predictable and safe. Have house and safety rules and follow through. Emphasize that you are a family, that you look out for one another, and that everyone does their part. This can offer children a sense of ownership, purpose and control.
- **Manage your own stress, anger, depression, or fear so that your children feel safe dealing with their own sadness and frustration.** Use a counselor to help you monitor and manage your stress and any challenges you and the children may have.
- **Support the children's relationship with the other parent.** Always speak about the other parent with respect and with a smile. Have his or her photo in their room. Your support helps their transition. When a decision or issue comes up, take the lead, for example, "I'll ask Dad what he thinks." Take a tip from military families: Use Skype and speakerphones for full family talks with both parents and all the children. Send a weekly update to the other parent-even when he or she is in frequent contact with the children.
- **Be a parent team. Cooperate and communicate.** Hostility and bitterness are major causes of toxic stress for everyone. Be courteous, calm, and diplomatic (CCD). Keep your arguments with the other parent out of earshot and sight of the children. If teamwork is a problem, try using a special parent-business set of guidelines to regain composure and develop agreements[5] It's not easy to be "CCD", but it's the key to a better future.

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[5] A special "parent business" type of relationship is explained in Chapters 4, 5 and communications in Chapter 6 of *The CoParenting Toolkit, by Isolina Ricci*

- **Stay updated!** Use electronics. Both parents can have school and activity calendars and are on email lists. If a child has a cell phone, use it frequently. Send photos, videos, texts, and notes back and forth. Explore on-line communication sites. Resident parent---try to be in touch with your school age-children several times a day. Be creative.

For more notes on "Move Aways", check the websites below.

Isolina Ricci, PhD., is the author of the *Mom's House, Dad's House* books including *Mom's House, Dad's House for KIDS,* and the award winning *The CoParenting Toolkit.* She is a licensed Marriage and Family Therapist, educator, and consultant to attorneys and other professionals.
www.coparentingtoday.com www.momshousedadshouse.com

Relocation: Trying to Move on but is it in the Best Interests of the Child?

*Linda D. Elrod, Richard S. Righter Distinguished Professor of Law and Director,
Children and Family Law Center, Washburn University School of Law

Relocation cases, when one parent attempts to move a child either out of state or a significant distance from the child's other parent, are among the most difficult for courts to decide because they are "no win" situations. The status quo changes and the child will have to establish a new type of contact with at least one parent. The proposed move can generate conflict where there had been none before or can exacerbate a bad situation when the parties are already involved in a high conflict situation.

If the move is at the time of the initial divorce action, the court decides parenting time and residency based on the best interests of the child. Each parent would put on evidence as to why residency with the parent in Kansas or the moving parent would be best for this particular child. The most common scenario, however, occurs when the primary residential custodian of a child announces an intent to move to a new location after an award has been made of custody, residency or parenting time. Kansas statute, K.S.A. 23-3222, provides that a parent entitled to legal custody

or residency of or parenting time with a child shall give written notice by restricted mail, to the other parent not less than 30 days prior to changing the child's residence (even within the state) or taking the child from Kansas for more than ninety days. The change of the residence or the removal **may** be considered a material change of circumstances which justifies modification of a prior order. In Kansas, the party seeking to change custody has the burden of proving that the relocation is a change of circumstances.

If a hearing is held, relocation cases are intensely fact driven because each parent's reasons for relocation and relationships with the child differ. Kansas does not have a presumption for or against relocation but the statute provides that the court shall consider all factors the court deems appropriate including: The effect of the move on the best interests of the child and on any party having rights and the increased cost the move will impose. Most states have a far more expansive list of factors.

If the relocating parent has a good faith reason for the move, such as to be closer to family who can help with child care, a new job paying substantially more money or to stay with a new spouse, and shows that the child's quality of life will be improved, then the nonmoving parent will need to show that the move is not in the child's best interests. Judges look at the nature, quality, extent of involvement, and duration of the children's relationship with each parent. Courts are more likely to allow the primary residential parent to move if there is a good faith reason for the move and the nonmoving parent is not actively involved in the child's daily life or if the move is not very far away. Parents must be prepared to show how the move will impact the child's physical, educational, and emotional development considering the child's age, developmental stage, and needs. Other relevant factors include the quality of the child's relationship with peers and other relatives; strength of ties to the community; the frequency of the contact between the child and each parent; the child's preference; existence of educational advantages; the distance between parents' homes and the cost of alternative arrangements. Mental health experts may be involved. In one Kansas case, even though both parents were described as good parents, the trial court followed the psychologist's recommendation to change custody to the father so the children could remain in Wichita mainly based on "the picture of proven stability" for the children with their schools, friends, and relatives. *In re* Marriage of Bradley, 899 P.2d 471 (Kan. 1995).

A parent who has tried to thwart the other parent's relationship with the child, as evidenced by a pattern of conduct to interfere with access, may not be allowed to move. Likewise, the court will examine the integrity of the nonmoving parent's motives for opposing the move. A parent who objects to the child's relocation to secure a financial advantage, to exercise a measure of control over an ex-spouse as in a domestic violence situation, or to carry on a fight may not be able to convince the court the child should remain. The mere fact that the nonmoving parent's access may be more difficult will not keep most courts from allowing the move. The moving parent should be prepared to show that there are realistic opportunities for adequate parenting time to allow the nonmoving parent and the child to maintain a close relationship and that the parties can afford the costs. In addition the moving parent must be willing to comply with the new arrangements. With

the advent of modern technology, there are many more ways for families to stay connected through the internet and cell phones with video.

Moving a child to another location should not be taken lightly. A parent wishing to move should do his or her homework to show how the child will benefit. Most studies indicate that as a general rule a child benefits from having a quality relationship with both parents.

Long Distant Parenting and Child Support,

By Greg Kincaid.

This is a very brief note on the impact of long-distance visitation costs on child support calculations.

There are three common adjustments that should be considered when parents do not live in close proximity to each other: (a) long-distance visitation costs (transportation expenses); (b) cost of living adjustments; and (c) parenting time adjustments. The Kansas Supreme Court Child Support Guidelines address each of these issues and they are further amplified in important ways by our case law.

A. Long-Distance Parenting Time Costs.

When there is long distance parenting, the increased transportation costs must be equitably allocated between the parents. Our *Kan. Child Support Guidelines, Kan Sup. Ct. Admin Order no. 128* (hereinafter the "Guidelines"), provide:

> IV.E.1. Long-Distance Parenting Time Costs (Line E.1)
>
> Any substantial and reasonable long-distance transportation/communication costs directly associated with parenting time shall be considered by the court.

While court must consider long distance visitation costs, they can *consider* and thereafter refuse to make any adjustment at all. See, *In the Matter of the Paternity of A.L., 316 P.3d 172, 2014 Kan. App. Unpub. LEXIS 27.*

There are four factors that must be weighed in determining whether to make an adjustment

"(1) [w]hich party moved away, thereby causing the expense; (2) the reasonableness of the expenditure; (3) the amount of the expense; and (4) the other relevant factors, which relate to whether the parties should be given a credit or share in the expenses." *In re Marriage of McPheter, 15 Kan. App. 2d 47,50, 803 P.2d 207 (1990).*

A brief review of the case law suggests that the first factor is weighed heavily. For obvious reasons, it is inequitable for one parent to move away--shifting the parenting burdens on the remaining parent, often times so the parent moving away can improve their own financial situation--and then simultaneously expect the remaining parent to shoulder part of the cost of the move.

Assuming the move had no selfish or ulterior motivations, the Court is left trying to simply allocate the burden. There is no guidance on the practical mechanics of this process and the trial courts have not surprisingly been repeatedly challenged by the task.

For example, while it might be tempting to apply some type of formula, as for example is done with out-of-pocket medical expenses, the Court of Appeals was unwilling to adopt this approach. *See, In the Matter of the Parentage of Joshua F. Brown, 39 Kan. App. 2d 26, 176 P.3d 242 2008).* It's not clear from this case, however, whether the court out-right rejects the use of the formula or just reversed because the trial court seemed to think it was required to use a formula (and did not apply its own formula correctly).

The trial court must also be careful not to simply craft an equitable arrangement that is inconsistent with an agreed upon parenting plan unless making specific finding that it is in the children's best interest to do so. See, *In the Matter of the Marriage of Watson, 229 P.3d 420, 2010 Kan. App. Unpub. LEXIS 323.*

B. Interstate Pay Differential.

There are wide variances in the cost of living across the country and, even more so, across the borders of our country. The Guidelines provide:

> III.B.9. Interstate Pay Differential
>
> The cost of living may vary among states. The "Average Annual Pay by State and Industry" as reported by the United States Department of Labor Statistics can be used to compute a value for the interstate pay differential... There is a rebuttable presumption that the adjusted pay amount reflects the variance in average pay. The application of the Interstate Pay Differential is discretionary. The income of the parties will not be subject to an interstate pay differential if both parties live in Kansas or reside in the same metropolitan statistical area (MSA).

The Guidelines permit the courts to use a quotient to convert the value of dollars earned elsewhere to the value of dollars earned in Kansas. The Court may (but is not required) to use the Interstate pay differential if the parties do not both live in the State of Kansas. Notice, however, that if one

parent lives in Missouri, the guidelines do allow the use of the interstate pay differential if both parents reside in the same standard statistical area, e.g. KCMO. While the Interstate Pay Differential helps to put two parents living in two different states on a level playing field, it does not appear to take into account the more frequent situation for move away cases: one parent living in an urban area of Kansas and another parent living in a rural area. The level of wages and the cost of living may vary just as significantly intrastate as they do interstate. Presumably these differences could arguably also be accounted for with an Overall Financial Conditions of the Parties (Line E.6) adjustment.

Another consideration not directly considered by the Guidelines would be where a family is separated not by states, but by countries. The Guidelines do not specifically address the question, but the concept would seem to be equally applicable when entirely different countries are involved, potentially with vastly different salary structures, tax provisions, and costs of living. In one very recent unpublished case, the Court of Appeals did not reject the trial court's consideration of the cost of living adjustment where the father had moved to Toronto. *In re the Marriage of McHenry, 320 P3d 449, 2014 Kan. App. Unpub. LEXIS 169.*

C. Parenting Time Adjustments.

In general, the child support calculations are impacted by the quantity of time the non-custodial parent spends with the children above or below some average or norm. These issues are very complicated when the parents live close together. They grow even more complicated when long-distance parenting is involved. My reading of the Guidelines is that if the parent without physical custody (that lives outside of Kansas) exercises more than 14 consecutive days of access, they are entitled to up to 50% reduction in child support for such period. Strangely, the resident parent is not entitled to any credit (adjustment upwards) unless the non-custodial parent does not exercise the time set forth in the parenting plan.

The Guidelines provide:

> In situations where a child spends fourteen (14) or more consecutive days with the parent not having primary residency, the support amount of the parent not having primary residency from Line F.5 (calculated without a Parenting Time adjustment) may be proportionately reduced by up to 50% of the monthly support from Line F.5. The court may [also] make an adjustment based on the historical non-exercise of parenting time as set forth in the parenting plan.
>
> Of course whether or not a parent is exercising the time set forth in the parenting plan is a matter of fact. See, also, *In re Marriage of Katona, 322 P. 3d. 1026, 2014 Kan. App. Unpub LEXIS 281.*

APPENDIX 2

Greg D. Kincaid

Subject: FW: Initial Mediation Meeting
Attachments: SDOC6794.pdf; 0093_001.pdf; GDKFORM. AGREEMENT TO MEDIATE (6-23-2014) (104571x9E65E).doc

Mitch and Terri,

I want to confirm that Mitch contacted me and, subject to Teri's approval, set your first mediation meeting for 9:00 AM on Thursday, August 14, 2014. The initial meeting usually last approximately two hours.
So that I may have your file opened before you arrive, it would be helpful if one of you could complete and return the informational sheet attached above. You may either scan and email it back, or fax it to me at 913 782 2012.

Please understand that as a mediator I do not represent either of you and that any agreements reached in mediation are therefore always subject to review and approval by your own attorney--if you have one--or the court. I am also attaching the Agreement to Mediate for you review, which must be read and executed before I can commence work. Please review it and bring it, signed, to our first meeting.

At the first meeting, we will also agree on a retainer amount, which is an estimate of the legal fees involved. Unless other arrangements are made, we expect the retainer to be paid in full at the first meeting. My hourly rate is $300.00. There is typically about half an hour of work involved by our office before you arrive and you will be billed for that time. An average retainer is between $2,500 to $3,000, depending on the complexity of the matter. We prefer a check for the retainer, but we can also take a credit or debit card.

Prior to our meeting, if you have not already done so, you may wish to view my webpage, www.sensibleseparation.com. In particular, please look over "What to Bring to My First Appointment." You may also wish to review an article I recently wrote for an ABA publication that I attached.

Feel free to call or email me if you have any questions. If I am for any reason unavailable, you may wish to speak with our paralegal, Lois Lawrenz, or my legal assistant, Martha Huggins.

Thanks and I look forward to meeting you both.

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913 780 2012 (fax)

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Circular 230 Disclosure: In compliance with requirements imposed by the IRS pursuant to IRS Circular 230, we inform you that any U.S. tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing, or recommending to another party any transaction or matter addressed herein.

AGREEMENT TO MEDIATE

The Mediation Process

Mediation is a voluntary process by which a neutral third party assists you in reaching a mutually acceptable agreement as to the issues of visitation and custody of your child(ren), and/or the division of property. My role as your mediator will be to assist you in identifying the issues, reducing misunderstanding, clarifying priorities, exploring areas of compromise and finding points of agreement -- not in telling you how you should resolve those issues. Any agreement reached by you can resolve all or only some of the disputed issues.

Legal Counsel and Legal Advice

As a mediator, I am not acting as an attorney and will not under any circumstances give legal advice to either party. Both parties are advised to seek their own legal counsel at any time during the mediation proceeding.

A mediator may give legal information to both parties as may be necessary for the parties to make informed decisions. However, the mediator cannot give either party legal advice.

Each of the parties is encouraged to seek the advice of independent and separate counsel at any time during the mediation process with regard to his or her individual legal rights and responsibilities.

Each of the parties is requested to seek the advice of independent and separate legal counsel prior to signing any formal separation agreement prepared by an attorney who purports to incorporate the Memorandum of Understanding the parties have designed.

The parties agree that no legal action of any kind will be taken by either of them during the course of mediation, except with the express agreement of the other party and the mediator. Further, if either or both parties have retained counsel prior to mediation, he or she shall be obligated to direct his or her attorney in writing that no action is to be taken on his or her case while the matter is in mediation.

Although the mediator is a licensed Kansas attorney, he/she cannot give legal advice to any participant and he/she cannot represent either or both of them in their marital dissolution or child custody issues.

Communications with the Mediator

The parties will not communicate or meet with the mediator concerning matters in mediation except in the presence of each other during a mediation session unless the parties expressly agree beforehand that communication between the mediator and an individual party may be helpful and appropriate in reaching settlement.

Third Party Involvement

To facilitate the mediation process, the parties shall refrain from discussing the matters in mediation with friends, relatives or others. However, you are encouraged to consult with legal counsel at any time and to consult with mental health professionals or clergy as you may find helpful.

Full Disclosure

Each party shall fully and completely disclose in good faith to the other party and the mediator all financial assets and liabilities, including but not limited to, all account statements and information, such as financial statements, income tax returns, pension and/or profit-sharing plans, or any other documentation. Such disclosure shall include all employee related benefits and shall also include assets that may not have any current value, but may have value in the future, e.g. a stock option. Mediation cannot proceed to completion without these disclosures being made by both parties.

The preparation of budgets and financial statements by each party is an essential part of the mediation process. If either party shall fail or refuse to prepare the documents, the mediator may suspend or terminate the mediation process.

The mediator is not an accountant and any spreadsheet prepared by the mediator is for discussion or illustrative purposes only and may not be relied upon as a substitute for the parties doing the appropriate accounting work themselves or retaining an accountant or attorney to do it for them. The mediator does not do any independent financial review, valuation, or analysis of the information supplied by the parties. If either party believes assets have not been fully or fairly disclosed, it is their responsibility to terminate mediation and seek independent counsel. The parties are encouraged to obtain their own independent appraisals and valuations if they are uncertain as to the value of any asset they own.

Transfers of Property During Mediation

During the mediation process neither of the parties shall transfer, encumber, conceal, sell or in any other way dispose of any tangible or intangible property except in the usual course of business or for the necessities of life. In addition, transfers by either party outside regular monthly expenses shall be disclosed prior to expenditure.

Termination

Any participant or the mediator may terminate mediation at any time, except when the mediation is court-ordered pursuant to the corresponding Kansas or Missouri statutes, in which case the participants may terminate the mediation at any time after the required time.

The mediator will terminate the mediation whenever the mediator believes that: (a) continuation of the process would harm or prejudice one or more of the parties or the children; (b) the ability or willingness of any participant to participate meaningfully in mediation is so lacking that a reasonable agreement is unlikely; (c) the participants' interests are so complex and difficult that the participants cannot prudently reach an agreement without legal or other expert assistance; (d) there is a known or potential conflict of interest on the part of the mediator which would affect the mediator's impartiality; (e) there has not been a fair and full disclosure of all relevant information; (f) the mediator must terminate the mediation to report suspected child abuse; (g) in the mediator's professional judgment the agreement does or will involve overreaching, duress, or unfairness; or, (h) the continuation of the process would harm a participant or the proposed agreement does not protect the best interests of the children.

Confidentiality

Evidence of anything said or of any admission made in the course of the mediation is not admissible in evidence, and disclosure of such evidence shall not be compelled in any civil action in which, pursuant to law, testimony can be compelled to be given. By signing this agreement, the parties are waiving the right to subpoena or otherwise compel the mediator or the mediator's agent to disclose any matter disclosed in the process of setting up or conducting the mediation.

Unless the document specifically states to the contrary and is signed by all parties to the mediation, no document prepared for the purpose of, or in the course of, or pursuant to mediation, or a copy of any such document shall be admitted into evidence, and disclosure of any such document shall not be

compelled in any civil action in which, pursuant to law, testimony can be compelled to be given.

Evidence may be admitted if all persons involved in the mediation consent to its disclosure.

All communications between each participant and the mediator shall be confidential and, in the event of litigation regarding custody or visitation with the children of the participants or any other matters discussed with the mediator, neither participant shall call or cause anyone else to call the mediator as a witness or subpoena his/her records.

If mediation has been court-ordered, the mediator shall report a termination of the mediation to the court, but will not state the reason for termination except when the termination of the mediation is due to a conflict of interest or bias on the part of the mediator.

If subpoenaed or otherwise notified to testify, the mediator will inform the participants immediately so as to afford them an opportunity to quash the process.

The participants understand that mediators have imposed upon them by Kansas Statutes Annotated 38-1522, and amendments thereto, certain obligations concerning the disclosure and reporting of child abuse and neglect. If during the mediation process a matter comes to the mediator's attention which he/she believes he/she is obligated by law to report to any agency or authority, nothing contained herein shall prohibit him/her from making such a report or disclosure. Pursuant to Kansas and Missouri law, the mediator is further obligated to report the commission of a crime during the mediation process or an expressed intent to commit a crime in the future, and nothing herein shall prevent the reporting of such crimes or expressed intents. The participants hereby agree to release and hold the mediator harmless from any damage they may suffer as a result of such disclosures.

Mediation Fees

The parties understand that, unless a different fee is agreed upon in writing, the mediator charges $300 per hour (not per party). Payment of a retainer, in an amount to be agreed upon, must be paid and returned with a signed copy of this Agreement at or before your first scheduled mediation session. The retainer is only an estimate of the fees. Your account must be paid in full before the divorce or other applicable mediation process is completed. We do not charge you for cancelled appointments as long as the cancellation is with at least 24 hours notice. If we don't receive such notice, you will be charged for one hour of time ($300 dollars). Please note, however, even with

notice, we do charge a small amount (approximately .15 of an hour) for the time involved in rescheduling your appointment for you. If the appointment is rescheduled at our request, there is, of course, no charge.

Unless another agreement is reached in mediation, the parties agree to evenly divide the costs of mediation. The mediator cannot and does not attempt to allocate the cost of mediation on any other basis, e.g. "my spouse called you, I didn't, therefore let him (or her) pay for that cost."

Failure to pay mediation fees as directed above will result in a termination of the mediation process. The parties agree that they will pay for mediation (beyond the retainer amount) at the time it is scheduled. If mediator is forced to file any action to collect fees, the cost of collection shall also be borne by the parties.

Mediator Communication with Attorneys

The parties give the mediator permission to communicate with our attorneys to discuss the status of mediation.

File

The parties grant permission to the mediator to destroy their file once an entry of a Decree of Divorce has been made. The parties understand that it is their responsibility to seek the return of any copies they may want before the case is terminated. For this reason, no originals should be given to the mediator and each party should maintain their own files and records and not rely on the mediator to do so.

PARTICIPANTS _____ Date _____

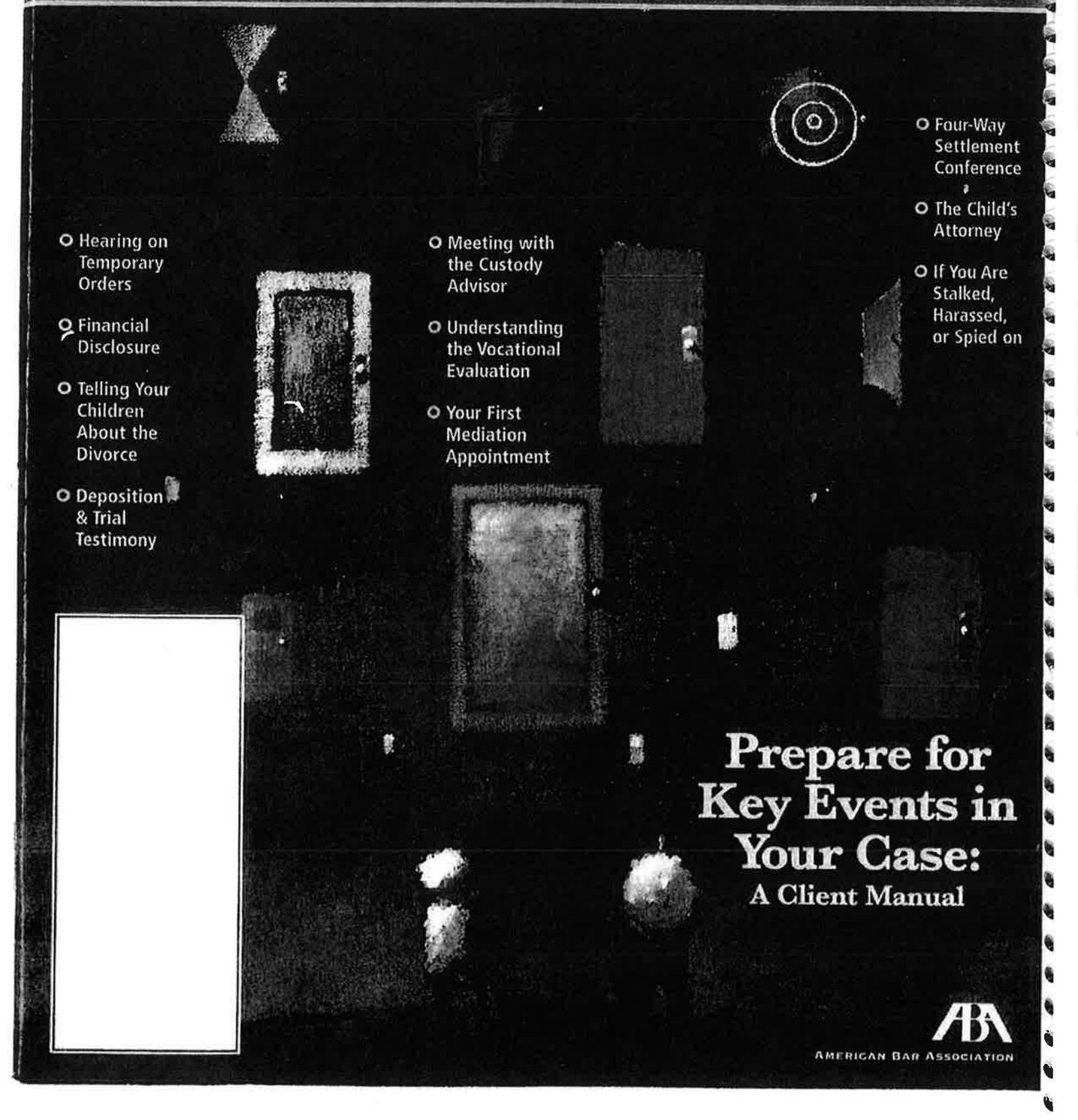
_____ Date _____

MEDIATOR _____ Date _____
GREGORY D. KINCAID

ABA SECTION OF FAMILY LAW

FAMILY ADVOCATE

Summer 2012 • Vol. 35, No. 1



- Hearing on Temporary Orders
- Financial Disclosure
- Telling Your Children About the Divorce
- Deposition & Trial Testimony
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- Your First Mediation Appointment
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Prepare for Key Events in Your Case:
A Client Manual

AMERICAN BAR ASSOCIATION

What to Bring to Your First Mediation Appointment

The "right" documents, information, and attitude

By GREGORY D. KINCAID

A LITIGATED DIVORCE CASE IS RARELY A GRATIFYING EXPERIENCE FOR BOTH SIDES. HOLLYWOOD DRAMA ASIDE, MOST DIVORCE TRIALS DO NOT END WITH ONE SIDE CELEBRATING VICTORY.

At best, there is a sense of resolution. At worst, one and sometimes both spouses feel let down and disappointed by an outcome that is inconsistent with each party's view of what is "fair." Mediation, on the other hand, strives to find win-win solutions. It can be a faster, less intrusive, and less expensive alternative to trial.

My experience has taught me that healthy and wise families often gravitate toward mediation. They inherently have more trust in a cooperative (not competitive) structure for problem solving. The fact that you are reading this article and seriously considering mediation should give you some assurance that you are likely to achieve a satisfactory divorce outcome. I call this a sensible or "adult" divorce.

Candidly, however, one spouse rarely achieves "the best possible outcome" through mediation, because "the best possible outcome" for one spouse too often comes at a hefty price for the other spouse or the children. In mediation, the needs of the individual are often subordinated, or at least tempered, by the needs of others. At bottom, when we are doing this—fairly balancing the needs of others against our own legitimate self-interests—we are processing our divorce in a healthy, mature, or "adult" way.

Congratulations for seeing the wisdom of this approach and being willing to come to the table. Now, the next step, how best to prepare?

There are three distinct parts of the preparation process: (a) assembling documents; (b) familiarizing oneself with the mediation process and family law; and (c) adopting a helpful attitude. The first two are relatively easy. The third part, which is probably the most important, can also be the most difficult.

What documents should I bring?

In general, if you have children, most divorces are going to involve five fundamental issues: a parenting plan (where the children reside), child support (How will expenses for the children be allocated?), maintenance (called "alimony" in some states), division of assets, and division of liabilities.

The first step in your preparation should be to assemble all the reasonable documents that you, your mediator, and your spouse may need to address these five issues (three issues if there are no minor children). For instance, child support is typically driven by the income of both parents. For many families, both parents' incomes are obvious. However, for some families and, in some states, it's not always as simple as one might assume. For instance, should bonus income be included in the child-support calculation? How about car or cell-phone allowances?

These are issues that will be resolved in the mediation process, and the more of this information you can bring to the meeting, the quicker the mediator and your family can move along. Because mediators typically charge by the hour, it's not productive to have lengthy discussions about whether one party is making $80,000 or $85,000 a year. It's easier to simply say, here's my W-2, here's our tax return, or here's a letter from my employer that sets out my exact compensation and benefits.

In addition to your income information, it can be helpful to have a budget prepared for the anticipated expenses of both spouses in their new post-divorce homes. It may be too early in the process to complete a budget in great detail. But if you have Beverly Hills in mind, you may want to have a budget handy so the feasibility of that address can be examined.

Finally, you need to make a list of all assets and liabilities. It's most productive if you can have account statements to verify balances and account names. At some point, the attorney or the mediator must draft agreements allocating the assets between the parties and, if there are account statements, there will be no confusion over which accounts are being described or their exact values. Most mediators and attorneys have a list or a form you can use for this purpose. See also *Divorce Forms: Fact Gathering to Help Your Lawyer* on the back cover of this issue.

In addition to financial documents, if you and your spouse have already agreed upon a parenting arrangement, be prepared to discuss that arrangement. If you have not started the discussion, it might be best to allow the mediator to help you. Typically, this area is emotionally charged and difficult.

What should I know about mediation and family law?

Mediation is an entirely voluntary process. The focus tends to be on dialogue and not debate, consensus and not competition. Typically, the first session is exploratory.

Good mediation reminds me of arranging furniture in a new house. You set things down where you think they might work, but you won't know where things finally fit best until all the pieces are in place and you've lived with it for a while. Mediation is similar. Don't plan on making binding agreements at the first meeting. Instead, focus on possible solutions. Once you've explored those possible solutions and allowed them to settle in your mind for a week or two, then it's more appropriate to think about moving from negotiation to settlement, which typically happens in the second and subsequent meetings.

One of the responsibilities of the mediator is to help the family define their priorities. Accordingly, it may be productive for each spouse to think about and discuss what is really important before starting this process. Keep it general. "No matter what, let's agree to put the children's needs first."

One of the most attractive features of mediation is its ability to be creative. You only get to this realization, however, if you enter the process with an open mind and a willingness to explore all the alternatives.

Because mediators typically charge by the hour, it's not productive to have lengthy discussions about whether one party is making $80,000 or $85,000 a year. It's easier to simply say, here's my W-2

If, for instance, your husband indicates that he is absolutely unwilling to pay maintenance or alimony, be patient and hear the entire concern before reacting. He may be willing to relinquish extra assets in lieu of making monthly maintenance payments. In other words, a husband's interest may not be in denying his wife the stream of payments to which she may be entitled. It may very well be more about the painful process of having to write a check every month. In many instances, a lump-sum payment could actually be advantageous.

BEFORE YOU ARRIVE FOR YOUR first meeting, have a beginner's understanding of the legal issues that need to be resolved. Mediators are generally required to advise you to have your own lawyer. Your attorney should be able to give you a general assessment of the law and some reasonable expectations. Remember, too, that a mediator is a neutral party and cannot give legal advice.

If you arrive at mediation knowing nothing about family law, your mediator will not be irritated or frustrated. This happens. In ten or fifteen minutes, your lawyer can pass along the nuts and bolts you need. You will not, however, win the much-coveted "Client-of-the Year" award by arriving at the first session with a lot of misinformation. So, please try to avoid the free tutorial from Karl down at the gym. What Karl won't tell you is that he was divorced in 1964—in Sweden. Knowing next to nothing is far preferable to knowing Karl's law or, for that matter, mom's law, or Cousin Betty's law!

What's the best attitude to adopt about mediation?

The most important thing you need to bring to your first mediation session is the best possible attitude, or what I've described above as your adult self—capable of pursuing your own legitimate interests without ignoring the interests of other family members. Because of all the normal feelings of loss, anger, and disappointment that so often accompany divorce, it is not always possible to show up with the right attitude or to even know what the right attitude would look like if it were staring you in the face. Eventually, however, you should be able to accept the divorce without feeling like a victim or engaging in blaming or fault-finding. The healthiest outcomes seem to come when families share a common goal of helping each family member adjust to the new divorced-family structure.

Having the right attitude is not always easy. Some patterned ways of thinking get many family members into trouble. These are some of the attitudes to avoid if you can.

Please do not negotiate like Donald Trump trying to buy an office building at a steep discount. This is not business as usual. What sounds like a "good" deal to you may very likely sound like a "bad" deal to your children or your spouse. This is a personal relationship that requires interpersonal skills far more than business acumen. Leave the chisel at home.

An example might help. Assume it is clear that you owe $1,400 in child support. Telling your spouse that you might be willing to pay $1,000 for your children, but not a penny more, is likely to result in a post-mediation call to your doctor. There is only one right answer in this situation, so don't try to negotiate. "I will always support our children above and beyond what I am required to do. What can we talk about next?"

Feeling rushed, pushed, and controlled is not the hallmark of a cooperative process. Patience is helpful—in heaping doses. Don't expect too much from the first mediation session. Please don't forget that you may have been processing this divorce in your head for months or even years. Everyone else is not necessarily on your timeline, so let the rest of us catch up. Just because you are very eager to get out of this marriage does not mean that it's smart to act like it! Let your spouse know that you'll take the time necessary to do it right, not just for you, but also for your whole family.

Feeling rushed, pushed, and controlled is not the hallmark of a cooperative process. Patience is helpful—in heaping doses.

Be open to the possibility that what you think is terribly important may not be. For example, I've seen blood pressure shoot off the chart when one family member understates—or as the mediator in me wants to say, *conservatively depicts*—his or her income. I've had families become quite agitated over whether a spouse's income was $85,000 or $90,000 a year, only to find out that the difference between those two incomes amounts to only $2.50 a month on a child support worksheet. Try to keep an open mind and

simply allow the mediator to explore different options with you, based on various assumptions. Look for areas where you can let go and not dig in.

Mediation can be a very creative process. That's a good thing. So be creative. Try to focus on your interests, and don't get stuck in a particular position. There's a famous mediation story that drives home the distinction between positions and interests.

Position versus interest

Two children are fighting over an orange. Not surprisingly, their mother chops the orange in half and gives one-half to each child. Both were unhappy. As it turns out, one child wanted the peel to make a cake, and the other child wanted the fruit to make a salad. Their mother's resolution to the conflict, although expedient, allowed neither one to get what was really needed. A more thoughtful analysis of their true interests —as opposed to their stated need of one fresh orange—would have allowed the decision maker to reach a more helpful resolution. Likewise, for families, stating what you want is typically not as helpful as clearly defining your interests. Making demands about what we want tends to foster inflexibility in negotiations

Try also to avoid platitudes. It's not uncommon, for instance, for one parent to state that a consistent parenting schedule and not "bouncing kids back and forth" between houses is in the children's best interest. Although this certainly sounds laudable, the practical translation of it by the other parent is "So what you are really saying is that the kids should stay with you and never see me!"

The preparations suggested above should not take more than a few hours and are time well spent. If you can follow these simple steps, your chances of a reasonable outcome are high. Mediation is a powerful process that has worked successfully for many, many families. For more information about the mediation process, talk with your attorney or a local mediator, or ask your lawyer for a copy of *ADR Options: A Client Manual,* a publication from *Family Advocate* (see back cover of this issue). FA

GREGORY D. KINCAID
is an attorney and family law mediator who has practiced for thirty years in Johnson County, Kansas.

The Four-Way Settlement Conference

A settlement conference is a chance to try to resolve your case. Sometimes, a judge will sit in. At other times, the conference is between the parties and their lawyers, and possibly other key people. It is important to be ready for the conference.
Here are some tips to help you prepare.

Before the conference

1. Schedule an appointment with your attorney to plan the settlement conference.
2. Give yourself enough time to provide documents or other information that your lawyer may need at the conference.
3. Share all papers that you intend to bring to mediation with your lawyer before the conference.
4. Make sure you have all reports from experts or evaluators, and ask your attorney any questions you may have.
5. Your lawyer may want to prepare any spreadsheets or schedules, such as asset-debt spreadsheets or parenting-time schedules, so have this information available.
6. Make a list of issues upon which you feel there is agreement.
7. If there is something you have not told your lawyer, tell it now before the meeting.
8. Prepare a game plan or strategy with your attorney and make sure you understand it.
9. Discuss with your attorney whether the conference is confidential.
10. Assign who will talk about which topics during the conference. Stick to your assignments.

During the conference

1. Refer to the child as "our" child, not "my child."
2. Use your lawyer if you do not understand something. Ask questions.
3. Be polite. No name calling. Do not argue. Let the other side talk without interruption.
4. Keep an open mind as to settlement possibilities and principles. Participate in good faith.
5. Listen.

—CARL W. GILMORE

MEDIATION/DIVORCE INFORMATION:

Name and address:

Husband: _____

_____

_____

Telephone: _____

E-mail address: _____

Wife: _____

_____

_____

Maiden name: _____

Telephone: _____

E-mail address: _____

Social Security numbers: Husband_____

Wife _____

Dates of birth: Husband _____

Wife _____

Driver's license: State: Husband_____ Wife_____

DL Number _____ _____

Place of Marriage (City, County and State): _____

Date of Marriage: _____

Minor children?

_____

Date of Birth: _____Gender:_____

SSN: _____

_____

Date of Birth: _____Gender:_____

SSN: _____

_____

Date of Birth: _____Gender:_____

SSN: _____

ATTORNEYS:

Husband: _____

Wife: _____

APPENDIX 3

CONTACT INFORMATION

Clerk of the Appellate Courts
Kansas Judicial Center
301 SW 10th Avenue, Room 374
Topeka Kansas 66612-1507
Telephone: 785.296.3229
Fax: 785.296.1028
Email: appellateclerk@kscourts.org

Rules Adopted by the Supreme Court

Court Rules Relating to Mediation

Rule 903
Court Rules Relating to Mediation

Ethical Standards for Mediators Prefatory Comment

Approximately three years ago, leaders of several organizations in the alternative dispute resolution (ADR) field discussed the need to establish formal guidelines for the conduct of mediators. The American Arbitration Association (AAA), the American Bar Association (ABA) and the Society of Professionals in Dispute Resolution (SPIDR) created a joint committee to draft standards that would serve as a general framework for mediators. John D. Feerick, Dean of the Fordham University School of Law, and a member of the AAA board, chaired the committee.

The function of the committee was to develop a set of standards to serve as a general framework for the practice of mediation. The effort was a step in the development of the field and a tool to assist practitioners in it--a beginning, not an end. The resultant Rule 903 developed primarily from the AAA/ABA/SPIDR efforts is intended to apply to all types of mediation. It is recognized, however, in some cases the application of these standards may be affected by laws or contractual agreements. Slight modifications to the AAA/ABA/SPIDR guidelines were made by the Advisory Council on Dispute Resolution and the director in order to comport with current Kansas law and practice.

Rule 903 is intended to perform three major functions: to serve as a guide for the conduct of mediators; to inform mediating parties; and to promote public confidence in mediation as a process for resolving disputes. The standards draw on existing codes of conduct for mediators and take into account issues and problems that have surfaced in mediation practice. They are offered in the hope they will serve an educational function and provide assistance to individuals, organizations, and institutions involved in mediation.

Mediation is a process in which an impartial third party--a mediator--facilitates the resolution of a dispute by promoting voluntary agreement (or "self-determination") by the parties to the dispute. A mediator facilitates communications, promotes understanding, focuses parties on their interests, and seeks creative problem solving to enable parties to reach their own agreement. These standards give meaning to this definition of mediation and are adopted as the standards for any person mediating a court-connected case not excluded by Rule 902, or a case falling under K.S.A. 5-501 et seq.

(a) Self-Determination: A Mediator Shall Recognize Mediation Is Based on the Principle of Self-Determination by the Parties.

Self-determination is the fundamental principle of mediation. It requires the mediation process rely upon the ability of the parties to reach a voluntary, uncoerced agreement.

COMMENT
The mediator may provide information about the process, raise issues, and help parties explore options. The primary role of the mediator is to facilitate a voluntary resolution of a dispute. Parties shall be given an opportunity to consider all proposed options.
A mediator cannot personally ensure each party has made a fully informed choice to reach a particular agreement, but it is a good practice for the mediator to make the parties aware of the importance of consulting other professionals, where appropriate, to help them make informed decisions.

(b) Impartiality: A Mediator Shall Conduct Mediation in an Impartial Manner.
The concept of mediator impartiality is central to the mediation process. A mediator shall mediate only those matters in which she or he can remain impartial and evenhanded. If at any time the mediator is unable to conduct the process in an impartial manner, the mediator is obligated to withdraw.

COMMENT
A mediator shall avoid conduct that gives the appearance of partiality toward one of the parties. The quality of the mediation process is enhanced when parties have confidence in the impartiality of the mediator.
When mediators are appointed by a court or institution, the appointing agency shall make reasonable efforts to ensure that mediators serve impartially.
A mediator should guard against partiality or prejudice based on the parties' personal characteristics, background or performance at the mediation.
(c) Conflicts of Interest: A Mediator Shall Disclose All Actual and Potential Conflicts of Interest Reasonably Known to the Mediator. After Disclosure, the Mediator Shall Decline to Mediate Unless All Parties Choose to Retain the Mediator. The Need to Protect Against Conflicts of Interest Also Governs Conduct that Occurs During and After the Mediation.

A conflict of interest is an association or relationship which might create an impression of possible bias. The basic approach to questions of conflict of interest is consistent with the concept of self-determination. A mediator has a responsibility to disclose all actual and potential conflicts reasonably known to the mediator and could reasonably be seen as raising a question of impartiality. If all parties agree to mediate after being informed of conflicts, a mediator may proceed with mediation. If, however, the conflict of interest casts serious doubt on the integrity of the process, the mediator shall decline to proceed.

A mediator must avoid the appearance of conflict of interest both during and after mediation.

COMMENT
A mediator shall avoid conflicts of interest in recommending the services of other professionals. A mediator may make reference to professional referral services or associations which maintain rosters of qualified professionals. Potential conflicts of interest may arise between administrators of mediation programs and mediators and there may be strong pressures on the mediator to settle a particular case or cases. The mediator's commitment must be to the parties and the process. Pressures from outside the mediation process should never influence the mediator to coerce the parties to settle.
(d) Competence: A Mediator Shall Mediate Only When the Mediator Has the Necessary Qualifications to Satisfy the Reasonable Expectations of the Parties.

Any person may be selected as a mediator, provided the parties are satisfied with the mediator's qualifications. Training and experience in mediation, however, are often necessary for effective mediation. A person who offers herself or himself as available to serve as a mediator gives parties and the public the expectation she or he has the competency to mediate effectively. In court-connected or other forms of mandated mediation, it is essential mediators assigned to the parties have requisite training and experience.

COMMENT
Mediators should have available for the parties information regarding their relevant training, education and experience.
The requirements for appearing on a list of mediators must be made public and available to interested persons. When mediators are appointed by a court or institution, the appointing agency shall make reasonable efforts to ensure that each mediator is qualified for the particular mediation.
(e) Confidentiality: A Mediator Shall Maintain the Reasonable Expectations of the Parties with Regard to Confidentiality.

The reasonable expectations of the parties with regard to confidentiality shall be met by the mediator. The parties' expectations of confidentiality depend on the circumstances of the mediation and any agreements they may make. A mediator shall not disclose any matter that a party expects to be confidential unless given permission by all parties or unless required by law or other public policy.

COMMENT
The parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations. Since the parties' expectations regarding confidentiality are important, the mediator should discuss these expectations with the parties.
If the mediator holds private sessions with a party, the nature of these sessions with regard to confidentiality should

be discussed prior to undertaking such sessions.
In order to protect the integrity of the mediation, a mediator shall avoid communicating information about how the parties acted in the mediation process, the merits of the case, or settlement offers. The mediator may report, if required, whether parties appeared at a scheduled mediation.
Confidentiality should not be construed to limit or prohibit effective monitoring, research, or evaluation of mediation programs by responsible persons. Under appropriate circumstances, researchers may be permitted access to statistical data and, with the permission of the parties, to individual case files, observations and interviews.
(f) Quality of the Process: A Mediator Shall Conduct the Mediation Fairly, Diligently, and in a Manner Consistent with the Principle of Self-Determination by the Parties.

A mediator shall work to ensure a quality process and to encourage mutual respect among the parties. A quality process requires a commitment by the mediator to diligence and procedural fairness. There should be adequate opportunity for each party in the mediation to participate in the discussions. The parties decide when and under what conditions they will reach an agreement or terminate a mediation.

COMMENT
A mediator may agree to mediate only when he or she is prepared to commit the attention essential to an effective mediation.
Mediators should only accept cases when they can satisfy the reasonable expectations of the parties concerning the timing of the process.
A mediator should not allow a mediation to be unduly delayed by parties or their representatives.
Where appropriate, a mediator should recommend parties seek outside professional advice, or consider resolving their dispute through arbitration, counselling, neutral evaluation, or other processes. A mediator who undertakes, at the request of the parties, an additional dispute resolution role in the same matter assumes increased responsibilities and obligations that may be governed by the standards of other professions.
A mediator shall withdraw from a mediation when incapable of serving or when unable to remain impartial.
A mediator shall withdraw from mediation or postpone a session if the mediation is being used to further illegal conduct, or if a party is unable to participate due to drug, alcohol, or other physical or mental incapacity.
Mediators should not permit their behavior in the mediation process to be guided by a desire for a high settlement rate.
(g) Advertising and Solicitation: A Mediator Shall be Truthful in Advertising and Refrain from Promises and Guarantees of Results.

(h) Fees: A Mediator Shall Fully Disclose and Explain the Basis of Compensation, Fees, and Charges to the Parties.

Parties should be provided sufficient information about fees at the outset of a mediation to determine if they wish to retain the services of a mediator. If a mediator charges fees, the fees shall be reasonable considering, among other things, mediation service, type and complexity of the matter, expertise of the mediator, time required, and rates customary in the community. The better practice in reaching an understanding about fees is to set down arrangements in a written agreement.

COMMENT
A mediator who withdraws from a mediation should return any unearned fees to the parties.
A mediator should not enter into a fee agreement which is contingent upon the result of the mediation or amount of the settlement.
Co-mediators who share a fee should hold to standards of reasonableness in determining the allocation of fees.
(i) Obligations to the Mediation Process: Mediators Have a Duty to Improve the Practice of Mediation.

COMMENT
Mediators are regarded as knowledgeable in the process of mediation. They have an obligation to use their knowledge to help educate the public about mediation; to make mediation accessible to those who would like to use it; to correct abuses; and to improve their professional skills and abilities.

[History: New rule promulgated February 16, 1996, effective July 1, 1996; effective October 7, 2004.]

See also: Rule 1001 - Electronic and Photographic Media Coverage of Judicial Proceedings

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Rules Adopted by the Supreme Court

Court Rules Relating to Mediation

Rule 901
Court Rules Relating to Mediation

Mediation

(a) Mediation under this Rule is the process by which a neutral mediator assists the parties in reaching a mutually acceptable agreement as to issues of a dispute. The role of the mediator is to aid the parties in identifying the issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise, and finding points of agreement. An agreement reached by the parties is to be based on the decisions of the parties and not the decisions of the mediator.
(b) An attorney may act as a mediator for multiple parties in a dispute if:
(1) The attorney-mediator clearly informs the parties of the attorney-mediator's role as a mediator including the confidentiality of the process pursuant to K.S.A. 60-452a and they consent, in writing, to this arrangement;
(2) The attorney-mediator defines the legal issues to the parties only in the presence of all parties in the matter;
(3) The attorney-mediator advises and encourages the parties to seek independent legal advice before the parties execute any settlement agreement drafted by the attorney-mediator;
(4) The attorney-mediator has not represented one of the parties beforehand in a matter that is the subject of the mediation; and
(5) The attorney-mediator does not act on behalf of any party in court nor represent one party against the other in any related matter. However, the attorney-mediator may act as an attorney for a party after the completion of the mediation process if the subsequent representation is clearly distinct from the mediated issues.
(c) An attorney-mediator shall withdraw as mediator if any of the parties so requests, or if any of the conditions stated in paragraph (b) are no longer satisfied. Upon withdrawal, the attorney-mediator shall not continue to act, in any capacity, on behalf of any of the parties in the matter that was the subject of the mediation.
(d) An attorney acting as a mediator is not the legal representative of the parties and there is no attorney-client relationship between the parties and the attorney-mediator.
(e) Nothing in this Rule restricts the activity of:
(1) attorneys representing clients in the negotiation process, or
(2) intermediaries, as defined by EC 5-20 of the Code of Professional Responsibility.
(f) In addition to the requirements of this Rule, an attorney involved in mediation of family disputes must comply with the Kansas Standards of Practice for Lawyer Mediators in Family Disputes, an appendix hereto.

JUDICIAL COUNCIL COMMENT:

The Judicial Council added section (a) to Supreme Court Rule 901 because the members believed a definition of mediation was necessary to distinguish mediation from other methods of dispute resolution, such as negotiation, arbitration and conciliation. This definition is taken from K.S.A. 23-601, which provides for court-ordered mediation in child custody cases.

Sections (b) and (c) are patterned after the Oregon disciplinary rule on mediation, which was recently adopted by the Oregon Supreme Court. These sections set out the basic obligations of an attorney engaging in mediation.

Section (d) makes it clear that an attorney doing mediation is not acting as an attorney in a representative capacity and no attorney-client relationship exists. This section eliminates the confusion in earlier ethical decisions, which erroneously decided that attorneys could not engage in mediation because the attorney-mediator was representing both parties. (See Silberman, Professional Responsibility Problems of Divorce Mediation, 16 Fam. L. Q. 107 [1982].)

The Judicial Council added section (e) because the members were concerned that the new rule on mediation may be perceived as limiting the negotiation activities of attorneys representing clients in adversarial activities. Negotiating on behalf of a client is distinct from mediating a dispute, because in mediation the mediator is not acting on behalf of either party and the parties negotiate for themselves. Also, the rule does not apply to the role of a mediator or intermediary as defined by the Code of Professional Conduct (EC 5-20) or the proposed Kansas Rules of Professional Conduct (Rule 2.2) because these codes envision the mediator or intermediary acting as an attorney, representing clients. Again, in mediation, as defined by this rule, the mediator is not acting as a representative and there is no attorney-client relationship.

Under section (f), attorneys who mediate family disputes must also comply with the more detailed Standards of Practice for Lawyer Mediators in Family Disputes. The Judicial Council added this section to clarify the interrelationship between the mediation rule and these Kansas Standards.

[History: New rule effective May 6, 1987.]

See also: Rule 1001 - Electronic and Photographic Media Coverage of Judicial Proceedings

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Rules Adopted by the Supreme Court

Court Rules Relating to Mediation

Rule 902
Court Rules Relating to Mediation

Qualifications of Dispute Resolution Providers Under the Dispute Resolution Act

The qualifications for dispute resolution providers and trainers apply to individuals who handle cases referred by the state courts or under the Dispute Resolution Act, K.S.A. 5-501 et seq. No standards or qualifications should be imposed upon any person chosen and agreed to by the parties. These qualifications should not prevent parties having free choice of process, program and the individual neutral.

A)Definitions:

1. "mediation" means the intervention into a dispute by a third party who has no decision-making authority, is impartial to the issues being discussed, assists the parties in defining the issues in dispute, facilitates communication between the parties and assists the parties in reaching resolution. The agreement reached by the parties shall be based on the decisions of the parties and not on the decisions of the mediator;
2. "arbitration" means a proceeding in which a neutral person or panel hears a formal case presentation and makes an award, which can be binding or nonbinding upon the parties relative to a prior agreement;
3. "neutral evaluation" means a proceeding conducted by a neutral person who helps facilitate settlement of a case by giving the parties to the dispute an evaluation of the case;
4. "summary jury trial" means a formal case presentation to a jury and judge which results in a nonbinding decision;
5. "mini trial" means a formal case presentation to a party representative and an expert neutral person who makes a nonbinding decision;
6. "settlement" means a proceeding in which someone other than the presiding judge assists the parties in reaching a resolution;
7. "conciliation" means a proceeding in which a neutral person assists the parties in reconciliation efforts;
8. "neutral person" or "neutral" means the impartial third party who intervenes in a dispute at the request of the parties or the court in order to help facilitate settlement or resolution of a dispute.

(B)Mediation:

1. The director of dispute resolution shall keep a list of approved mediators, trainers, and trainings, and shall review any requests for approval within 60 days of the receipt of the written application and materials required by the director.
2. To be approved as a mediator, an applicant must:

   (a) Complete the required training for the types of cases the applicant wishes to receive approval to mediate,

   (b) Sign an agreement to follow the ethical standards of Supreme Court Rule 903,

   (c) Co-mediate with or be supervised by an approved mentor mediator for three cases during the first year of approved mediation practice with cases in the area the trainee took his/her training after completing core training, and receive an acknowledgment from the mentor mediator that the applicant has demonstrated the basic skills and knowledge as outlined in the

statute,

(d) Comply with Supreme Court Rule 904 concerning continuing mediator education, and

(e) Be of good moral character and be mentally and emotionally fit to engage in the active and continuous practice of mediation.

3. All approved mediators shall have participated in core mediation training of 16 hours. Training components must include conflict resolution techniques, neutrality, agreement writing, ethics, role playing, communication skills, evaluation of cases, and the laws governing mediation. Initial training must be done in a continuous manner within a 120-day period. Core training enables the applicant to mediate disputes which may include, but are not limited to, neighborhood, community, victim/offenders, small claims, education, or farmer-lender problems. In addition, applicants wishing to mediate certain types of cases must have additional training as specified below or as established by the director of dispute resolution:

(a) To mediate child custody or parenting cases, the applicant must have 14 hours of mediation skill training and 10 hours of training in child development, family systems, psychological aspects of divorce, domestic violence, or related substantive areas in addition to core training.

(b) To mediate parent/adolescent disputes, an applicant must have 4 hours of mediation skill training and 10 hours of training in child and adolescent development, family psychology, the parent-adolescent relationship, or related substantive areas in addition to core training.

(c) To mediate general civil (Chapter 60) cases, the applicant must have 14 hours of mediation skill training and 10 hours of training related to the subject being mediated or the civil litigation system in addition to core training.

(d) To mediate juvenile dependency cases the mediator must have 24 hours of dependency mediation training and have one of the following: a Bachelor's degree or higher in psychology, social work, marriage and family therapy, conflict resolution, or other behavioral science substantially related to family relationships; a Juris Doctor degree with experience in the field of juvenile law or family law; be an approved domestic and parent/adolescent mediator with at least three years of experience in mediation, counseling, psychotherapy, social work or any combination thereof, preferably in a setting related to juvenile dependency court or domestic relations; status as a judicial officer, practicing in juvenile dependency court; or have the training and/or experience acceptable to the court to be served;
(e) To be approved as a mentor mediator the applicant must have 40 hours or more of training, must already be an approved mediator, must have completed 10 mediation cases, and must have two references from referral sources. Mediators who meet these requirements will be approved for co-mediation supervision. The director of dispute resolution has the discretion to change the number of required mediation cases.

(f) In addition to requirements set forth in (B)(1)(2)(3), a trainer of an approved course must have the following experience:

1. Three years' practice of mediation,
2. One year's substantive experience in the subject area of the mediation training, and
3. Serve as an assistant or coach in three trainings with an approved trainer.

(g) Any training being conducted by an approved trainer may be monitored and evaluated by the director of dispute resolution.

(h) If an applicant has specialized experience or training but does not specifically meet the requirements set forth above, the applicant may apply to the director of dispute resolution for special approval. Role-play cases or other comparable simulations can be substituted for the co-mediation experience required in (B)(2)(c) with the approval of the director of dispute resolution.

(i) The director of dispute resolution will develop and implement the following:

1. An appeals process for a person to use in appealing a mediator application denial; and
2. Procedures for processing complaints regarding a mediator or a mediator trainer.

(j) The director of dispute resolution, for purposes of character and complaint investigations, may obtain such information as bears upon the character, fitness, and general qualifications of the candidate, or may investigate a complaint about a mediator or a mediation trainer.

(k) Complaints, reports, or testimony in the course of disciplinary proceedings or appeals process under the Office of Judicial Administration procedures shall be deemed to be made in the course of judicial proceedings. All participants shall be entitled to judicial immunity and all rights, privileges and immunities afforded public officials and other participants in actions filed in the courts of this state.

COMMENT

• The qualifications for mediators and trainers are the result of over five years of study. Recommendations and

suggestions were received from members of the Supreme Court ADR Committee, Heartland Mediators Association, Kansas Bar Association, National Institute for Dispute Resolution, Society for Professionals in Dispute Resolution, American Bar Association, Academy of Family Mediators, State Justice Institute, judges, mediators, therapists and various representatives from other states. These recommendations and suggestions were collated and modified to encompass the statutory mandates of K.S.A. 5-501, current mediator training occurring in Kansas, national trends for minimum requirements, and future needs.

• Conditions, including the availability of individuals with mediation training and experience, will vary between rural and urban areas. The minimum qualifications are listed to give judges and approved centers a beginning point to establish local policy. Judges and centers are encouraged to add requirements as necessary for the type of case to be mediated and the availability of individuals with additional qualifications.

[History: New rule promulgated February 16, 1996, effective July 1, 1996; Am. effective October 7, 2004.]

See also: Rule 1001 - Electronic and Photographic Media Coverage of Judicial Proceedings

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Rules Adopted by the Supreme Court

Court Rules Relating to Mediation

Rule 904
Court Rules Relating to Mediation

Continuing Education for Mediators

(a) Each mediator within the State of Kansas seeking approval from the director of dispute resolution, shall earn a minimum of six (6) credit hours of approved mediation education each calendar year.

(b) The initial training year will begin July 1, 1996 and end on December 31, 1997. Subsequent training years will begin on January 1 and end on December 31.

(c) The director of dispute resolution shall approve all programs for continuing mediator education credit and shall designate the number of credit hours which can be earned by actual program attendance.

(d) Each mediator required by this rule to earn continuing mediator education credits shall submit an annual report to the director of dispute resolution of continuing education credits earned by the mediator in such form as prescribed by the director of dispute resolution.

(e) The director of dispute resolution may grant waivers or extensions of time to complete continuing mediator education requirements because of hardship, disability or other good cause.

[History: New rule promulgated February 16, 1996, effective July 1, 1996.]

See also: Rule 1001 - Electronic and Photographic Media Coverage of Judicial Proceedings

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Rules Adopted by the Supreme Court

Court Rules Relating to Mediation

Rule
Court Rules Relating to Mediation

Appendix

Kansas Standards of Practice for Lawyer
Mediators in Family Disputes
Introductory Comments by the Family Law Advisory Committee

In the past three years, the Family Law Advisory Committee (FLAC) of the Kansas Judicial Council has been studying ethical standards for attorneys doing mediation of family disputes. Because there was no uniformly recognized standards at the time FLAC began its study, the Committee began drafting its own standards. However, in August of 1984, the American Bar Association's House of Delegates approved a set of standards for lawyers acting as mediators in family disputes. Although many members of FLAC preferred the FLAC standards, it was the consensus of the Committee that FLAC should adopt the ABA Standards, unless there was substantial disagreement with the ABA Standards. The Committee members reached this decision because they believed that general uniformity and the interpretation of the ABA Standards in other jurisdictions could assist Kansas in implementing the Standards.

To a great extent, FLAC has retained the ABA Standards as the ABA adopted them. However, there is one ABA position with which FLAC substantially disagrees. The members of FLAC disagree with the ABA's prohibition against a mediator acting as an attorney for either party after the mediation. Under the ABA prohibition an attorney-mediator, who mediated with a couple involved in a child custody dispute, could not be hired as an attorney by the father five years later to represent the father in a workmen's compensation case. According to the ABA, the reason for this prohibition is the protection of the neutrality of the mediation process. For example, if an attorney-mediator mediated a divorce between a professional spouse and a homemaker and after the mediation, the professional spouse hired the mediator as an attorney, the homemaker may question whether the mediator favored the professional spouse during mediation in the hopes of obtaining future legal retainers.

The members of FLAC, however, rejected the ABA position as too restrictive, particularly in rural areas. For example, a total prohibition against later representation would mean that attorneys in rural Kansas would not act as mediators because they would lose the parties as future legal clients. Consequently, FLAC adopted a less restrictive alternative by limiting later representation to those matters that are clearly distinct from the mediated issues. Although this position does not protect the public to the same extent as the ABA prohibition, FLAC believed that attorneys are accustomed to making decisions concerning conflicts of interest and attorneys should be trusted to distinguish those issues that are clearly distinct from the mediated issues. Attorneys can also seek advice from the KBA Ethics Advisory Committee if they are uncertain about whether the later representation of a mediation client is distinct from the mediation issues.

Besides these areas of disagreement, there are other FLAC amendments to the ABA Standards. However, these changes are not intended to substantially change the ABA Standards, but rather are seen as improvements and clarifications of the original proposal. Also, FLAC views these Standards as compatible with the statutory duties of an attorney-mediator who does court-ordered mediation under K.S.A. 23-601 et seq.

The following material sets out the amended ABA Standards.

PREAMBLE

FOR THE PURPOSES OF THESE STANDARDS, FAMILY MEDIATION IS DEFINED AS A PROCESS IN WHICH A LAWYER HELPS FAMILY MEMBERS RESOLVE THEIR DISPUTES IN AN INFORMATIVE AND CONSENSUAL MANNER. THIS PROCESS REQUIRES THAT THE MEDIATOR BE QUALIFIED BY TRAINING, EXPERIENCE AND TEMPERAMENT; THAT THE MEDIATOR BE IMPARTIAL; THAT THE PARTICIPANTS REACH DECISIONS VOLUNTARILY; THAT THEIR DECISIONS BE BASED ON SUFFICIENT FACTUAL DATA; AND, THAT EACH PARTICIPANT UNDERSTANDS THE INFORMATION UPON WHICH DECISIONS ARE REACHED. WHILE FAMILY MEDIATION MAY BE VIEWED AS AN ALTERNATIVE MEANS OF CONFLICT RESOLUTION, IT IS NOT A SUBSTITUTE FOR THE BENEFIT OF INDEPENDENT LEGAL ADVICE.

I. THE MEDIATOR HAS A DUTY TO DEFINE AND DESCRIBE THE PROCESS OF MEDIATION AND ITS COST BEFORE THE PARTIES REACH AN AGREEMENT TO MEDIATE.

SPECIFIC CONSIDERATIONS: Before the actual mediation sessions begin, the mediator shall conduct an orientation session to give an overview of the process and to assess the appropriateness of mediation for the participants. Among the topics covered, the mediator shall discuss the following:

A. The mediator shall define the process in context so that the participants understand the differences between mediation and other means of conflict resolution available to them. In defining the process, the mediator shall also distinguish it from therapy or marriage counselling.

B. The mediator shall obtain sufficient information from the participants so they can mutually define the issues to be resolved in mediation.

C. It should be emphasized that the mediator may make suggestions for the participants to consider, such as alternative ways of resolving problems and may draft proposals for the participants' consideration, but that all decisions are to be made voluntarily by the participants themselves.

D. The duties and responsibilities that the mediator and the participants accept in the mediation process shall be agreed upon. The mediator shall instruct the participants that either of them or the mediator has the right to suspend or terminate the process at any time, unless the mediation has been ordered pursuant to K.S.A. 23-601 et seq.

E. The mediator shall assess the ability and willingness of the participants to mediate. The mediator has a continuing duty to assess his or her own ability and willingness to undertake mediation with the particular participants and the issues to be mediated. The mediator shall not continue and shall terminate the process, if in his or her judgment, one of the parties is not able or willing to participate in good faith. The mediator shall be satisfied that the parties can intelligently and prudently consent to all the waivers involved in the mediation process.

F. The mediator shall explain the fees for mediation. It is inappropriate for a mediator to charge a contingency fee or to base the fee on the outcome of the mediation process.

G. The mediator shall inform the participants of the need to employ independent legal counsel for advice throughout the mediation process. The mediator shall inform the participants that the mediator cannot represent either or both of them in their marital dissolution or in any legal action concerning the mediated issues.

H. The mediator shall discuss the issue of separate sessions. The mediator shall reach an understanding with the participants as to whether and under what circumstances the mediator may meet alone with either of them or with any third party.

I. It should be brought to the participants attention that emotions play a part in the decision-making process. The mediator shall attempt to elicit from each of the participants' a confirmation that each understands the connection between one's own emotions and the bargaining process.

J. The mediator shall warn the participants that their interests are in conflict. The mediator shall explain that mediation by an attorney of a dispute between participants whose interests are in conflict is being allowed only because of the participants' consent.

K. The mediator shall inform the participants that neither of them is receiving legal representation from the mediator, that the mediator is not providing the services lawyers typically provide, and that no attorney-client relationship will exist.

II. THE AGREEMENT TO MEDIATE SHALL BE IN WRITING.

SPECIFIC CONSIDERATIONS:

The agreement to mediate shall be set forth in a written contract, signed by the participants, and shall contain all the conditions, consents, and waivers required under Standard I. of this rule. In addition the contract shall state:

A. There shall be a full and fair disclosure of all information.

B. That information revealed in the course of mediation shall be considered confidential by all participants except that information required by law to be disclosed or information that the participants agree, in writing, to disclose to third parties, shall not be considered confidential.

C. The participants shall waive the right to subpoena or otherwise compel the mediator or the mediator's agent to disclose any matter disclosed in the process of setting up or conducting the mediation.

D. That either participant or the mediator may terminate the mediation at any time, unless the mediation has been ordered by the court pursuant to K.S.A. 23-601 et seq.

E. The fee to be charged for the mediation.

F. The conditions under which the mediator shall suspend or terminate the mediation. These shall include:

1. The participants' interests are so complex and difficult that the participants cannot prudently reach an agreement without legal or other expert assistance.

2. There is a known or potential conflict of interest on the part of the mediator which would affect the mediator's impartiality.

3. There has not been a fair and full disclosure of all relevant information or a participant is unable or unwilling to participate in the mediation process

4. The continuation of the mediation process would harm a participant or the proposed agreement does not protect the best interests of the children.

5. In the mediator's professional judgment the agreement does or will involve overreaching, duress, or unfairness.

G. Although the conditions of mediation are embodied in the contract, the mediator shall explain the conditions to the participants and satisfy himself or herself that the participants understand and consent to the conditions of the mediation.

III. THE MEDIATOR SHALL NOT VOLUNTARILY DISCLOSE INFORMATION OBTAINED THROUGH THE MEDIATION PROCESS WITHOUT THE PRIOR CONSENT OF BOTH PARTICIPANTS.

SPECIFIC CONSIDERATIONS:

A. The mediator shall inform the participants that the mediator will not voluntarily disclose to any third party any of the information obtained through the mediation process, unless such disclosure is required by law, without the prior consent of the participants. The mediator also shall inform the parties of the limitations of confidentiality.

B. If subpoenaed or otherwise noticed to testify, the mediator shall inform the participants immediately so as to afford them an opportunity to quash the process.

IV. THE MEDIATOR HAS A DUTY TO BE IMPARTIAL.

SPECIFIC CONSIDERATIONS:

A. The mediator shall not represent either party during the mediation process in any legal matters. However, the mediator may act as an attorney for a party after the completion of the mediation process if the subsequent legal representation is clearly distinct from the mediation issues. If the mediator has represented one of the parties beforehand, the mediator shall not undertake the mediation unless the prior representation was clearly distinct from the mediated issues.

B. The mediator shall disclose to the participants any biases or strong views relating to the issues to be mediated both in the orientation session, and also before these issues are discussed in mediation.

C. The mediator must be impartial as between the mediation participants. The mediator's task is to facilitate the ability of the participants to negotiate their own agreement, while raising questions as to the fairness, equity and

feasibility of proposed options for settlement.

D. The mediator has a duty to ensure that the participants consider fully the best interests of the children, that they understand the consequences of any decision they reach concerning the children. The mediator also has a duty to assist parents to examine the separate and individual needs of their children and to consider those needs apart from their own desires for any particular parenting formula. If the mediator believes that any proposed agreement of the parents does not protect the best interests of the children, the mediator has a duty to inform them of this belief and its basis. The mediator shall terminate the mediation if the mediator believes the agreement of the parents does not protect the best interests of the children.

E. The mediator shall not communicate with either party alone or with any third party to discuss mediation issues without the prior written consent of the mediation participants.

V. THE MEDIATOR HAS A DUTY TO ASSURE THAT THE MEDIATION PARTICIPANTS MAKE DECISIONS BASED UPON SUFFICIENT INFORMATION AND KNOWLEDGE.

SPECIFIC CONSIDERATIONS:

A. The mediator shall assure that there is full financial disclosure, evaluation and development of relevant factual information in the mediation process, such as each would reasonably receive in the discovery process, or that the parties have sufficient information to intelligently waive the right to such disclosure.

B. In addition to requiring this disclosure, evaluation and development of information, the mediator shall promote the equal understanding of such information before any agreement is reached. This consideration may require the mediator to recommend that either or both obtain expert consultation in the event that it appears that additional knowledge or understanding is necessary for balanced negotiations.

C. The mediator may define the legal issues, but shall not direct the decision of the mediation participants based upon the mediator's interpretation of the law as applied to the facts of the situation. The mediator shall endeavor to assure that the participants have a sufficient understanding of appropriate statutory and case law as well as local judicial tradition, before reaching an agreement by recommending to the participants that they obtain independent legal representation during the process.

VI. THE MEDIATOR HAS A DUTY TO SUSPEND OR TERMINATE MEDIATION WHENEVER CONTINUATION OF THE PROCESS WOULD HARM ANY PARTICIPANT.

SPECIFIC CONSIDERATIONS:

A. If the mediator believes that the participants are unable or unwilling to meaningfully participate in the process; or that the issues are so complex and difficult that the participants cannot prudently reach an agreement; or that reasonable agreement is unlikely; the mediator may suspend or terminate mediation and should encourage the parties to seek appropriate professional help. The mediator shall recognize that the decisions are to be made by the parties on the basis of adequate information. The mediator shall not, however, participate in a process that the mediator believes will result in harm to a participant.

B. The mediator shall assure that each person has had the opportunity to understand fully the implications and ramifications of all options available.

C. The mediator has a duty to assure a balanced dialogue and must attempt to diffuse any manipulative or intimidating negotiation techniques utilized by either of the participants.

D. If the mediator has suspended or terminated the process, the mediator should suggest that the participants obtain additional professional services as may be appropriate.

VII. THE MEDIATOR HAS A CONTINUING DUTY TO ADVISE EACH OF THE MEDIATION PARTICIPANTS TO OBTAIN LEGAL REVIEW PRIOR TO REACHING ANY AGREEMENT.

SPECIFIC CONSIDERATIONS:

A. Each of the mediation participants should have independent legal counsel before reaching final agreement. At the beginning of the mediation process, the mediator should inform the participants that each should employ independent legal counsel for advice at the beginning of the process and that the independent legal counsel should be utilized throughout the process and before the participants have reached any accord to which they have made an emotional commitment. In order to promote the integrity of the process, the mediator shall not refer either of the participants to any particular lawyers. When an attorney referral is requested, the parties should be referred to a

Bar Association list if available. In the absence of such a list, the mediator may only provide a list of qualified family law attorneys in the community.

B. The mediator shall inform the participants that the mediator cannot represent either or both of them in their marital dissolution.

C. The mediator shall obtain an agreement from the husband and the wife that each lawyer, upon request, shall be entitled to review all the factual documentation provided by the participants in the mediation process.

D. Any memo of understanding or the proposed agreement which is prepared in the mediation process should be separately reviewed by independent counsel for each participant before it is signed. While a mediator cannot insist that each participant have separate counsel, they should be discouraged from signing any agreement which has not been so reviewed. If the participants, or either of them, choose to proceed without independent counsel, the mediator shall warn them of any risk involved in not being represented, including where appropriate, the possibility that the agreement they submit to a court may be rejected as unreasonable in light of both parties' legal rights or may not be binding on them.

See also: Rule 1001 - Electronic and Photographic Media Coverage of Judicial Proceedings