

A Guide for Family Mediators: Working with Self- Represented Litigants

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This Guide is one in a series developed by the AFCC Access to Family Court Services Task Force. For additional information and resources, go to the Center for Excellence in Family Court Practice in the online AFCC Resource Center at www.afccnet.org

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INTRODUCTION

Family mediation is customarily offered in domestic relations courts and by private practitioners in the United States, Canada, Australia, and many other parts of the world. The Association of Family and Conciliation Courts (AFCC) and the American Bar Association Section of Family Law have developed *Model Standards of Practice for Family and Divorce Mediation* for mediators who work in both the court and private sectors. The *Model Standards* specify the responsibilities a family mediator assumes, including the duty to act impartially, explain the mediation process clearly, screen cases throughout the process, ensure that the parties can negotiate effectively, and provide information that helps parties make good decisions without acting as an advocate for either party.

Simultaneous to the growth and institutionalization of family mediation, there has been a steady increase in the number of parents who represent themselves in separation, divorce and other family court matters. “[A recent] survey of individual states reveals that on average, eighty percent of all family law cases involved at least one self-represented litigant, while in nearly fifty percent of the cases, both litigants proceed on their own” (Herman, cited in Applegate and Beck, 2013, p. 88). Parents represent themselves in family court for a variety of reasons. According to Greacen, “most self-represented litigants represent themselves because they have no realistic alternative – free legal services are not available to them if they are poor; private representation is not affordable if they are persons of modest means” (Greacen 2014, p.664). A smaller number of parents may self-represent because they believe their cases are uncomplicated and do not require attorney expertise, or because they prefer not to spend their money on an attorney even though they can afford it.

Unfortunately, self-represented litigants (SRLs) are at a disadvantage as they navigate the family court system. They often lack basic information about court processes, procedures, and the rules of court. Many SRLs do not understand the distinction between a court hearing and mediation, or that a mediator is not a judge. When the court refers SRLs to mediation, the mediator essentially becomes the face of the court process. Therefore, when the parties are not represented by legal counsel, mediators must think carefully about their process and their responsibilities. Self-represented parties frequently turn to the mediator for guidance about matters other than mediation because they do not have anyone else to ask. While mediators will want to be as helpful as possible, it is important that they focus on assisting participants in resolving their conflicts *without* providing legal advice or creating the perception that they favor one party over the other.

Family mediators should be familiar with legal information such as the parenting time statutes, child support guidelines, and relevant local court or administrative rules. Mediators should also understand the basic principles of child development and the impact of divorce on children. This type of knowledge becomes more important in mediation when the parties are not represented by attorneys to provide legal advice and explain the court and mediation processes. Mediators also need to know how to refer the SRLs to outside resources and/or alternative processes. This guide

will address some important considerations for mediators who work with self-represented litigants (SRLs).

LEGAL INFORMATION, NOT LEGAL ADVICE

When self-represented litigants are referred to mediation, they often know little about the court or mediation process and may look to the mediator for guidance about all aspects of the custody litigation process. Although this is a fundamental misunderstanding of the mediator's role, it is a reality that mediators must address. At times, judges or court staff who refer parties to mediation may have explained the process to them, but often this does not occur. The mediator must therefore balance the parties' need for information about the court and mediation processes with the mediator's need to avoid offering legal advice. This can be accomplished by referring SRLs to outside resources, such as self-help centers, so they can conduct their own research and educate themselves about the court and mediation processes. Where they exist, self-help centers have staff who can help the parties complete forms. There is also a wealth of information available on court websites, or elsewhere on the internet, about legal terms, state statutes, and custody procedures in each jurisdiction. Care should be taken to instruct the parties to local court-based sites where possible, as universal advice may be incorrect for their jurisdiction.

Even with the guidance described above, many SRLs find it overwhelming to find, understand, and absorb this information, let alone use it in a constructive manner. Therefore, some mediators will take a directive and hands-on approach to provide detailed explanations of certain legal information. For example, mediators may provide the definition of a parenting plan, and discuss what is meant in their jurisdiction by joint or sole legal and physical custody, parental decision-making, or shared parenting time, among other terms.

Whether referring SRLs to outside resources or providing information directly, mediators may be tempted to provide additional guidance or to interpret legal information when parties are unrepresented. It is important that mediators resist this temptation, even if it has the potential to move the process along or facilitate an agreement. Mediators should limit themselves to providing legal information, but not legal advice or interpretation of the law. Otherwise, the mediator risks engaging in the unauthorized practice of law. For example, if the mediator is addressing child support or other financial matters along with parenting time and decision-making, the mediator may demonstrate how the court calculates child support, how parenting time may impact these calculations, and where there may be room for negotiation. However, the mediator should not provide advice related to these matters. Mediators should not tell parents that their positions are unreasonable or unlikely to be viewed favorably by the court, in essence advising them against a particular solution. Rather, the mediator might refer generally to a statutory preference by telling the parents, for example "In our state, the courts often prefer that parents make major decisions about their children together whenever possible. If one parent wants to make most of the parenting decisions for the children, there has to be a reason to justify having only one decision-maker." There is often a fine line between legal information and advice. When in doubt, mediators should limit what they say to the parties, whether the parties are self-represented or not.

MAINTAINING IMPARTIALITY

Maintaining impartiality is particularly challenging when working with self-represented litigants because the parties may see the mediator as their only source of information or support and be quick to misinterpret the mediator's behaviors. The *Model Standards* state that mediators shall conduct mediation in an impartial manner and disclose any actual or potential conflicts of interest. In explaining the process at the outset, the mediator must define impartiality, i.e., that the mediator does not favor one side over the other. Impartiality also extends to the way mediators provide legal information and guide both parties toward additional resources. It is critical that mediators do so in a manner that demonstrates they are detached from the dispute and neutral towards the outcome. This is especially important when one party is represented and the other is not, because the SRL will typically require more resources and information from the mediator.

Furthermore, the mediator can demonstrate impartiality by maintaining a balanced process, demonstrating the same degree of care and concern for each party by listening carefully to each of them, making sure both parties have opportunities to share their concerns, and sharing information and resources with both, even if the needs of one of the parties are not as great as those of the other.

The mediator may also wish to emphasize to SRLs that it is his job to ask each party difficult questions and test the practicality of proposed solutions. If the mediator asks one parent a challenging question, that parent may feel that mediator is partial to the other parent's ideas. Without attorneys to help the litigants understand the need for these questions or the mediator's role, the parties may misunderstand the mediator's intent. In some cases, difficult questions that mediators might typically ask in joint session may be better asked of SRLs in caucus so that one parent does not feel vulnerable in front of the other parent.

It may also help to be proactive and create an atmosphere in which parents have permission to discuss any perceived bias with the mediator. This can be done by explicitly telling the parties that they should speak up if they have any concerns about the mediator taking sides. Many self-represented parents will look to mediators to help them assess settlement offers; the mediator must be careful to avoid offering an opinion when asked. When one party has an attorney, or simply more information or experience, it can be challenging for mediators who may feel they can create more balance by assisting the unrepresented or less informed person. This places mediator impartiality at risk. It is preferable to inquire about the SRL's comfort level with the offer, ask them to consider the alternatives, provide resources to help them consider the offer, and encourage an outside review, perhaps with a lawyer providing unbundled legal services.

SCREENING AND ASSESSMENT

Screening for competency, capacity, intimate partner violence, and other issues that may impact the mediation process is especially important when one or both parties are not represented by attorneys. Without an attorney's support, SRLs are less likely to understand the legal implications of participating in mediation or reaching an agreement. They may be more likely to

acquiesce to the other side's demands because they cannot negotiate effectively. Victims of intimate partner violence may be unaware that they can request a waiver from mediation, or may not understand that there are options for conducting mediation, such as including a support person or shuttle mediation, that will better ensure their ability to participate in the process safely.

The mediator should conduct a well-structured initial screening process to gain insight into whether there is a history of intimate partner violence (IPV), substance abuse, mental illness, chronic high conflict, or other issues that may impact the parties' capacity to safely and effectively negotiate, discuss parenting issues, and reach a mediated agreement.

In some jurisdictions and programs, parties, including SRLs, are screened before meeting the mediator. Even then, mediators must continue to screen the parties for issues that arise during or after separation that may impact the parties' effectiveness in mediation. If it is determined that mediation is not appropriate at all or requires safeguards, the mediator should have a plan for informing the parents that mediation is not the right process for them or orienting them to a safer and more effective process.

If mediation is not going to take place due to the presence of IPV, the mediator should privately discuss a safety plan with the victim, including how to safely leave the mediator's office and where to get advice on how best to proceed with the case, e.g., victim services, a legal aid office, or a self-help center. If mediation is going to take place with safeguards, techniques to consider may include mediating with the parties in separate rooms or in separate locations, communicating over video or audio resources, or requiring that a party have a support person or advocate present during the mediation. Mediating in a location where the parties must go through metal detectors may also provide some reassurance. With SRLs, the importance of frequently checking in with a survivor on how they are experiencing the mediation process becomes even more important, as there may be nobody else asking whether they feel safe or comfortable negotiating with the other party.

Many of the actions described above are recommended whether the parties are represented by an attorney or not, but when parties are unrepresented, the dynamics change. When parties are represented and the mediator has concerns about the appropriateness of the mediation process, she may terminate the process and refer the parties to their attorneys for further guidance. With SRLs, their options going forward may be limited and their lack of attorney guidance can create additional challenges. Prior to termination, the mediator should be certain to discuss next steps and feasible alternatives. There is a greater likelihood that SRLs have not had the opportunity to identify critical issues that can negatively (and perhaps dangerously) impact the mediation process and its aftermath. Mediators may wish to proceed with mediation if it is the SRL's best available option and there are adequate safeguards. It is particularly important to help SRLs identify community resources (e.g., community mental health agencies, victim services) that can help address their specific needs and concerns. Importantly, while it is always critical to consider alternatives to mediation when making the decision whether to proceed or to terminate, the lack of legal counsel is not a good reason to continue with mediation when it is otherwise not appropriate.

THE PRESSURE TO SETTLE AND SRLS

Mediators typically possess a good deal of formal and informal information about legal processes and court procedures that the parties do not have. This can range from administrative matters, such as how long it takes to get a hearing, to reputations or preferences of a judge, for example, that Judge Smith is known to frequently order 50/50 parenting time. When parties are represented, the mediator often suggests checking with their attorney about likely outcomes in court, or the time and financial cost in achieving them. When parents are not represented, there is a bit of a balancing act involved. The mediator must find a way to share that information with the parties so that they can factor it into their decision making, without inappropriately pressuring them to settle.

The mediator needs to make it clear that parents do not have to agree on a plan while acknowledging that the court will decide for them if they are unable to reach an agreement. Depending on court expectations and program guidelines, mediators may discuss with the parents some common outcomes in their jurisdiction in similar cases. Different mediators handle these discussions in different ways. Some are directive, making suggestions and providing detailed information about how a parenting plan could work. Others are more facilitative, asking informed questions designed to elicit certain responses, while avoiding specific suggestions or details. For example, when parents have separated after a lengthy period where both were actively involved with the children, a mediator may ask the parents to consider whether the judge would restrict overnight parenting time absent evidence that one parent is impaired or poses a danger to the children. Another mediator might choose to do some reality testing in caucus or ask the parties if they know of other people who have been through similar cases and what the judges did in those cases.

The strategies identified above would be well supported by parents having the opportunities to review the questions and issues raised with an attorney. While mediators may find ways to provide the parties with this information, they must be extremely cautious and aware of their influence.

CONFIDENTIALITY

Mediators should talk with all clients about confidentiality—its limits and exceptions—before and during mediation. It is particularly important to carefully explain and define these terms to self-represented litigants, who may not understand the legal implications. Mediators who are practicing mental health professionals (e.g., social worker, counselor, therapist, or psychologist) should explain that they are mandated to report allegations of child abuse or threats of homicide or suicide to the proper authorities. Attorney mediators may be mandated reporters as well, and if the law in their jurisdiction requires them to report incidents that they learn about during mediation, they need to tell this to the participants. Mediators who are not mandated reporters in their jurisdictions should still inform parents what the state laws or program guidelines are that govern what they will or will not have to report, such as threats of serious, imminent harm or when they might break confidentiality to deal with suspected danger in or outside of the

mediation setting. If there are other participants in the mediation such as counselors or attorneys for children, they may be mandatory reporters as well. Self-represented litigants should also be informed before mediation to what extent the mediator or other participants are expected to provide information to the court during or following the mediation process, and whether the mediator is expected to make recommendations about custody or visitation.

WRITTEN COMMUNICATION AND DRAFTING DOCUMENTS

When parties resolve their disputes in mediation, the mediator prepares a written agreement that addresses a variety of issues. It is standard practice for the mediator to encourage represented parties to review the agreement with legal counsel prior to signing and submitting it to the courts. Of course, when there are not attorneys involved, this practice must change.

When SRLs reach a final agreement, it is usually the mediator's responsibility to draft the agreement in document form. Many courts use standard parenting plans and the mediator should be able to explain these forms to the parties. The mediator should involve the parents in drafting the document, and encourage parents to read the document carefully and ask questions about anything that they do not understand. The mediator may wish to take additional time to walk through each section of the agreement to make sure the parties understand and agree to what has been written. It can be helpful for the mediator to ask the parties what they think the agreement says to gauge their understanding of the terms. Mediators should also be aware of court and jurisdiction rules about who can draft and submit documents to the court.

In jurisdictions where court-connected mediators are limited to addressing parenting time and child support, it is important to discuss with the parties how they will address any unresolved financial or property issues.

When drafting a document, mediators working with SRLs must be especially cognizant of the need to use simple, straightforward language -if possible the parties' own words. Litigants who do not have attorneys to explain even the most fundamental legal terms may find the terminology confusing and off-putting, or they may agree to terms without understanding what they mean.

The mediator should also make it clear to self-represented parents that their agreement is only enforceable once it is entered as a court order, meaning that it will be necessary for the document to be submitted to the court. For example, if parents decide to make changes to an already existing parenting schedule, those changes cannot be upheld by the court unless they are part of a court order. The mediators should know the rules of their jurisdiction about filing documents so they can explain them to SRLs. Some courts will schedule settlement conferences that will give the parents the opportunity to present and file their documents. Other jurisdictions will require parents to file the documents with the court on their own. If the mediator does not assist the parties in filing, the mediator should be able to tell the self-represented parents where to find information about how to file their documents. Finally, the mediator should encourage the parents to make every effort to have another professional review the document before they file it with the court. For example, an attorney who practices unbundled legal services may be able to provide a review for a reasonable fee.

CONCLUSION

Mediation provides many benefits to parents going through separation or divorce. The mediator's job is to provide parents with information without giving legal advice, to help them in creating or amending a parenting plan, to facilitate a dialogue between them, and then to let them decide what they want to do. Parents should be able to participate in mediation whether or not they have attorneys representing them; however, when parents are self-represented, mediators will need to ensure that the parties understand the mediator's role, and the importance of impartiality, confidentiality, and screening. Mediators should also provide information and guidance toward additional outside resources that parents may need to make informed decisions for their children's futures.

FOR FURTHER READING

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