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2 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
3 **IN AND FOR THE COUNTY OF LOS ANGELES**

4 In re the Marriage of

5 Wife and

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7 Husband

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} Case No: BD xx xxx

} ATTORNEY DISQUALIFICATION

} AGREEMENT FOR PARTIES IN

} MEDIATION

12 **IT IS HEREBY STIPULATED BY THE PARTIES AND THEIR COUNSEL** that:

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14 1. (Wife) and (Husband) are participants in mediation with Forrest S.
15 Mosten, Mediator.

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17 2. The engagement of consulting attorneys by each party will facilitate the
18 mediation process by providing legal advice and support to each party.

19
20 3. The parties further stipulate that the below disqualification of attorneys upon
21 any termination of mediation will permit the attorneys to support the parties'
22 commitment to resolve all matters within the safe confidential container of
23 mediation without threats of court action or court action itself.

24 4. Both parties stipulate that should mediation terminate and the attorneys are
25 disqualified, there will be additional expense and time necessary to engage
26 substitute legal counsel.
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1 5. The parties agree that all communications by either the party or the
2 mediator with their respective attorney will remain confidential. The
3 mediator may speak with either or both attorneys outside the presence of
4 the parties

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6 6. The parties shall mutually agree whether the mediator shall send
7 summary agreements directly to the attorneys .

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9 7. If either party wants his/her attorney to attend a mediation session,
10 this may occur without the agreement of the other party. However, the
11 party intending to have his/her lawyer attend a mediation session must
12 give at least 3 days notice to the other party and to the mediator so that
13 the other party may bring her/his lawyer. If a set time for a mediation is
14 not convenient for either lawyer, it is agreed that the date of the mediation
15 will be changed to accommodate both parties and both lawyers.

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17 8. Attorney #1 has been retained by Wife to advise her during the course of this
18 mediation and Attorney #2 has been retained by Husband to advise him during
19 the course of this mediation. Each attorney named above has agreed to be
20 bound by the terms of this agreement.. Should the mediation terminate due to
21 request for termination by either party, either attorney, or the mediator, each
22 attorney named above, and any attorney in association with such attorney,
23 shall immediately withdraw and is forever disqualified from appearing as an
24 attorney of record in contested matters for either party named above in this
25 proceeding or in any other family law or civil matter involving both parties. An
26 attorney shall be deemed "in association" if, at any time during the pendency of
27 these proceedings or future family law proceedings between these parties,
28 such attorney is the employer or employee of, or co-employee with, or shares a

1 relationship of partnership or independent contractor status with any attorney
2 named above.

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4 9. The Court shall reserve jurisdiction over enforcement of this
5 Stipulation which is a binding and enforceable agreement of the
6 parties and not contingent on the resolution of other issues of the
7 marriage.
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9 10. The Court reserves jurisdiction of all other issues of the marriage
10 and all prior orders shall remain in effect.
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12 11. A facsimile of photo copy of this Stipulation/Order shall be deemed
13 as valid as an original and this Stipulation may be signed in
14 counterparts.
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16 12. This signed Stipulation shall not be filed with the court unless either
17 party determines it is necessary to enforce this stipulation. The party
18 seeking enforcement shall be entitled to file this stipulation with the
19 court without further notice and this Stipulation shall be entered as an
20 order of the court pursuant to Code of Civil Procedure Section 664.6.
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23 **IT IS SO STIPULATED:**
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25 _____, 2019

26 _____
27 Wife

28 _____, 2019

Husband

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APPROVED AS TO FORM:

Dated: _____, 2019 _____

Attorney for Husband

Dated: _____, 2019 _____

Attorney for Wife

**PROTOCOL FOR USE OF
CONSULTING LAWYER IN MEDIATION**

1. If either of you wishes to consult an attorney, you will let the other party and me know
2. You will only consult mediation friendly lawyers, unless a different agreement is made. Basic training qualifications for an effective mediation friendly consulting lawyer in mediation are:
 - a) a 40 Hr Mediation Course and
 - b) 2 Day Min Basic Collaborative Law Training.
3. The local Collaborative Practice Group (www.lacfla.org), of which I am an active member provides a number of qualified consulting lawyers
4. I have your authority to provide referrals to either of you without compromising my neutrality;

- 1 5. My referral may be separate lists of attorneys to each of you or a single list of attorneys that
2 each of you may use
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4 6. You both will need to discuss and agree as to whether all communications with your
5 attorney will remain confidential or whether you will share the advice if it provides
6 information or different perspectives than have been discussed in mediation;
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8 7. Once engaging an attorney, you will need to discuss and agree whether I send summary
9 agreements to them, I may communicate with them, and what the lawyers' role will be.
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11 5. If either of you wish for your attorney to attend a mediation session, this may occur
12 without the agreement of the other party. However, the party intending to have his/her lawyer
13 attend must give at least 3 days notice to the other party and to me so that the other party may
14 bring her/his lawyer. If a set time for a mediation is not convenient for either lawyer, it is
15 agreed that the date of the mediation will be changed to accommodate both of you and both
16 lawyers.

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REPRESENTING CLIENTS EFFECTIVELY IN FAMILY LAW MEDIATION
By Forrest S. Mosten and Elizabeth Potter Scully*

Introduction

What does a “mediation consulting attorney” do? As more and more clients seek the services of family lawyers to support and assist them in mediation, lawyers in turn have an opportunity to think critically about the kinds of services that support mediating parties most effectively. Mediation consulting attorneys certainly perform traditional attorney tasks such as drafting and reviewing settlement agreements, although they may perform these tasks differently in the mediation context. There are many other less traditional roles consulting attorneys can play which materially benefit clients and create lucrative practice expansion opportunities. This article explores the difference between traditional advocacy and

1 effective mediation representation through three alternative lawyering roles –
2 scholar, teacher and negotiation coach.

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4 **1. Be a Scholar: Know and Use Mediation Research¹**

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6 Mediation, especially in the family law context, has been widely studied.
7 There is a tremendous amount of empirical information available about mediation,
8 including without limitation who chooses to mediate; the mediation process;
9 outcome and satisfaction; impact of timing of mediation, number of sessions, use of
10 directive strategies; and the list goes on. Familiarity with mediation research, and
11 strategic use of that research in advising clients, can help clients maximize chances
12 of success in mediation.²

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15 For example, research indicates that the factors most predictive of settlement
16 are (1) the parties' perception of the mediator's ability to provide insights into their
17 own feelings; and (2) the mediator's ability to aid the parties in understanding the
18 feelings of children and ex-spouses.³ If we as consulting attorneys are aware that
19 insight into clients' own feelings as well as those of their children and former
20 spouse promotes settlement, why not put effort into helping our clients gain that
21 insight?
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26 ¹ See Mosten and Scully, *Complete Guide to Mediation*, 2nd Edition, Appendix B: Highlights in Divorce
27 Mediation Research, pages 209-216 (ABA Family Law Section, 2015).

28 ² For the best compilation of research on mediation between two covers, see Constance Beck and
Bruce Sales: *Family Mediation: Facts and Myths*, published by the American Psychological
Association, 2001. While this book needs updating, it is a solid foundation for our work.

³ Pearson, 1989.

1 Other research indicates that the “active ingredients” of mediation include (1)
2 the call for parental cooperation over the long run; (2) the opportunity to address
3 underlying emotional issues; (3) helping parents to establish a businesslike
4 relationship; and (4) avoidance of divisive negotiations at a critical time for family
5 relationships.¹ Think of the many ways consulting attorneys could support
6 mediation by working with clients on these issues.
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8 A final example relates to the timing of mediation. Several empirical studies
9 have found that mediating early is more likely to result in settlement than waiting
10 to mediate later in the litigation process. This is inconsistent with the conventional
11 wisdom that mediation should only take place once all discovery has been
12 completed and the case is essentially ready for trial. Consulting attorneys can add
13 value by encouraging early use of mediation while simultaneously identifying and
14 helping fill information gaps early to ensure that clients have a sufficient basis for
15 informed consent without missing the window of opportunity for settlement.
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18 **Be a Teacher: Educate Clients about Divorce Dynamics**

19 Clients are not born, they are taught. Clienthood is not a genetic condition.
20 Most people need attorneys to explain, clearly and patiently, the keys to success as
21 a client in order to have their goals met and enjoy a positive lawyer-client
22 relationship.
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24 Clients who are educated about general divorce dynamics are likely to be
25 more self-aware and have greater insight into the post-separation behavior of their
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28 ¹ Emery, R.E, Sbarra, D. and Griver, T. (2005) *Divorce Mediation: Research and Reflections*, Family Court Review, vol. 43, Issue 1, 22-37.

1 spouses. Since (as research shows) mediation success depends on the ability to
2 articulate one's own needs and interests as well as the ability to acknowledge the
3 other participants' needs and interests, the more insight and empathy your client
4 has, the more likely your client will contribute productively to the mediation as well
5 as get her own needs met.
6

7 There are many ways to approach the subject of divorce dynamics. Conceptual
8 frameworks can be extremely helpful. For example, you can point out the distinct
9 divorce relationships involved (e.g. Maccoby and Mnookin's four types of divorce—
10 spousal divorce, parental divorce, economic divorce, and legal divorce).¹ In the
11 spousal divorce, sexual, psychological and social intimacy is brought to an end. In
12 the parental divorce, the parties' respective parental roles are redefined to
13 accommodate new arrangements for the children. The economic divorce involves
14 transition away from an economic relationship based on a single household. The
15 legal divorce is aimed at producing a written document governing what will happen
16 economically and in terms of parenting post-dissolution. These different
17 relationships are obviously intertwined, but can unfold at different speeds and with
18 different levels of acrimony and chaos. Using these relationships as a framework
19 for discussion, check in with your client as to the status of each as a way of
20 assessing where the parties are in the process and what implications there may be
21 for mediation timing, agendas and likelihood of success.
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28 ¹ Maccoby, Eleanor E. and Mnookin, Robert H., *Dividing the Child: Social and Legal Dilemmas of Custody*, pages 19-57 (1992).

1 Another useful framework for discussing divorce dynamics is the model of
2 cycles of grief developed by the Swiss psychologist Elisabeth Kübler-Ross.¹ This
3 model, which identifies a cycle of emotions including shock, denial, anger,
4 bargaining, guilt, depression and acceptance, can be used as a tool for mitigating
5 feelings of loss. Because divorce represents many losses - the loss of a relationship
6 and companionship, lost connections to extended family and community, loss of an
7 identity, and loss of each spouse's hopes and dreams for the relationship and for
8 their long-term future, the cycles of grief model applies to divorce experience.
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11 Parties in the **shock/denial** stage may feel stunned or numb; they may try to
12 avoid the very notion of the pending divorce by deflecting efforts to talk about what
13 is happening, refusing to respond, procrastinating or acting as though nothing has
14 changed. Parties in the **anger** stage may vent, express frustration and fury at the
15 separation and focus on punishment or vengeance ("I want to hire the nastiest
16 divorce attorney I can find and take my ex to the cleaners!") **Bargaining** parties try
17 to change the outcome of the relationship by fantasizing about "what ifs" that may
18 be irrelevant to the other party or otherwise unrealistic ("If I show my ex I can
19 change the way s/he always wanted, maybe s/he will come back.") During the
20 **depression** stage, the person takes on as his or her responsibility the failures in the
21 relationship and surrenders to the sorrow of the divorce ("I am worthless. This is
22 all my fault - no wonder my ex left. I will be alone forever. Who would possibly
23 want to be with me?"). Finally, in the **acceptance** phase, the person develops an
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¹ Kübler-Ross, Elisabeth, *On Death and Dying*, 1969.

1 ability to focus on the future and move forward towards it (“This has been really
2 hard, but I am ready to be done and move on. I want to do what needs to be done
3 to get this whole thing finished.”)

4 Though the model identifies an overall pattern, a party’s transition through these
5 phases does not occur in a perfectly linear way.¹ To the contrary, parties can move
6 back and forth between and among the stages for months or years before arriving at
7 acceptance. To further complicate matters, chances are the two parties will be at
8 different stages in the process during any given interaction or negotiation.

9 Educating clients about divorce dynamics is productive for a number of reasons.
10 People going through divorce often feel isolated; normalizing their experience can be
11 comforting. Clients are also often comforted and helped by the reminder that their
12 feelings will change over time. Adopting the posture of a teacher and helping clients
13 contextualize their own experiences builds trust and reassures clients that you
14 have insight into their struggle. Gaining insight into their own emotional
15 processing gives clients self-awareness which may help them differentiate and
16 articulate their short-term needs from their long-term needs. It may also help
17 clients recognize and empathize with the other spouse’s parallel struggles in a
18 manner that facilitates bridging the gap between them.

24 **2. Be a Coach: Prepare Clients for Negotiation**

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28 ¹ Kübler-Ross, Elisabeth and Kessler, David, *On Grief and Grieving: Finding the Meaning of Grief Through the Five Stages of Loss* (2007)

1 In traditional representation, family lawyers are the key players in the game. Not
2 only do we strategize, but are the leading players in negotiation and the sole players
3 in court advocacy and drafting. In mediation, the key players are the clients. Lawyers
4 can still carry proverbial clipboards and whistles around their necks, but the clients are
5 on the field also. Sometimes, lawyers assume the role of “player-coach” in partnership
6 with the client.
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9 The lawyer coach can teach the client essentials of negotiation theory and give
10 supervised individual training to the client in preparation for the mediation session.
11 Helping the client develop creative options and a plan for the negotiation may be one of
12 the consulting lawyer's most important roles. In her groundbreaking article "Toward
13 Another View of Legal Negotiation," Professor Carrie Menkel-Meadow makes a persuasive
14 case that thorough and creative negotiation planning, not style of presentation, is most
15 effective in achieving negotiation success.¹ The consulting attorney can help the client
16 assess the strengths and weaknesses of various proposals and help the client develop not
17 only an initial proposal but also backup proposals based on anticipated responses. The
18 lawyer can coach the client on how to present a proposal in a way that maximizes the
19 likelihood it will be heard and received positively by the other party.
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24 Before a negotiation, offer the client an opportunity to consult with you to
25 develop a strategic plan and to role-play making and responding to offers. Spend
26 enough time working with your client to unpack and explore the client’s own
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1 underlying needs and goals in order to help develop priorities and clear objectives
2 for the negotiation. Brainstorm these needs and goals with the client and list them.
3 Have the client rank and prioritize them and help the client think critically about
4 the subjective value that client places on each one. This process may require more
5 than one session to give the client sufficient time for reflection. What additional
6 information might the client need, if any, to prioritize her needs and goals in a
7 thoughtful and informed way? Identifying information gaps and options for filling
8 them in can save clients time and money and facilitate mediation. Clients will fare
9 better in mediation when they have a clear sense of their own strategic endgame, as
10 opposed to mediating in a purely reactive, ad hoc fashion.
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13 As with divorce dynamics, conceptual frameworks are useful here. There are
14 many conceptual models for negotiation which you can use to provide structure for
15 your client preparation. Professor Russell Korobkin of UCLA School of Law sets
16 forth one such model in his casebook *Negotiation Theory and Strategy*;² many other
17 scholars have articulated such models.³
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20 Consulting attorneys should explain to clients fundamental negotiation
21 concepts such as BATNA (Best Alternative to a Negotiated Agreement)¹ and work
22 with clients to articulate their BATNA's in advance of working mediation sessions.
23 In the context of family law mediation, the most common BATNA is to litigate;
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26 ¹ Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*,
31 UCLA L. REV. 754, 818-21 (1984).

27 ² *Negotiation Theory and Strategy*, 3d Edition (Wolters Kluwer Law & Business 2014).

28 ³ See e.g. Mnookin, Robert H., *Beyond Winning: Negotiating to Create Value in Deals and Disputes*
(2000); Lewicki, R.J., Barry, B. and Saunders, D.M., *Essentials of Negotiation*, 4th Edition (McGraw –
Hill/Irwin (2007)).

1 assessment of the BATNA, therefore, will involve a discussion of the law as it
2 applies to the disputed issues and an assessment of the relative strengths and
3 weaknesses of the parties' legal positions. Comparing a negotiated agreement to the
4 BATNA and quantifying the differences between the two will help the client
5 determine his or her initial reservation point (i.e. the tipping point at which the
6 BATNA is better for the client than a negotiated agreement.) Reservation points can
7 always be adjusted during negotiation to accommodate new information. Strategic
8 planning of this kind can help clients avoid what Professor Korobkin calls the
9 "cardinal sins" of negotiation, namely (a) agreeing to a deal which renders the client
10 worse off than the BATNA; and (b) missing out on a deal which would have rendered
11 the client better off than the BATNA.
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15 There are other ways to add value as a negotiation coach. For example, talk to
16 clients about ways in which they might try to promote their interests in the
17 mediation. Many clients initially gravitate towards power-based techniques (e.g.
18 coercion, intimidation, using status and resources to overpower opponents) which
19 can sometimes be effective but can also engender emotional responses that lead to
20 impasse, damage reputations and relationships and make future dispute resolution
21 even harder.
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24 Help the client to analyze the personalities involved (including those of the
25 mediator and the opposing party's consulting attorney), communication dynamics,
26 and psychological factors which may influence how the negotiations unfold. For
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¹ Fisher, Roger and Ury, William, *Getting to Yes: Negotiating Agreement Without Giving In* (1983).

1 example, one common psychological factor in family law mediation is reactive
2 devaluation, a cognitive bias that acts to devalue proposals that originate from an
3 antagonist. The other side might be more amenable to considering a proposal that
4 appears to originate from the mediator, or is raised as a hypothetical, than one that
5 comes directly from the spouse. Anticipating and strategizing about how to defuse
6 reactive devaluation is a highly effective aspect of consulting attorney negotiation
7 coaching.

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10 Progressive law schools emphasize role playing for teaching essential skills such
11 as client counseling, negotiation, and trial practice. In effect, you can become the
12 client's clinical instructor by rehearsing a negotiation and then giving constructive
13 feedback. You can do this type of rehearsal in the presence of an associate or
14 paralegal to get a useful outside perspective. Have the client record the rehearsal
15 on his or her Smartphone and review the recording together.

17 **Conclusion**

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19 Lawyers are more than just scriveners or legal encyclopedias. Our access to
20 relevant research on mediation and on emotional dynamics of divorce, our experience
21 working with families in transition, and our expertise in negotiation theory and practice
22 are commodities with tremendous value for mediation clients. By thinking outside the
23 traditional attorney box and leveraging our specialized experience and expertise in
24 creative ways, consulting attorneys can serve mediation clients more effectively while also
25 expanding our practices.

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28 *Forrest S. Mosten, CFLS has been in private mediation practice since 1979 specializing in
complex legal and financial issues and high conflict dynamics. He also serves as a non-

1 litigation family lawyer who offers limited scope representation for clients in mediation and
2 self- represented litigants. He is an Adjunct Professor of Law at UCLA School of Law where
3 he teaches Mediation, Family Law Practice: A Non-Litigation Approach, Lawyer as
4 Peacemaker, and The Lawyering Process: The Lawyer-Client Relationship.

5 Elizabeth Potter Scully, CFLS is a founding partner of the Los Angeles family law firm
6 Jacobson Scully Shebby LLP. She serves on the Board of Directors of Levitt & Quinn
7 Family Law Center and is an adjunct clinical faculty member at UCLA School of Law,
8 where she teaches Mediation and Negotiation. She is the recipient of the Association of
9 Family and Conciliation Courts' 2016 Meyer Elkin Award for the article judged as the best
10 of those published in each volume of *Family Court Review*.

11 Mr. Mosten and Ms. Scully are co-authors of the Complete Guide to Mediation, 2nd Edition
12 (2015) and the Lawyer's Guide to Unbundled Legal Services (forthcoming, 2017) published
13 by the ABA Section on Family Law. They have presented jointly at the ABA Family Law
14 Section, the Beverly Hills Bar Association, and with Judge Thomas Trent Lewis for
15 CFLR/The Rutter Group.