Mediation to Resolve Complex Family Law Cases - Ethical Considerations for the Advocate and the Guardian *Ad Litem*

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***Please See Reference/ Companion Piece*: www.mccammongroup.com/wp-content/uploads/2018/02/Effective-Advocacy-in-Mediating-Complex-Equitable-Distribution-Divorce-Cases-WCT-2018-1.pdf**

Introduction: In matters of divorce, whether the issues are strictly financial or whether there are custody and visitation issues involved, emotions and anxieties typically run high. Disappointment and hurt feelings, as well as concern about splitting finances and fear of moving forward alone can cause the parties to engage in behavior that is counter-productive and sometimes openly hostile. In preparing for litigation in a complex divorce, discovery and preparation can include business valuations, vocational rehabilitation evaluations, appraisals of homes, custody and psychological evaluations and other sometimes invasive methods designed to assist the fact finder.

The process is often extremely draining on the financial and emotional resources of the family. Heading to Circuit Court on Fridays to argue about discovery, valuation dates, *pendent lite* support and custody often creates stress for the parties and can also wear on the attorneys when the process is unduly adversarial. Waiting several months for a contested trial, enduring depositions, wading through disagreements and discovery motions along the way often seems to leave the parties with nothing but debt.

Most of the time, it is far more desirable for the parties to avoid litigation and to reach a solution that is not handed down by a judge after a day or more of tearing each other down in a long drawn out trial. Particularly when children are involved, the parties will have to deal with each other for years to come, and it is usually a better path to peaceful coexistence if the parties both participate in arriving at a creative solution that does not appear to be a windfall to either party.

A skilled mediator with experience dealing with family law and complex equitable distribution matters can be an invaluable asset to attorneys and clients who want to emerge feeling as if they have reached a fair solution that will preserve the family's assets so that each party can move forward with confidence. As obvious as it seems, many parties don't fully grasp before litigation begins that the assets have to be divided, and parties sometimes seem to think that they will end up with all of the assets because the other party simply does not deserve anything, including contact with the parties' shared children.

While this is obviously an unrealistic point of view, mediation can undoubtedly ease a party into a more realistic stance more gently than if he or she is confronted at trial by opposing counsel during cross examination or a ruling that he or she believes is unjust. Long term, it seems impossible that being questioned at trial by an adversary would lead to anything but increased hostility and resentment, which can poison every family event in perpetuity. Mediation offers a solution and can often, with the right mediator and well prepared lawyers, create a sense of community even in the midst of disagreement.

Not only can mediation lead to a creative solution that is better financially for the family long term, but stopping the litigation and reaching a compromise can ease the acrimony and create a more peaceful atmosphere for the children and the parents.

For the mediation experience to be optimized, the attorneys have to be well prepared and knowledgeable, sometimes including a Guardian *Ad Litem* who can add more insight into the child's perspective. These materials and hypotheticals can hopefully help attorneys more carefully consider the ethical rules that are implicated in mediation so that each experience can be the best possible for the parties and the professionals involved.

OUTLINE OF EXCERPTS OF A FEW APPLICABLE MODEL RULES AND RAMIFICATIONS FOR THE MEDIATION PROCESS

A. RULE 1.1 Competence

Rule: A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Discussion of Application to Mediation:

Representation of a client in divorce is not a simple process, particularly when the couple has accumulated assets such as retirement accounts, pensions, investment accounts, businesses, and other marital property. Competent representation requires that the attorney understands the difference between marital and separate property as well as how to trace and evaluate what the client might be entitled to, and what the other spouse will likely claim about his or her share of the assets. Competence requires that the attorney knows how to estimate the client's separate or marital share of the value of any hybrid property and how to value the different equities and interest that have accumulated during the marriage. Allocation of debts may also be a significant issue in some divorces.

In addition to knowing how to obtain and synthesize information about each party's interests in the marital estate, an attorney will have to gather all of the relevant information and explain to the client prior to mediation different possible outcomes and methods of how the property may be valued and apportioned. A thorough explanation to your client of how equitable distribution

works will be crucial in any effort to competently prepare your client to attempt to resolve the case in mediation.

The attorney should explain to the client prior to mediation what the possible valuation methods might be, how valuation dates may impact each party's share, and what the arguments are regarding how to classify the various assets as marital, separate or hybrid. If your client understands the relevant concepts and terms and how the law applies prior to mediation, it will be much easier for the client and mediator to have an intelligent and productive discussion about possible compromises.

To prepare a client properly, the attorney should have a firm grasp of all of the assets, as well as a firm idea of how to prepare the client to arrive at various outcomes that would be acceptable to the client prior to attending mediation. Going into a mediation with an organized, complete picture of the assets and a client who understands the possible outcomes is a must for providing competent representation. In addition, providing the mediator with a detailed accounting of the assets in advance is a good way to avoid wasting time in the mediation sorting out the interests and explaining why your client believes he or she is entitled to a certain distribution.

Advance preparation also prevents a situation where the parties believe the matter is fully resolved but later realize that certain assets were not discussed in the mediation and must be dealt with later. Thorough preparation for mediation should include written materials memorializing your client's thoughts prior to entering the mediation about a "best case scenario," some possible compromises as well as any "bottom line" positions your client may have. While it is undeniable that mediation is less stressful than litigation, the pressure of a long day of negotiation may cause a client to make additional compromises beyond what he or she initially believed was acceptable. Having your client's parameters in writing prior to mediation and being able to review those materials with your client during discussions outside of the presence of the other party is critical in ensuring that you are providing competent representation and avoiding claims by the client tht he or she was unduly pressured or was not adequately represented.

B. RULE 1.2 Scope of Representation

> **Rule:** (a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (b), (c), and (d), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision, after consultation with the lawyer, whether to accept an offer of settlement of a matter. [*criminal segment omitted*]
>
> A lawyer may limit the objectives of the representation if the client consents after consultation.

Discussion of Application to Mediation:

As with the rule above regarding competence, the scope of representation rule requires that the attorney and client have a clear understanding of what is expected of each of them. This rule specifically addresses the lawyer's duty to discuss with the client the means by which the desired

outcome is going to be pursued by the client. If the initial representation agreement was to represent the client at trial, or was unclear about the possibility of settlement negotiations and alternative dispute resolution, the decision to attempt mediation should be reduced to writing and acknowledged in writing by the client to avoid any confusion about whether this was a joint decision by the attorney and the client.

When the lawyer and client make the decision to attempt mediation, this may be a change in what the client initially believed to be the means and scope of representation, so it is critical that the attorney and client are clear with each other as to how much trial preparation to accomplish prior to the mediation and whether the client can afford to proceed with the litigation if the mediation is unsuccessful. A clear statement in the representation agreement regarding what financial arrangements the client will be expected to make prior to the mediation and/or the litigation will be critical in preserving the professional relationship throughout the process.

Once the mediation is underway, the lawyer will have an obligation to ensure that the settlement offers are explained thoroughly to the client and that the attorney answers any questions or concerns that the client has about the offer. The client will have to be advised throughout the process of all of the pros and cons of each offer and the nuances of the negotiations. Although the mediator is bound by a confidentiality agreement and cannot testify at trial, it is still important to talk with your client privately about all of the ramifications of each offer.

C. RULE 1.3 Diligence

(a) A lawyer shall act with reasonable diligence and promptness in representing a client.

(b) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but may withdraw as permitted under Rule 1.16.

(c) A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under Rule 1.6 and Rule 3.3.

Discussion of Application to Mediation:

(a) This rule often overlaps with the rule regarding competence, as preparation is crucial for competent representation, and diligence is required for thorough preparation. Returning calls, answering correspondence, conducting discovery, and gathering all of the relevant information well in advance to prepare for the mediation is critical in having the knowledge and skill necessary to present your arguments and points during the mediation to reach the best possible outcome in mediation. Heading into a mediation with a nervous client who has not heard from you and is not comfortable with the game plan does not set the stage for taking an offer of settlement and feeling confident that it was a fair outcome.

(b) It is questionable whether it is ethically appropriate to withdraw from a case just prior to mediation. If a mediation is scheduled, it is likely best to resolve any issues with representation

far in advance of the mediation to avoid any issues regarding causing an undue prejudice to a client by withdrawing too close to a mediation, just as it would be with a trial.

(c) Although a long day of mediation can be arduous and frustrating, it would clearly be an ethical violation to threaten to sabotage or abandon a client if he or she does not take a settlement offer or to say or do anything during a mediation to sabotage the client's case. Regardless of how fair or reasonable an attorney thinks an offer is, the attorney cannot force the client to take the deal, and must merely advise the client of the possible consequences and respect the client's right to make the decision. Similarly, the mediator can explain to the parties why a particular offer is reasonable or desirable, and can explain to the parties what might be likely to happen if the matter goes to trial, but neither the neutral nor the attorneys can pressure or coerce a party to settle the case.

D. RULE 1.4 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

(c) A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.

Comment:

[1] This continuing duty to keep the client informed includes a duty to advise the client about the availability of dispute resolution processes that might be more appropriate to the client's goals than the initial process chosen. For example, information obtained during a lawyer-to-lawyer negotiation may give rise to consideration of a process, such as mediation, where the parties themselves could be more directly involved in resolving the dispute.

Discussion of Application to Mediation:

The comment and subsection (c) of this rule are relatively self-explanatory with respect to mediation. Particularly in cases where children are involved and cases where the parties have assets that should be preserved, informing the client that mediation and other ADR methods are available is not only an ethical obligation of the lawyer but could save the parties years of acrimony and a great deal of financial loss. Even if traditional litigation is undertaken and the parties decline ADR after being informed that ADR is an available option, if a settlement offer is forwarded by opposing counsel, the attorney must discuss the offer with his or her client regardless of whether the client is likely to take the offer.

E. RULE 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

CLE Note: ***Virginia Code Sections 8.01-576.9 et seq****. govern mediation and the parameters of the confidentiality of the proceedings. Relevant sections are listed in the footnotes of these materials. When accompanying your client to mediation, it is wise to be well versed in these statutes in their entirety, including the exceptions to the bar to disclosure. Explaining these rules and limitations to your client in advance can avoid an issue with your client disclosing too much or too little and can assist with ensuring that the mediation has the best chance at success.*

Discussion of Application of Rule 1.6 to Mediation[1]:

Although mediation is less adversarial than litigation, and although many mediators are very skilled in easing tensions and making the parties feel comfortable discussing his or her feelings and issues in a case freely, it is still critical for attorneys to protect client confidentiality and to avoid disclosing any information that would be damaging or embarrassing to a client or any information that the client has asked the attorney not to share. While it is important to make

[1] This Rule should be considered in conjunction with Virginia Code Section 8.01-576.9, governing Standards and duties of neutrals; confidentiality; liability (liability section omitted here). The statute states in pertinent part:

> A neutral selected to conduct a dispute resolution proceeding under this chapter may encourage and assist the parties in reaching a resolution of their dispute, but may not compel or coerce the parties into entering into a settlement agreement. A neutral has an obligation to remain impartial and free from conflict of interests in each case, and to decline to participate further in a case should such partiality or conflict arise. Unless expressly authorized by the disclosing party, the neutral may not disclose to either party information relating to the subject matter of the dispute resolution proceeding provided to him in confidence by the other. In reporting on the outcome of the dispute resolution proceeding to the referring court, the neutral shall indicate whether an agreement was reached, the terms of the agreement if authorized by the parties, the fact that no agreement was reached, or the fact that the orientation session or mediation did not occur. The neutral shall not disclose information exchanged or observations regarding the conduct and demeanor of the parties and their counsel during the dispute resolution proceeding, unless the parties otherwise agree.

The statute also discusses the obligation despite the foregoing of disclosure of the figures and computations used in calculating child support, if applicable. Section 8.01-576.10 governs the confidentiality of the neutral's files and other related information, Section 8.01-576.11 governs written agreements reached in mediation, and Section 8.01-576.12 explains under what circumstances a mediated agreement will be vacated.

every attempt to resolve matters if mediation is undertaken, there is no duty to disclose information that may be detrimental if the matter is not resolved.

In a divorce matter, for instance, while a client may decide after consultation and consideration to tell the mediator in confidence that he or she is worried about proceeding with litigation because a deposition or further discovery may reveal adultery or other issues or grounds, it is not obligatory that the client do so, and it would be unethical for an attorney to disclose that information to the mediator without careful consultation, counsel and consent as contemplated by this rule. Even if sensitive information is revealed in mediation either to the mediator or otherwise, it is not permissible for the opposing party to reveal the contents of settlement negotiation if the mediation is unsuccessful, however, in an abundance of caution, and due to the tense nature of most domestic cases, clients and attorneys are wary of revealing any information in mediation that would potentially have a negative impact going forward.
Given all of this, it is wise to discuss with your client how it may be advantageous to discuss issues with the mediator in confidence, and decide if it could be helpful in guiding the mediator to come up with solutions and to avoid proposals that will not be acceptable to your client for reasons that you do not want to disclose.

For example, if your client is awaiting a bonus, inheritance or has plans to acquire property at some time in the future, and you do not want to disclose that fact for fear that the other party will want a stake in it, it may be helpful to let the mediator know that you will not accept any proposals that include terms that would postpone the final disposition or otherwise place that property or asset at risk. Likewise, if there is information that your client may want to tell the mediator that pertains to custody or visitation, and it might be helpful for the mediator to know, but you do not want the GAL to know for fear that it will change his or her recommendation or opinion of your client, it is wise to talk with your client about sharing confidential information with the mediator outside of the presence of the GAL.

Discussion of Application to Mediation as a Guardian *Ad Litem:*

During a mediation, the GAL is also bound by a statutory duty not to disclose what happened in the mediation. In general terms, as a practitioner representing a child's interests rather than an adult client, the GAL is not bound by the same type of confidentiality as the attorneys for the parties. In contrast to Counsel for the parents, the GAL has an obligation to disclose information and can use his or her judgment in terms of what should be confidential and what should be disclosed to the parties, the judge or the neutral, but as with all representation, a GAL cannot reveal information that would be detrimental to the child whose interests are represented.

It is a difficult balancing act when a GAL believes that settlement would be more likely if the child's preferences were revealed versus concerns that the parties, if mediation is unsuccessful (and sometimes even if it successful), will confront or coerce the child about any statements that were made to the GAL. It is also difficult for a GAL to know when a child is being truthful and when the child may be harmed by disclosing his or her statements.

In mediation, the GAL and mediator should speak privately to discuss the child's preferences and any specific statements the child has made about his or her feelings about the parents. For a GAL, it is an invaluable opportunity to tell the mediator what the child has said without exposing the child's statements to the parties and counsel. With this information as well as all of the other information gathered, the mediator can subtly incorporate the child's preferences into his or her discussions with the parties and counsel without directly revealing the child's preferences and placing the child at further risk for coercion. This added layer of protection for the child can make the difference between an agreement that brings the family together as opposed to a traumatic inquisition for the child when the parties next see him or her.

Similarly, the GAL must be cautious not to allow anything that happens in mediation to be conveyed in his or her report to the Court or to be brought up at trial, however this can present a challenge if one of the parties discloses something potentially harmful to the child, or reveals information that would indicate that what the party is asking for in litigation is logistically or practically impossible.

RULE 4.1 Truthfulness In Statements To Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of fact or law; or
(b) fail to disclose a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

COMMENT

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by failure to act or by knowingly failing to correct false statements made by the lawyer's client or someone acting on behalf of the client.

Discussion of Application to Mediation

The parties are not under oath at mediation. This creates some space for negotiation tactics and sometimes offering overblown projections in terms of what might happen at mediation if the other side does not take a certain proposal. Additionally, the parties often fail to disclose facts that might come out if the party were under oath or if further depositions or discovery were completed. The lawyer has an ethical duty not to exaggerate to the point of falsifying law, and cannot use the mediation to bluff so blatantly about the perils of rejecting an offer so as to misstate the law.

Statements by attorneys such as "Well in my vast experience, I have never seen a judge rule this way…" or "I know this judge and I can promise you (s)he will …" intended to sway an opposing attorney or party to agree to certain terms can come close to crossing this line if they are perceived to be a misstatement of the law or are untruthful.

Regarding the facts of the case as shared during mediation, and as discussed with respect to confidentiality, the attorney has no obligation and in some cases, cannot disclose in mediation information that would harm the client's case. When information is shared with the mediator that has not been borne out in discovery, and the mediator knows that the information, if shared, would likely lead to a compromise, it can be difficult to know the correct balance between using this information and keeping it private. Although the mediation is confidential, if the information is shared with opposing counsel and later denied by the party's counsel, this ethical rule could come into play.

Even in a confidential mediation and negotiation, the lawyer's ethics must be upheld and this rule forbids an attorney from making a false statement of fact even though it is not technically a court proceeding and is not on the record. There is an important distinction for attorneys to understand between negotiation, bluffing, and misrepresentation. Before mediation, each practitioner should have a clear view of where that line stands in his or her case so as to avoid getting caught up in the moment and making any statement that crosses it. Knowing your facts and agreeing in advance with your client about what is and is not to be shared is critical for maintaining your obligations under both this rule and 1.6.

E. VIRGINIA RULES SPECIFICALLY REGARDING MEDIATION

[Note: The ABA Model Rules are somewhat different as they have not all been adopted in Virginia]

RULE 2.10 Third Party Neutral

(a) A third party neutral assists parties in reaching a voluntary settlement of a dispute through a structured process known as a dispute resolution proceeding. The third party neutral does not represent any party.

(b) A lawyer who serves as a third party neutral

(1) shall inform the parties of the difference between the lawyer's role as third party neutral and the lawyer's role as one who represents a client;

(2) shall encourage unrepresented parties to seek legal counsel before an agreement is executed; and

(3) may encourage and assist the parties in reaching a resolution of their dispute; but

(4) may not compel or coerce the parties to make an agreement.

(c) A lawyer may serve as a third party neutral only if the lawyer has not previously represented and is not currently representing one of the parties in connection with the subject matter of the dispute resolution proceeding.

(d) A lawyer may serve as a third party neutral in a dispute resolution proceeding involving a client whom the lawyer has represented or is representing in a matter unrelated to the dispute resolution proceeding, provided:

(1) there is full disclosure of the prior or present representation;

(2) in light of the disclosure, the third party neutral obtains the parties' informed consent;

(3) the third party neutral reasonably believes that a prior or present representation will not compromise or adversely affect the ability to act as a third party neutral; and

(4) there is no unauthorized disclosure of information in violation of Rule 1.6.

(e) A lawyer who serves or has served as a third party neutral may not serve as a lawyer on behalf of any party to the dispute, nor represent one such party against the other in any legal proceeding related to the subject of the dispute resolution proceeding.

(f) A lawyer shall withdraw as third party neutral if any of the requirements stated in this Rule is no longer satisfied or if any of the parties in the dispute resolution proceeding so requests. If the parties are participating pursuant to a court referral, the third party neutral shall report the withdrawal to the authority issuing the referral.

(g) A lawyer who serves as a third party neutral shall not charge a fee contingent on the outcome of the dispute resolution proceeding.

(h) This Rule does not apply to joint representation, which is covered by Rule 1.7.

RULE 2.11 Mediator

(a) A lawyer-mediator is a third party neutral (*See* Rule 2.10) who facilitates communication between the parties and, without deciding the issues or imposing a solution on the parties, enables them to understand and resolve their dispute.

(b) Prior to agreeing to mediate and throughout the mediation process a lawyer-mediator should reasonably determine that:

(1) mediation is an appropriate process for the parties;

(2) each party is able to participate effectively within the context of the mediation process; and

(3) each party is willing to enter and participate in the process in good faith.

(c) A lawyer-mediator may offer legal information if all parties are present or separately to the parties if they consent. The lawyer-mediator shall inform unrepresented parties or those parties who are not accompanied by legal counsel about the importance of reviewing the lawyer-mediator's legal information with legal counsel.

(d) A lawyer-mediator may offer evaluation of, for example, strengths and weaknesses of positions, assess the value and cost of alternatives to settlement or assess the barriers to settlement (collectively referred to as evaluation) only if such evaluation is incidental to the facilitative role and does not interfere with the lawyer- mediator's impartiality or the self-determination of the parties.

(e) Prior to the mediation session a lawyer-mediator shall:

(1) consult with prospective parties about

(i) the nature of the mediation process;

(ii) the limitations on the use of evaluation, as set forth in paragraph (d) above;

(iii) the lawyer-mediator's approach, style and subject matter expertise; and

(iv) the parties' expectations regarding the mediation process; and

(2) enter into a written agreement to mediate which references the choice and expectations of the parties, including whether the parties have chosen, permit or expect the use of neutral evaluation or evaluative techniques during the course of the mediation.

(f) A lawyer-mediator shall conduct the mediation in a manner that is consistent with the parties' choice and expectations.

COMMENT

[1] Offering assessments, evaluations, and advice are traditional lawyering functions for the lawyer who represents a client. A lawyer-mediator, who does not represent any of the parties to the mediation, should not assume that these functions are

appropriate. Although these functions are not specifically prohibited in the statutory definition of mediation, which is set forth as paragraph (a) of this Rule, an evaluative approach which interferes with the parties' self-determination and the mediator's impartiality would be inconsistent with this definition of mediation.

[2] Defining mediation to exclude an evaluative approach is difficult not only because practice varies widely but because no consensus exists as to what constitutes an evaluation. Also, the effects of an evaluation on the mediation process depend upon the attitude and style of the mediator and the context in which it is offered. Thus, a question by a lawyer-mediator to a party that might be considered by some as "reality testing" and facilitative, might be viewed by others as evaluative. On the other hand, an evaluation by a facilitative mediator could help free the parties from the narrowing effects of the law and help empower them to resolve their dispute.

Informed Consent to Mediator's Approach

[3] The Rule focuses on the informed consent of the prospective mediation clients to the particular approach, style and subject matter expertise of the lawyer- mediator. This begins with consultation about the nature of the mediation process, the limitations on evaluation, the lawyer-mediator's approach, style and subject matter expertise and the parties' expectations regarding the mediation process. If the parties request an evaluative approach, the lawyer-mediator shall explain the risk that evaluation might interfere with mediator impartiality and party self-determination. Following this consultation the lawyer-mediator and the parties shall sign a written agreement to mediate which reflects the choice and expectation of the parties. The lawyer-mediator shall then conduct the mediation in a manner that is consistent with the parties' choice and expectations. This is similar to the lawyer-client consultation about the means to be used in pursuing a client's objectives in Rule 1.2.

Continuing Responsibility to Examine Potential Impact of Evaluation

[4] If the parties choose a lawyer-mediator who is willing and able to offer evaluation during the mediation process and has met the requirements of paragraph (e), a lawyer-mediator has a continuing responsibility under paragraphs (b) and (d) to assess the situation and consult with the parties before offering or responding to a request for an evaluation. Consideration shall be given again as to whether mediator impartiality and party self-determination are at risk. Consideration should also be given as to whether an evaluation could detract from the willingness of the parties to work at understanding their own and each other's situation and at considering a broader range of interests, issues and options. Also, with an evaluation the parties may miss out on opportunities to maintain or improve relationships or to create a higher quality and more satisfying result.

[5] On the other hand, the parties may expect the lawyer-mediator to offer an evaluation in helping the parties reach agreement, especially when the most important issues are the strengths or weaknesses of legal positions, or the significance of

commercial or financial risks. This is particularly useful after parties have worked at possible solutions and have built up confidence in the mediator's impartiality or where widely divergent party evaluations are major barriers to settlement.

[6] The presence of attorneys for the parties offers additional protection in minimizing the risk of a poor quality evaluation and of too strong an influence on the parties' self-determination. An evaluation, coupled with a reminder to the parties that the evaluation is but one of the factors to be considered as they deliberate on the outcome, may in certain cases be the most appropriate way to assure that the parties are making fully informed decisions.

Legal Advice, Legal Information and Neutral Evaluation

[7] A lawyer-mediator shall not offer any of the parties legal advice which is a function of the lawyer who is representing a client. However, a lawyer-mediator may offer legal information under the conditions outlined in paragraph (c). Offering legal information is an educational function which aids the parties in making informed decisions. Neutral evaluations in the mediation process consist of, for example, opining as to the strengths and weaknesses of positions, assessing the value and costs of alternatives to settlement or assessing the barriers to settlement.

[8] The lawyer-mediator shall not, however, make decisions for any party to the mediation process nor shall the lawyer-mediator use a neutral evaluation to coerce or influence the parties to settle their dispute or to accept a particular solution to their dispute. Paragraphs (d), (e), and (f) restrict the use of evaluative techniques by the lawyer-mediator to situations where the parties have given their informed consent to the use of such techniques and where a neutral evaluation will assist, rather than interfere with the ability of the parties to reach a mutually agreeable solution to their dispute.

Mediation

[9] While a lawyer is cautioned in Rule 1.7 regarding the special considerations in common representation, these should not deter a lawyer-mediator from accepting clients for mediation. In mediation, a lawyer-mediator represents none of the parties and should be trained to deal with strong emotions. In fact, mediation can be especially useful in a case where communication and relational breakdown have made negotiation or litigation of legal issues more difficult.

Confidentiality and Professional Responsibility Standards

[10] Confidentiality of information revealed in the mediation process is governed by *Code of Virginia* Sections 8.01-576.9 and 8.01-576.10 and Section 8.01-581.22.

COMMITTEE COMMENTARY

The Committee adopted this Rule, not part of the *ABA Model Rules*, to give further guidance to lawyers who serve as mediators. Although Legal Ethics Opinions [e.g., LEO 590 (May 17, 1985)] have approved of lawyers serving as mediators, different approaches to and styles of mediation ranging from pure facilitation to evaluation of positions are being offered. This Rule requires lawyer-mediators to consult with prospective parties about the lawyer-mediators' approach, style and subject matter expertise and to honor the parties' choice and expectations.

The amendments effective December 30, 2009, in Comment [9], deleted the references to Rule 2.2 that was deleted by Court order dated September 24, 2003.

END OF RULE SUMMARY MATERIALS

HYPOTHETICALS FOR FAMILY LAW ATTORNEYS AND GALS IN MEDIATION

Fact Pattern for Hypotheticals:

Adam Attorney is a general practitioner. He agrees to represent his wife's second cousin, Charlie Client in a divorce. Adam has been practicing mostly in criminal and traffic cases for several years, but handles uncontested divorces when his criminal business is slow. He has done a few contested family law matters, and figures he has a handle on it. Charlie and his wife, Daisy, are in their 60's. Charlie's wife, is a retired Admiral in the Navy, currently working as a florist, and Charlie is a retired Air Force Master Sergeant who is no longer employed.

The couple raised three children to adulthood together but later, after they retired from the military, they adopted two formerly neglected children out of foster care. The adopted children are currently in kindergarten and second grade, respectively. The youngest child was born addicted to heroin and has special needs and developmental delays. Charlie is the primary care provider for the children and takes the lead on tending to the medical needs of the youngest child.

The couple disagrees on how severe the youngest child's needs are and how long the youngest child will need services and intensive care. The older child is a prodigy on the piano and attends special lessons and camps that require a lot of transportation. There is a recital or command performance almost every weekend because the child's talent is so rare.

The couple has a marital residence in Church Point, but they disagree on the value of the home and who should reside there. They have a vacation home in the Outer Banks that they purchased with another couple, and they own a property in Monterey, California that they use as a rental property. The couple has various investment accounts but Charlie is unsure about all of the details because his wife typically handled the finances.

Unfortunately, Charlie had an injury while he was serving in the military and developed an addiction to pain killers during treatment. After he realized his problem, Charlie went to rehabilitation and reports that he has not used any pain killers for seven years. Charlie's wife claims that Charlie has relapsed and that he is an unfit parent. She reports that she would be comfortable with Charlie having every other weekend visitation but also reports that she thinks he needs supervision in case he relapses further. Charlie claims that he has no current issues with substance abuse and that he believes his Wife is exaggerating his issues because she wants to avoid paying him support.

Charlie reports that Daisy is having an affair with her partner at the florist shop and that he has screen shots of some racy texts he captured from her phone one night when one of the children was playing on her phone to prove it. He also claims that the shop, Daisy's Daisies, is cooking their books and that the shop is a front for some nefarious dealings of Daisy's business partner/alleged lover.

Daisy hires Oprah Opposition, a family law attorney who has a reputation for being needlessly aggressive, filing copious motions, propounding burdensome discovery and driving up fees. Very few attorneys enjoy working with Oprah as opposing counsel, however, she has a fantastic sense of style and can be quite personable at bar functions. Adam has never had a case directly against her, although he is aware of her reputation. Personally, Adam gets along well with Oprah but is slightly disheartened when he receives twelve motions by mail, fax, and email along with her first notice of appearance in the matter.

In the initial flurry of contested motions that Oprah noticed without clearing dates with Adam, Charlie is awarded temporary exclusive use and possession of the marital home. Daisy is awarded joint legal and shared physical custody, and temporary support and custody are set. A forensic business valuation is ordered for Daisy's Daisies, and a vocational rehabilitation evaluation is ordered for Charlie.

Gayle Guardian is appointed as GAL for the children, and Daisy and Charlie are ordered to pay her a retainer in equal shares, which upsets Charlie because Daisy has more income than he does. A psychological custody evaluation is ordered to be conducted by Dr. Archer, and Daisy is ordered to front the fees, with the matter of apportionment reserved for disposition. Both parties are upset with the rulings for various reasons. Adam is also displeased with the Court's selection of Gayle as the GAL, because he believes that Oprah and Gayle are very close socially. Adam

advises Charlie about his concerns in this regard and advises Adam to get in touch with Gayle as quickly as possible and to be as complimentary as he can about his wife and her attorney.

The parties send a great deal of discovery back and forth within the first weeks, and Gayle begins her investigation. Understanding their obligations, Oprah and Adam advise their clients separately about the availability of ADR and decide to attend mediation with Judge Tower. The attorneys inform Gayle that they will be attending mediation and ask her if she would like to attend as well. The attorneys including Gayle agree that Gayle should attend the mediation, and that it would be best if she has met the parties and children and has formulated at least a preliminary recommendation by the time mediation occurs, so they agree to set the mediation several weeks out to give Gayle a chance to get as far into her investigation as possible.

Judge Tower schedules a telephone conference with the attorneys and sets the mediation for an agreed date a week or so after the phone conference.

HYPOTHETICAL #1… Rule 1.1 Competence and Rule 4.1 Truthfulness

Adam has not tried a contested divorce for a long time. He starts looking into the finances and realizes that Charlie owned the marital home, which he inherited from his parents, before the wedding, but that he refinanced during the marriage. He recalls some vague notion that his client may be entitled to something because of this, but he really doesn't know how to go about figuring out what his client is entitled to. He knows that Judge Tower has a very strong background in equitable distribution, and figures that when they get to mediation, she can tell his client what would be fair for him to expect.

Oprah has sent copious discovery and asked for information about how Adam and his client believe this property should be divided up, and asks in Requests for Production for supporting documentation of any claims of separate or hybrid property. Adam isn't exactly sure how to answer, so he prepares an answer stating that the home is separate property because it was inherited and he provides the will. He knows this isn't complete but he reserves the right to supplement and figures he will do that after he learns more about equitable distribution.

Charlie isn't aware of what he can expect regarding the value and his share of the house so going into mediation, he says to Adam "I don't know… just tell me what I should agree to!" Adam doesn't quite know yet, but says to his client, "Relax. We are going in there offering nothing on the house because it was inherited! Maybe they will just agree to that! If they do, it doesn't matter what else the law would say about the house. This is just mediation, we don't need all the answers until trial!"

Questions:

1. Has Adam violated Rule 1.1 in failing to understand the law with respect to the assets before heading to mediation? If yes, what should Adam have done differently and to what extent? Is there any merit to Adam's claim that he has plenty of time to prepare before trial and still represent his client competently?

2. Has Adam violated Rule 4.1 in making an assertion in discovery, and again at mediation (assuming he does so) that Daisy has no claim to the marital home and that it is his position that the home is separate property?

2a. If the property is inherited and the burden then shifts to the other party to show some hybrid or marital share, isn't is fair that Oprah should have to come up with that information on her own?

2b. Adam doesn't believe he has any obligation to disclose facts about the refinance or the comingling and that Oprah needs to discover that and make her argument if she wants to represent her client adequately. Is he arguably correct?

HYPOTHETICAL #2… Rule 4.1 Truthfulness and Rule 1.6 Confidentiality With GAL Issues… With a Bonus Mediator Question!

In mediation, Daisy tells the mediator in confidence that she is, in fact having an affair with her business partner, Peter Poppy. She tells the mediator that she is desperately in love with Pops, as she affectionately calls him, and that she knows that fate brought them together because they both love flowers, jazz guitar, and watching synchronized swimming (what are the odds?!). She also confides in the mediator that Pops may have a teensy issue with heroin, but that it is not a big deal and he never uses it when the children are with them. She tells the mediator that she will not settle on any terms that allow Pops to be subjected to a drug test, or that require an audit of Daisy's Daisies.

Questions:

1. Oprah knows about Peter "Pops" Poppy and also knows that the books are not the only thing Pete is cooking in the flower shop (dear friends, this is a heroin reference). Oprah also knows, based on her confidential talks with Daisy that Pete and Daisy do some crazy non-child-friendly activities together, even when the kids are with Daisy overnight. Daisy has told Oprah in vague terms that she and Pete often frolic all night and sleep all day, leaving the kids to play video games and wander around the house without supervision. Daisy was giddy as she explained how much fun she is having with Pete. She was adamant with Oprah that the kids are benefitting greatly from having such a fun mom with a renewed *joie de vivre,* unlike when they had a boring, stiff, rule-following Navy Admiral as a mom!

Oprah also knows that at times, when she sees Daisy in her office, Daisy appears compromised and looks disheveled, wears long sleeves even when it's hot outside, and sometimes smells really weird. Oprah suspects that Pete may not be the only one with a drug problem, but she has purposely not asked Daisy exactly what is going on with her because she does not want to know the answer.

Can/should Oprah tell the mediator in confidence that she has concerns about Daisy's fitness as a mother based on her observations? Since Daisy has not specifically told Oprah that she uses drugs, is Oprah violating Rule 1.6 if she shares her concerns with Judge Tower and tells Judge Tower that she thinks Daisy and the kids would benefit from giving Charlie primary custody?

2. In preparing for mediation, what should Oprah advise Daisy about disclosing her relationship with Pete and how to approach this sensitive subject in mediation? With respect to custody, what can Oprah ethically advocate for Daisy to have shared or primary custody, knowing what she knows about her relationship with Pete and their proclivities?

3. Under the Competence Rule, does Oprah have an obligation to ask Daisy specifically about her drug use so that she can be adequately versed in the facts? If Daisy had admitted to using drugs when the kids are around, but Daisy was adamant in mediation when opposing counsel was present that she has never used an illegal drug in her life and that she doesn't have a boyfriend, what are Oprah's obligations under Rule 4.1? How should Oprah handle it ethically if she knows Daisy is not being truthful in the mediation? How does that interact with Rule 1.6?

4. **GAL Gayle** is attending the mediation and hears the discussion between Oprah and Judge Tower about Pete and Daisy and some of their extracurricular activities. Gayle had been totally unaware of Pete's role (other than business partner) until this point, because Daisy had previously responded that she was not seeing anyone. If the matter doesn't settle, what can Gayle do to protect the children? How does the Rule regarding confidentiality and the related statute impact what Gayle can and cannot do to protect the children? Can Gayle ethically ignore what she learned? If Gayle has to write a report, what does she do with this information about Daisy and Pete and their lifestyle? Gayle and Oprah are, in fact, best friends, as Adam suspected. Can Gayle tell Oprah (over dinner outside of a professional setting) that she is worried about the children and that if Daisy doesn't take a deal relinquishing the majority of her visitation that she thinks she will have to disclose the Pete information to the Court?

5. Has Oprah violated any rule by allowing the GAL to participate in the discussion with the mediator regarding Pete and Daisy and their habits? If you think a Rule has been violated, what should Oprah have done?

6. If the matter doesn't settle, can Oprah ethically allow Daisy to testify if she knows that Daisy plans to say that she doesn't have a boyfriend and doesn't use drugs or do anything that is contrary to appropriate parenting?

END OF MATERIALS

TIPS FOR EFFECTIVE ADVOCACY IN MEDIATING COMPLEX DIVORCE CASES

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This outline contains a compilation of practice tips to enhance effective advocacy in mediation of complex family law cases.

WHY MEDIATION AND WHEN

As a family lawyer, Mediation is one of the options in your toolbox and should be discussed with your client early on as a way to resolve the case. The following are some of the advantages of choosing mediation which ought to be explained to the client:

- Avoid a lengthy, expensive trial and possible appeal.
- Avoid an unpredictable determination by a court.
- Client has input into the outcome; helps shape the agreement.
- Confidentiality, privacy are guaranteed.
- Ability to proceed without time and costliness of formal discovery, if so choose.
- Mediator will have the benefit of significantly more evidence than time or the rules will permit to be admitted at trial.
- Can set consecutive days, as necessary, to get the case resolved in an efficient way.
- Creative, inventive solutions, are possible, which are not available to the court.
- Timely closure benefits parties and their families.
- Compliance with the agreement reached is more likely.
- The relationship between the parties and any children is more likely to be preserved and possibly improved. Ability to coparent will be increased.

In addition to informing your client of the availability of mediation, some of the factors the attorney might consider in terms of determining if the case is ripe for mediation and whether to encourage the client to engage in mediation include the following:

- Does your client want to try mediation? Listen to the client's preference.
- Have you hit a wall in trying to negotiate with the other side?
- Is your client unrealistic and needs a neutral's help to get realistic?
- Is your client inflexible, vindictive, and expecting too much?
- Is your client insecure and indecisive?
- Given the facts and the law of the case, is it likely that a mediated solution could work out better for your client?
- Does the case call for a creative solution that is not available in court?

PRE-MEDIATION

Once the case has been set for mediation, get prepared. Effective advocacy requires lawyers to be well versed in the facts and law of their case. As importantly, the lawyer needs to have a thorough grasp of the client's psychological and financial needs and interests.

Likewise, crucial to a successful mediation is the lawyers' coaching of their clients for the actual day(s) of the session. The long and tedious nature of the process should come as no surprise to the parties. They will want to bring something to occupy themselves during the Mediator's often extensive caucuses with the other side. Counsel should strongly recommend that their clients pack patience and perseverance in their bags.

Both the lawyers and their clients must bring to the session a positive attitude and a strong commitment to its success. Counsel are responsible to ensure their clients enter into mediation with realistic expectations. Promising an improbable result is counterproductive.

Promising a stake in the outcome of his future, however, empowers the client and furthers his investment in the process.

Counsel can assist by instilling the client with confidence in the process and in the Mediator who has been chosen. Be sure your client understands how the process works and remind the client of the neutrality of the Mediator, despite the uneven time the Mediator may end up spending in individual caucuses.

Confidentiality is an extraordinary advantage to mediation; lawyers must emphasize this to their clients. Privacy is of great importance to clients, as is closure. Clients want to move on with their lives, their investments and their businesses.

Scheduling enough time is important. Counsel should honestly evaluate how much time a successful mediation will likely take. An initial divorce case with all issues of ED, custody, visitation, child and spousal support might call for two days, especially if either lawyer or party has a firm cut off time.

THE COMMENCEMENT OF THE MEDIATION PROCESS

A joint conference call with the lawyers, typically, starts the actual mediation process. Lawyers should be sure to identify who is on the call. It will not be well received if your client or some other person is participating when the other lawyer and mediator are not aware. It is important not to become argumentative or adversarial in this call.

Matters to be addressed in the conference call include:

- Summary of facts and positions.
- The procedural posture of the case. Strategy can be impacted in many ways by whether suit has been filed or not, both positively and negatively.
- The status of settlement discussions. Sharing with the mediator the latest settlement offers can be helpful.

- Disclosure/discussion of non-party players,experts, new spouses, fiancees that you want to be present at the mediation. Will anyone , a party, lawyer, expert, have to appear by skype, e.g.? This poses logistical and negotiating challenges.
- Which side will meet first with the mediator in caucus and, thus, make the opening offer in mediation?
- The order of tackling the issues. In some cases, custody should be knocked out first. In others, the sometimes less emotional financial issues should be resolved first.
- The status of discovery? Informal or formal discovery to identify, value and classify the couple's income and assets, as well as, the issues relevant to custody and support, etc. is a pillar to a successful divorce mediation. Each side has to be satisfied with the documentation exchanged. It is not productive to schedule the mediation prematurely before each side has adequate information.

Ex parte pre-mediation calls with each lawyer typically occur after the joint call. During these calls, the attorney may want to disclose to the Mediator his true assessment of the case, as well as possible acceptable outcomes. What are the land-mines on his side of the case? Where does he have leverage? What is his client's best and worst day? Where is the lawyer particularly looking for help from the Mediator?

The individual calls provide an opportunity for the lawyers to educate the Mediator on case law to be relied upon, any expert's valuation methodology and any critical financial, emotional or personality issues likely to impact the process.

At the conclusion of the calls, the Mediator should be able to articulate the positions of the clients on all of the issues to be resolved, and the particular areas in which the lawyer is looking for help from the Mediator.

The joint and individual calls should also include a discussion of written submissions. A well-informed Mediator will be more likely to

have the means to keep the waters flowing towards resolution. And the parties will have more confidence and feel they are getting their money's worth with a knowledgeable Mediator.

The lawyers must decide how they can best prepare the Mediator. It may be by providing a written summary of the case, as well as copies of settlement offers, key pleadings, prior orders and decrees, documents and expert reports.

Counsel may want to arrange for the Mediator to have a pre-mediation conference call with his expert(s). All expert reports to be referenced in the mediation should be disclosed. Any plans to have an expert participate during the session should be revealed to opposing counsel and the Mediator. If one side feels blindsided or embarrassed because his expert is not available, this may create a barrier to settlement.

THE MEDIATION SESSION

The actual mediation session will commence with a joint meeting of all parties and the Mediator, who will give a statement outlining the process and have everyone sign the Agreement to Mediate. In family law cases, opening statements by the parties or the lawyers are usually not helpful.

The Mediator will break the parties and their counsel into individual caucus rooms and will start the negotiating process with the plaintiff, if suit has been filed, or with the side that has been agreed upon in pre-mediation discussions.

The client may have the opportunity, especially in the opening caucus, to vent to the Mediator. This is an unfettered opportunity for the client to communicate background, goals,and needs directly to the Mediator.

Having a mediation check list is a good practice tip, as it is helpful to have a reference to insure all issues are addressed in the ultimate comprehensive agreement. The Mediator will want to have obtained

an agreement in pre-mediation discussion on which issue to tackle first.

1. Equitable Distribution

In many cases the first issue to be tackled will be equitable distribution of the property. The mediation will involve the identification, classification, valuation, and distribution of each marital, separate and hybrid asset, as contemplated in Va Code Ann. § 20-107.3. All debt must be taken into account, as well.

Counsel should attempt to bring to mediation a mutually agreed upon chart format that lists all debt and each identifiable asset, even if value, classification or division have not been agreed upon. Working from the same format will make deliberation more efficient. Any stipulated values, classifications and divisions of assets and/or debts should be set forth in the chart ahead of the session.

i. Classification

Before crafting an equitable division of property, each asset of the parties must be classified as marital, separate or hybrid. Property acquired during the marriage is presumed marital, *but* any claim by either side of separate or hybrid classification should be put on the table upfront in the first joint conference call. I use the ex parte calls to explore the evidentiary basis for any such, often querulous, claims.

I encourage counsel to exchange documentation that traces property alleged to be have been originally or transmuted into separate or hybrid classified property. A forensic CPA may be warranted to help trace separate property that may have been commingled with marital property.

Also, counsel should have ready calculations applying the *Brandenburg* formula and the *Keeling* analysis to any hybrid property,

using their best and worst case application of the facts and the law. This can provide a range from which a compromise on classification might emerge.

The marital and separate share determination of pensions and retirement accounts usually involves a straightforward formula application. But the growth/loss on separate and marital shares of retirement accounts and any loans against them must be considered, creating trickier issues for classification purposes.

Classification can depend on whether certain property was a gift to one spouse or the other. What proof or indicia of gift exists? Gift issues are frequently hotly contested, and a court's ruling may not be predictable. Disagreements over an increase in value during the marriage of a gift (or other separate property), through active efforts of either spouse, lend themselves to compromise through mediation.

As with other ED issues, but particularly where classification is disputed, lawyers with persuasive arguments and the often voluminous tracing documents at the ready have an advantage. They are in a stronger position to convey effectively their positions to the Mediator to use in negotiating with the other side during caucus.

ii. Valuation

Va. Code Ann. **§** 20-107.3 provides that the valuation date shall be the date of the evidentiary hearing, unless a motion timely made to the court establishes an alternative date. Thus the issue of the date of valuation may need to be resolved in the mediation.

Each side's valuation experts will likely approach differently the valuation of assets, such as second homes, commercial property, closely held businesses, professional practices, and deferred compensation. Even appraisals of the marital home will frequently be at odds.

Thus, effective advocacy in mediation may require the hiring of an appropriate expert, whether an accountant, appraiser or forensic economist, to assist in analyzing the value, tax issues, applicable vesting schedules and/or transferability of diverse assets. The input from forensic CPA's may be needed to determine the true financial picture of closely held businesses/professional practices that need to be valued.

In this regard, counsel should equip the Mediator with a comprehensive explanation of his expert's methodology, so the Mediator can effectively convey it to the other side during an individual caucus. The Mediator can then work with counsel and the experts to effectuate compromise on valuations for purposes of settlement.

The Mediator may need to employ evaluative techniques, pointing out strengths and weaknesses to each side from a judge's perspective. In a complex ED case, she should have fluency in business valuation issues, such as over-compensation factors, capitalization rates, depreciation schedules, and business expenses.

The Mediator should be conversant in income, market and asset valuation approaches, as well as the means of arriving at intrinsic value and discounts for marketability and lack of control. The Mediator's input into discussions of personal goodwill vs enterprise goodwill might induce concessions from one side or another.

Disputes over antique furniture and cars, art and jewelry can blow up a mediation as they present valuation challenges, exacerbated by sentimental attachments. The parties and lawyers should be able to rely on the Mediator to defuse the emotional component, but effective advocacy also requires that lawyers confront these explosive issues in advance.

Pre-mediation efforts, as well as reasonableness during the mediation, will help resolve valuation disagreements critical to settlement. Education of the Mediator by counsel on their valuation positions is crucial to solid lawyering in ED mediations.

iii. Division

Virginia law requires an equitable, not equal, division of marital property, as well as the apportionment of debt, taking into consideration the eleven statutory factors enumerated in Va Code Ann. § 20-107.3 (E).

Whereas courts are restricted by statute as to the means by which assets and debt can be divided in ED, Mediation can provide creative and flexible options to sell, offset, buy out or transfer certain property in the case.

Lawyers should come into mediation comprehending his client's range, high to low, for an all-inclusive acceptable division of the property, prepared to provide the Mediator with an opening position on his preferred total asset/debt division. This proposal should have taken into consideration each asset individually and as a part of the whole picture, including tax and other ramifications.

How and when to modify the overall opening position or individual asset positions is a tactical decision the lawyer and his client have to make with each bargaining step in the mediation process.

If the division of certain property is non-negotiable, the Mediator should be advised early on. The Mediator can help assess and craft allocation schemes agreeable to each party, as the case plays out.

The Mediator must consider both the emotional and financial impact on the negotiations. When the parties do not agree to a third party sale of certain property, the cost to buy out a spouse might require agreement not just on market value, but also on imputed costs of sale and any hypothetical tax calculations.

A party claiming more or less than a 50% division must have a well-supported rationale for doing so. The Mediator should facilitate the venting early on in private caucus of any emotionally charged

arguments for a non-equal split, such as marital misconduct, waste, or monetary and non-monetary contributions. Some clients cannot proceed rationally on financial matters until they have unloaded their intense feelings and grievances. Counsel and the Mediator ignore this at their peril.

If one spouse owns high valued non-transferable assets, such as stock options or an interest in a professional practice, he will undoubtedly vehemently resist a large cash payout to compensate the non-owning spouse. This tough issue often keeps the Mediator occupied for several rounds of caucusing before a scheme to address it emerges.

Joint debt often has to be divided equitably, paid off or refinanced. Counsel should have in his back pocket potential solutions to debt issues, as they often present barriers to settlement. This is particularly true when one party has run up debt on extravagant expenditures.

Issues regarding qualified vs non-qualified deferred compensation, pensions, defined contribution plans, survivor benefits, and traditional IRAs vs Roth IRAs can all impact a fair division. If thorny tax issues are anticipated, tax advisors should be on call during the mediation process.

Lawyers should have on hand model QDRO language, obtained in advance from plan administrator(s), to use subject to negotiation of the coverture fraction and percentage shares going to each party.

Counsel must be well versed on military and government retirement pension plans, thrift savings plans, and health and survivor benefits, and come to mediation armed with the correct formula and language approved by DFAS, OPM or other government agency, under the current laws and regulations.

The issue of the waste of marital assets can absorb an entire day of mediation. (It is not likely that any court will afford counsel this kind of

time). Waste is a troublesome issue, especially when huge sums have been spent on paramours, drug habits, and/or lavish selfish spending. If the waste is provable, a tactical play may be to concede it, rather than to ratchet up emotions in the mediation in tracing all the minutiae of expenditures on “bad acts”.

2. Spousal Support

A determination of income from all sources and the application of the statutory factors relevant to spousal support as set forth in Va Code Ann. §20-107.1 are paramount. Be prepared to advocate in the mediation the impact of the cogent factors based on the facts in the case at hand in the mediation, if necessary.

Be conscious of the emotional need for security that alimony represents to the payee and the emotional and financial burden that the payor feels. Helping the payor understand the legal differences between support and property division can be critical. The clients also need to be aware of their exposure, whether it is the risk of a high or a low award.

ED is going to have to be hammered out before a final number on alimony can be negotiated in a typical case. Because the issue of spousal support is one of the most contested, bringing the parties together on this issue often requires neutral evaluative input from the Mediator re a range that might be expected in court.

Amount, duration, and modifiability are all negotiable and can be cleverly and creatively handled in mediation. A reservation of support under certain conditions may be on the table.

Once the mediation commences, counsel and the Mediator have to be equipped to address the various types of income in a given case. Counsel will lose face with their clients if, in the midst of the mediation, it becomes apparent that they do not have sufficient information to

address a complicated bonus plan, an unconventional compensation package or the vesting schedule, for example, of deferred compensation vehicles (incentive stock options, non-qualified stock options, restricted shares, performance units or the like).

If imputation of income is an issue, a vocational expert's input may be part of the consideration. If tracing is called for on the income or asset side, a forensic expert's analysis may be warranted.

If there is a basis for the denial of spousal support, is there an argument that such denial will cause manifest injustice? Again, this may be an area for horse trading in mediation.

Lawyers must be aware of all tax considerations when negotiating alimony. Be familiar with the new tax laws and their impact on alimony, dependency exemptions and child tax credits.
The modifiability or non modifiability of an award is always ripe for negotiation in mediation.

3. Custody
Custody and visitation, as all family lawyers know, are often highly contested issues fraught with deeply felt emotional positions. Counsel and the parties must be prepared to address the application in the case at hand of the statutory factors relevant to custody as provided in Va Code Ann. § 20-124.3. These will guide the outcome in court and will serve to anchor positions in mediation. It is important for the lawyers and the Mediator to have a complete understanding of the concerns and the goals of each party regarding their children.

If the court has appointed a GAL and ordered a written report, consideration must be given to whether the mediation would be better served or not by having such a report generated in contemplation of the mediation. Will the GAL be participating in the mediation? Are both parties aware of this? If so, the Mediator must be prepared for the challenges the participation of the GAL may pose, depending on the relationship of the GAL to the parties and their respective counsel.

Therapists, Custody Evaluators and/or Parental Capacity Evaluators may also be involved in contested custody matters. It may be critical for the Mediator to have copies of any reports they have produced. They may need to be available for consultation on the day of the mediation.

Mediation provides an opportunity to assist the parties in arriving at a schedule that meets the unique needs of their family. Thinking out of the box in a creative manner may present possible ways to overcome settlement barriers to custody and visitation. Color coded calendars with proposed solutions can produce helpful visual aids.

The Mediator must be very patient and empathic when dealing with custody issues. The lawyers can be of great assistance in preparing the clients for optional acceptable, if not perfect, solutions. The GAL can prove very useful in keeping the best interest of the children as a priority. But the GAL and the Mediator must be cautious in not alienating one side or the other.

4. Child Support

Child support will be governed by Va. Code Ann. § 20-108.1. Counsel should come to the mediation having prepared alternative child support guidelines in contemplation of sole, shared, split and now mixed custody arrangements that may evolve in mediation. Having a range in mind as to where child support might end up will be helpful when negotiating.

Of course, all of the issues in arriving at the actual income to be used for spousal support are equally relevant for purposes of child support. Counsel should be prepared with evidence to verify health insurance costs allocable to the children, as well as work related child care.

The code provides for deviation from presumptive guidelines based on the the 15 factors outlined therein. Mediation is a perfect process for negotiating an appropriate deviation, particularly if counsel is prepared with evidence to advocate for the applicable deviation factor(s).

Addressing the hidden agenda of counting days when addressing custody can be challenging, given that the real issue is the amount of child support different custody arrangements produce per the guidelines.

Documentation of Agreement

Prior to the mediation, counsel can hopefully agree upon the template of a stipulation agreement or a court order containing all the usual boilerplate provisions, any stipulated matters, and blank paragraphs for each issue to be mediated in the case.

Sometimes mediation seems like magic. But in reality it works, in part, because the parties' and lawyers' hard work and singular focus on the case at hand, with the assistance of a skilled mediator, enable them to come to their own tailor-made resolution of the case.

But if everyone leaves the mediation, without a signed agreement, and returns to the fray of life and law practice, the written document may take weeks to be produced. Or worse, the settlement may fall apart as the good will and motivation engendered by the mediation itself diminishes with time.

Effective advocacy dictates that, if at all possible, before adjourning, the mediation should conclude with execution by the parties and counsel of a comprehensive settlement agreement.

In closing, good lawyering requires advising clients of the potential benefits that the mediation process affords any family law case. This is decidedly important when satisfactory resolution of complex issues require the flexibility and creativity available only in a negotiated settlement. Effective advocacy brought to bear throughout the mediation process is crucial to its success.