Divorce Mediation: Getting It Done and Getting It Right

By Franklin R. Garfield

Marital dissolutions are often negotiated by the parties under the auspices of a mediator, a process that typically involves multiple meetings spread over a period of months.[1] The process is concluded with a stipulated Judgment of Dissolution of Marriage that does double duty as the parties' marital settlement agreement. That Judgment should not only resolve the issues; it should pass muster with the family law professionals who may be called upon to review it and serve the parties well as the future unfolds.

Every mediator has his or her own strategies and techniques for brokering a settlement that the parties can both live with. There are thus significant differences in the process. Mediated settlements must conform to the statutory schemes that govern mediation and dissolution of marriage. The goal should be uniformity when it comes to these settlements. Following these practice tips may help to achieve that goal.

The Role of the Mediator

A mediator's job is to help the parties resolve disputed issues and, at least in the divorce context, to document the deal.

A mediator should ensure that there is no confusion about his or her role. Mediation clients sometimes assume that the mediator is representing both parties. To the contrary, the mediator is representing neither party. Along the same lines, the mediator should inform the parties that he or she may provide legal information and guidance; however, he or she is not giving the parties legal or tax advice, or telling them what to do. These admonitions should be stated in the mediation agreement and confirmed in the Judgment.

Provisions along these lines should be incorporated into the Judgment that concludes the case:

The mediator had no power to decide disputed issues for the parties and even though the mediator was an attorney, the mediator did not represent both parties jointly or either party individually. Specifically, without limitation, the mediator did not inform the parties with respect to all arguments that could be made on their behalf if the parties elected to negotiate through lawyers or to go to trial before a public or private judge. In entering into the settlement

[1] It is generally understood that over 90% of all divorce cases are settled out of Court. A sizeable percentage of those settlements are mediated, although exact figures are unavailable. In the 2017-2018 fiscal year, 32,330 petitions for dissolution of marriage were filed in the Los Angeles Superior Court, and only 2,772 cases were resolved after trial. Judicial Council of California, *2019 Court Statistics Report* (Statewide Caseload Trends), Table 11c, at 156.

set forth in this Judgment, the parties have given such weight as they deem appropriate to the laws of the State of California, the arguments available to each of them, the analysis and advice they have received from attorneys, accountants, or other advisors (if any), and their own notions of fairness.

The parties acknowledge that at various times during the course of the mediation, the mediator provided them with legal information. However, the mediator did not provide them with legal, financial, or tax analysis or advice. Specifically, without limitation, the mediator did not analyze any of the issues in the case from either party's point of view, or advise either party with respect to what he or she should do. The parties had the opportunity to obtain independent legal, financial, and tax advice throughout the mediation process, as well as independent review of the Judgment prior to its execution, and the parties in fact obtained such advice and review as they have deemed appropriate from attorneys, accountants and other advisors of their own selection.

The parties were advised by the mediator that Section 721 of the *California Family Code* specifies that a husband and wife are in a fiduciary relationship that imposes a duty of the highest good faith and fair dealing on each of them and that prohibits either of them from taking unfair advantage of the other. The parties were further advised that Section 1100 of the *California Family Code* specifies that the management and control of community property are subject to the rules governing fiduciary relationships until such time as the parties' community property has been divided by the parties or by a Court, and that each party has an obligation to make full disclosure to the other of all material facts and information regarding the existence, characterization, and valuation of all assets in which the community has or may have an interest and all debts for which the community is or may be liable, and to provide equal access to all information and records that pertain to the value and character of those assets and debts, upon request.

The mediator was not requested to investigate or confirm the nature, extent, or value of the parties' community, quasi-community, or separate property (including, without limitation, assets *and* liabilities). The mediator relied solely upon the parties' representations regarding the nature and extent of their assets and liabilities, and the mediator had no obligation to determine the value of any asset or the amount of any liability.

The mediator was not requested to investigate or confirm the nature or extent of the parties' income and expenses. The mediator relied solely upon the parties' representations regarding the nature and extent of their income and expenses, and the mediator had no obligation to determine the nature and extent of their income and expenses.

Any such investigation or confirmation of the facts upon which this Judgment was based was beyond the scope of the services the mediator was retained to render, the parties had no expectation, intention, or understanding that the mediator would conduct any such investigation or confirmation, no such investigation or confirmation was authorized or requested by either party, and the mediator conducted no such investigation or confirmation.

The mediator was not requested to opine on the provisions of the Judgment. Any such opinion was beyond the scope of the services the mediator was retained to render, and the parties had no expectation, intention, or understanding that the mediator would render any such opinion. The parties expressly acknowledge that the mediator expressed no opinion whatsoever with respect to the substance of the settlement set forth in this Judgment.

The parties acknowledge and agree that they have not been told that any provision of this Judgment is "standard." The parties have reviewed each and every one of the provisions of this Judgment, and have negotiated those provisions as necessary to reflect their agreement and to meet their needs.

The parties acknowledge that they have the right to resolve all issues through adversarial legal proceedings in which each of them is represented by separate and independent counsel and disputed issues would be adjudicated by a public or private judicial officer. The parties have elected to resolve all issues covered by this Judgment through mediation. In making that election, the parties have given such weight as they deem appropriate to the delay, expense, inconvenience, uncertainty and risk inherent in adversarial legal proceedings, as well as the physical and emotional burden of such proceedings on themselves, their children and others. The parties acknowledge that the resolution of the issues set forth in this Judgment may be different in material respects from a settlement they might have negotiated through counsel or the adjudication of all issues by a private or public judge as the culmination of adversarial legal proceedings.

Analysis and Advice

The mediator should advise the parties of their right to get any analysis and advice they deem appropriate from an attorney, accountant or other advisor of their choice. Some mediators require the parties to consult counsel. Other mediators recommend that the parties consult counsel. Still others tell the parties that it is up to each of them to decide whether or not to consult counsel. On the one hand, a mediator has no obligation to ensure that either party gets legal or tax advice. On the other hand, as a matter of professional responsibility, mediators should ensure that the parties have an opportunity to do so at every stage of the mediation process. Since analyzing the strengths and weaknesses of the parties' positions is inherently subjective, the parties should obtain that analysis from their attorneys or other professionals, not the mediator.

California Law

A divorce mediator should explain the laws of the State of California to the parties; preferably in writing so the parties do not have to rely on their memory or their notes. While there are mediators who de-emphasize (or even ignore) California law in assisting the parties to craft a settlement that serves their purposes and meets their needs, this is not a best practice. There are several reasons:

To begin with, most parties want to know their legal rights and duties. They can then make decisions with respect to resolving the issues in their case that are truly informed.

Moreover, California law is the default if the parties do not agree otherwise.

Finally, a marital settlement agreement that conforms to California law is more likely to pass muster with the attorneys the parties may consult.

Especially if the parties make agreements that one party may later come to regret, the mediator should ensure that the parties are informed with respect to California law.

For example, the parties may agree to an unequal division of community property. This is permissible. Per marriage of *Dellaria & Blickman-Dellaria* (2009) 172 Cal.App.4th 196, 201: "The court's role with regard to a proper stipulated disposition of marital property is to accept the stipulation and, if requested, to incorporate the disposition into the judgment." While California law provides that each party is entitled to receive half of the parties' community property, it does not mandate that result.[2] A marital settlement agreement set forth in a stipulated judgment should state: "The parties have been informed that community property is owned half by each party, and that each party is entitled to receive half of the community property upon the dissolution of their marriage. The parties have nonetheless agreed to an unequal division of their community property." A statement along these lines guards against the possibility that a party may subsequently claim that he or she didn't know his or her legal rights, or wasn't told his or her legal rights, or didn't understand his or her legal rights.

If the parties agree to waive the right to request or receive spousal support from each other, the stipulated judgment should also set forth the applicable law. A statement along these lines will suffice: "The parties have been informed that under California law, after a long marriage, the Court would ordinarily retain jurisdiction over spousal support until the death of either party, the remarriage of the party seeking support, or a further order of Court. The parties have nonetheless agreed to waive the right to request or receive spousal support fully, finally and forever."

With respect to all settlements negotiated by the parties in mediation that diverge from a conventional resolution, there should be consideration, and that consideration should be recited on the face of the settlement agreement. The last thing a mediator would ever want to hear is "what did I get in exchange for what I gave up?" or, worse, "how could you have let this happen?"

The parties may of course make any deal that serves their purposes and meets their needs; they

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[2] Section 2550 of the *California Family Code* allows the parties to divide community property by written agreement and contemplates that they can agree on a lopsided division if the division is evidenced by a written agreement or an oral stipulation in open court. The court must accept the parties' agreed disposition of their property. *Marriage of Cream* (1993) 13 Cal.App.4th 81, 91. Section 2550 does not require any such written agreement to be notarized; nor does it require unrepresented parties to be advised of their right to legal counsel.

are not obligated to follow California law; their settlement does not have to pass muster with attorneys or the Los Angeles Superior Court. The challenge that may confront a mediator: The parties negotiate a settlement fraught with problems that the parties may not have considered. On the one hand, a mediator is understandably reluctant to talk the parties out of a settlement they are both willing to make. On the other hand, a conscientious mediator should point out potential complications that the parties may have not considered. A mediator is not doing his or her clients any favors by letting them agree to a settlement that is impractical or otherwise unworkable.

For example, the parties sometimes agree to celebrate Thanksgiving, Christmas and other holidays and special days as a family. Almost always, the parties assume that family celebrations will be comfortable for both of them and will make their children happy. Initially, they may be right about that. However, if and when one or both parties have new partners, joint celebrations may be unrealistic. For this reason, the parties should be encouraged to divide up the holidays and other special days in the parenting plan that is incorporated into the Judgment. This gives the parties maximum flexibility: Each of them may invite the other to join in a family celebration, but there is no obligation to do so.

Divorce mediators who are not attorneys are less likely to provide the parties with reliable legal information and guidance. Mental health professionals, clergy and other non-lawyers who believe that an agreement between the parties is the only legitimate goal of mediation may do their clients a disservice by giving them incomplete or incorrect information with respect to their legal rights and duties. However, the parties sometimes select nonlawyer mediators for any number of reasons, including the desire to base a settlement on their feelings and notions of fairness, deference to the tenets of their religion, or cost.

Confidentiality

Section 1119 of the *California Evidence Code* provides that oral statements or admissions made and writings prepared "for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation" are not subject to discovery and are inadmissible into evidence.

Starting with *Foxgate Homeowners Ass'n., Inc., Bramalea California Inc.* (2001) 26 Cal.4th 1, 14, the California Supreme Court has uniformly held that judicially crafted exceptions to mediation confidentiality are not appropriate. To this end, the Court stated that "[t]o carry out the [legislative] purpose of encouraging mediation by ensuring confidentiality, the statutory scheme . . . unqualifiedly bars disclosure of communications made during mediation absent an express statutory exception." The principle of mediation confidentiality trumps competing public policies.[3]

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[3] The Supreme Court has repeatedly held that there is no need for judicial construction of sections 1119 and 1121 of the *California Evidence Code* and that no "judicially crafted exception" is either necessary or permissible. *Foxgate Homeowners Association, Inc. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, 13. See also *Rojas v.*

There are virtually no exceptions to the principle of mediation confidentiality in California.[4] Nothing that is written or said in connection with the mediation – by the parties or by the mediator – is discoverable or admissible into evidence. This important principle has implications for both the parties and the mediator.

In *Eisendrath v. Superior Court* (2003) 109 Cal.App.4th 351, husband filed a motion to correct a spousal support agreement reached through mediation. The agreement provided that family support was to be nontaxable; husband contended that he and his ex-wife had agreed that family support would be taxable. In barring admission of all communications that took place in the context of the mediation, the Court also reaffirmed that the mediator was an incompetent witness. Permitting the mediator to testify "would authorize mediator testimony in virtually every dispute over a mediated agreement, and thus gut section 703.5 [of the *California Evidence Code*]."[5]

In *Marriage of Kieturakis* (2006) 138 Cal.App.4th 570, the Court of Appeal concluded that the presumption of undue influence cannot be applied to marital settlement agreements reached through mediation. The Court recognized that it gave an advantage to parties defending mediated marital settlement agreements. Those parties could refuse to waive the privilege and thereby prevent their settlements from being effectively challenged. Nonetheless if there is a price to be paid in fairness to preserve mediation confidentiality, the cases have required that it be paid by parties challenging, not defending, what transpired in the mediation.

In spite of the barriers to proving undue influence, a mediated settlement agreement should recite that the parties discharged their fiduciary duties, exchanged the requisite disclosures, and entered into the settlement voluntarily; not because of fraud, duress, coercion, undue influence or a misrepresentation of any kind. *Kieturakis* noted that even such recitals could be the product of undue influence, but "they should count for something, at least where, as here, the parties' capacity is not in question."[6]

Absent fraud, it is unlikely that any mediated settlement will be set aside. Apart from the fact that nothing written or said is discoverable or admissible into evidence, the courts are unreceptive to claims that one party was subject to undue influence by the other party or the mediator.

Superior Court (2004) 33 Cal.4th 407, 424; *Fair v. Bakhtiari* (2006) 40 Cal.4th, 189, 194; and *Simmons v. Ghaderi* (2008) 44 Cal.4th 570, 580.

[4] The exceptions to mediation confidentiality are few and far between See, eg, *Rinaker v. Superior Court* (1998) 62 Cal.App. 4th 155, 167 (minor's due process right to confront witnesses); *Olam v. Congress Mortg. Co.* (N.D. Cal. 1999) 68 F. Supp. 2nd 1118-1119, 1129 (parties waived confidentiality).

[5] *Eisendrath, supra,* at 357, 362-63.

[6] *Kieterakis, supra*, at 90.

In *Rojas v. Superior Court* (2004) 33 Cal.4th 407, the Supreme Court held that the confidentiality of writings prepared for mediation is not subject to a "good cause" exception based on "prejudice" or "injustice" to the party seeking discovery. "[C]ourts are thus not free to balance the importance of mediation confidentiality against a party's need for the material sought."[7]

In *Cassel v. Superior Court* (2011) 51 Cal.4th 113, the Supreme Court held that the principle of mediation confidentiality extended to communications between all participants in a mediation, including a client and his own attorney; any such communications cannot be introduced into evidence in a malpractice action.[8]

The Supreme Court has never deviated from its strict policy in spite of Justice Chin's concern in Justice Chin's concurring opinion in *Cassel*: "This holding will effectively shield an attorney's actions during mediation, including advising the client, from a malpractice action even if those actions are incompetent or even deceptive. . . . . This is a high price to pay to preserve total confidentiality in the mediation process."[9]

Despite repeated observations that the legislature could create additional exceptions to the principle of mediation confidentiality, the legislature has declined to do so. Following the decision in *Cassel*, the California Law Revision Commission recommended creating a statutory exception to the principle of mediation confidentiality for legal malpractice actions.[10] That recommendation was rejected.

Instead, the legislature added section 1129 to the *California Evidence Code* which requires an attorney to provide a mediation client with a printed disclosure containing the confidentiality restrictions described in section 1119 and to obtain a printed acknowledgment signed by that

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[7] *Cassel v. Superior Court* (2011) 51 Cal.4th 113, 123 citing *Rojas, supra.*

[8] The Supreme Court's decision in *Cassel* was anticipated by *Wimsatt v. Superior Court* (2007) 152 Cal.App.4th 137, 163: "[W]hen clients . . . participate in mediation, they are, in effect, relinquishing all claims for new and independent torts arising from mediation, including legal malpractice causes of action against their own counsel."

[9] *Cassel, supra,* at 137. Section 958 of the *California Evidence Code* eliminates the confidentiality protections otherwise afforded by the attorney-client privilege in disputes between clients and their own attorneys; however, there is no comparable exception to the principle of mediation confidentiality. As the majority confirmed in *Cassel*: The mediation confidentiality statutes do not create a "privilege" in favor of any particular person. *Cassel, supra,* at 132. Neither the language nor the purpose of the mediation confidentiality statutes supports a conclusion that they are subject to an exception, similar to that provided for the attorney-client privilege, for lawsuits between attorney and client.

[10] Proponents of exceptions to the principle of mediation confidentiality ignore the fact that disputants may schedule a settlement conference, with or without the participation of a lawyer or judicial officer acting as a neutral, and thus entirely avoid the benefits and burdens of mediation. See Section 1117(b)(2) of the *California Evidence Code* and California Rules of Court, Rule 3.1380(a).

client that he or she has read and understands the confidentiality restrictions. Section 1129 provides a template for the acknowledgment: "I, [name of client], understand that, unless all participants agree otherwise, no oral or written communication made during the mediation, or in preparation for a mediation, including communications between me and my attorney, can be used as evidence in any subsequent noncriminal legal action, including an action against my attorney for malpractice or an ethical violation."

From the mediator's point of view, the principle of confidentiality guards against the possibility that the mediator could be dragged into a subsequent dispute. To be sure, the mediator is an incompetent witness pursuant to section 703.5 of the *California Evidence Code*, but most mediators have received the occasional request for a copy of their file – either from a party or an attorney representing a party. The only way to avoid involvement is to destroy the file. Many mediators provide in their mediation agreement and in the stipulated Judgment (both signed by the parties) that the mediator is authorized to destroy the file within 30 days after the mediation has terminated or the Judgment has been entered, whichever occurs first.

Mediators can guard against potential malpractice claims – no matter how farfetched they may be – by reciting in their mediation agreement that the mediator is not representing either party or both parties, and that the parties may not rely on the mediator for legal or tax advice. The mediation agreement is discoverable and admissible into evidence pursuant to Section 1120(b)(1) of the *California Evidence Code*.

The mediation agreement should provide that the mediator's statements for services rendered and costs advanced are also discoverable and admissible into evidence. This serves two purposes: First, those documents are relevant to a fee dispute that may have to be arbitrated or adjudicated. Second, some judges have been known to rule that an alleged mediation did not take place. A signed mediation agreement and a series of statements reflecting the services performed by the mediator and the charges for those services are persuasive evidence that the mediation was *bona fide.*

An admissible mediation agreement and a Judgment, both reciting that the parties did not rely on the mediator for legal or tax advice, substantially undermine the credibility of any claim that the mediator committed malpractice.[11]

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[11] Whether a divorce mediator may be sued for legal malpractice has not been addressed in any published appellate opinion. *Howard v. Drapkin* (1990) 222 Cal.App.3d 843, 852 holds that a mediator enjoys *quasi-judicial immunity* from suit: "Absolute quasi-judicial immunity is properly extended to these neutral third parties for their conduct in performing dispute resolution services which are connected to the judicial process and involve . . . the arbitration, mediation, conciliation, evaluation or other similar resolution of pending disputes." That is one impediment to suing a mediator. A second impediment is the principle of mediation confidentiality that makes anything written or said in connection with the mediation undiscoverable and inadmissible into evidence. However, until the Supreme Court decided *Cassel*, claims of *legal* malpractice were theoretically as cognizable against mediators as against lawyers.

Compliance with Disclosure Requirements

California law mandates the a full and accurate disclosure of all assets and liabilities at the early stages of a marital dissolution proceeding to ensure an appropriate division of the parties' community property as well as fair and reasonable support orders. To implement this policy, sections 2104 and 2105 of the *Family Code* requires each party to serve on the other a Preliminary and Final Declaration of Disclosure.

The Preliminary Declaration of Disclosure provides a general inventory of the parties' respective assets at the outset of the proceedings. The Final Declaration of Disclosure is more extensive. *Family Code* section 2105(b) provides that the final declaration of disclosure shall include all material facts and information regarding (1) the characterization of all assets and liabilities, (2) the valuations of all assets that are contended to be community property, (3) the amounts of all obligations that are contended to be community obligations, and (4) the earnings, accumulations, and expenses of each party.

The parties may resolve property and support issues via arbitration or mediation without strict compliance with the technical requirements of *Family Code* sections 2104 or 2105.[12] However, prior to entry of judgment, the parties must comply with their statutory disclosure obligations.

The parties may waive the exchange of Final Declarations of Disclosure by stipulation, provided that the waiver includes all of the following representations: The parties completed and exchanged Preliminary Declarations of Disclosure; the parties have completed and exchanged current Income and Expenses Declarations; both parties have fully complied with section 2102 and have fully augmented the Preliminary Declarations of Disclosure; and the waiver is knowingly, intelligently, and voluntarily entered into by each of the parties.

Unless there is a valid waiver of the exchange of Final Declarations of Disclosure, judgment may not be entered until the parties have exchanged Final Declarations of Disclosure and current Income and Expense Declarations. "Each party, or the party's attorney, shall execute and file with the Court a declaration signed under penalty of perjury stating that service of the Final Declaration of Disclosure and current Income and Expense Declaration was made on the other party or that service of the Final Declaration of Disclosure has been waived pursuant to subdivision (d) of Section 2105 . . . ."[13]

However, per *Marriage of Steiner & Hosseini* (2004) 117 Cal.App.4th 519, 522, noncompliance with statutory disclosure requirements must be prejudicial to justify relief: "[T]he failure on the

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[12] "Parties who agree to settle their dispute by private mediation may also agree to make financial disclosures that do not meet the technical procedural requirements of sections 2104 and 2105. Thus, strict compliance with sections 2104 and 2105 is not required for private meditations that address issues arising out of a marital dissolution." *Marriage of Woolsey* (2013) 220 Cal.App.4th 881, 892.

[13] *California Family Code §2106.*

part of two divorcing spouses to exchange Final Declarations of Disclosure does not constitute a 'get-a-new-trial-free' card, giving either one of them the automatic right to a new trial or reversal on appeal when there is no showing of a miscarriage of justice." Any motion to set aside the Judgment because of alleged nondisclosure will be governed by the provisions of section 2105(c) of the *California Family Code*: "In making an order setting aside a Judgment for failure to comply with this section [governing the exchange of the parties' disclosure declarations], the Court may limit the set-aside to those portions of the Judgment materially affected by the nondisclosure."[14]

The parties' disclosure documents are not confidential. Pursuant to section 1120(a) of the *California Evidence Code*, a writing that is otherwise admissible or subject to discovery outside of mediation does not become inadmissible or protected from disclosure solely by reason of its introduction or use in mediation. *Marriage of Lappe* (2014) 232 Cal.App.4th 774, 785 applied this principle to the parties' declarations of disclosure: "Because exchange of the declarations is mandated by the Family Code, these documents would have existed (and would have been exchanged) even if the parties had never agreed to mediate. Their introduction at mediation does not obviate the disclosure obligation or shield the declarations from discovery."

Enforceability

Any document that the parties intend to be a binding and enforceable agreement must say so. Section 1123(b) of the *California Family Code* provides that "[a] written settlement agreement prepared in the course of, or pursuant to, a mediation, is not made inadmissible, or protected from disclosure . . . if the agreement is signed by the settling parties, and, *inter alia*, the agreement provides that it is admissible and subject to disclosure, or that it is enforceable or binding, or words to that effect." The mere inclusion of terms unambiguously signifying the parties' intent to be bound will not suffice.[15]

Conclusion

When the principle of mediation confidentiality is inviolate, as it is in California, the parties must rely on the mediator to do more than just get it done. The mediator should get it right, or at the very least, not get it wrong. Toward that end, mediators must take responsibility for ensuring that the parties are informed with respect to their legal rights and duties, that they comply with their disclosure obligations, and that the settlement is properly documented.

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[14] When unrepresented parties resolve their case in mediation, their compliance with disclosure requirements may be incomplete. As the mediator is not representing either party or acting as an enforcer for the State of California, a mediator has no professional responsibility to ensure strict compliance with the disclosure requirements. In the event that a community asset or liability has been intentionally concealed or inadvertently omitted from the parties' disclosure documents, or is not adjudicated by the Judgment, the Court has continuing jurisdiction to divide that asset or liability. *California Family Code* section 2556.

[15] *Fair v. Bakhtiari*, *supra*, at 199.

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