This Case Will Never Settle!: A Paradigm for Successful Mediation of Family Disputes in State and Federal Courts

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After law school, Nika joined the United States Department of Justice, Community Relations Service (CRS), as a Conciliation Specialist. At CRS, she worked closely with government officials, school administrators, law enforcement officers, and influential community leaders to assess and respond to local and national conflicts based on race, color, or national origin. She monitored the racial climate in communities throughout the Southeast and substantially contributed to the Annual Assessment of Racial Tension, which is submitted to the United States Attorney General and to the congress. Nika is specially trained in education mediation and currently serves as an idea mediator for the Alabama State Department of education. Nika is also a certified Guardian ad Litem and appointed child and parent advocate in Montgomery County, Alabama.

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Mabry-King was a full-time Civil Procedure and Family Law professor for twenty-two years and an Associate Dean of Academic Affairs for two years. In 2005 and 2010, she taught an international comparative law course on alternative dispute resolution processes at the University of the Western Cape in Cape Town, South Africa. She is a member of the District of Columbia Bar Association, the Federal Bar Association’s Alternative Dispute Resolution Section, the American Bar Association’s Dispute Resolution and Family Law Sections, the Association for Conflict Resolution, the International Society of Family Law. She frequently speaks at Continuing Legal Educations seminars and lectures at law schools. Her lengthy publication record, that includes a best-selling Adoption Law textbook, has been cited favorably and widely by judges, legislators, lawyers and professors. She has received many awards for her scholarship, teaching and community service.
Introduction.

International and interstate family law encompasses any family law dispute in which the parties: (1) hold assets or derive income in a more than one jurisdiction; (2) the parties’ minor children are present in or may travel to multiple jurisdictions; and/or (3) the enforcement of a family court order is contemplated in or from a foreign jurisdiction. See Innovations in Resolving Int’l Family Law Cases in Tough Economic Times, Valerie Arnold, MSBA, Family Law Forum, Winter 2010/11, Volume 19, No. 1. Mediation can be an invaluable tool for navigating the complexities of these types of family law disputes and may benefit the parties through reduced costs in litigation, faster and more flexible resolutions, better enforcement, and a reduction in stress for the parties and children.

In representing clients in international or other complex family law matters, it is critical to understand how to:

1. Anticipate and plan for situations, which commonly arise during mediation of international or complex family disputes, such as international and interstate state enforcement issues, logistics for mediation of international and cross-country disputes, past and present domestic violence concerns, and emotional or cultural dynamics for more productive sessions.
2. Create a workable plan for preparing your case and client for mediation to ensure a greater likelihood of success; and
3. Use court-annexed and private mediation effectively.

Issue Identification.

In representing a client to an international or other complex family law dispute, the key to effective advocacy often lies in issue identification and accessing appropriate resources to assist the client. As each prong of an international or interstate family dispute may involve unique considerations, it is recommended to consider each sub-issue separately in analyzing potential issues:

1. Dissolution of Marriage.
   a. Has domestic or family violence occurred? If so, what are the implications for the case and for mediation?
   b. Is more than one jurisdiction able to dissolve the marriage?
   c. Are there advantages/disadvantages to proceeding in a particular jurisdiction?
i. Service requirements
ii. Expense
iii. Judicial economy

2. Division of Property.
   a. Where are the parties’ assets or liabilities (personal and real estate) located?
   b. Is more than one jurisdiction able or required to address property issues?
   c. Are there advantages/disadvantages to proceeding in a particular jurisdiction?
      i. Are there more favorable laws in a particular jurisdiction?
      ii. Is it easier to obtain discovery in a particular jurisdiction?
      iii. Are there anticipated enforcement issues?

   a. Is more than one jurisdiction able to address spousal support?
   b. Are there advantages/disadvantages to proceeding in a particular jurisdiction?
      i. Which jurisdiction(s) may exercise personal jurisdiction over the obligor?
      ii. Are there more favorable laws in a particular jurisdiction?
      iii. Are there anticipated enforcement issues?

   a. Is more than one jurisdiction able to address child support?
   b. Are there advantages/disadvantages to proceeding in a particular jurisdiction?
      i. Are there more favorable laws in a particular jurisdiction?
      ii. Are there reciprocity agreements between the jurisdiction?
      iii. Is it easier to obtain discovery in a particular jurisdiction?
      iv. Are there anticipated enforcement issues?

   a. Is more than one jurisdiction able to address child custody and parenting time?
   b. Are there potential abduction/retention risks?
   c. Does this case involve claims under the 1980 Hague Convention on the Civil Aspects of
      International Child Abduction (herein after “1980 Hague Abduction Convention”)?
   d. Are there advantages/disadvantages to proceeding in a particular jurisdiction?

Once the issues in the case are identified, counsel should develop a plan to gather necessary information and to determine how and where to proceed.

In international cases, consultation with foreign counsel is almost always a recommended first step. Foreign counsel may provide information as to critical questions such as recognition and enforceability of a U.S. divorce decree or court order. In addition, foreign counsel may advise as to procedural and substantive law in the foreign jurisdiction, information about how domestic violence is considered in family law matters, information about relevant cultural issues, as well as mediation practices and options in the foreign jurisdiction. Foreign counsel may also assist in gathering evidence, communicating with local authorities, or in providing a synopsis of relevant law from the foreign jurisdiction.

In the family law matter calls for consultation with foreign counsel, it is important to identify counsel with experience international family law. Foreign embassies or consulates may have legal referrals. In addition, the International Academy of Family Lawyers has an extensive listing of international family lawyers at: https://www.iafl.com. Depending upon the facts of each matter, consultation questions should be prepared to identify and understand the risks/benefits of a particular case plan. In most cases,
information should also be provided to the foreign counsel about the local proceedings including jurisdictional and substantive legal considerations.

**Creating a Plan for Settlement.**

Developing a solid plan for the international or complex family law mediation can be critical to success. Careful consideration should be given to the scope and length of each mediation session. In family law matters, the order of issues addressed may be particularly impactful. For example, will addressing social issues separately from financial issues advance or hinder settlement? In addition, different issues in a family law dispute may involve multiple jurisdictions and implicate questions related to the choice of law. Just as international or complex family law proceedings may require bifurcation, mediation of claims may benefit from a focused and separate approach to resolve distinct claims.

A plan for settlement should include addressing the following in advance of the mediation session(s):

1. **Identifying issues for the mediation.**
   a. Child custody
   b. Child support
   c. Division of assets/liabilities
   d. Attorney’s fees and costs
   e. . . .  

*Practice tip:* It may be beneficial to make the issue of jurisdiction secondary to the negotiation of substantive claims. Jurisdictional disputes are a common impediment to settlement in international or other complex family law cases as they often create an impasse to progress on the substantive negotiations. Once substantive agreements are reached, enhanced agreements as to enforcement mechanisms may facilitate resolution of jurisdictional disputes.

2. **Participants.**
   a. Attorneys in client’s jurisdiction
   b. Attorneys in foreign jurisdiction
   c. Mediator(s)
      i. Should the same or different mediators be used for social vs. financial issues?
      ii. Should mediators represent both jurisdiction in international or interstate matters?
   d. Interpreters
   e. . . .  

*Practice tip:* Too many participants to a mediation can slow progress and resolution of claims. Addressing legal questions prior to the mediation session may help to limit the number of required participants and advance the likelihood of settlement.

3. **Type of Mediation.**
   a. Facilitative
   b. Evaluative
   c. Hybrid
   d. . . .
Practice tip: International or other complex family law disputes may present high stakes conflicts. Including an evaluative component to these types of mediation may help drive a settlement by managing the parties’ expectations and avoiding all or nothing outcomes.

4. Strategies for implementation and enforcement of agreements.
   a. Domestication processes
   b. Mirror image orders
   c. UCCJEA registration
   d. Comity
   e. Reservation of Issues
   f. . .

Practice tip: Ensuring future enforcement of mediated agreements may be one of the most critical elements to a successful mediation. While interstate enforcement within the United States is generally not problematic, the efficacy and cost of international enforcement options may vary significantly. Endeavor to understand the availability and requirements of foreign enforcement options before mediation.

1980 Hague Abduction Convention Cases. Mediating cases under the 1980 Hague Abduction Convention can present unique challenges as well as opportunities for better client outcomes. These cases involve family law disputes where a party alleges that a child has either been wrongfully retained in or removed to a contracting-state from the child’s habitual residence. In addition, the 1980 Hague Abduction Convention can be used as an enforcement tool in the case of a parent who claims that international child access rights have been violated.

In wrongful retention or wrongful removal cases under the 1980 Hague Abduction Convention, the issue before the state or federal court is whether to return the child to the child’s place of habitual residence. To obtain an order for the return of a child, in general terms, the parent must establish that the removal or retention of a child is wrongful by showing that:

1. it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
2. at the time of the removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

Hague Convention, Art. 3. Under the Hague Convention “rights of custody” include “rights related to the care of the person of the child and, in particular, the right to determine the child’s place of residence.” Hague Convention, Art. 5. The rights of custody may arise through a custody determination or by operation of law. Hague Convention, Art. 3. The 1980 Hague Abduction Convention extends protection to children under age 16 involving contracting-states. Hague Convention, Art. 4. The affirmative defenses include the “well-settled” defense, “consent or acquiescence” defense, “grave risk of harm” defense, and child preference. Hague Convention, Arts. 12, 13, 20. Defenses to the return of the child under the Hague Convention are affirmative defenses that are to be narrowly construed. 42 U.S.C. 11601(a)(4).

The resolution of this claim has the potential to impact not only where a child custody dispute will ultimately be heard but may also influence jurisdiction on collateral issues such as dissolution of marriage and related claims. Whether or not a party has formally initiated an action under the 1980 Hague Abduction Convention, if the family law dispute may give rise to claims of a wrongful removal or retention under the 1980 Hague Abduction Convention, the mediation should address these issues. The


Additional Consideration.

1. Translation/Interpreting. Planning ahead for translation or interpreting needs can be critical to success.
   a. Parties to a mediation need to be able to articulate their positions, concerns etc. accurately;
   b. Parties need to fully understand the topics being discussed and the terms that are being negotiated;
   c. Parties need to understand documents relevant to the mediation including any written agreements reached

2. Logistics.
   a. Plan for time differences
   b. Secure video-conferencing
In the voluntary mediation process, participants agree to use a third party neutral who is trained in substantive family law to facilitate their discussion of “self-determined” solutions to resolve their dispute(s). Deborah Thompson Eisenberg, *Reflections on “Innovations in Family Dispute Resolution,”* 75 MD. L. REV. 1, 3-4 (2016). Undisputed advantages of resolving family disputes through mediation include a quicker, more efficient resolution; a less expensive process; more flexible options for resolving disputes; confidential resolution of some very private concerns; and, reduction of acrimony between participants. More importantly, when participants will have an ongoing relationship, such as with shared parenting, mediation often results in improved communication between participants. Moreover, participants tend to uphold their agreements because they feel more in control over the outcome and empowered by the process. Eido Walny and Kelly Dancy, *Family Feuds: Mediating Estate and Probate Disputes*, 88-SEP WIS. LAW. 24, 24-28 (2015) (Walny and Dancy).

Whether it is court-annexed or private, mediation has become the norm for resolving differences between feuding family members. For example, the Superior Court of the District of Columbia reported that between 2013 and 2016, 2,994 family law cases were mediated. Partial or full settlements were entered in 665 of those cases. 2016 Program Summary, Multi-Door Dispute Resolution Division, Superior Court of the District of Columbia at 18, Washington, D.C., https://www.dccourts.gov/sites/default/files/MultiDoor-PDFs/2016%20Program%20Summary.pdf (last visited February 11, 2019). Today, state courts in many jurisdictions encourage parties to participate in mediation or mandate that they participate in at least one session. See, e.g., CAL. FAM. CODE § 1814(b)(8) (West 2019); ME. REV. STAT. ANN. tit. 19-A, § 251(1-2) (West Supp. 2017); Or. Rev. Stat. § 107.765(1) (Supp. 2018); VA. CODE ANN. § 8.01-576.5 (Michie Supp. 2018).
Federal courts also have authority to order mediation. See, e.g., Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651, 653 (2019); Eisenberg, supra, at 4 (discussing mandatory mediation in child access cases). Similarly, most district courts and courts of appeals have developed alternative dispute resolution programs with mediation as the penultimate ADR method that “reigns supreme.” Donald L. Swanson and Koley Jessen, ADR Act of 1998: A Reflection of its Effectiveness and Shortfalls, 37-NOV AM. BANKR. INST. J. 28, 28 (2018) (noting that one district court utilizes “presumptive mediation” before a trial).

Family disputes cover a vast spectrum of subtopics. These national and international disputes may encompass issues concerning children such as child time, custody, and child support as well as modification of existing court orders. The dispute may be about dependency, child abuse, or neglect. A couple may seek a separation or divorce with associated issues such as maintenance, property distribution, and debt. For other parties, estate, trust and probate disputes may arise. All these disputes may be good candidates for mediation. 2016 Program Summary, supra, at 12-13; Nikeela R. Abrams and Natalie Greaves, “Once Upon A Contempt” Fairytale and Real Life DR Options in Family Law, June/July ADVOCATE 25, 27 (2017) (Abrams and Greaves).

In general, practitioners are familiar with the domestic relations exemption that the Supreme Court of the United States announced in Ankenbrandt v. Richards, 504 U.S. 689 (1992). The Court concluded that federal courts do not have jurisdiction to issue divorce, maintenance or child custody decrees. Id. at 703. However, at the core of some federal disputes lies one or more family issues that may be appropriate for mediation. One specific example involves access to children in accordance with the Hague Convention on the Civil Aspects of International Child Abduction, T.I.A.S. No. 11,670, 1343 U.N.T.S. 49 (1980). Although compliance with the Hague Convention is a federal matter, often a parent files such an action because he or she wants access to the child. Cuellar v. Joyce, 596 F.3d 505 (9th Cir. 2010). On the Hague Convention website, there is a link for mediation. Convention on the Civil Aspects of International Child Abduction, https://www.hcch.net/en/instruments/conventions/full-text/?cid=24 (last visited February 28, 2019).

How Mediators Screen Family Disputes for Mediation

Even when the subject of the dispute makes it a good candidate for mediation, mediation may be inappropriate for some participants. For various reasons, some disputes will be screened out of the process before negotiations begin. In determining whether a dispute should be mediated, mediators will make the following inquiries.

Are all persons who are needed to resolve the dispute willing to participate in the process? Third parties who have not been named in a lawsuit or petition may need to be at the negotiation table. Furthermore, participants must be engaged and invested in working to identify solutions that they are willing to implement and follow.

Are the participants willing to compromise? If one or both parties is entrenched and will not budge from a position, mediation may not be appropriate. However, the mediator may use a cadre of tools to test a person’s perceived intractability. Reality checking is one of those tools.

Are the participants willing to honor confidentiality? The mediator is concerned with maintaining the integrity of the mediation process. Preserving confidentiality is paramount. Confidentiality rules provide that neither the participants (including attorneys) nor the mediator may disclose mediation information. See ABA,
Symposium on Standards of Practice, Model Standards of Practice for Family and Divorce Mediation, Standard VII (2001); Tex. Fam. Code Ann. § 153.0071(g) (2017). The mediator will emphasize the importance of maintaining confidentiality orally and in the written mediation agreement. Any allegations of a breach of confidentiality will be addressed. See generally, In re Anonymous, 283 F.3d 627 (4th Cir. 2002).

Will resolution of this dispute require unique solutions? Mediation gives the participants an opportunity to design a remedy that uniquely suits their needs. See Walny and Dancy, supra, at 28. If the nature of the dispute presented or the participants’ circumstances present unique situations, the mediator will want to know and he or she will prepare for addressing any exceptional aspects of the dispute.

When participants have been involved in family violence, a dispute may not be appropriate for mediation. The bases for excluding such cases include an imbalance of power; a person’s unwillingness to participate; a person’s decision-making ability is impaired; and, a person may feel unsafe. Indeed, the mediator and others may have safety concerns. The list of relevant factors used in assessing whether disputants should participate in mediation include whether there is current evidence of violence and when the most recent incident of violence occurred. See Colo. Rev. Stat. § 13-22-311(1) (2018) (excluding cases involving psychological or physical abuse); ABA, Symposium on Standards of Practice, Model Standards of Practice for Family and Divorce Mediation, Standards IX and X (2001); Kathy A. Hunt, Using Mediation in Family Law Cases, 27-December, Wyoming Law 32, 33 (2004). See also Tex. Fam. Code Ann. § 153.0071(e-1) and (f) (2017) (allowing mediation over a party’s objection without supporting evidence). If the mediator or a willing participant has any concerns, safety precautions may be taken. For example, the mediation session may be held in the courthouse. The mediator may arrange for a marshal to check in as needed.

What Family Mediators Want Family Lawyers to Know

Attorneys play a vital role in the mediation process as they advise and counsel their clients before and during the process. Here are some practical tips on how attorneys may prepare themselves and their clients for mediation.

First, advise your client about the mediation option and encourage your client to participate. Assure the client that the parties, not the mediator, make the decisions. When a client provides information about a prior agreement, review the agreement to ascertain whether the parties are required to engage in ADR as a prerequisite to litigation. Abrams and Greaves, supra, at 27. For a client who does not have the financial means to hire a private mediator, inform the client that court-annexed mediation is free or provided on a sliding scale that is based on need. Judith M. Keegan, The Family Mediation Program: Helping Parents in Conflict Develop An Action Plan for Raising Children, 75 Ala. Law. 367, 367 (2014) (describing the court process and its goals); Susanne Terry and Christine Packard, Achieving Lasting Settlements for Vermont Families: Justice, Equity, and Self-Determination, 36-Fall Vt. B.J. 18, 18 (2010).

Then prepare your client by explaining the mediation process. If you are unsure, ask your assigned mediator or contact the court-annexed mediation program. Some mediation programs have a frequently asked questions link on the webpage. United States Court of Appeals for the Fourth Circuit, http://www.ca4.uscourts.gov/mediation (last visited March 1, 2019). A preliminary discussion with the mediator also may encompass any prerequisites that the attorney may be required to provide such as a position statement. If a statement is required, please provide it by the stated deadline.

At the conference, after introductions and instructions about the process are conveyed, one of the first things that the mediator will want to know is which issues the participants seek to resolve. Before the first conference, help your client to identify the issues that may be decided in mediation. You and your
client may decide that although there is more than one dispute, the mediation will focus on one or two issues. If you have provided a list of issues prior to the mediation and you and your client have decided to modify the list, let the mediator know. The mediator will be better prepared for the conference and notice will help the mediator to organize the discussion. Also, after you identify the issues, brainstorm about workable settlement possibilities with respect to each of the issues.

During sessions, the mediator may speak directly to your client. As the advisor and advocate, attorneys are expected to take charge during the sessions and they tend to speak for the client. The mediator may give your client an opportunity to share his/her interests, concerns and needs in his or her own words. This approach improves the chances that the client will be satisfied with the process and the outcome. The mediator may ask simple questions such as basic introductory questions about a child who is at the center of a dispute and more complex questions such as why the client needs to have a specific piece of property.

Mediators are trained in substantive family law; but, they cannot advise your client. Discuss the applicable law and your client’s legal rights. Correct any misconceptions. For example, when one parent vehemently opposes the other parent’s access to the child, help the parent to understand that unless certain circumstances exist, the other parent is likely to receive an order for access if a judge rules because the parents are unable to reach an agreement. When the mediator concludes that a client needs advice, the mediator may suspend negotiations to give that client an opportunity to confer with counsel. Thus, the attorney who is not present during negotiations should be available to advise the client.

Sometimes, significant delays in negotiations occur between proposals and offers because the parties have not thought about how they will negotiate. Mediations run more smoothly when participants have a flexible negotiation plan. List and prioritize what the client wants. Discuss deal breakers and walkaway positions. Discuss the client’s next move if there is an objection to what your client wants. Determine what your client is willing to exchange in return for receiving something of value to him or her. Have an honest and realistic discussion with your client about his/her expectations, the propriety of negotiations, and the uncertainty and dissatisfaction that often accompanies a judicial opinion. Also, you or your client should record proposals/offers as they are made. Although the mediator is trained to take accurate notes, attorneys should keep track independently.

Identify key persons whose participation is needed to resolve the dispute. Ensure that those persons are available on the conference date and willing to participate. For example, if the child’s parents have agreed that the child will live with the maternal grandmother, the mediator will want to meet with the grandmother. In addition, court appointed representatives such as a guardian ad litem or a parenting coordinator should participate. See Leslie K. Smith, When Mom Won’t Give Up the Keys: A Guide to Mediating Disputes Involving Seniors, June/July ADVOCATE 33, 34 (2017).

In disputes about monetary payments, give the client some idea of the amount that the client may be entitled to pay or receive. The mediator will calculate amounts for support and other payments. However, to avoid the initial shock and surprise that may result in an impasse, the client should be forewarned. See, e.g., Child Support Services Division, Child Support Guideline Calculator, http://csgc.oag.dc.gov/application/main/intro.aspx (last visited February 13, 2019).

To avoid lengthy delays associated with document retrieval, gather appropriate documents before the first session and give copies to the client or bring them to the first session. For example, if child maintenance is an issue, the mediator will need to see employment records, child care receipts, W-2 forms, income tax statements, custody orders, proof of health insurance coverage, and other evidence of income to make an accurate calculation. Id. Although many of these documents may be accessible online, it could take days or weeks for a client or an attorney to access or locate some information. Meanwhile, negotiations will be impeded.
Confide in the mediator. If your client has unrealistic expectations or there are other barriers to a mediated-resolution, let the mediator know. The mediator may decide to conduct a reality check or change the procedure to address the concern. If your client will be uncomfortable in the same room with the other party, tell the mediator. The mediator may hold a short joint session and separate the participants quickly or forgo holding a joint session altogether.

Explain your role during mediation. Tell the client how to reach you during sessions and plan to be available if the client contacts you. Assure the client that he/she will not be required to sign an agreement until you have reviewed it. This assurance may assuage any concerns that the client may have about entering into an agreement that is not in her best interests. Also, if the parties reach an agreement, consider a provision for mediation if future disagreements arise. Abrams and Greaves, supra, at 28. Moreover, explain the judge’s role in the process if the dispute involves a child. The judge must make an independent determination about whether the agreement that the parents/guardians reach is in the child’s best interests.

Timeliness is essential throughout the process. You and your client should show up for sessions on time and prepare to stay for the entire time allotted. The mediator decides how to organize the discussion based upon the amount of time set aside for these participants. Notify the mediator ahead of time if there is a genuine need to leave before the mediator adjourns the session so that the mediator may make adjustments if needed. Also, respond to offers/proposals within a reasonable time and make timely submissions as required/requested.

Besides listening to your client, listen to the mediator. Family mediators facilitate communications and negotiations in many disputes. They have valuable insight to share. Although a party is not obligated to adopt any suggestion that the mediator makes, information about how other participants resolved a similar dispute may lead you and your client to create a remedy that is suitable for him or her.

Removing Barriers to a Mediated Resolution

Family disputes are some of the most contentious disputes. Participants often arrive with high emotions. Although venting makes some mediators, other participants, and attorneys uncomfortable, mediation often presents the first opportunity for participants to express their feelings to each other. When parties have space to vent either in joint session or in private session, when the mediator handles it properly, it allows the party who is expressing anger, sadness, or some other emotion to feel heard. That, in turn, opens the channels for communication of interests and needs that often leads to a resolution of the dispute.

A skilled mediator will allow appropriate time for venting. Even during venting, through active listening, the mediator may learn valuable information about that participant’s interests and needs that will be useful during negotiations. Then, after empathic responses, rephrasing and reframing techniques, at the appropriate time, the mediator carefully will shift the discussion from venting to identifying issues and solutions. See generally Russell M. Ware, "I'm Too Mad to Settle!" Working With Angry Plaintiffs In A Mediation, 81 Wis. Law 16 (May 2008).

Negotiation weariness may be another barrier to mediation. Some parties will be reluctant to try mediation because prior efforts to resolve the dispute have been unsuccessful. They may have gone to court multiple times without satisfaction. They may have engaged in prior attempts to resolve the same dispute without court intervention. Promises may have been made and they were not kept. If your client is reluctant to participate but you feel that mediation is a good option, the mediator may be willing to talk to the client.
Cultural differences may be a barrier. A participant may refuse to negotiate or feel disrespected by an adverse party’s, attorney’s or mediator’s conduct. How the mediator treats a disputant of another culture could derail negotiations if the mediator does not appreciate, understand and accept the differences. For example, the custom in African culture for Africans not to look persons whom they hold in high esteem in the eye may be misjudged by an American mediator who is accustomed to sustained eye contact. Without cultural awareness, the mediator may draw inaccurate conclusions about participants based on his or her own cultural norms and behaviors. Katie Shonk, *How to Resolve Cultural Conflict: Overcoming Cultural Barriers at the Negotiation Table*, THE NEGOTIATION INSIDER, January 29, 2019 https://www.pon.harvard.edu/daily/conflict-resolution/a-cross-cultural-negotiation-example-how-to-overcome-cultural-barriers/?utm_source=WhatCountsEmail&utm_medium=daily&utm_date=2019-01-29-13-30-00&mqsie=E4025770 (last visited February 28, 2019). *See also African Americans are not Carbon Copies of White Americans — The Role of African American Culture in Mediation of Family Disputes*, 13 OHIO ST. J. DISP. RESOL. 405-60 (1998) (cited in THE CONFLICT & CULTURE READER 198 (Pat K. Chew, ed. 2001).

Sometimes, logistics will create barriers that are not unsurmountable. Disputants may live in different parts of the United States and in different countries. The traditional model of mediation relies upon in person communications between the mediator and participants. However, under some circumstances, face-to-face or in person mediations would be a major challenge, if not impossible. In recent years, online or cyber mediation was developed to enable parties to resolve family disputes as an alternative to traditional ADR methods. Online Dispute Resolution (ODR) allows participants who are separated geographically to resolve their differences conveniently and without high travel costs. ODR allows a mediator to employ a panoply of tools and technology to facilitate the parties’ discussions and negotiations. The mediator and the participants may communicate by telephone, electronic mail, direct mail, video conferencing, internet bulletin boards, and conference calls. To finalize an agreement, the parties may have access to applications for formulating agreements and digitized signature programs. See Dafna Lavi, *No More Click? Click in Here: E-Mediation in Divorce Disputes—The Reality and the Desirable*, 16 CARDOZO J. CONFLICT RESOL. 479, 482, 488 (2015).

In addition, tell the mediator if there are other complications that may hinder or slow down the mediation process. Flexibility in setting the time for the mediation may be required when the mediator and one or both participants are in different states or time zones. Also, in some cases, the mediation process may be lengthened because of the need for translations. The attorney may have to submit proposals to a translator and wait for someone in another country to translate the proposal. Afterward, all participants will wait for the translator to report back to the attorney. When an oral agreement is reached, as it is drafted, provisions and edits will need translation. Barriers may complicate the process and the participants may have to work together to remove barriers so that they may take advantage of mediation.

Conclusion

Mediation is an excellent and successful tool for resolving family disputes in state and federal courts. Trained mediators in court-annexed programs and private mediators are ready and willing to facilitate discussions between participants to help them fashion creative solutions to resolve their differences. Proper screening, preparation and attention to participants’ concerns, interests, and needs will enhance the mediation experience for those who need this valuable service.
THIS CASE WILL NEVER SETTLE!
A PARADIGM FOR SUCCESSFUL MEDIATION OF FAMILY DISPUTES IN STATE AND FEDERAL COURTS

ABA Family Law Section
Annual Conference
Dominican Republic
May 3, 2019

Val Arnold
Cynthia R. Mabry-King
In the voluntary mediation process, participants agree to use a third party neutral who is trained in substantive family law to facilitate their discussion of “self-determined” solutions to resolve their dispute(s).

Deborah Thompson Eisenberg, Reflections on “Innovations in Family Dispute Resolution,” 75 MD. L. REV. 1, 3-4 (2016).

Defining Mediation
FAMILY DISPUTES WHICH MAY BE APPROPRIATE FOR MEDIATION

Interstate Disputes
Children’s Issues
Divorce
Estate
Probate
Property Distribution
Separation
Wills

International Disputes
Hague Convention

State and Federal (with underlying state disputes)
MEDIATOR SCREENING OF FAMILY DISPUTES FOR MEDIATION

• Willingness to Participate
• Willingness to Compromise
• Willingness to Honor Confidentiality

• Uniqueness of Potential Solutions
• History of Family Violence
• Additional Considerations for International Family Disputes
QUERY FOR MEDIATORS IN THE AUDIENCE:

HAVE YOU EVER AGREED TO TAKE A FAMILY DISPUTE THAT YOU WISH THAT YOU HAD NOT TAKEN?

Why?
Knowing what you know now, would you accept or screen out a similar case that is presented to you?
What are common impediments to a successful mediation?
A FAMILY LAWYER’S PERSPECTIVE ON MEDIATION

Planning for Settlement

- Issue identification for each phase of mediation
- Participants
- Type of Mediation
- Preparing for Mediation
REMOVING POTENTIAL BARRIERS TO RESOLUTION OF A DISPUTE

- Animosity Between Parties
- Logistics
- Cultural Differences
- Litigation/Negotiation Weariness
Spanish is the most frequently used language in interpreting proceedings in the courts, comprising 97 percent of all reported interpreting events in fiscal year 2018. Federal courts used interpreters in 361,733 court proceedings in the 12 months ending Sept. 30, 2018. Overall, 130 different languages were used. The top 10 languages that required interpreting were Spanish (351,220), Portuguese (1,417), Mandarin (1,287), Russian (892), Arabic (811), Punjabi (570), Mixteco (413), Romanian (321), Haitian Creole (266), and American Sign Language (255). Administrative Office of the U.S. Courts, Director’s Annual Report 2018, Court Operations And Case Management (Mar. 11, 2019).

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<thead>
<tr>
<th>Language</th>
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</tr>
</tbody>
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INTERPRETING AND TRANSLATION

- Ensuring qualifications of interpreters
- Proper use of interpreters
- Interpreting vs. translation
HYPOTHETICAL

Group Discussion
WHAT ARE THE LIKELY BARRIERS TO A SUCCESSFUL MEDIATION?

WHAT ARE POSSIBLE SOLUTIONS?
WHAT MEDIATORS WANT LAWYERS TO DO

• Consider Mediation as a Possible Tool
• Prepare the Client
  • Explain the Law, Alternatives, and Roles
• Identify Issues
• Identify Key Persons
• Establish a Negotiation Plan
• Do Preliminary Calculations
• Obtain Relevant Documentation
• Be on Time and Make Timely Submissions
• Be Available for Consultation
• Confide in the Mediator
• Listen for Clues About How You May Resolve the Dispute
THE MEDIATOR’S KNOWLEDGE OF FAMILY LAW

How important is it in your selection process?
SELECTED VIDEO DEMONSTRATIONS OF FAMILY MEDIATION

• https://www.bing.com/videos/search?q=ABA+family+mediation+video&view=detail&mid=3141952524FFE983E7E3141952524FFE983E7E&&FORM=VDRVRV

• https://www.bing.com/videos/search?q=ABA+family+mediation+video&view=detail&mid=1C7ED9BCB34F81D877B71C7ED9BCB34F81D877B7&&FORM=VDRVRV

• https://www.bing.com/videos/search?q=ABA+family+mediation+video&view=detail&mid=CBE64EE1E0A15D86C50CBE64EE1E0A15D86C50&FORM=VDRVRV
QUESTIONS AND ANSWERS
CONCLUSION