

**CHILD CUSTODY; PROCESSES TO
RESOLVE ONGOING DISPUTES**

Maribeth Blessing, Esquire
Law Offices of Maribeth Blessing, LLC
Maribeth Blessing, Mediation & Arbitration, LLC
Rockledge

Kim Denise Morton, Esquire
Crawford, Wilson & Ryan LLC
West Chester

TABLE OF CONTENTS

I. Litigation

II. Negotiation

III. Arbitration

A. Explanation; Pros and Cons

B. Ethical Considerations

C. Agreement to Arbitrate

IV. Mediation

A. The Evolution of Mediation

B. Divorce Mediation; What is it; How Does It Work?

C. Custody Mediation; Information and Tips

D. Scheduling Custody Mediation Clients

E. Mediation Agreement for Custody Matters

F. Mediation Attitude Agreement

G. Ethical Opinions Re: Mediation

H. Confidentiality Privilege Statute

I. Duties of the Mediator Per Supreme Court Rule: Supreme Court Rule Re: Voluntary
Mediation in Custody Matters

J. Montgomery County Local Rules for Custody Mediation

K. Chester County Local Rules for Custody Mediation

L. Sample: Chester County Mediation Agreement Re: Custody

M. Chester County Custody Appendix

K. Custody Mediation Orientation Certificate of Compliance

V. Collaborative Family Law

A. Explanation: Pros and Cons

B. Collaborative Retainer Agreement

LITIGATION

I. Definition - A lawsuit. Legal action, including all proceedings therein. Contest in a court of law for the purpose of enforcing a right or seeking a remedy. A judicial contest; a judicial controversy; a suit at law. *Black's Law Dictionary, 5th Edition*

II. Participants to a Custody Suit

- A. Parties to the action; Mom and Dad; Third Party with standing
- B. Their respective counsel, if represented
- C. Masters and Judges when adjudicated
- D. Children; Pursuant to Pa. R.C.P. 1915.11(b)

The court may interrogate a child, whether or not the subject of the action, in open court or in chambers. The interrogation shall be conducted in the presence of the attorneys and, if permitted by the court, the parties. The attorneys shall have the right to interrogate the child under the supervision of the court. The interrogation shall be part of the record.

III. Nature of a Custody Suit

- A. Adversarial
- B. Lawyers advocate the interests of their client
- C. Judges make decisions based on the best interests of the children
- D. Negative impact on the family; trickle down effect
 - 1. Financial burden of litigation affects children
 - 2. Polarization of the parents
 - 3. Emotional trauma trickles down to children
- E. Win/Lose outcome
- F. Litigation can be prolonged and fragmented

NEGOTIATION

I. Definition -

A. The process of submission and consideration of offers until acceptable offer is made and accepted. *Gainey v. Brotherhood of Ry and A.A. Clerks, Freight Handlers, Exp. & Station Emp., D.C. Pa.* 275 F. Supp. 292, 300. *Black's Law Dictionary, 5th Edition.*

B. The deliberation, discussion, or conference upon the terms of a proposed agreement; the act of settling or arranging the terms and conditions of a bargain, sale, or other business transaction. *Black's Law Dictionary, 5th Edition.*

II. Types of Negotiating Styles

A. Positional Bargaining

1. Competitive Strategy

- a. Not concerned about the relationship with opponent
- b. Prone to psychologically attack the problem
- c. High initial demands
- d. Limited disclosure of information about the facts and/or the negotiator's interests
- e. Few and small concessions
- f. Committed to position; frequently does not respond to concessions

2. Cooperative Strategy

- a. Concerned about relationship with opponent
- b. Attempts to establish atmosphere of trust
- c. Moderate opening demand.
- d. Limited disclosure of information about facts and negotiator's interests until convinced opponent will reciprocate exchange of information
- e. Uses reasoned statements to support position
- f. Less committed to position and more ready to compromise

B. Interest Based Bargaining

1. Separates the people from the problem; attack the problem and not each other
2. Focus on interests, not positions. Not what you want but why you want. Look for complementary interests.
3. Brainstorm options that offer mutual gain. Win/win vs. Win/lose.
4. Insist on objective rather than subjective criteria to govern an outcome. E.g., instead of negotiation a price for a car, agree on the blue book value
5. Know your BATNA (best alternative to a negotiated agreement). The purpose is to produce a better result than that which could be obtained without negotiation. *See Getting to Yes; Roger Fischer and William Ury*

C. Participants to Negotiation in Custody Matters

1. Mom and Dad
2. Counsel, if any, for the parties
3. Third parties as agreed upon or Third Parties with standing

ARBITRATION

I. Definition- The reference of a dispute to an impartial (third) person chosen by the parties to the dispute who agree in advance to abide by the arbitrator's award issued after a hearing at which both parties have an opportunity to be heard. *Black's Law Dictionary - 5th edition*

II. Participants in a Custody Arbitration

- A. Mom and Dad; Third parties with standing
- B. Counsel for the parties
- C. Selected Arbitrator

III. Process

- A. Private setting; privacy maintained
- B. Preparation of clients and trial similar to court hearing
- C. Rules of evidence apply unless agreed otherwise
- D. Arbitrator personally selected by parties and counsel as to their expertise in field
- E. Relatively quick and inexpensive as compared to litigation
- F. Flexible; Scope and issues determined by parties with their counsel
- G. Final and binding, except as to custody, visitation and child support. See *Miller v. Miller*, 620 A.2d 1161 (Pa. Super. 1993)
- H. Consolidation of issues before one fact finder; Control over the process
- I. Litigants more likely to abide by the results
- J. Possible loss of appellate rights

ETHICAL CONSIDERATIONS FOR ARBITRATORS

By: Maribeth Blessing, Esquire

SOURCES FOR GUIDANCE REGARDING ETHICAL RULES FOR ARBITRATORS

I. STATUTES

- A. No Pennsylvania statute imposing specific ethical obligations
- B. 42 Pa. Cons. Stat. Ann., Sections 7301-62 (1982) govern arbitration in Pennsylvania
- C. 42 Pa. Cons. Stat. Ann., Section 7314 provides general parameters of permissible conduct by establishment of conditions under which the court may vacate an arbitrator's award:
 - the court shall vacate an award where...evident partiality by an arbitrator appointed as a neutral or corruption or misconduct in any of the arbitrators prejudicing the rights of any party.
- D. 42 Pa.Cons. Stat. Ann., Section 7341 provides that a common law arbitration award may be vacated or modified when:
 - it is clearly shown that...fraud, misconduct, corruption, or other irregularity caused the rendition of an unjust, inequitable or unconscionable award.

II. LOCAL COURT RULES

- A. E.D. Pa. Local Rules 53.2.1.D

Persons selected to be arbitrators shall be disqualified for bias or prejudice as provided in 28 U.S.C., Section 144 and shall disqualify themselves in any action in which they would be required under 28 U.S.C. section 455 to disqualify themselves if they were a justice, judge, or magistrate judge.

- B. E.D. Pa. Local Rules 53.1.(B)

Federal Qualifications for Arbitrators for Eastern District of Pennsylvania

1. Member of the bar of the highest court of Pennsylvania for, at least, five years.
2. Admitted to practice before the Eastern District of Pennsylvania.
3. Determined by the Chief Judge "to be competent to be competent to perform the duties of an arbitrator".

III. AMERICAN ARBITRATION ASSOCIATION CODE OF ETHICS
(published by the AAA governing arbitrators in commercial disputes)

A. Seven Canons of Ethics:

1. Canon I: An arbitrator should uphold the integrity and fairness of the arbitration process.
2. Canon II: An arbitrator should disclose any interest or relationship likely to affect impartiality or which create an appearance of partiality or bias.
3. Canon III: An arbitrator in communicating with the parties should avoid impropriety or the appearance of impropriety.
4. Canon IV: An arbitrator should conduct the proceedings fairly and diligently.
5. Canon V: An arbitrator should make decisions in a just, independent and deliberate manner.
6. Canon VI: An arbitrator should be faithful to the relationship of trust and confidentiality inherent in that office.
7. Canon VII: Ethical considerations relating to arbitrators appointed by one party.

NOTE: Canons 1-6 describe ethical obligations of neutral arbitrators.

Canon 7 reviews Canons 1-6 for the benefit of non-neutral party-appointed arbitrators and advises what duties they should observe and to what extent.

B. Cases quoting the American Arbitration Code of Ethics with approval by the Courts.

1. *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F. 3d 753, 759 (11th cir. 1993).
2. *Metropolitan Property & Cas. Ins. Co. v. J.C. Penney Cas. Ins. Co.*, 780 S. Supp. 885, 892-93 (D. Comm. 1991).
3. *Aetna Cas. & Surety Co. v. Gravvert*, 590 A. 2d 88, 93, (RI 1991) - AAA code "offers strong guidance" in determining appropriate standard for assessing conduct of party-appointed arbitrators.

IV. CODE OF JUDICIAL CONDUCT - Keep in mind that an arbitration proceeding should combine an air of professionalism and formality. Arbitrators, along with all others who perform quasi-judicial functions are bound by standards that are analogous to the code of judicial conduct. *SEE PHILADELPHIA LEGAL ETHICS OPINION, NO. 80-28.*

- A.
1. Canon I: A judge should uphold the integrity and independence of the judiciary.
 2. Canon II: A judge should avoid impropriety and the occurrence of impropriety in all of his activities.
 3. Canon III: A judge should perform the duties of his office impartially and diligently.
 4. Canon IV: A judge may engage in activities to improve the law, the legal system and the administration of justice.
 5. Canon V: A judge should regulate his extra-judicial activity to reduce the risk of conflict with his judicial duties.
 6. Canon VI: Compensation received for quasi-judicial and extra-judicial activities permitted by this code.
 7. Canon VII: A judge should refrain from political activity inappropriate to his judicial office.

V. GUIDELINES RELATING TO ETHICAL REQUIREMENTS OF THE CODE OF JUDICIAL CONDUCT

A. Disqualification

1. CJC Canon 3C. regarding disqualification.

This Canon requires a judge to disqualify himself-herself in any proceeding in which his/her impartiality could be questioned including but not limited to instances where:

- a. He/she has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding.
- b. Where he/she has served as a lawyer in a matter of controversy, or a lawyer with whom he previously practiced law, served during such association as a lawyer concerning the matter, or the judge or

such lawyer has been a material witness during it.

2. Ethical opinions related to disqualification issues.
 - a. *Pennsylvania Legal Ethics Opinion*, No. 91-11 - a lawyer who represented a school district in a teacher dismissal action could not arbitrate the matter. The disqualification was imputed to other members of the lawyer's firm as well pursuant to the rule of professional conduct 1.12.
 - b. *Philadelphia Ethics Opinion*, No. 81-87 -an arbitrator must disqualify himself if the arbitrator knows of an interest such that his or her impartiality might reasonably be questioned.

B. Impartiality

1. Canon CJC Canon 3 as in impartiality.

Under impartiality a judge should respect and comply with the law and conduct himself at all times in a manner that promotes public confidence, integrity and impartiality of the judiciary)

2. *Philadelphia Legal Ethics Opinion*, No. 95-8

{Judges} should disqualify themselves from any proceedings in which their impartiality might reasonably be questioned, including instances where they have a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings. Arbitrators take the role and fulfill the functions of judge and jury, and are required to decide cases impartially. These principles require a broad reading of Rule 3.5 to forbid ex parte communications with one appointed as an arbitrator.

3. Arbitrators must not only be impartial but must convey that impression to parties and counsel. The arbitrator must disclose any interest or relationship which might affect his or her ability to give a fair and impartial decision, and may not continue as an arbitrator once disclosure has been made unless all parties agree. Furthermore, a arbitrator should not comment on the evidence or any aspects of the proceedings as such comments might be construed as indicating bias in favor of one party or the other.

4. Parties may waive objections to an arbitrators partiality.

Donegal Ins. Co. v. Longo, 415 Pa. Super. 628, 610 a. 2d 466 (Pa. Super. 1992) - In dicta the court states “a party may waive its objection to the composition of an arbitration panel if, after learning the grounds for objection, the party, nevertheless, participates in the hearing and withholds objection until the panel renders a decision”.

5. Pennsylvania case stats advise that a party who consents to the appointment of an arbitrator knowing the arbitrators bias or impartiality cannot later object to the proceeding on the ground that partiality exists.

a. *Merritt - Chapman & Scott Corp. v. Pennsylvania Turnpike Commission*, 261 F. Supp. 1, affirmed 387 F. 2d 768, (MDPa 1966)- a Federal District Court ruled that plaintiff, a turnpike contractor, waived his right to object to the arbitrator’s partiality because he specifically agreed, by contract, that the disputed arbitrators were to continue to be members of the arbitration board.

b. *Abramovich v. Pennsylvania Liquor Control Board*, 490 Pa. 290, 416 2d 474 (Pa. 1980) - Court ruled that plaintiff did not waive right to challenge the appointment of a biased arbitrator as the partiality was challenged at the earliest opportunity and the objection was preserved for appellate review.

VI. ISSUES AND ARBITRATOR ETHICS; ETHICAL ISSUES THAT COMMONLY ARISE IN ARBITRATION PROCEEDINGS

A. The Neutral Arbitrator

1. A neutral arbitrator must be totally unconnected to the disputant and to the factual substance of the arbitration over which they are presiding. He or she must be strictly impartial during the proceedings and disinterested in the outcome. The neutral arbitrator is usually designated by the contract between the disputants or the determined method of appointment (e.g. appointment through the AAA).

a. *Bole v. Nationwide Ins. Co.*, 475 Pa. 187, 379 A 2d 1346 (Pa. 1977)- Supreme Court held that insurance company’ appointment of its former lawyer violated the contract provision requiring appointment of “disinterested” arbitrators. The prior representation of one of the parties by a designated arbitrator disqualified that arbitrator upon the objection of the opposing party.

- b. *Whiting v. Nationwide Mutual Ins. Co.*, 229 Pa. Super. 162, 323, A 2d 331 (Pa. Super. 1974) - The Superior Court upheld the appointment of an American Arbitration Association arbitrator despite the fact that his insurance litigation practice constituted 90% defense work, because the lawyer's practice had changed since designation as "neutral" arbitrator and lawyer was unaware of designation.
 - c. *Munson v. Dury Clothing, Co.*, 33 Pa. D & C. 2D 450 (1964) - Disqualified officer and shareholder of corporation acting as "disinterested" arbitrator in an arbitration in which the corporation was a party.
2. The neutral arbitrator has an obligation to disclose any prior contacts with the parties to the arbitration.
- a. Commentary to Canon II of the American Arbitration Code states that persons serving as Arbitrators should disclose:
 - (1). Any direct or indirect financial interest in the outcome of the arbitration; and
 - (2). Any existing or past financial, business, professional, family or social relationships which are likely to affect in partiality or which might reasonably create an appearance of partiality or bias. Persons requested to serve as arbitrators should disclose any such relationships which they personally have with any party or its lawyer, or with any individual whom they have been told will be a witness. They should, also, disclose any such relationships involving members of their family or their current employers, partner or business associates.
 - b. *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 US 145, 89 S.Ct 337, 21 L.Ed. 2d 301 (1968) - Supreme Court of United States vacated an arbitration award when the "neutral" arbitrator failed to disclose his prior business relations with one of the parties to the arbitration.
 - c. *Bole v. Nationwide Ins. Co.*, 475 Pa. 187 379 A. 2d 1346 (Pa. 1977) - Husband and "neutral" arbitrators obligated to disclose any relationships with parties that would possibly indicate bias. In this case, an arbitrator previously represented a party and was disqualified.
 - d. *Keystone Ins. Co. Appeal*, 222 Pa. Super. 404, 307 82d 55 (Pa. Super. 1973) - American Arbitration Association designated "neutral" arbitrator who failed to disclose his prior and continued representation of a party to arbitration was disqualified.

- e. *James Morrissey, Inc. v. Gross Construction Co.*, 297 Pa. Super. 151, 443 A2d 344 (Pa. Super. 1982) - Court vacated an arbitration award when the arbitrator was a long time business associate of one of the parties.
- f. *Ambrovich v. Pennsylvania Liquor Control Board*, 490 Pa. 290, 416 A2d 474 (Pa. 1980) - Deputy attorney general failed to disclose that he had acted as legal counsel to the Pennsylvania Liquor Control Board and when he later revealed this information, the deputy refused to disqualify himself and entered an award in favor of the Liquore Control Board. The court vacated the award for his failure to disclose and failure to meet the requirements in partiality.
- g. *Pennsylvania Legal Ethics Opinion*, No. 96-180. Lawyer should not accept appointment as arbitrator on behalf of insurer when the attorney has ongoing attorney-client relationship with same insurer, absent disclosure and consent of opposing party.

Attorney can serve as arbitrator on behalf of insured plaintiff in the insured's UM/UIM claim against an insurer when that attorney has represented unrelated plaintiffs in actions against insured of that insurer.

B. Confidentiality. An arbitrator must keep the confidences of the parties to an arbitration.

1. AAA Code Canon VI, Comment

Unless otherwise agreed by the parties, or required by applicable rules or laws, an arbitrator should keep confidential all matters relating to the arbitration proceedings and decisions.

2. AAA Code Canon VI, Comment

An arbitrator is in a relationship of trust to the parties and should not, at anytime, use confidential information acquired during the arbitration proceedings to gain personal advantage or advantage for others, or to affect adversely the interest of another.

C. Appearance Of Impropriety.

1. CJC 2B - A judge should not allow his family, social or other relationship to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interest of others; nor should he convey or knowingly permit others to convey the impression that they are in a special position to influence him.

2. AAA Code Canon 3 provides that "an arbitrator in communicating with the parties

avoid impropriety or the appearance of impropriety”.

3. AAA Code Canon 3 Comment

Provides that an arbitrator should communicate simultaneously with both parties and if the arbitrator received written communication from one party that has not been sent to the other, the arbitrator must do so.

D. Ex Parte Communication - Neutral arbitrators have a ethical duty to avoid ex parte contract with the party. No. 1 Rule of Professional Conduct 3.5 states that a lawyer “shall not communicate ex parte with a judge except if permitted by law.

1. CJC Canon 3.A.(4) states that a judge should “except if authorized by law, neither initiate nor consider ex parte or other communications concerning the pending or impending proceeding”.
2. *Philadelphia Legal Ethics Opinion*, No.95.8 states that a lawyer may not communicate ex parte with an arbitrator unless both parties agree to permit such communication or the arbitration rules, otherwise, allow them.
3. *Nicholson Co. v. Pennsy Supply, Inc.*, 524 A. 2D 520 (Pa. Super. Ct. 1987) - The ex parte presentation of post-hearing evidence to an arbitrator was not permitted.

Note: A personal or professional relationship between the arbitrators is not usually considered a conflict - *See In re: Andros Compania Maritima v. Marc Rich and Co.*, Cali. 579 F. 2d 691 (1978).

E. The Non-neutral Arbitrator

Non-neutral Arbitrators are party appointed. They perform a quasi-judicial function and must remain sufficiently impartial to do the job, yet they are expected to sympathize with and even advocate a favorable result for the party appointing them. They have a delicate balancing task.

1. Generally appointed in arbitrations involving three arbitrators, where each party picks their own whose task is to pick the third arbitrator.
2. *Munson v. Dury Clothing Co., Inc.*, 33 Pa.D.&C.2d 450 (1964) - strict view that even party-appointed arbitrators must be neutral, disinterested and not connected to the appointing party; court held that officer and shareholder of a company is not qualified to serve as arbitrator in court ordered proceeding. This case is fact specific.
3. *City of Erie v. Fraternal Order of Police*, 57 Pa. D.&C.2d 779 (1971)- a party

appointed arbitrator cannot be disqualified only because of his relationship to the appointer. Erie unsuccessfully sought to disqualify the selection of the F.O.P. national president as the chosen arbitrator by the Fraternal Order of Police.

4. *Astoria Medical Group v. Health Ins. Plan*, 11 N.Y. 2d 128, 182 N.E. 2d 85 (N.Y. 1962) - Contract provided that each party select its own arbitrator and the third would be selected by agreement. Defendants selected past president of the insurance company who was presently on board of directors. Plaintiffs unsuccessfully sought to disqualify. *Munson* holding rejected. Court stated that “the very reason each of the parties contracts for the choice of his own arbitrator is to make certain that his ‘side’ will, in a sense, be represented on the tribunal.” This reasoning was adopted by subsequent cases, e.g. *Borough of New Cumberland v. Police employees*, 503 Pa. 16, 467 A.2d 1294 (Pa. 1983), where Pa. Supreme Court rejected the argument that an arbitration award was void merely because the arbitration panel included partisan arbitrators. Court noted that statute expressly stated that party-appointed arbitrators were “representing” the parties.
5. AAA Canon VII suggests framework for balancing impartiality with the notion that party appointed arbitrators should actively represent the interests of the party selecting them.

Non-neutral arbitrators may be predisposed toward the party who appointed them but in all other respects are obligated to act in good faith and with integrity and fairness. For example, non-neutral arbitrators should not engage in delaying tactics of harassment of any party or witness and should not knowingly make untrue or misleading statements to the other arbitrators.

6. *Philadelphia legal ethics opinion*, No. 95-8

Lawyers may make *ex parte* contact with a party-appointed arbitrator to discuss the nature of the claim when parties have waived the ban on such communication. Written waiver recommended.

F. Advertising/Solicitation

1. Arbitrators who are lawyers must comply with Rules of Professional Conduct governing advertising - Rules 7.1-7.5.
2. *New Jersey Legal Ethics Opinion*, No. 676 - Lawyer who offered arbitration services as part of his law practice did not engage in ancillary business and could undertake services in same location and advertise jointly.

G. Bias

Zuckerman v. Parkview Hosp. Inc., 428 Pa. 138, 236 A.2d 761 (Pa. 1968) - Court held that chairman of arbitration board was not biased or prejudiced simply because he hired counsel when a party to the arbitration sought an injunction against reconvening of the arbitration board.

H. Fees

Aetna Cas. & Surety Co. v. Grabbert, 590 A.2d 88 (R.I. 1988) - Court held that arbitrator was improperly paid a contingent fee based on the amount of the award.

I. Scope

Theodore C. Wills Company, Inc. v. School District of the Boyertown Area, 2003 Pa. Super. 461 (2003) - Court held that in a proceeding to stay or compel arbitration, the question of whether the parties agreed to arbitrate is generally one for the courts and not arbitrator, but resolution of procedural questions, including whether the invocation of arbitration was proper or timely is left to the arbitrator. Unless limitation on authority is imposed by the parties, the arbitrator may decide all matters necessary to dispose of disputed claims.

AGREEMENT TO ARBITRATE

This Agreement is entered into by and between _____ (“Husband”) and _____ (“Wife”).

A. A Complaint for Divorce was filed by Wife in the Court of Common Pleas of Montgomery County, Pennsylvania at No. _____ and a support action at Case No. _____.

B. Each party has retained independent counsel: _____, Esquire, counsel for Wife; and _____, Esquire, counsel for Husband.

C. The parties have been unable to agree regarding certain issues relating to their separation and divorce including but not limited to interim child and spousal support, custody, alimony pendente lite, equitable distribution, counsel fees, etc.

D. In order to reduce the delays, expense, uncertainties and anxieties of court litigation, the parties agree to resolve their differences by binding arbitration pursuant to the terms of this Agreement.

NOW, THEREFORE, intending to be legally bound, the parties agree as follows:

1. Agreement to Arbitrate

a. The parties shall submit to binding common law arbitration in accordance with the terms of this Agreement.

b. Neither party to this Agreement shall have the right or power to revoke this submission without the consent in writing of the other party to this Agreement, except on such grounds as exist in law or equity for the rescission or revocation of any contract.

2. Selection of Arbitrators

a. The parties have agreed upon and designate, Maribeth Blessing, Esquire as

the Arbitrator to consider, adjudicate and make an Award herein.

b. In the event that before the final Award is made, the Arbitrator dies or becomes incapacitated, she shall be replaced if a replacement Arbitrator is agreed to by both parties within thirty (30) days after such event.

3. Scope of Arbitration

The Arbitrators shall have the power to conference, adjudicate and make Award(s) on all issues relating to the dissolution of the parties' marriage, including, without limitation, spousal support, temporary alimony, alimony pendente lite, child support, custody, alimony, equitable distribution of marital property, counsel fees and costs, etc. The parties acknowledge that there is an outstanding Complaint for child support, spousal support, and custody pending in the Court of Common Pleas of Montgomery County which shall be consolidated with the herein Arbitration and an Award rendered thereto. Issues which relate to discovery shall be resolved by the Court if the parties are unable to do so themselves.

4. Arbitrator's Fees

a. The Arbitrator shall be compensated at the rate of \$ 225.00 per hour for the Arbitrator's time spent on this matter, including, without limitation, preparation, reviewing documents, telephone calls, conferences, conducting the hearing(s), research and rendering an Award.

b. At the execution of this Agreement, a deposit of \$ 2,500.00 (via certified check, bank check, law firm check, or money order) shall be forwarded to the Arbitrator to be shared (paid) equally by the parties and applied toward the time to be spent by the Arbitrator on this matter. The Arbitrator will hold in escrow any fees in excess of the time expended to be

refunded at the conclusion of the case. If the Arbitrator determines that the total fee is likely to exceed at any point the amount on deposit, the Arbitrator shall have the right to require additional deposits on account as the case progresses. Such additional fees shall be payable by each party as prescribed by the Arbitrator. All fees outstanding shall be paid prior to the issuance of the final Arbitration Award.

c. The final Arbitrator's fees shall be paid and/or allocated and/or credited and/or adjusted as prescribed in the Award.

5. Procedure

a. The Arbitration shall be conducted in accordance with the terms of this Agreement and the procedures employed by the Arbitrator not inconsistent with this Agreement. For example, the Arbitrator will determine to what extent she will follow the rules of evidence and whether post-hearing memoranda will be required. The Arbitrator shall be free to fashion such remedies as she deems just and proper (except as to discovery) and to the extent a Court Order is necessary in order to procure compliance, both parties agree not to oppose any motion to enforce the ruling of the Arbitrator.

b. The parties, their counsel and the Arbitrator understand the importance of resolving this matter expeditiously. They each will remain accessible, promptly return phone calls and answer all correspondence. They will cooperate in scheduling conferences and hearings; and, devote the time necessary so that, if at all possible, the Award will be issued within thirty (30) days of the completion of the hearing(s) (which the parties agree shall be concluded no later than mm/dd/yy).

c. One week prior to the commencement of the hearing, each attorney shall

submit a Pre-Trial Memorandum. Within one week of the closing arguments, the attorneys shall submit a Post-Trial Memorandum including a proposed distribution Award.

d. The parties further agree to cooperate with one another in good faith and to stipulate in advance to those facts which are undisputed so as to expedite the Arbitration.

6. Effect of Award

a. The Arbitrator shall retain jurisdiction for fourteen (14) days following submission of the Award to correct any errors, to amend the Award to include matters which may have been overlooked and to resolve any disputes between the parties in drafting the language of the judgment to be entered with the Court.

b. No confirmation of the Award by the Court shall be needed or required. The Award shall be fully enforceable as to any other Agreement of the parties under the Divorce Code of 1980, as amended, and shall be subject to an action of contempt and award of counsel fees and costs in the event of non-compliance. The Arbitration Award shall be submitted to the Court for incorporation by reference in the final Decree in Divorce.

c. The Award of the Arbitrator shall be binding upon the parties and not appealable except for the following:

- (1) Denial of a hearing to a party; or
- (2) Fraud, misconduct or corruption; or
- (3) Evident miscalculations of figures.

The parties recognize that any custody and child support award may be subject to modification by the Court of Common Pleas.

d. In the event either party seeks to proceed as to subparagraph c above,

notice of the nature of Exceptions must be filed with the Court in the county where the divorce action was commenced within ten (10) days of the receipt of the Award. The Exceptions shall have attached a copy of the Arbitrator's Award and this Agreement. Copies of the Exceptions shall be sent to opposing counsel. This matter will be argued before the Court in the same manner as if Exceptions were taken from a record hearing in accordance with existing Rules of Court, except that any Exceptions shall be limited to those set forth in subparagraph (b) above.

e. All counsel fees and costs of such Exceptions of further appeal will be subject to a further Order of the Court and will be charged to either party or both in a proportion to be determined by the Court.

IN WITNESS WHEREOF, the parties intending to be legally bound, hereby sign this Arbitration Agreement.

Counsel For Husband

Date

Husband

Counsel for Wife

Date

Wife

ARBITRATOR

THE EVOLUTION OF MEDIATION
by Maribeth Blessing

In 1996 the Divorce Code was revised to encourage local courts to establish voluntary mediation in both divorce and custody (see 23 PA CS §3901 through 3904). In October of 1999, the Supreme Court promulgated Rule No. 234 which established Rules of Civil Procedure 1940.1 through 1940.8 governing custody mediation programs. Any county that had pre-established local rules governing custody mediation orientation programs were grandfathered in, Montgomery County being one of them (see Montgomery County Local Rules No.*1940.3 through *1940.12 which are even more stringent than the Pennsylvania State Rules). These new Pennsylvania Rules of Civil Procedure are not normally applicable to the private mediation sector but they are applicable when the court has referred mediation to a private mediator. The rules established procedures for referring cases to mediation wherein the court may order a mandatory mediation orientation unless there is a Protection from Abuse action either pending or filed within the last twenty- four months. The court may also refer parties to mediation.

The rules established minimal qualification for mediators which include that the mediator have a Bachelor's Degree and practical experience in law, psychiatry, psychology, counseling, family therapy, or a comparable behavioral or social science. The mediator must have completed basic training that has been approved by the Academy of Family Mediators (no longer in existence, but supplanted by the Association of Conflict Resolution), the American Bar Association, the American Academy of Matrimonial Lawyers or the Administrative Office of the Pennsylvania Court. The mediator is required to carry professional mediation liability insurance. The mediator

must obtain additional training by mediating four cases totaling ten hours under the supervision of a mediator that has been approved by the court to supervise such training. Mediators must comply with the ethical standards of both the mediation profession and any other profession of the mediator. Thus a lawyer mediator is held to mediation ethical standards as well as the Rules of Professional Conduct for lawyers and mental health professionals are held to their professional standards as well as the ethical standards of the mediation profession. There are numerous mediation ethical standards promulgated, among them being the ABA Divorce and Family Mediation Standards of Practice, the Family Law Section of the American Bar Association Standards of Practice for Lawyer Mediators and Family Disputes, the Academy of Family Mediators Standards of Practice, and numerous other promulgated standards. The difficulty lies in the fact that there is no governing body for the enforcement of mediator ethical standards as there are governing bodies for the enforcement of ethical standards in other professions.

The duties of a mediator in a court annexed mediation program are spelled out in the Rules of Civil Procedure. They include a continual ethical obligation to screen for abuse, and the requirement to thoroughly apprise the mediating parties of the costs and the process of mediation. Additionally, the mediator must ensure his or her neutrality and make it clear to the mediating parties that the mediator is not representing nor can they represent either party in an adversarial proceeding, thus encouraging mediating parties to have independent legal counsel. Under the Montgomery County Rules of Civil Procedure there is no ability for a mediator to draft a legally binding agreement. However, in Chester County, if the parties are in agreement, the mediator may complete a “fill in the blank” custody form agreement and order, the parties sign it and the

order is entered by a Chester County judge either after review by counsel, or immediately if the parties agree. (See attached Chester County form). It is important that the practitioner check their local rules.

In custody mediation, the mediator must ensure that the parties consider the best interest of the children. With the parties' consent, the mediator may bring the children into the mediation or invite other third parties to participate as appropriate. Furthermore, the Rules of Civil Procedure spell out conditions under which the mediator may terminate and/or must terminate the mediation. It should be noted that parties may always terminate mediation since it is a voluntary process.

The confidentiality of the mediation process is protected by 42 Pa. C.S.A. §5949 dealing with confidential mediation communications and documents. Under this statute, all communications and documents that arise in mediation are privileged and therefore inadmissible except:

1. A settlement agreement may be introduced into evidence to enforce the agreement unless said agreement states that it is unenforceable or not intended to be legally binding.
2. Communications and documents arising in mediation are admissible to the extent that the communication is evidence relevant in a criminal matter. For example:
 - a. A threat of bodily injury on a person.
 - b. A threat that damage may be inflicted on real or personal property that would constitute a felony.
 - c. Conduct during mediation that causes direct bodily injury.

There is no privilege for fraudulent statements made in mediation that are relevant evidence utilized to set aside or enforce a mediated agreement that was reached as a result of that fraudulent communication. Additionally, any document which otherwise exists or existed independent of the mediation is not privileged and is discoverable and admissible.

Hand in hand with the Confidential Mediation Statute is Rule 408 of the Pa. Rules of Evidence (225 Pa. Code, Article IV). This Rule of Evidence ensures that evidence of conduct or statements made in compromised negotiations are not admissible. However, the Rule does not require the exclusion of an admission of fact or any evidence that is otherwise discoverable just because it is presented in the course of compromise or negotiations. Unlike the Federal Rule of Evidence, the Pennsylvania Rule supports existing Pennsylvania Law that distinct admissions of fact made during settlement negotiations are admissible. *See Hammel v. Christian*. 416 Pa. Super. 78, 610 A.2d 979 (1992).

Practitioners should be very diligent in helping their clients choose qualified mediators. There are no formal requirements or qualifications for mediators operating in the private sector.

Practitioners must be aware of the confidentiality privilege attendant to the mediation process.

The parties may elect to waive the privilege of confidentiality as to their respective attorneys. That waiver will allow the mediator to share all information with their counsel. Counsel can diligently monitor the mediation, be available to the mediating parties throughout the process for the purpose of advising parties as to their legal rights, the ramifications of their agreements, and enable parties to participate in mediation with adequate knowledge to make informed decisions.

DIVORCE MEDIATION

I. WHAT IS MEDIATION?

A. Divorce Mediation is the step-by-step process through which separating couples arrive at an equitable and suitable agreement about their differences. Topics for discussion may include distribution of property issues, distribution of debt, financial and support issues, and parenting issues.

B. Mediation provides an alternative to the adversary system which casts divorcing spouses as opponents. In Mediation, the spouses are viewed as cooperative adults who are restructuring their lives and the lives of their children.

C. Mediation is conducted under the guidance of a trained professional who helps the couple make the necessary decisions about their changing future.

II. WHO USES MEDIATION?

Mediation is used by couples who are only separating, by those who are also divorcing, by couples prior to marriage, and by couples post-divorce.

III. WHY CHOOSE MEDIATION?

By selecting Mediation, individuals in a dissolving marriage are choosing to take charge of their lives, maintaining their sense of dignity and self-esteem. They are saying that they prefer to end their marriage by a cooperative and rational procedure which minimizes the anger of divorce and the negative impact of litigation.

IV. HOW DOES MEDIATION WORK?

In Mediation, the couple proceeds through a series of steps. Briefly these are:

A. Both spouses attend an orientation session in which a detailed explanation of Mediation is given. Parties are encouraged to have separate counsel to advise them of their legal rights as they go through the process of mediation.

B. After the couple decides to mediate, they sign an Agreement to that effect covering the scope of the Mediation. At that time they will also sign a Fee Agreement and are asked to make a deposit covering the cost of the orientation and a retainer fee against which the time of the Mediator will be billed until depleted. The unused portion of this deposit is returned upon completion of Mediation. If depleted prior to the completion of the Mediation, the Mediator may require an additional retainer. The Mediator may also allow payment on a session by session basis with a smaller initial retainer requirement to be applied to fees incurred in addition to the sessions, such as the drafting of the Agreement, telephone calls, research and administrative costs.

C. At the first Mediation session, the couple may enter into a temporary agreement for the duration of Mediation to address those concerns that require immediate and necessary resolution.

D. The remaining sessions are used to help the spouses arrive at decision concerning any or all of the following:

1. Division of Property
2. Spousal Maintenance
3. Child Support
4. Parenting Schedules for the Minor Children
5. Any other Topic or Issue Agreed Upon by the Parties to be addressed by the Mediator

E. The mediation culminates in a Memorandum of Agreement which outlines the specifics of the couple's separation agreement.

F. As the last step, the couple may consult with one or two attorneys concerning the settlement reached. Typically they will have various questions regarding the tax implications of their settlement. One attorney will then prepare a final Settlement Agreement incorporating these elements agreed to in Mediation. Once the couple signs this document, they may then have it made part of their Divorce Decree.

CUSTODY MEDIATION; INFORMATION AND TIPS

I. MEDIATION ORIENTATION

A. Educating the parties - what is it?

1. Mandatory, except where there is abuse as specified by the Rule
2. Orientation is confidential. Confidentiality attaches when first introduced to orientation program. Confidentiality is a privilege that must be asserted.
3. The Mediator will report to the court as to parties' attendance and compliance with local rule via filing Certificates of Compliance
4. Mediator CANNOT draft a binding agreement, merely a Memorandum of Understanding to be given to the parties, or to counsel with authorization from the parties.
5. Orientation only is court directed, further mediation is NOT court connected or directed.
6. Fee for orientation determined by local rule (currently \$150 to be divided equally unless *in forma pauperis* case)
7. Length of orientation is up to two hours
8. Regardless of length of orientation, parties must pay full amount
9. Optional for parties to enter into mediation at conclusion of orientation for the duration of the two hour period, and thereafter

B. Mediator's role in orientation

1. Educate the parties as to the process
2. Screen for abuse - Mediator may choose to use the Tolan Screening Test, or refer back to the representation by the parties' at the Conciliator's hearing that no abuse Order was entered in the last 24 months; free to use own method for screening (e.g. deductive questioning to parties, pre-mediation ex parte telephone interviewing, etc.)
3. Develop rapport with parties
4. Gather initial information - parties' names, children's names and ages, attorney involvement; ice breaking; encourage dialogue between the parties
5. Remain objective, be cautious as to intermingling of orientation and mediation
6. Observe body language and demeanor as part of abuse screening and to get to know the parties and their power balance

C. What to include in explanation of Mediation process

1. A voluntary negotiated resolution of differences
2. Termination of process can be by either party or mediator
3. If Mediation is pursued, scope for orientation session is limited to custody issues
4. Mediator's role is in facilitating discussion, not adjudicative or directive
5. Discussion of parties' role in taking responsibility for and ownership of the process
6. Maximum time frame for orientation; possibility of beginning mediation
7. Discussion; fees for orientation; fees for continued mediation

8. Ground rules for orientation and for continued mediation, if necessary
9. Ensure impartiality of mediator
10. Discussion of confidentiality - mediation communications and documents are privileged once process commences. See 42 PA C.S.A. §5949
11. Discussion of “generating of options” as part of process
12. Discussion of Memorandum of Agreement - non-binding, (non-represented parties may submit its substance to the Court at time of short list hearing; represented parties may submit to attorneys for drafting of stipulation/proposed Order)

D. Mediator’s goals common to orientation and mediation

1. Establish positive rapport with both parties
2. Establish environment of fairness, candor and impartiality
3. Instruct the parties as to the process
4. Encourage and facilitate the recognition by one party of the other party’s position and feelings
5. Create a receptive atmosphere to maximize the generation of options and alternatives
6. Translate and transmit information submitted by the parties
7. Help the parties differentiate need from want
8. Provide a reality base for the parties
9. Distinguish “interests” from “positions”
10. Manage the process; organize the information
11. Managing the anger while allowing parties to vent as necessary

II. TRANSITIONING INTO MEDIATION

- A. Develop and use an “initial intake” sheet. Information should include:
 1. Mediating parties - names and addresses, employment, work and home phone numbers, schedules
 2. Attorneys, if any
 3. Children - names, date of birth, and ages, special needs, activities, school arrangements; center focus on children and their best interests
- B. Present and explain your Mediation Agreement (agreement of the parties to enter into mediation)
- C. Present and explain your Fee Agreement
- D. Discuss scope of issues and agenda for mediation
- E. Identify current custodial arrangement; What’s working? What’s not?

III. MEDIATION

- A. Useful Mediation skills and tools
 1. At orientation, get a sense of who the parties are and what they want
 2. Listen with a third ear to assess needs, fears, wishes
 3. Build trust
 4. Identify obstacles to communication and mediation
 5. Assess the parties communication styles and help them to “hear” one another
 6. Help parties identify goals
 7. Provide structure when and where needed
 8. Summarize each parties position/story
 9. Point out areas of agreement
 10. Generate an evaluation of alternatives
 11. Problem solving
 12. Maintain balance of power between parties
 13. Identify and eliminate blocks to listening - mind reading, comparing, rehearsing what you will say, filtering, criticizing/judging, dreaming, identifying, advising, sparring, being right, derailing, placating
 14. Watch for areas for empowerment and recognition

- B. Pitfalls/Issues for Mediators
 1. Do not have the parties sign any Memorandum of Agreement/Understanding
 2. Refer parties to their attorney for legal questions and advice
 3. Avoid giving legal advice
 4. Be careful in dispensing “legal information”
 5. Avoid allowing irrelevant facts to cloud the real issues
 6. Avoid monopolizing the mediation; encourage the parties to interact
 7. Avoid ex parte communication with either party or their counsel
 8. Avoid opinionated comments as to options generated by the parties
 9. Avoid derogatory comments, stereotyping
 10. Do not initiate discussion of support impact on custody issues

Mediation Clients - Scheduling

Date of first contact: _____ Date scheduled: _____

Time & location: _____

Name of party making first contact: _____

Telephone number at work and/or
cell phone number; home also if possible: _____

Other party - husband, wife, ex, other: _____

Telephone number at work and/or
cell phone number, home also if possible: _____

Type of mediation - check one:

Custody Orientation Mediation
(Recommended by Conciliator) _____

Custody Mediation
(Recommended by _____

Divorce Mediation
(Recommended by _____

If custody, how many children? If you have a hearing date set in Court
when is it? _____

Best times for mediation - morning, afternoon _____
Keep last appt. to 3:00 p.m., first appt. at 9:00 a.m., unless specifically approved by MB
No appts. in Narberth before 9:00 a.m.

Determine whether in Narberth or Abington/Rockledge

Reserved conference room in Narberth

Reserved conference room in Abington

Confirmed by _____ Confirmed by _____
Name of client (date) Name of client (date)

Inform clients to bring to Mediation their paperwork that has a docket number on it; along with a
check in the amount of \$75.00 for the orientation mediation certification fee.

Scheduled by: _____

MARIBETH BLESSING, MEDIATION & ARBITRATION, LLC
310 Huntingdon Pike
Rockledge, PA 19046
215-663-9018

MEDIATION AGREEMENT FOR CUSTODY MATTERS

We, _____ and _____ intend the development of parenting schedules and handling of issues related to our children to be non-adversarial and to negotiate and settle matters directly with each other.

We request MARIBETH BLESSING to provide us with information regarding the laws and procedures relating to custody in the State of Pennsylvania . We understand that the Mediator will not provide us with legal advice and that we must seek advice regarding the information we receive as well as our questions and concerns from our respective attorneys. We also request MARIBETH BLESSING to act as an impartial mediator to assist us in compromising, settling and/or resolving issues relating to the parenting of our children and to aid us in resolving any conflicts or disputes which may arise during the course of our negotiations.

We acknowledge that MARIBETH BLESSING has advised us that her hourly rate for her mediation services is one hundred and seventy-five dollars.

We acknowledge that MARIBETH BLESSING has explained the following to us:

1. A proceeding for custody in the court system is an adversarial proceeding wherein each spouse is entitled to be individually represented and have his/her separate interests represented by a separately selected attorney who will be concerned exclusively with the interests of his/her client.
2. Pennsylvania law prohibits one attorney from representing adverse parties in the same legal proceeding and from entering into a confidential attorney-client relationship with more than one of the parties to an adversarial legal proceeding. Mediation is not a substitute

for the benefit of independent legal advice, and the Mediator cannot act as counsel for either party or both parties to the Mediation.

3. Mediation is a non-adversarial approach to a custody proceeding through the court system. Through the process of mediation, we will have the opportunity to negotiate our own settlement rather than have one imposed on us by the Court. Under such circumstances, a resolution of parenting issues is not considered a win-or-lose situation. A successful mediation proceeding requires recognition by us that each of us must consider the position of the other and the best interests of the children, each of us must be willing to compromise, and neither of us should have to win-or-lose by the outcome. The process of mediation is mutual, and the goal is a settlement that is acceptable to both of us and controlled by us.

4. The mediator's role is to assist us in reaching a settlement. The mediator will use her mediation and legal skills to help us identify areas of agreement and disagreement, and areas where legal problems can arise. When we disagree, the mediator may point out how a Court might look at the problem, and the mediator may provide us with some suggestions as to alternative solutions. The mediator will not act as a judge or arbitrator, nor will the mediator make decisions for us.

5. The mediator does not represent either of us, and the mediator cannot be our individual attorney or the attorney for both of us. There may be complex legal issues concerning custodial issues involved in our matter. We may obtain our own independent legal or psychological advice at any time, and the mediator encourages us to do so.

6. The mediator may initiate or receive telephone or written communications from us or, with our authorization, from our respective attorney, if applicable, for purposes which the mediator deems necessary to assist us in reaching a settlement, but the mediator will not have any ex parte communication on matters of substance with either of the parties' attorneys or with either party without the express consent of the other parent.

7. When settlement is reached on any, or all issues, if we desire, the mediator will prepare a Memorandum of Agreement which will set out in detail all of the terms of our settlement and which document we understand is not legally binding. No settlement shall be binding on the parties unless the settlement terms are incorporated in a written agreement signed

by both of us, and such document cannot be generated by the mediator. Each of us should retain an independent attorney to advise us as to the drafting of legally binding documents, and also to agreements memorialized in the Memorandum of Agreement. When the mediation results from the Montgomery County Court Mediation Orientation and Mediation program, we understand that the mediator is prohibited from requesting us to sign as binding, any Memorandum of Agreement nor can such a document be submitted to the Court in any proceeding. Either the document can be submitted to our respective attorneys, or if we are unrepresented, we may advise the Court of our agreements at the time of the listing of the custody matter before the Judge.

8. Each of us may withdraw from the mediation proceeding at any time for any reason whatsoever. The mediator may terminate the mediation proceedings at any time if she believes that either of us is not participating in the mediation process on a meaningful basis and/or that the resolution of issues is not possible. In the event the mediation proceedings are terminated by either of us, or by the mediator, the mediator will not represent either of us as an attorney in an adversarial proceeding against the other.

9. Mediation proceedings require a high degree of mutual respect and honesty. However, this does not mean that either of us has to accept everything that our spouse says, particularly concerning an opinion as to any custodial issue. As part of the mediation proceedings, each of us must make a full disclosure to our spouse and to the mediator.

10. We understand and agree that private caucuses may be utilized to facilitate successful negotiations throughout the mediation process. The caucus may be initiated by the mediator or requested by either parties or their attorney. The mediator will not disclose what is said in any private caucus without permission of the party participating in the caucus.

11. We agree that what is said in our sessions with MARIBETH BLESSING will be treated as confidential information, and that to that extent permissible under Pennsylvania law, all communications with MARIBETH BLESSING will be confidential and she will not be called as a witness, nor will her notes and/or memoranda be subpoenaed, by either of us in any legal proceeding. We further agree that MARIBETH BLESSING notes and/or memoranda shall not be released to either of us under any circumstances, and MARIBETH BLESSING may destroy or distribute to us said materials at her discretion. We agree to waive confidentiality

when, in the Mediator's opinion, there is a serious threat that there will be an action by either of the parties that is likely to result in death or substantial bodily harm to either of the mediating parties or third persons, or substantial injury to the financial interests or property of another, or in the event the Mediator must defend a malpractice action.

12. Each of us has read this Mediation Agreement in its entirety and understands its contents. We further acknowledge that we clearly understand that Maribeth Blessing does not represent either one of us in an attorney capacity and she is acting in her sole capacity as a neutral mediator.

DATED: _____

MARIBETH BLESSING, MEDIATOR

Finally, you have been advised, and are aware, that concluding an agreement through mediation and through traditional adversarial legal proceedings are not the same, and therefore do not necessarily result in the same kind of an agreement. If you retained separate lawyers to represent you, they would each see their role as being to assure that the other got no more, and that you received no less, than a court of law would grant you. (Unfortunately, they would see you as having very conflicting interests here, and would, in all likelihood, have different opinions as to what that should be. That is what makes those proceedings adversarial in nature.) I, on the other hand, see my role as attempting to help you solve the problem which your separation has left you with by assisting you to conclude an agreement that both of you feel you can accept and live with. It must be understood therefore that, since, in mediation, we are not trying to accomplish the same thing as you and your attorney may wish to accomplish in litigation, we do not necessarily employ the same procedures, or judge the result by the same yardstick.

PRIVATE CAUCUSES

1. The mediator will not meet (caucus) or discuss substantive issues separately with either party without the authorization of the parties.

2. Private caucus are recommended by the mediator and serve three purposes:

a. They provide an opportunity to discuss information with the mediator which a party may not want to discuss in the presence of their spouse. The purposes of these discussions may be to assure the party that the mediator understands all of the factors that are important to that party so that the mediator can focus joint discussions on the most realistic options.

b. They provide an opportunity for the mediator to play devil's advocate regarding a party's position. This process may provide a reality check on a party's position before it is introduced in joint discussions.

c. They provide an opportunity for the mediator to hear a party's's concerns and parameters for settlement so that the mediator is in a position to fashion a remedy which meets all of those interests, which perhaps the parties, themselves, would not have developed. At the same time, the parties would not be compromising their negotiating positions by making unreciprocated offers of settlement as to issues. In this process, the mediator will learn also if there is a range within which both parties are willing to settle a particular issue.

3. The mediator will not disclose what is said in any private caucus without permission of the party participating in the caucus.

We agree to private caucuses:

DATED: _____

MARIBETH BLESSING

Mediator

MEDIATION ATTITUDE AGREEMENT

3. A commitment to be honest and to keep an open mind
4. A realization that the mediation process can help us to reestablish or improve our future relationship.
5. An agreement to use our given names and to not use “he” or “she”.
6. An understanding that all decisions will be made jointly by us and that our Mediator has no power to make any decisions.
7. A willingness and desire to listen to each other and to attempt to understand what is being said and meant by the other.
8. The knowledge that this is not a rushed process and that each one of us needs to have the opportunity to be heard.
9. The knowledge that it is all right to ask for clarification as long as we do not interrupt the other.
10. The knowledge and acceptance that we will disagree on some matters.
11. A commitment to try to consider the interest of the other party along with our own.
12. A commitment to not control or attempt to control the other party and a commitment to not pressure the other party to give in or to make a decision.
13. A commitment to not attack the other for what he or she may say or believe.
14. A commitment to not threaten the other with any action, non-action or consequence.
15. A commitment to treat each other with respect and courtesy.
16. A commitment to attempt to control our own emotions and to not provoke the other and an agreement that only one person will be allowed to be upset at any one time.
17. A commitment to help each of us to make a free and fully informed decision on each of the issues we need to resolve.

18. A commitment to avoid taking any firm positions, to express our own interests which need to be met, and to explore different alternatives to meet the interests of each of us.
19. A desire to reach a settlement which will be fair for each of us, which will meet each of our interests to the maximum extent possible, which will be satisfactory and constructive for each of us, and which can and will be followed in the future by each of us.
20. A commitment to work toward peace in each of our lives and in the lives of our children.
21. A commitment to remain focused on the best interests of our children even when such might not enure to our own personal best interests.
22. A commitment to forever strive to improve the quality of our communication.

ETHICAL OPINIONS

SUBJECT: Preparation of separation/marriage termination agreements by non-attorney divorce mediators.

OPINION 97-101

It is the OPINION of the Pennsylvania Bar Association Unauthorized Practice of Law Committee that providing advice on equitable distribution, support, visitation and alimony by a non-attorney Divorce Mediator and the preparation of a separation/marriage termination agreement constitutes the unauthorized practice of law.

SUBJECT: Attorney-Mediator's obligation to comply with the Pennsylvania Rules of Professional Conduct relating to attorneys.

INQUIRY #96-167

You submitted an inquiry to the Pennsylvania Bar Association's Committee on Legal Ethics and Professional Responsibility (Committee) about an attorney-mediator's obligation to comply with the Pennsylvania Rules of Professional Conduct (Rules). As a member of the Committee, I have been asked to respond to your inquiry.

Specifically, your inquiry questions whether an attorney-mediator who complies with the Model Standards of Conduct for Mediators (Standards) meets his/her obligations under the Rules. Though it is difficult to answer your question without more factual details, the general answer is that compliance with the Standards does not necessarily meet the obligations of the Rules.

Instrumental to my analysis is new Rule 5.7, Responsibilities Regarding Nonlegal Services, which became effective on August 31, 1996. I am attaching a copy of this rule and its accompanying comments for your convenience. According to Rule 5.7, “[n]onlegal services are

those that are not prohibited as unauthorized practice of law when provided by a nonlawyer.”¹
Thus, mediation appears to be among those nonlegal services under the purview of this new rule.

If the attorney-mediator’s nonlegal services are not distinct from legal services provided to the party, he/she is subject to the Rules with respect to both the legal and nonlegal services .² If the nonlegal services are distinct from the legal services, however, the nonlegal services nonetheless subject the attorney-mediator to the Rules if the lawyer knows or reasonably should know that the party might believe that he/she is receiving the protection of a client-lawyer relationship.³ This latter provision “does not apply if the lawyer makes reasonable efforts to avoid any misunderstanding by the recipient receiving nonlegal services. Those efforts must include advising the recipient that the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the provision of nonlegal services to the recipient.”⁴ Similarly, if the attorney-mediator is involved with an entity providing mediation services, he/she is subject to the Rules if he/she knows or reasonably should know that the party served by the entity might believe that he/she is receiving the protection of a client-lawyer relationship.⁵ Again, this requirement may be waived if the appropriate efforts, quoted above, are made.⁶

¹Pa.R.P.C. 5.7 cmt.

²Rule 5.7(a)

³Rule 5.7(b)

⁴Rule 5.7(d)

⁵Rule 5.7(c)

⁶Rule 5.7(d)

As your inquiry did not present any particular factual question, it is unclear which of the Rule 5.7 situations would apply. Rule 5.7 is concerned with the recipient of the nonlegal services and the risk that he/she fails to distinguish them from the legal services and fails to understand the limits of the client-lawyer relationship. The specific facts underlying your inquiry will determine how substantial that risk is and which provision of Rule 5.7 comes into play. For example, in one of our Committee's opinions, another member opined that including "Esquire" after the mediator's name on the letterhead of a mediation service might generate, rather than diminish this confusion. I am enclosing a copy of this opinion for your information.

Despite Rule 5.7, "a lawyer involved in the provision of nonlegal services [is] subject to those Rules of Professional Conduct that apply generally."⁷ Thus, whether or not the attorney-mediator is subject to the Rules by Rule 5.7, he/she is still subject to the other Rules provisions that always govern lawyers, such as Rule 8.4(c). Professor Laurel Terry, co-vice chair of the Committee, has noted that:

The comment to Pennsylvania Rule 5.7 clarifies that even if a lawyer is not subject to all of the provisions of the Rules of Professional Conduct when providing nonlegal services, the lawyer is *always* subject to *some* of the Rules of Professional Conduct with respect to everything he or she does, including the provision of nonlegal services. Thus, for example, a lawyer violates Rule 8.4(c) if the lawyer engages in dishonesty, fraud, deceit or misrepresentation regardless of whether that occurs in the context of providing legal representation to a client. Similarly, a lawyer providing nonlegal and legal services to a client must always consider whether other rules of professional conduct apply, such as Rules 1.7(b) and 1.8(a).⁸

⁷Rule 5.7 cmt.

⁸

Laurel S. Terry, "Pennsylvania Adopts Ancillary Business Rule," 8 Professional Lawyer 10 (1996)

Furthermore, if an attorney-mediator advertises his/her services, he/she must comply with the advertising and solicitation rules. Consequently, an attorney-mediator must always be mindful of the Rules despite compliance with the Standards.

In conclusion, compliance with the Standards does not necessarily fulfill an attorney-mediator's obligations under the Rules. There are some rules to which lawyers are always subject.

I hope that this opinion is helpful in answering your inquiry. If you have further questions, do not hesitate to contact me.

Very truly yours,

Nancy Goldberg Wilks, Esq.
P.O. Box 572023
Houston, Texas 77257-2023
(713) 973-2826

CAVEAT: THE FOREGOING OPINION IS ADVISORY ONLY AND IS NOT BINDING UPON THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA OR ANY COURT. IT CARRIES ONLY SUCH WEIGHT AS AN APPROPRIATE REVIEWING AUTHORITY MAY CHOOSE TO GIVE IT. MOREOVER, THIS IS THE OPINION OF ONLY ONE MEMBER OF THE COMMITTEE AND IS NOT THE OPINION OF THE FULL COMMITTEE.

cc: Tom Wilkinson

Louise Lamoreaux

PENNSYLVANIA STATUTORY LAW
MEDIATION CONFIDENTIALITY PRIVILEGE STATUTE

Title 42, Pa. C. S. A. Judiciary and Judicial Procedure

§ 5949 - Confidential mediation communications and documents

(a) General Rule. - Except as provided in subsection (b), all mediation communications and mediation documents are privileged. Disclosure of mediation communications and mediation documents may not be required or compelled through discovery or any other process. Mediation communications and mediation documents shall not be admissible as evidence in any action or proceeding, including, but not limited to, a judicial, administrative or arbitration action or proceeding.

(b) Exceptions. -

(1) A settlement document may be introduced in an action or proceeding to enforce the settlement agreement expressed in the document, unless the settlement document by its terms states that it is unenforceable or not intended to be legally binding.

(2) To the extent that the communication or conduct is relevant evidence in a criminal matter, the privilege and limitation set forth in subsection (a) does not apply to:

(i) a communication of a threat that bodily injury may be inflicted on a person;

(ii) a communication of a threat that damage may be inflicted on real or personal property under circumstances constituting a felony; or

(iii) conduct during a mediation session causing direct bodily injury to a person.

(3) The privilege and limitation set forth under subsection (a) does not apply to a fraudulent communication during mediation that is relevant evidence in an action to enforce or set aside a mediated agreement reached as a result of that fraudulent communication.

(4) Any document which otherwise exists, or existed independent of the mediation and is not otherwise covered by this section, is not subject to this privilege.

(c) Definitions. - As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

“Mediation.” The deliberate and knowing use of a third person by disputing parties to help them reach a resolution of their dispute. For purposes of this section, mediation commences at the time of initial contact with a mediator or mediation program.

“Mediation communication.” A communication, verbal or nonverbal, oral or written, made by, between or among a party, mediator, mediation program or any other person present to further the mediation process when the communication occurs during a mediation session or outside a session when made to or by the mediator or mediation program.

“Mediation document.” Written material, including copies, prepared for the purpose of, in the course of or pursuant to mediation. The term includes, but is not limited to, memoranda, notes, files, records and work product of a mediator, mediation program or party.

“Mediation program.” A plan or organization through which mediators or mediation may be provided.

“Mediator.” A person who performs mediation.

“Settlement document.” A written agreement signed by the parties to the agreement.

I HEREBY ACKNOWLEDGE THAT THE MEDIATOR, MARIBETH BLESSING, HAS EXPLAINED THE PROCESS OF MEDIATION AND RELAYED TO ME THE FACTS AS LISTED BELOW.

Date: _____

Date: _____

Rule *1940.5 Duties of the Mediator.

- (a) At the orientation session, the Mediator must inform the parties in writing of the following:
 - (1) the costs of mediation;
 - (2) the process of mediation;
 - (3) that the Mediator does not represent either or both of the parties;
 - (4) the nature of the extent of any relationships with the parties and any personal, financial or other interests that could result in a bias or conflict of interest;
 - (5) that mediation is not a substitute for the benefit of independent legal advice; and
 - (6) that the parties should obtain legal assistance for drafting or reviewing any agreement.

- (b) When proceeding from the orientation to mediating a custody dispute, the Mediator shall ensure that the parties consider fully the best interests of the children.

- (c) With the consent of the parties, the Mediator may meet with the parties' children or invite other persons to participate in the mediation.

SUPREME COURT RULE
VOLUNTARY MEDIATION IN CUSTODY ACTIONS

IN THE
SUPREME COURT OF PENNSYLVANIA

IN RE: **: No. 324**

PROMULGATION OF RULES **:**
OF CIVIL PROCEDURE **: CIVIL PROCEDURAL**
RELATING TO VOLUNTARY MEDIATION **RULES DOCKET**
IN CUSTODY ACTIONS **: No. 5**

ORDER

PER CURIAM:

AND NOW, this 28th day of October, 1999, new Rules 1940.1, 1940.2, 1940.3, 1940.4, 1940.5, 1940.6, 1940.7, and 1940.8 of the Pennsylvania Rules of Civil Procedure are promulgated as attached hereto.

This order shall be processed in accordance with Rule of Judicial Administration 103(b) and shall be effective immediately.

Note: **This material is now.**

A True Copy Patricia Honard

As of: October 28, 1999

Attest:

Chief Clerk

Supreme Court of Pennsylvania

VOLUNTARY MEDIATION IN CUSTODY ACTIONS

Explanatory Comment

Introduction

In recent years, the use of mediation as a means for alternative dispute resolution of custody and Station cases has received widespread attention from legislators, judges, attorneys and mental health professionals. As two noted mediation experts observed: “[courts are ill-equipped to mandate particular visitation schedules and custodial arrangements, the wisdom of which depend on the situations of the parents and children rather than on legal rules.” Nancy G. Rogers & Craig A. McEwen, *Mediation Law Policy Practice* 230 (1989). Many share this frustration with the adversarial system and a growing body of research suggests that mediation may be the more satisfactory and desirable means of conflict resolution in these cases. Mediation offers more flexibility both in terms of the subject matter that may be discussed during mediation and the range of solutions available to the parties. Effective mediation also assists the parties in shaping their own framework for future discussion and resolution of conflicts that arise following separation and divorce.

In 1996, the Pennsylvania legislature amended the Divorce Code, Act No. 20-1996, § 2, codified at 23 Pa.C.S. §§ 3901-3904, to encourage local courts to establish voluntary mediation programs for divorce and custody cases. The following Rules of Civil Procedure are intended to govern custody cases only. They set forth the procedures for referring cases to mediation, minimum mediator qualifications, the duties of the mediator, the procedures for terminating mediation as well as sanctions for noncompliance with these rules. These are all areas in which statewide uniformity of practice and procedure is essential to successful mediation in Pennsylvania. These rules are flexibly designed to encourage the establishment of mediation programs.

Pursuant to 23 Pa.C.S § 3903, the Supreme Court is directed to monitor and evaluate the overall effectiveness of mediation programs statewide. At present, the Domestic Relations Procedural Rules Committee is working on the development of uniform statewide reporting

requirements and evaluation forms. Reporting is necessary to assess the overall effectiveness of mediation as an alternative to litigation and It will eventually be required. The current lack of reporting requirements, however, should not be a cause for delay in the establishment of mediation programs or the implementation of statewide mediation rules.

These rules do not address confidentiality and privilege in the context of mediation. Those issues are governed by 42 Pa.C.S. § 5949, and the Committee concluded that to address them further in the rules would confuse rather than clarify any legal issues arising from the statutory language

RULE 1940.1. APPLICABILITY OF RULES TO MEDIATION

The rules in this chapter shall apply to all court-established custody mediation programs and to any court-ordered mediation of individual custody cases.

Explanatory Comment- 1999

23 Pa.C.S. § 390t authorizes a court to establish a mediation program for both divorce and custody cases. At the present time, these rules apply only to court-connected mediation of custody cases because most, if not all, court-connected mediation programs that have been established for domestic relations. are limited to mediation of custody disputes. If, in the future, these programs expand to include mediation of divorce issues. these rules will be revised accordingly.

These rules do not apply to private mediation, which may be agreed to by the parties and conducted independent of the custody proceeding. They do apply, however, whenever the court refers a custody case for mediation, regardless of whether the referral is made to a formal program established and operated by the court or to a less formal arrangement between courts and mediators such as a court-approved list of mediators or, in the absence of such a list, to individual mediators appointed by the court to mediate particular cases.

RULE 1940.2. DEFINITIONS

As used in this Chapter, the following terms shall have the following meanings:

“Mediation” is the confidential process by which a neutral mediator assists the parties in attempting to reach a mutually acceptable agreement on issues arising in a custody action. The role of the mediator is to assist the parties in identifying the issues, reducing misunderstanding, clarifying priorities, exploring areas of compromise and finding points of agreement. An agreement reached by the parties must be based on the voluntary decisions of the parties and not the decision of the mediator. The agreement may resolve all or only some of the disputed issues. Parties are required to mediate in good faith, but are not compelled to reach an agreement. While mediation is an alternative means of conflict resolution, it is not a substitute for the benefit of legal advice.

“Memorandum of Understanding” is the written document prepared by a mediator which contains and summarizes the resolution reached by the parties during mediation. A Memorandum of Understanding is primarily for the benefit of the parties and is not legally binding on either party.

“Orientation Session” is the initial process of educating the parties on the mediation process so that they can make an informed choice about continued participation in mediation. This process may be mandated by the court and may be structured to include either group or individual sessions. An orientation session may also include an educational program for parents and children on the process of divorce and separation and the benefits of mediation in resolving custody disputes.

Explanatory Comments 1999

The definitions of orientation session and mediation follow the legislative distinction between the initial orientation session, which the court may order the parties to attend, and actual mediation of the issues in dispute by the parties, which may be ordered only upon the parties'

agreement. See 23 Pa.C.S § 3901(b). The purpose of the orientation session is to educate the parties on the availability of mediation, the advantages and disadvantages of mediation, and the process of mediation so that the parties can make an informed decision about whether they wish to proceed further with mediation.

The definition of mediation set forth in this rule is not intended to restrict, expand or otherwise modify the statutory definition of mediation in 42 Pa.C S. §5949(c) relating to confidentiality. The statutory provision defines mediation for the purpose of determining when confidentiality and privilege attach to communications made or documents submitted during a mediation session.

**RULE 1940.3. ORDER FOR ORIENTATION SESSION AND
MEDIATION. SELECTION OF MEDIATOR**

(a) Except as provided in (b), the court may order the parties to attend an orientation session at any time upon motion by a party, stipulation of the parties, or the court's own initiative.

(b) The court may not order an orientation session if a party or a child of either party is or has been the subject of domestic violence or child abuse either during the pendency of the action or within 24 months preceding the filing of the action.

NOTE: See also Rule 1940.6(a)(4) requiring termination of mediation when the mediator finds that the proceeding is "inappropriate for mediation. The mediator has continuing ethical obligation, consistent with Rule 1940.4(b), during the mediation to screen for abuse and to terminate the mediation in the event he or she determines that the abuse renders the case unsuitable for mediation.

(c) Following the orientation session and with the consent of the parties, the court may refer the parties to mediation. The mediation may address any issues agreed to by the parties unless limited by court order.

Explanatory Comment- 1999

Rule 1940.3 describes the circumstances under which a case may be referred to mediation. Consistent with 23 Pa.C.S. § 3901(c)(2), it prohibits the referral of any case involving past or present domestic violence or abuse because of the substantial imbalance of negotiating power that exists between the parties. The parties themselves, however, may always agree to mediation.

Although each court may devise its own procedures for screening these cases, screening must occur prior to referral of a case to the orientation session.

RULE 1940.4. MINIMUM QUALIFICATIONS OF THE MEDIATOR

(a) A mediator must have at least the following qualifications

(1) a bachelor's degree and practical experience in law, psychiatry, psychology, counseling, family therapy or any comparable behavioral or social science field;

(2) successful completion of basic training in domestic and family violence or child abuse and a divorce and custody mediation program approved by the Academy of Family Mediators, American Bar Association, American Academy of Matrimonial Lawyers, or Administrative Office of Pennsylvania Courts;

(3) mediation professional liability insurance; and

(4) additional mediation training consisting of a minimum of 4 mediated cases totaling 10 hours under the supervision of a mediator who has complied with subdivisions (1) through (3) above and is approved by the court to supervise other mediators.

(b) The mediator shall comply with the ethical standards of the mediator profession as well as those of his or her primary profession and complete at least 20 hours of continuing education

every two years in topics related to family mediation.

(c) A post-graduate student enrolled in a state or federally accredited educational institution in the disciplines of law, psychiatry, psychology, counseling, family therapy or any comparable behavioral or social science field may mediate with direct and actual supervision by a qualified mediator.

Explanatory Comment- 1999

Mediator qualifications are a key component of any successful mediation program. This rule sets forth the minimum qualifications that a mediator must have in order to participate in court-connected mediation. Local courts may impose additional, more stringent qualifications.

In addition to a bachelors degree and practical experience, a mediator must have basic training a program approved by one of the organizations listed in subdivision (a)(2). While these are the organizations which have been recommended by mediators and other trained professionals, the Domestic Relations Procedural Rules Committee and the Administrative Office of Pennsylvania Courts may, from time to time, propose to the Court that additional organizations be added to this list. Subdivision (a)(3) of the rule requires the mediator to have his or her own professional liability insurance prior to mediating independently, subdivision (a)(4) of the rule requires that the mediator co-mediate at least cases under the supervision of a court-connected mediator.

RULE 1940.5. DUTIES OF THE MEDIATOR

(a) As part of the orientation session, the mediator must inform the parties in writing of the following:

(1) the costs of mediation;

NOTE: Rule 240 sets forth the procedures for obtaining leave to proceed in forma pauperis when

the parties do not have the financial resources to pay the costs of litigation. This rule applies to court-connected mediation services as well, so that parties without sufficient resources may file a petition seeking a waiver or reduction of the costs of mediation.

(2) the process of mediation;

(3) that the mediator does not represent either or both of the parties;

(4) the nature and extent of any relationships with the parties and any personal financial, or other interests that could result in a bias or conflict of interest;

(5) that mediation is not a substitute for the benefit of independent legal advice; and

(6) that the parties should obtain legal assistance for drafting any agreement or for reviewing any agreement drafted by the other party.

(b) When mediating a custody dispute, the mediator shall ensure that the parties consider fully the best interests of the child or children.

(c) With the consent of the parties, the mediator may meet with the parties' children or invite other persons to participate in the mediation.

Explanatory Comment- 1999

Rule 1940.5 sets forth the mediator's responsibilities to the parties Subdivision (c) permits the participation of third persons with the consent of both parties. Such persons would include attorneys, other family members, mental health professionals or any other person who may be of assistance in resolving the disputed issues.

RULE 1940.6. TERMINATION OF MEDIATION

(a) Mediation shall terminate upon the earliest of the following circumstances to occur:

(1) a determination by the mediator that the parties are unable to reach a resolution regarding all of the issues subject to mediation;

(2) a determination by the mediator that the parties have reached a resolution regarding all of the issues subject to mediation;

(3) a determination by the mediator that the parties have reached a partial resolution and that further mediation will not resolve the remaining issues subject to mediation; or

(4) a determination by the mediator that the proceedings are inappropriate for mediation.

(b) If the parties reach a complete or partial resolution, the mediator shall, within 14 days, prepare and transmit to the parties a Memorandum of Understanding. At the request of a party, the Mediator shall also transmit a copy of the Memorandum of Understanding to the party's counsel.

(c) If no resolution is reached during mediation, the mediator shall, within 14 days, report this in writing to the court, without further explanation.

Explanatory Comment- 1999

This rule sets forth the circumstances for termination of mediation. Subdivision (a)(4) rejects the mediator's continuing ethical obligation, consistent with Rule 1940.4(b), to screen for domestic violence, substance abuse and any other factors, which make the case unsuitable for mediation.

Subdivision (b) requires the mediator to prepare a Memorandum of Understanding, as that term is defined in Rule 1940.2.

Reducing the parties' resolution to a binding and enforceable agreement is accomplished either by the parties' attorneys or, if not represented, the parties themselves, but in no event is the mediator responsible for drafting the parties' agreement. Court approval of the final agreement is not necessary for the purpose of enforcing it to the same extent as a court order.

RULE 1940.7. MEDIATOR COMPENSATION

Mediators shall be compensated for their services at a rate to be established by each court.

Explanatory Comment 1999

Mediator compensation is necessary to establish and maintain a quality mediation program. Presently, however, the absence of a statewide office for alternative dispute resolution means that each court must develop and secure its own funds for the mediation program. Because the availability of such funds varies significantly from court to court, each court may establish its own rate and method of compensation at this time, provided that the fees are structured so that all parties are assured equal access to mediation services. As Pennsylvania moves in the direction of a unified judicial system, a statewide fee schedule setting forth uniform fee standards may eventually be established for mediation compensation.

RULE 1940.8- SANCTIONS

On its own motion or a party's motion the Court may impose sanctions against any party or attorney who fails to comply or causes a party not to comply with these mediation rules. Sanctions may include an award of mediation costs and attorney fees, including those reasonably incurred in pursuing the sanctions.

NOTE: To the extent court orders are employed to direct parties regarding mediation, contempt proceedings may also be instituted to enforce these orders.

IN THE COURT OF COMMON PLEAS OF
MONTGOMERY COUNTY, PENNSYLVANIA

IN RE: **NO. 99-00001-8**

**ADOPTION OF MONTGOMERY COUNTY LOCAL RULES OF CIVIL
PROCEDURE GOVERNING CUSTODY MEDIATION ORIENTATION PROGRAM**

ORDER

AND NOW, this 18th day of October, 1999, the Court approves and adopts the attached Montgomery County Local Rules of Civil Procedure Governing Custody Mediation Orientation Program. These Rules shall become effective thirty (30) days from the date of publication in the Pennsylvania Bulletin.

The Court Administrator is directed to publish this Order once in the Montgomery County Law Reporter and in the Legal Intelligencer. In conformity with Pa.R.C.P. 239, seven (7) certified copies of the within Order shall be filed by the Court Administrator with the Administrative Office of Pennsylvania Courts. Two (2) certified copies shall be distributed to the Legislative Reference Bureau for publication in the Pennsylvania Bulletin. One (1) certified copy shall be filed with the Domestic Relations Committee. One (1) copy shall be filed with the

Prothonotary, one (1) copy with the Clerk of Courts, (1) copy with the Court Administrator of Montgomery County, one (1) copy with the Law Library of Montgomery County and one (1) copy with each Judge of this Court.

BY THE COURT:

JOSEPH A. SMYTH, P.J.

Rule *1940.3. Order for Orientation Session and Mediation. Selection of Mediator.

- (a) Except as provided in (c) below, in an action for custody, partial custody or visitation where an agreement is not reached and reduced to writing by the conclusion of the Custody Conciliation Conference, the parties shall attend a two-hour custody mediation orientation session.

- (b) An orientation session is an initial meeting between parties, and a mediator pursuant to Local Rule 1940.4 below, to educate the parties concerning the mediation process so that an informed choice can be made about continued participation in that process. The mediation is confidential at the point, if any, that mediation commences during, or after, the initial orientation session.

- (c) An orientation session shall not be mandated if a party or a party's child is or has been the subject of abuse either during the pendency of the action or within 24 months preceding the filing of the action.

Rule *1940.4. Minimum Qualifications to be a Mediator Under Local Rule 1940.3.

- (a) A mediator must meet, at a minimum, the following requirements.
 - (1) hold a post-graduate level degree in law, or a mental health field such as psychiatry, psychology, counseling or family therapy;

 - (2) have successfully completed basic training in a divorce and custody mediation program approved by the Academy of Family Mediators or equivalent program, such as a program approved by the Academy of Matrimonial Lawyers, or its substantial equivalent;

 - (3) certify that Mediator Professional Liability Insurance is maintained;

(4) participation in a program offered by the Family Law Section of the Montgomery Bar Association involving substantive law training, training concerning our local child custody procedures, and training concerning the local custody mediation orientation program, including reporting obligations;

(5) continued compliance with the ethical standards and any continuing educational requirements of the Academy of Family Mediators, the Academy of Matrimonial Lawyers or their substantial equivalents.

(b) The Court shall have the authority, upon cause shown, to decertify any Montgomery County custody mediator who has not complied with the foregoing local rule.

Rule *1940.5. Duties of the Mediator.

(a) At the orientation session, the mediator must inform the parties in writing of the following:

(1) the costs of mediation;

(2) the process of mediation;

(3) that the mediator does not represent either or both of the parties;

(4) the nature and extent of any relationships with the parties and any personal, financial or other interests that could result in a bias or conflict of interest;

(5) that mediation is not a substitute for the benefit of independent legal advice; and

(6) that the parties should obtain legal assistance for drafting or reviewing any agreement.

(b) When proceeding from the orientation to mediating a custody dispute, the mediator shall

ensure that the parties consider fully the best interests of the children.

- (c) With the consent of the parties, the mediator may meet with the parties' children or invite other persons to participate in the mediation.

Rule *1940.6. Termination of Mediation.

- (a) Mediation, if undertaken after the initial orientation session, shall terminate upon the earliest of the following:

- (1) the complete agreement of the parties;

- (2) a partial agreement of the parties and a determination by the mediator that further mediation will not resolve the remaining issues;

- (3) a determination by the mediator that the parties are unable to reach an agreement through mediation or that the proceeding is inappropriate for mediation; or

- (4) a refusal of one of the parties to continue with the mediation.

- (b) If the parties reach a complete or partial agreement, the mediator shall promptly prepare and transmit to the parties and their attorneys, if any, a non binding Memorandum of Understanding setting forth the terms of the parties' agreement. In no event shall any agreement, whether reflected in the Memorandum of Understanding or otherwise, be binding on the parties unless and until it is subsequently incorporated into a writing signed by the parties.

- (c) The mediator may mediate subsequent disputes between the parties, but shall not act as attorney, or psychotherapist for any party either during or after the mediation of a custody action, or in any matter which was the subject of mediation.

(d) The mediator is prohibited from asking the parties to sign any Memorandum of Understanding or agreement. No mediator drafted Memorandum of Understanding or agreement shall be submitted to the Court in any proceeding.

Rule *1940.7. Confidentiality of Mediation Subsequent to Initial Orientation Session.

(a) All mediation communications and mediation documents, as those terms are defined in 42 P.S. § 5949 of the Judicial Code, are privileged, not subject to discovery and inadmissible as evidence in any proceeding; and

(b) No party, mediator or other person who participates, may be called as a witness, or otherwise compelled to reveal any matter disclosed in mediation undertaken, if any, during or subsequent to the initial orientation session.

Rule *1940.8. Mediator Compensation.

Mediators shall be compensated for their orientation services at a rate to be established by the Court. Unless otherwise ordered, the rate established for the custody mediation orientation session shall be divided between the parties. The costs of the orientation session may be waived by the Court for any party qualifying to proceed in forma pauperis.

Rule *1940.9. Sanctions.

On its own motion or the motion of a party, the Court may impose sanctions against any party or attorney who fails to comply or causes a party not to comply with these mediation rules. Sanctions may include an award of mediation costs and attorneys fees, including those incurred in the filing and presentation of the motion for sanctions, as well as a finding of Contempt. A hearing on a Custody Complaint or Petition shall not be delayed, however, by a party's refusal or failure in attending the mediation orientation sessions.

Rule *1940.10. Evaluation of Custody Mediation Orientation Program.

- (a) The Court shall require mediators and Court personnel to evaluate the mediation orientation program at least semi-annually.
- (b) The President Judge shall appoint an Advisory Panel to the program to oversee and implement the program consistent with local Court rules, including, but not limited to, implementing and monitoring the program consistent with Paragraph (a) above.

Rule *1940.11. Certificate of Compliance.

A certificate of compliance shall be filed by the mediator with the Prothonotary's Office, confirming compliance. Such certificate shall reflect only that such party or parties have complied with these local rules, but shall in no event detail that such compliance was comprised of attendance or disqualification, so as to ensure that confidentiality is not violated consistent with Local Rule 1940.7.

Rule *1940.12. Available List of Mediators

The Court shall maintain and make available to all parties and counsel in the Prothonotary's Office and the Custody Conciliator's Office a list of custody mediators who have satisfied the requirements described more fully in Local Rule 1940.4. Such list shall include, at a minimum, the names, addresses and the schedule of fees for mediation services to be provided subsequent to the initial custody mediation orientation session.

COLLABORATIVE FAMILY LAW

I. Description - Collaborative Family Law is alternative dispute resolution process. It is an

integrated, cross-disciplinary team approach that can be used to resolve any or all issues related to a divorce - property division, support, custody, and divorce.

II. The Process

- A. Contractual commitment of the parties, their respective lawyers, and any other professionals engaged by the parties not to litigate.
- B. Attorneys and the parties execute retainer agreements not to litigate.
- C. Sole purpose and goal is settlement,- an agreement meeting the legitimate needs of both spouses to the maximum degree possible.
- D. Commitment to full voluntary and early disclosure of assets, liabilities and income.
- E. If either party initiates litigation, both attorneys must resign.
- F. Team of Professionals may include:
 - 1. Domestic Relations Lawyers
 - 2. Therapist coaches for each party
 - 3. Mutually selected neutral financial advisor
 - 4. Mutually selected neutral estate planner
 - 5. Mutually selected child specialist (mental health professional)
 - 6. Mutually selected business evaluator or licensed appraisers as needed
- G. Professional team members are specifically trained in Collaborative Law
- H. Negotiations usually conducted through a series of four way meetings.
- I. Allows for creativity and brainstorming in fashioning acceptable settlements.
- J. A “family friendly” alternative dispute resolution process.
- K. Articulation geared to real needs and interests - not positional bargaining.
- L. Combines the commitment to settlement of mediation, but allows individual legal advocacy and counsel of lawyers who are involved. Also includes conflict management and guidance of counsel throughout negotiations.

COLLABORATIVE RETAINER AGREEMENT

Date:

Name

Street Address
City, State, Zip

Re: Retainer Agreement

Dear:

INTRODUCTION

You have retained our firm to advise you in connection with your collaborative law process in which you and [other party] each has an lawyer, and all have a shared commitment to avoid litigation. The process primarily entails informal discussions and conferences for purposes of settling all issues. Each party and his or her lawyer agrees to adhere to honesty and mutual respect for the process.

SCOPE AND DUTIES

Assuming your spouse agrees to proceed via the Collaborative Law process, I will represent your interests through the final settlement and filing of a judgment of dissolution. **My representation of you as a collaborative lawyer differs in some important respects from conventional representation by a litigation lawyer. Please read particularly carefully** the following section describing my responsibilities, and yours, in collaborative representation under this agreement.

Your retention of me as your Collaborative lawyer is a “limited purpose retention.” You are retaining me specifically to assist you in reaching a comprehensive agreement with your spouse or partner, and for no other purpose. You retain the right to terminate the collaborative law process at any time and go to court, but doing so ends my representation of you. If your spouse should elect to go to court, this also terminates the collaborative law process, and you would need to retain litigation counsel to assist you in court. Accordingly, my representation of you and your retainer agreement with this firm are subject to the following:

- I will not be your lawyer of record, except for purposes of filing the judgment.
- I will not represent you in litigation except to the extent that both parties agree within the scope of the Collaborative Law Stipulation to submit selected issues to a private judge or arbitrator. My representation is terminated by any party’s decision to litigate, whether or not it was your decision.
- I will not represent you in any family law litigation against [name of spouse/other party] should the Collaborative Process end before settlement. However, I will cooperate with you in transferring your file to new counsel.
- I will keep you reasonably informed of the settlement process and will not agree to a settlement

of any issue without your consent. I will promptly respond to your inquiries.

- You acknowledge and agree that for so long as you participate in the collaborative process, you are giving up your right to advocacy in the process by your own expert(s), your access to the court system, and the right to formally object to producing any documents or to providing any information to the other side that I determine is appropriate.
- To this end, you agree to make full disclosure of the nature, extent, value of—and all developments affecting—your income, assets and liabilities. You authorize me to fully disclose all information which in my discretion must be provided to your spouse and his or her lawyer. If you should decline to make disclosures I regard as necessary I will, in my discretion, withdraw as your attorney, or terminate the collaborative law process.
- The collaborative law process depends upon good faith participation by both parties. A dishonest or unscrupulous party could take advantage of the collaborative law process for delay or advantage in litigation. Neither I nor any collaborative law attorney can guarantee that their client will in fact adhere to the good faith undertakings that are made formally in writing at the start of the process. Remedies for bad faith might be available subsequently in court but might or might not actually remedy the consequences of bad faith behavior in the collaborative law process. My commitment to you is that I will alert you to any suspicion of bad faith and recommend termination of the process if I suspect bad faith. Similarly, I will either withdraw as your counsel or terminate the collaborative law process, at my election, if it appears to me that you are not meeting your good faith commitments in the collaborative law process. In signing this agreement, you are authorizing me to withdraw or terminate the collaborative law process if, in my judgement, you are failing to participate in good faith.
- You and I both retain the right to withdraw from this contract if either of us feels we cannot abide by the principles of collaborative law or that the collaborative law process is not functioning satisfactorily, by notifying the other in writing. I agree to give you fifteen (15) days notice of my intention to withdraw.
- If your spouse declines to proceed in a collaborative divorce process, this retainer agreement will be null and void, and you and I would need to enter into a new retainer agreement for conventional divorce representation before we can proceed to represent you.

FINANCIAL PROVISIONS

It is understood that we use a team approach, involving partners, associates, associated counsel, and legal assistants where appropriate when their participation will in our judgment facilitate highest-quality, efficient, and most cost-effective representation of our clients. We reserve the right to, and you agree that we may, bring in associated counsel to assist in your case when in our judgment it is

appropriate to do so.

For our services you agree to pay for time devoted to your dissolution at our current rates for [YEAR], which are [\$ _____] per hour for myself and my partners, and [\$ _____] per hour for associates. Our paralegal's services will be billed to you at [\$ _____] per hour. These rates are subject to adjustment, and in signing this letter you agree that after written notification is sent to you of such a fee adjustment, you will be responsible for payment at the adjusted rate. We are not able to quote a fixed attorney fee or to predict what your total fee will be because each case is unique and it is impossible to predict just how much time will be required.

In addition, you will be charged for actual costs for such expenses as service of process, filing fees, photocopies, messengers, and telephone charges out of our local area. Also, it may be necessary to retain the services of an accountant, appraiser, actuary or other expert to value certain assets. If we deem it advisable to retain an expert, we will recommend an expert to you and your spouse's collaborative counsel, and will obtain full consent of all prior to engagement of his or her services. Payment for your share of expert services and other costs is your sole liability, and we may at our election require that you make arrangements for payment before we incur any cost on your behalf exceeding \$100.00.

In certain cases, we make use of highly specialized computer programs to assist us in analysis of issues. If such a program is used in your case, you will be billed a flat fee for the program use, ranging from \$75-\$250, in addition to lawyer time. Also, we maintain an inventory of complex documents which we adapt for individual cases. If we utilize such a document in your case, you will be charged a minimum of one to four hours' time in addition to the time expended by your attorney. Lawyer time is normally billed in increments of tenths of an hour; the minimum unit charge for lawyer time is 0.20 hours (12 minutes). You are billed for all time we spend associated with your case, including telephone time, file review and the very numerous other tasks involved in preparing your case to reach resolution.

In certain instances, one party agrees to pay some of the other party's lawyers fees and costs. Where appropriate, we will seek such agreements on your behalf; however, the obligation to pay fees and costs to us remains your own, regardless of any such agreements.

[CHOOSE ONE ALTERNATIVE: (A) Before proceeding, we request an initial retainer of \$ _____. OR (B) You have paid to us an initial deposit retainer of \$ _____.] We require that you pay any outstanding charges and replenish your initial retainer so that your trust account balance is restored to [\$ _____] each month. Any retainer balance remaining after we complete our services to you is refundable.

We will send you itemized bills on a monthly basis for all fees and costs. You agree to pay any balance due thereon within 25 days of billing. Unless you advise us within 15 days of the billing that you have questions about the bill, you agree to accept the bill as correct. A late charge of 1 percent

per month (12 percent per annum) will be added to the balance on any amounts owed to this office for more than 30 days. This is not a finance charge; we do not extend credit. Bills are payable in full each month. This late payment charge is intended as damages for failure to pay fees when due, and also represents payment for reasonable administrative costs of collecting and accounting for unpaid fees. By signing this letter, you agree and acknowledge that separate calculation of actual damages for each instance of late payment would be extremely difficult and impracticable, and you agree that the foregoing provision for liquidated damages is reasonable under the circumstances existing as of the date of this agreement.

If there should be a dispute between us regarding any bill for services, you and we agree that the dispute will be submitted to binding arbitration under the auspices of the Fee Dispute Committee of the Montgomery Bar Association, upon request for arbitration by either you or us.

In the event that the retainer is not replenished promptly as agreed above and/or any bill is not paid within 30 days, we reserve the right to cease providing any legal services to you, or on your behalf, until payment is received, or other satisfactory arrangements are made and confirmed in writing. In the alternative, we reserve the right to withdraw as your lawyer, and you agree to sign any documents necessary for us to withdraw, upon our request.

You agree to pay for all legal services rendered in your case until such time as our attorney-client relationship is ended.

Please note that because of necessary processing delays, the statement date shown on your monthly bill is ordinarily up to a week later than the actual date of services which will be recorded on the statement. Since your subsequent monthly bill may include services which were actually rendered during the prior billing period, you should not assume that a statement contains all charges incurred up to the statement date.

In signing this letter, you agree that we will have a judgment lien against any sums which you may receive in this action, to pay any unpaid balance of your attorney's fees and costs remaining in this action at the time of settlement. Furthermore, you agree that we may record this agreement in any county in which you own real property, in the event that you fail to pay all sums owing to this office, and that the recording of this agreement shall constitute a lien against such real property and that regardless of whether this agreement is recorded or not, all unpaid fees and costs owing to this office shall be paid from the escrow upon sale of any real property owned in whole or in part by you.

If for any reason we are compelled to commence collection efforts on any outstanding bill, then in addition to the above, you agree to pay us actual lawyer's fees and costs incurred (whether our own time or that of other lawyers employed) in connection with that collection effort.

We make every effort at this point to acquaint you with our firm's philosophy and procedures, and with the parameters within which we are able to assist you. Should there occur a change in your needs and

expectations which are incompatible with our views regarding the conduct of your case, or should there arise a substantial disagreement between us, we reserve the right to withdraw from your employment. Should that occur we will provide you with notice so that you may have the opportunity to employ other counsel; you agree in signing this letter to sign promptly any documents required to permit us to withdraw as your attorney, upon request.

Please read this letter carefully, and if you are in agreement with its terms, sign the copy which is enclosed and return it to me. This agreement is a legally binding contract between us, which you are free to have reviewed by another attorney before signing. We encourage you to do that if you have any uncertainty about entering into any part of this agreement with us. Should you have any comments or questions concerning this letter of agreement, please contact me at your convenience. We feel it is very important that we have a clear understanding about fees and costs because we want to devote our efforts and attention to the substance of your case and to avoid any possible future misunderstanding about our financial arrangements with you.

Sincerely,

Maribeth Blessing

Enclosure: Duplicate copy of retainer agreement for your records

I understand and agree to the terms of the foregoing letter.

Dated: _____