

## **PREPARING FOR COURT/MEDIATION - John M. Eccles, Esq. (60 minutes)**

There are, ultimately, only two (2) ways for a Family Law case to be resolved. The first is by agreement (or settlement). The second is to leave it in the hands of the Judge (litigation).

### **A. Planning Strategy With your Client; Setting Realistic Goals**

When attempting to put together an effective case to get your client where he or she wants to be at the conclusion of the case, the first thing an attorney must do is determine the goals of the client. If the client's expectations are unlikely to be met, then the next step is to discuss the client's goals with the client so as to ensure realistic goals, thereby ensuring a greater probability of obtaining the client's (now more realistic) goals.

The Court will often mandate an attempt at Mediation, at least as it relates to custody issues. There are various aspects of the Mediation process you will need to discuss with the client.

First, the client needs to be aware that, at least officially, the Mediation process as Ordered by the Court, deals only with custody, visitation, and holiday schedules. The mediators are not supposed to discuss the ancillary financial issues. With the focus on custody, visitation, and holiday schedules, it is easy for the client to lose sight of the financial issues. As an attorney, you should advise your client, at least in general terms, what the financial ramifications of agreeing to certain custodial arrangements will have on them. If the other party is awarded primary physical custody, there is a very high degree of probability the client will be obliged to pay child support. If the client obtains primary physical custody, there is a very high degree of probability the client will receive some child support. If the parties share joint physical custody, the Court will look at the parties' respective incomes to determine child support. Your client should be aware of these alternatives as they mediate.

Of similar importance, the client needs to go into Mediation with a well conceived plan of action. If the client is seeking primary physical custody, the client should go into

Mediation with no less than five (5), and preferably more, reasons why the client believes they are the parent who should have primary physical custody, and no less than three (3), and preferably more, reasons why the client believes the other parent should not have primary physical custody.

It is also of critical importance that the client understands the breadth of confidentiality associated with Mediation, and notably, the one exception to confidentiality carved out by the Court. FMC is obliged to inform the Court if one party, the other, or both, declare an impasse in Mediation. If the Court is informed your client declared an impasse in the Mediation process, it could adversely affect their case. Frankly, there is no reason to carve out this exception to the confidentiality associated with Mediation except to use it against the party declaring the impasse.

However, the mediators don't particularly care to be snitches, so they have come up with a creative solution to the problem. If one party indicates Mediation is a waste of time, the mediator will ask the other party if they agree the Judge should decide the matter, and the other party says: "Well, if she says Mediation is a waste of time, and it takes two to mediate, then I guess the Judge should decide the issue.", the mediator will indicate both parties declared an impasse. Of course, although creative, it simply isn't truly accurate. Therefore, I always advise my clients not to declare an impasse, and if the mediator asks them if they agree Mediation is a waste of time, I tell them to repeat this statement like a mantra: "I think two reasonable adults working together should be able to come up with an agreement as to what is in the best interests of their children." In this way, the client can never be accused of "agreeing" to an impasse.

Mediation of child custody issues is effective about 80% of the time, so the value of Mediation cannot be overstated. However, there is a certain level of bullying from FMC to force the parties to middle ground which can be very disconcerting for the client. I think of Mediation like haggling at a flea market. To be successful, and obtain a good result in Mediation, it is important to start negotiating from a position beyond the hoped-for end result (provided it is not an unreasonable starting position). The reality is that

both parties will start by asking for primary physical custody, and the mediator will attempt to bring the parties together by suggesting joint physical custody. If your client has been advised of the most likely result if the matter is litigated, and there aren't any good reasons to deviate from joint physical custody, and the client has already been reined in on the probabilities (and all of the foregoing can be said of the other party), Mediation may well result in joint physical custody, which may well resolve, at least for the time being, the custody issue.

One potential pitfall associated with agreeing to joint physical custody is the language of NRS 125.490(1), which states: "There is a presumption, affecting the burden of proof, that joint custody would be in the best interest of a minor child if the parents have agreed to an award of joint custody or so agree in open court at a hearing for the purpose of determining the custody of the minor child or children of the marriage." Therefore, although the standard to deviate from a joint physical custody arrangement is a simple "best interest of the child" standard, an agreement between the parties may affect the burden of proof required to shift away from a joint physical custody agreement.

Some Judges have taken this section of NRS 125.490 to mean that a request to change custody from joint physical custody to primary physical custody, when there is an original agreement between the parties to joint physical custody, requires "compelling" evidence, rather than the more relaxed "more probable than not" standard usually imposed on a review of a joint physical custody arrangement.

Ultimately, Mediation through FMC is a method by which the parties may be able to resolve custody, visitation, and holiday schedules without having to expend substantial amounts on attorney's fees. However, the attorney will do his client a disservice if he or she doesn't explain the ramifications any agreement reached in Mediation can have on ancillary matters to their case.

It is also possible for parties to engage the services of a private mediator to attempt mediation of all potential issues in dispute. There are a number of well-qualified

mediators whose understanding of the Family Law process permits them to provide terrific insight into where the case will be going in the event no agreement is reached, and the costs (both financial and emotional) involved in litigating rather than mediating a resolution.

Frankly, private mediation can be expensive, but since the parties share the expense (typically), it is still possible to mediate less expensively than litigation. The downside to attempting private mediation is the costs associated therewith in the event there is no resolution – effectively, money spent on attempts to resolve the issues in dispute which otherwise could have been spent on effective litigation. However, the success rate is such that in many cases, private mediation may be an attractive alternative to a trial on all issues. In any event, there is usually some resolution through private mediation, which in turn streamlines the remaining issues to be tried. This, in turn, can effectively reduce the costs of litigation.

#### **B. Effective Discovery**

Discovery has three critical components to it which permit you to effectively prepare for litigation. The first, and most obvious component, is obtaining information from the other side to “flesh out” the facts of the case. The second, and less obvious component, is to lock the other side into their purported facts and testimony. The third, and perhaps most important component, is to use the discovery responses to determine whether there are mistruths in the responses, and then obtain documentary evidence confirming the responses are false.

There is a rule in litigation called “the rule of threes”, which essentially says that if you can catch the other side in three lies, they will have no credibility with the Court. Of course, what is good for the goose is also good for the gander, so it is important to make sure your client does not get caught in three lies during the course of litigation.

Discovery can help you identify the three lies you intend to catch the other party in at the time of trial so as to eliminate their credibility with the Court.

There are three forms of “paper” discovery commonly used in litigation – Requests for Admission, Requests for Production, and Interrogatories.

Requests for Admission are only marginally useful. However, Requests for Admission can be very useful against a person representing themselves in proper person. When they are represented, the problem is twofold: First, the attorney is not likely to miss the deadline for responding to Requests for Admission, and second, if the attorney does miss the deadline, you are placed in a fairly untenable position of having to balance your client’s interests against the interest you have in maintaining a solid relationship with other members of the Bar (which may have an impact on future cases you handle for clients).

In my earlier days of practice, I nailed an attorney and his client for failing to timely respond to Requests for Admission twice (same attorney, different clients). At the time, my only view was that as a zealous advocate for my client, I had to pursue a request to the have the Court deem the unresponded to Requests for Admission as admitted. My mentor at the time tried to convince me not to, because the day might come that I would miss a deadline, and I would not want to be in the same position as opposing counsel. My thought was that I would never miss a deadline on Requests for Admission (I haven’t yet), so what possible harm could there be? Opposing counsel in those two cases is now a member of the Family Court Bench. Enough said.

In order for Requests for Admission to be effective, they must be carefully thought out. On the one hand, you want to be very specific, so as to avoid a denial based on being too vague or overbroad. On the other hand, it is important to break the Requests for Admission down to its simplest terms so as to avoid a denial based on it being compound. Most importantly, if the Requests for Admission are used in order to establish elements of a cause of action, it is critical to break down the Requests for Admission into each individual element.

In the first couple of years of practice, I sent a single Request for Admission to the other side (an individual representing himself in proper person). It was as follows:

REQUEST FOR ADMISSION NO. 1: Admit you have no case.

When he failed to respond, I filed a Motion to deem his failure to respond to my Request for Admission as admitted. The Court, understanding my zeal and young tenure as an attorney, broke the news to me very gently. The Judge said: “Mr. Eccles, your Request for Admission requires a legal conclusion, so I cannot grant your Motion.” The lesson I took from this exchange was that the Court will typically only consider a Motion to deem a failure to respond to admissions if the Requests for Admission are fact based.

Remember that although “Admit you committed battery upon my client” probably won’t get you where you want to go, breaking it down into its elements should. Instead of “Admit you committed battery upon my client”, which clearly calls for a legal conclusion, you could get to the same place as follows: “Admit you touched my client on August 3, 2007” and “Admit when you touched my client, it was harmful and/or offensive”. The two questions replacing the one requiring a legal conclusion results in establishing the elements of battery (a harmful or offensive touching) because they are fact specific.

The reality is that Requests for Admission are usually responded to, and are generally denied, but even in this instance, it is possible to make good use of the responses. Have your client go over the responses – especially the denials – and have the client determine whether or not the denial can be established as a false answer.

I had a recent case where one Request for Admission I sent out related to whether or not the other side had gifted a car to my client. The opposing party denied it. My client has a picture mail on her phone which is captioned “Look what I bought for (my client)!” First, this picture mail will prove the other side lied. Second, the picture mail will prove it was a gift (and therefore out of the equation relative to the division of community property). In that instance, I specifically asked my client for a series of Requests for

Admission which, if the other side denied, we would be able to prove the denials were false. At the time of trial, I am going to be able to establish both that the other side is a liar, and that he has no interest in the car - the best of both worlds.

The basic rule regarding Requests for Admission is not to expect too much from them. Consider the effect trying to get admissions will have on your relationship with other members of the Bar (and prospective members of the Bench). Consider whether you can craft them in a fact specific way so as to make them useful. Avoid legal conclusions.

As a final note, although language regarding admissions is largely mandatory, rather than permissive, the Family Court is reluctant to deem any failure to respond to Requests for Admission relative to custodial issues. As one judge put it: “This isn’t a can of tuna we’re talking about here.” Expect judges to decide custody issues on the merits, regardless of the purportedly mandatory language related to admissions.

Requests for Production of Documents, on the other hand, can be very useful. The documents produced should, at least theoretically, provide the foundation for documenting the facts of your case.

There are important restraints on what can be expected in a Request for Production of Documents. For example, although you may ask the other side for all of their payroll stubs for the past five (5) years, the Discovery Commissioner may consider this request unreasonable, because few people actually keep their payroll stubs that long. However, once such a request is made, the other side has an obligation to continually supplement their discovery responses, and once on notice, cannot dispose of the payroll stubs prospectively.

Another restriction usually associated with Requests for Production of Documents is that information which is in the other party’s possession, or is substantially easier for the other party to obtain than for your client to obtain. This would usually have to do with documents which are otherwise not generally available, even under subpoena – for

example, medical records. In these instances, the other party should provide an executed release of information. However, I make it a practice to send a release of information with my Requests for Production of Documents in the event the other party desires to claim such documents are not in his or her possession.

My experience tells me that if you ask for one year of bank records, and the other side says they do not keep those records, the Discovery Commissioner will compel production because monthly statement for the past year is typically available to almost everyone online. Again, prospective records will need to be supplied as supplemental discovery responses.

More often than you might expect, Requests for Production are, in fact, Interrogatories. These can be objected to because they do not seek documents presently in existence. For example, I have, on numerous occasions, received requests for written summaries, especially of the anticipated testimony of a witness. Such documentation almost never exists at the time it is requested, and the party receiving such a “document” request need not create such a document to provide to the other side of the case.

With the arrival of NRCP 16.2 in Family Court, it is critical that any Request for Production of Documents also request these things – any and all documents the other side may, or intends to, introduce into evidence at the time of trial, and any and all impeachment and rebuttal documents the other side may, or intends to, introduce into evidence at the time of trial. This will avoid any significant surprises, and will permit you to argue the other side is using “ambush tactics”, which the Nevada Supreme Court has determined may warrant sanctions.

Interrogatories are the method by which you can obtain written responses to those matters which otherwise fall outside the purview of either Requests for Admission or Request for Production of Documents. This would include a synopsis of the anticipated testimony of witnesses at trial, summaries of property owned, and an explanation from the other party as to the nature of such property (in their estimation). Such information

can also serve to lock the other party into specific positions in the litigation, and also serve to limit the scope of the testimony of witnesses called on the other party's behalf.

Although it is appealing to use stock discovery requests – or even stock discovery requests related to domestic cases – you should actually tailor your discovery requests as narrowly as you can (unless, of course, the point of propounding discovery is to paper the hell out of the other side in order to drive them crazy). Narrowly tailored discovery requests will typically result in more compact and useful information. Broadly propounded discovery requests will typically result in mountains of responses you will need to sift through to find relevant information.

It is unusual to require information from the other party from years prior to the marriage. There are exceptions (for example, in order to obtain the information necessary to perform a *Malmquist* calculation), but for the most part, requesting the last seven (7) years of bank statements from a party who has been married to your client for two (2) years would most likely be deemed an unreasonable request by the Discovery Commissioner.

Although discovery disputes can be costly, there are times when placing the matter before the Discovery Commissioner is the only way to protect the client. For example, if you receive discovery requests which are unduly burdensome, not reasonably calculated to result in the production of discoverable matters, or invoke some privilege, it may be necessary to file a Motion for a Protective Order, either limiting the scope of discovery, or the manner in which the discovery may be had (including time, duration, and method).

You may also need to file a Motion to Compel against the other party. If you intend to file a Motion to Compel as to Production of Documents or Interrogatories, you are *obliged* to conduct (or attempt to conduct) a discovery dispute telephonic conference. It is not sufficient to write a letter. In your Motion, you must submit an affidavit detailing your efforts to resolve the discovery dispute prior to the filing of the Motion.

An absence of a demonstration of your efforts to resolve the discovery dispute telephonically with the opposing party or counsel will not inherently result in a denial of your request, but it will affect your ability to recover attorney's fees. Furthermore, the Discovery Commissioner will not usually award attorney's fees if you are seeking to limit the use of any discovery (or absence thereof) or if you seek to have admissions as admitted for the other side's failure to timely respond.

Discovery is generally covered by NRCP 16, 16.1 and 16.2 (initial disclosures and related issues) as well as NRCP 26-37 (discovery in general). Familiarize yourself with these sections of the Nevada Rules of Civil Procedure so you can adequately protect your clients during the discovery process.

### **C. Working With Guardian Ad Litem and Expert Witnesses Prior to Trial**

Guardians ad Litem (GAL) are appointed from time to time in custodial disputes. Expert witnesses used in Family Court are primarily either custody evaluators or some form of financial experts – usually business valuers. GALs can be either Court Appointed Special Advocates (CASA), who are appointed by the Court if there is reason to believe there have been acts of abuse or neglect, or they can be any other person with sufficient training to act as an advocate for the best interests of the child or children. GALs can play a significant role in litigation, and should not be discounted. Because a GAL has “the best interests of the child” as a client, the GAL is not an advocate for one party, the other, or even for the child. The responsibility a GAL is charged with is solely to make a Report and Recommendation as to the best interest of the child or children.

I have acted as Guardian ad Litem on a number of occasions – first in law school as a CASA, and now as a person with sufficient training to act as an advocate for the best interest of a child. It can be fairly grueling work, and although I am sometimes compensated for my work, I am most often appointed to serve as GAL without compensation. It has, to date, been rewarding, but I have heard from others that it has become a nightmare – even resulting in the filing of a lawsuit (CASAs are protected as an

extension of the judiciary, but other GALs are not afforded the same protection). There is also a question as to when an attorney GAL is entitled to compensation. There is a provision permitting fees in certain types of cases, but not in all cases.

My mentor during law school (in Ohio) was a Court appointed GAL and served at the rate of \$95.00 per hour, and made a comfortable practice with about 2/3 of his billable time being attributed to this kind of work. It does not appear, under the current construction of law in Nevada, that an attorney could hope to build a practice on such work here.

As it relates to experts, a typical custody evaluation may cost the client (or clients) around \$7,500.00 or more, depending on how many extrinsic sources the evaluator uses in crafting his or her report. As with any business, there are good and less ideal evaluators, and evaluators which have certain propensities. It behooves the practitioner to know these details in advance of agreeing to, or suggesting, an evaluator for a particular case.

Business valuations, on the other hand, can run \$20,000.00 or more, depending on the complexity of the business being valued.

As to GALs, CASAs, and any expert, you as an attorney have the right to review the report prior to trial. Your client may review the report, but may not have a copy of the report.

You also have the right to challenge the credentials of the witnesses at the time of trial. If an expert has been qualified as an expert in the department in which you will appear, it is likely of no use to challenge the expert's credentials. However, it is incumbent on you as a practitioner to check out the expert's background.

I recently had an expert document examiner in a case (hired by the other side). She failed to disclose that she had been disqualified in a Nevada case in 2006. I challenged her qualifications as an expert, and she testified that she does not follow any controlling organization's policies and procedures, but felt based on her experience in watching other

experts that her protocol as an expert were consistent with those she saw other experts use. Ultimately, the Court permitted her to testify, but at the conclusion of trial, the Court concluded her testimony did not actually assist the trier of fact in reaching a conclusion as to the efficacy of the document in question.

Ultimately, the most important aspect of challenging an expert is in knowing how to question them as to methodology and conclusions. In some instances, it is possible to have the expert testify that their conclusions are inconsistent with methodology. This was more difficult for me with the document examiner because she didn't prescribe to any particular methodology on which she could be challenged.

In a fairly notorious case I handled years ago, I represented an acknowledged pedophile seeking to obtain custody of his twin boys. The pedophilia to which my client had admitted some involvement was related to girls. The other side called their expert, and on cross, I asked three simple questions: How unusual is homosexual pedophilia? (about 1% of cases involve homosexual pedophilia); Of that segment of pedophiles, what percent are familial (parent and child)? (about 1% of homosexual pedophiles are familial) Given the foregoing two answers, are you concerned that my client is a threat to commit any act of pedophilia against his own twin boys? (no)

During a break in the proceedings, opposing counsel came up to me and asked me if I had just asked their expert if it was okay for the kids to be around their father because he only molests girls. My response was "I believe I did". Although the client did not get custody, he did receive unsupervised visitation. No one expected he would then use his twin boys to lure girls to his home (or so I was told after I was out of the case).

With business valuers, the questions to ask the other side's expert should come from your own expert. Usually, if there is a substantial disparity in the results of two business evaluations, there are two causes: First, the experts were not reviewing the same information. Second, the experts are using different models (methodology) to reach their conclusions. Reasonable minds can differ, but it is incumbent on you as a practitioner to

convince the judge your expert's model is more accurate than the model used by the other expert.

You are entitled to depose an expert prior to trial. In order to do this effectively, you have to review the report from the expert with your expert so that you can go over questions to ask while the expert is under oath. The report should tell you what information was relied upon in reaching a conclusion, whether or not the opinion is qualified (and why it is, if it is a qualified opinion). The report may not detail methodology, but it should be apparent from the report (or it may reflect the absence of a generally accepted methodology, which is practically gold).

I have had a custody evaluator testify, under oath in a deposition, that she recommended primary custody to fathers about 65% of the time. If your expert says this, and you do not follow up with questions as to why such recommendations happen 65% of the time, the other side will use her deposition testimony to establish bias (even beyond the fact that he or she is a hired gun in the first place). In that instance, I elected not to call the expert in my case in chief.

Ultimately, the two (2) most important things related to experts is to make sure your expert's report (and underlying methodology) is unimpeachable, and that you know how to poke holes in the report (and underlying methodology) of the other side's expert. Similarly, if there is a GAL appointed in your case – someone the Court would generally consider a neutral evaluator – you must be able to challenge the findings and methodology (if they are detrimental to your client's case), or bolster the findings and methodology (if they support your client's case). It is not enough to expect the Court to take the expert's word for their conclusions, and a failure to diligently bolster or refute an expert's findings and methodology may mean the difference between winning and losing your client's case.

#### **D. Questions: To Settle or to Litigate?**

In my estimation, one of the most valuable aspects of a lawyer's job is to have a comprehensive discussion with the client about the pros and cons of settling or litigating a case. Put another way, the client has the right to hear your "cost-benefit" analysis of their case. The client does have the final word on any settlement, but it is your duty as a practitioner to weigh the benefits and detriments of settling or going to trial.

On the one hand, there may be a settlement offer which is about \$5,000.00 short of what your client perceives would be an acceptable settlement amount. In such a case, the attorney should sit down with the client and discuss how much it will cost to litigate over the \$5,000.00 disparity (which could end up being more expensive than the amount in controversy, and there are no guarantees the fees will be recovered). The client needs to consider the non-economic benefit of settling and compare that to the aggravation of proceeding to trial and being sworn in to testify (this is referred to as "peace of mind").

The client needs to look not only at the expense of trial, but the expenses which are created preparing for trial. My trial preparation tends to be about two to three times as much as the amount of time I will spend actually in trial, so if it is a four hour evidentiary hearing, the total amount of time invested for trial preparation and trial itself is typically around 12-16 hours.

However, it takes two to tango, so if the other side is unreasonable, or opposing counsel has limited client control, there may be no possibility of settlement. Even with excellent client control, it may be impossible to convince a client of the value of settlement over litigation. I call these clients "principled". Principled clients pay the note on my luxury sport sedan, and everyone has these clients. Frankly, if everyone were reasonable, we attorneys would all be driving around in subcompacts, so it probably just as well that some cases simply can't settle. However, if settlement is possible, I don't ever want to be the attorney who frustrated the settlement process.

The client needs to be placed in a position to make an informed decision on whether or not to settle. This means explaining the alternatives of settling or litigating with the client in a relatively dispassionate way, sometimes to your own detriment. Obviously there is more money made in litigating than in settling, but this is mostly offset by referrals you will receive from your clients who are satisfied you have their best interests at heart, and are at least comfortable with the settlement terms.

#### **E. Preparing Your Client for Trial/Mediation**

Since mediation is before Trial, preparing your client for mediation is your first priority. By far, the most common method used by the Courts in Clark County to resolve custody disputes between parents is to send them to FMC to engage in mediation to attempt to resolve the custody issues. The parties will meet with a neutral third party (the mediator) who is trained in dispute resolution. There is an initial meeting (a “meet and greet”), followed by a subsequent meeting (or meetings) to negotiate or mediate in earnest.

The mediators are aware of the presumption towards joint physical custody. As such, if your client is adamant in pursuing primary physical custody, it is important for the client to express to the mediator the basis for deviating from joint physical custody. A good plan of action is to have the client come up with a list of 5-7 positive attributes which he or she has as a parent (which, at the same time, the other parent lacks), and 3-5 negative attributes the other parent has (which, at the same time, your client does not suffer from).

The nature of the negative attributes should be constructive, and not inflammatory. For example, your client should not say the other parent can't help the children with homework. Rather, your client should say that because of his or her experience and education, he or she is better equipped to help with homework. A negative, in the sense contemplated in these discussions, could be something as simple as a work schedule which makes scheduling equal time with each parent difficult or impossible.

Along with positive and negative elements of parenting skills, the mediator needs to come up with solutions, so the client should be prepared to provide solutions to help “steer” the mediator toward the desired custodial arrangement.

Although the mediation process is “confidential” (in other words, it is treated like settlement negotiations, and therefore cannot be brought to the Court’s attention), there is an exception to the confidentiality: The mediator will inform the Court if one party, the other, or both declare an impasse. Basically, if someone declares an impasse, they have indicated that the mediation process has failed, and the judge should decide the custodial arrangement.

Mediators do not like to snitch on the parties, so if one party says mediation is a waste of time, the mediator will ask the other side if they agree. Since your client can’t (or at least shouldn’t) mediate against him or herself, it is quite common for the other side to agree. However, the mediator will then inform the Judge *both* sides declared an impasse. As such, I recommend telling your client to memorize and use this mantra: “I believe two caring parents working in the best interests of their children can come up with an agreement here in mediation” any time the mediator asks the client if mediation is a waste of time.

In the event the parties agree on some or all of the custody and visitation issues, a Parenting Plan, or Partial Parenting Plan will be drafted by the mediator. The draft will be provided to the parties for review. Their attorneys also get a chance to look it over and advise their client on the impact the purported “agreement” will have on their lives, both as to their time with the children, and on child support.

The Courts are not permitted to ratify a Parenting Agreement unless both parties and their attorneys approve it. However, if there is an objection to the Parenting Agreement, the Court will be disappointed, and will view such a change of heart as “buyer’s remorse” (even if the objection is one legitimately raised by the client’s attorney). This does not usually, but could, affect the Court’s ultimate decision on custody.

Mediation through FMC has a surprisingly good track record - resolution of some or all of the issues occurs in about 85% of the cases submitted to FMC for mediation. As such, the Court relies on the mediation process extensively. Obviously, mediation is also much cheaper for the client if it is successful, and the costs associated with mediation are fairly low even if there is no success.

Private mediation is also available to the litigants. The purpose is the same as mediation through FMC, and although it is more costly (sometimes as much as \$400 per hour, usually split between the parties), the qualifications of a private mediator may be substantially greater than the qualifications of a mediator through FMC. Furthermore, private mediators are not constrained to resolve only custody, visitation, and holiday schedules. All aspects of litigation may be resolved through the use of a private mediator. It is a good idea to meet and confer with the other side to define precisely what issues will be addressed in private mediation.

The very best private mediators have been involved in custody dispute resolution for a significant period of time, and can predict with sometimes frightening accuracy the ultimate outcome of a custody battle if the matter is submitted to the Court for a decision. Some private mediators are even former Family Court Judges. Litigants with the resources to pay for private mediation may find it a better alternative to FMC and/or litigation. It is also often beneficial to have a mediator who can resolve more than just custody, visitation, and holiday scheduling issues, thereby streamlining the remaining issues even if not everything can be resolved through private mediation.

Preparing a client for trial is significantly different from preparing them for mediation. A client needs to be advised on the procedure in Court, as opposed to efforts previously made to settle issues through the use of mediation. Mediation is typically more neutral than the advocacy style of a trial, so tensions tend to run higher in Court than they do in mediation. The client needs to be prepared – by the attorney – for what the process entails.

For example, the client needs to be told to listen to the questions asked of them both by you and by opposing counsel. The client needs to know to answer only the question asked by opposing counsel. As a Judge once indicated to my client while she was on the stand: “When I ask you what time it is, don’t tell me how to build a watch.”

The biggest potential pitfall of the client not being cognizant of the role of opposing counsel is that the client may end up providing information to opposing counsel which could be detrimental to the client’s case where otherwise, opposing counsel may not have asked the right questions to get the information the client just volunteered. It is human nature for clients to want to tell their side of the story, and in the absence of guidance from their counsel to restrain themselves from doing so, *they will*. The client needs to understand that by trying to tell “their side of the story” on cross examination, they can sink their own case.

Clients need to be made aware that as a rule, the opposing party in a case can be treated as a hostile witness. Some Judges require some actual hostility before they will permit the opposing party to be treated as hostile. However, in any event, most Judges permit the use of leading questions on cross examination.

The principal differences between direct examination and cross examination are how the questions are asked, and how far-reaching the questions can be. On direct examination, the questions must be generally open ended (unless the leading questions are used solely to lay foundation for more important questions down the road). In other words, when you ask a question of your own client on direct examination, the question is most likely leading if a simple “yes” or “no” answer can be given. On cross examination, nearly all questions asked should require a simple “yes” or “no” question.

Providing the opposing party with an open-ended question also gives them a pulpit to tell “their side of the story”, so it is okay to ask some open-ended questions in the hope some juicy information that should not have been provided will come out. You can always wait until the tail end of the answer to move to strike the answer as non-

responsive if it serves no useful purpose to your client's case. As an aside, only the person asking the question has the authority to ask to have the answer stricken as non-responsive.

Your client needs to understand that if the Court concludes they have lied about one thing, the Court can conclude the client lied about everything. Your client needs to understand that if they get caught in three lies, they will have no credibility with the Court. Your client needs to understand that if they lie, and you know they are lying, you are obliged to make an attempt to rehabilitate their testimony, and if they do not, you must immediately seek Court permission to withdraw from the client's case (which tells the Judge and opposing counsel your client just told a lie). Your client needs to understand that although people lie in Court, their case is not to be won at all costs.

The client also benefits from an explanation as to how the Court determines credibility between witnesses and parties. This includes a discussion about "demeanor" evidence. If your client has his or her arms crossed the whole time they are in Court, including when they are testifying, or even when they are next to you, the Court will view that negatively. Physical responses to witness testimony, whether it is verbal or a shake of the head, can make a difference to the Judge in how they view the credibility of your client.

I had a hearing where, in the span of one hour, my client furiously wrote notes to me about every 30 seconds, put his cell phone in front of me no less than seven times, and even whispered in my ear to ask the witness about a shotgun (the witness had no ties to a shotgun in any way shape or form). After an hour, the Judge asked for a bench meeting with counsel, at which time the Judge asked me: "If your client is acting like this right in front of me, what do you think my opinion is as to whether he is control freak outside of Court?" We settled the case five minutes later.

I had another case where opposing counsel, at the end of direct examination by his attorney, turned to me, and gestured “bring it on”. The Court found his testimony incredible, I suspect largely as a result of his confrontational mannerisms.

The long and short of it is that the more prepared your client is, the less likely they are to sink their own case. Opposing counsel is already doing everything possible to win the case, and it is incumbent on you to tell your client everything he or she needs to know to avoid helping opposing counsel to that goal. The way to insure, to the greatest extent possible, that your client meets their objectives is to make sure they understand the adversarial process and don't fall into any of the traps often laid by opposing counsel, or even inadvertently created by the client.