

CHAPTER 19

**DISPUTE RESOLUTION OPTIONS**

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## OVERVIEW

At their best, dispute resolution options, such as mediation, promote self-determination, build cooperation, reduce the hostility that harms children and partners, and increase the possibility for agreements practical for—and particular to—the people who make them and have to live with them. Those most satisfied with dispute resolution are informed consumers who choose the right process for their case over the other options. This chapter will help you answer the following questions:

- **Why choose dispute resolution?** Whether you hire a mediator, are required to participate in Probation Department dispute intervention, or participate in some other dispute resolution process, there are numerous advantages to finding your own solutions for settlement. This chapter will explain the advantages of dispute resolution, as well as some of the disadvantages.
- **How should you decide on the right dispute resolution process and professionals for you?** As a consumer, you have choices. Some of the dispute resolution processes are confidential and some are not, some may be required and others are voluntary, and each has its own unique advantages and disadvantages. This chapter will provide a definition of the different options, and explain the professional roles you may encounter in each type of dispute resolution.
- **What should you do to prepare effectively?** Ultimately you have to decide for yourself whether you can reach an agreement that satisfies you. You should know the elements of a good agreement, and how agreements are enforced, and how to prepare effectively to work toward an agreement. You get to define your own goals and your own definition of success. This chapter will help you understand what is required to identify your goals and how to have your process result in a complete agreement.

## REASONS FOR CHOOSING DISPUTE RESOLUTION

People involved in a family conflict usually experience financial, emotional, and physical crises. If you are involved in a domestic dispute, you have many options for resolving that dispute, both inside and outside the courthouse. Mediation, conciliation, arbitration, collaborative law, and dispute intervention through probation are all options for resolving family conflict. Each of these options includes working with a professional trained in conflict resolution.

There are many advantages to solving your own conflict through one of these dispute resolution services, including the following:

- **Control over the outcome.** You are provided the chance to decide personal issues outside a courtroom, and to participate as fully and equally as possible in major life decisions.
- **Control over the process.** You get to design a process that works best for you and your disagreements together. In many dispute resolution options, this includes choosing your own timeline, professionals, and even where meetings will take place.
- **Privacy.** The information you share in some dispute resolution options is kept confidential, which encourages settlement, and keeps your personal information out of the public courthouse. Confidentiality does not apply in all the options, but mediation, arbitration, and collaborative law are private and confidential processes. Mediation has an extra level of protection, G.L. c. 233, § 23C, that provides for confidentiality of the process and a mediator's work product, including memoranda and case files. See **Exhibit 19A**, Mediation Confidentiality Statute.
- **Cost savings.** The court process can be a drain on financial and emotional resources. An average lawsuit in America can take more than three years to reach trial or settlement. Dispute resolution moves at your pace and, if settlements are reached early, you both can avoid the stress and cost of further court hearings.
- **Buy-in.** Research suggests that people are more satisfied with agreements they make themselves, and are more likely to keep them, as opposed to judgments made and enforced by courts.
- **Informed decision making.** When working with dispute resolution professionals, you will have a greater opportunity to be informed (as compared to self-negotiation), which will help you decide how to divide property such as homes, cars, furniture, bank accounts, pensions, etc., with an awareness of what factors the court considers.

- **Protecting relationships.** Data increasingly supports the common-sense notion that children suffer when parents fight. Children are likely to make a happier, healthier adjustment to the change when partners settle things peacefully. You can build a coparenting relationship (rather than an adversarial relationship) to help work out custody and parenting-time schedules for children while gaining an understanding of their effects on children. Creating solutions that you both buy into offers you an opportunity to rebuild relationships that may be necessary for your wellbeing and for the wellbeing of others in your family, including children.

There are good reasons to choose litigation in some cases, especially when financial or physical safety are an issue. Not all cases are appropriate for mediation or dispute intervention. If you have an abuse prevention order or fear abuse, be sure to tell any mediator or probation officer (also called a family services officer in the Probate and Family Court) prior to a meeting. In Massachusetts, you are not required to meet in the same room with someone who has abused you or who you are afraid will abuse you. G.L. c. 208, § 34B; G.L. c. 209A, § 3; G.L. c. 209C, § 15. Legislative policy supports refusal to mediate even in the absence of a restraining order when you have been abused in the past or you are afraid of your partner. You may have to assert this right persistently in court settings (bring a friend for support). You can be required to, or may wish to, meet in separate rooms or at separate times with a probation officer. Be sure any process you may consider does not violate the terms of an existing restraining order or give you concern for your safety.

## THE DIFFERENT TYPES OF DISPUTE RESOLUTION

### Mediation

In mediation, a neutral professional, called a mediator, assists you in resolving your conflict. In mediation, all the parties have a chance to share their concerns, and the mediator helps them to find solutions that are mutually acceptable to everyone. Mediation is voluntary and confidential.

Modern mediation was designed as a voluntary and confidential process conducted by a neutral third party. *Cf.* Phyllis E. Federico & Peter F. Zupcofska et al., eds., *Massachusetts Divorce Law Practice Manual*, ch. 3 (MCLE, Inc. 3d ed. 2012 & Supp. 2014, 2016); Jay Folberg & Alison Taylor, *Mediation: A Comprehensive Guide to Resolving Conflict Without Litigation* (Jossey Bass 1984); ABA Task Force on Mediation, *Divorce and Family Mediation: Standards of Practice for Family Mediators* (American Bar Ass'n 1986).

The elements once considered crucial to good mediation are changing, and new definitions are emerging. *Cf.* Fiske, Neumann & Woodbury, “Divorce Mediation Training Associates,” *1998 Training Manual* (“A confidential, usually voluntary form of structured negotiation designed to help clients reach agreement with the assistance of one impartial mediator.”). For further information, see Daniel Bowling and David Hoffman, *Bringing Peace into the Room: How the Personal Qualities of the Mediator Impact the Process of Dispute Resolution* (Jossey-Bass 2003); various issues of *Mediation Quarterly*, published by Jossey-Bass; and Mediate.com, an ongoing source of comments, analysis, and conferences about mediation in all fields. Many books and articles available on mediation or other dispute resolution options are available from your local library or law library.

While some people disagree about how facilitative or directive a mediator should be, there are many ways to be an effective mediator. There are three typical styles of mediation and it is helpful to think of them as being on a spectrum, rather than distinct types.

- **Transformative mediation** focuses on transforming or changing the relationship between the participants, but may not concentrate on reaching a particular solution or endpoint.
- **Facilitative mediation** focuses on assisting the parties to communicate effectively so they may resolve their conflict without directing them toward any particular solution.
- **Evaluative mediation** still focuses on assisting the parties to communicate, but also provides an opportunity for the mediator to weigh in on the conflict, often providing an evaluation or opinion based on the likelihood of certain outcomes in court.

Family mediation tends to be more transformative and facilitative, while business mediation tends to be more evaluative. Each style will be more or less appropriate depending on the conflict styles of the people involved in the mediation, and the needs that they have.

## Conciliation

In conciliation, a neutral private attorney, usually appointed by the court, assists you in assessing the strengths and weaknesses of your case. You each have a chance to share your concerns and explore the options for resolving the matter without going to court. The conciliator will report to the court a list of resolved and unresolved issues, and may also share an assessment or recommendation with the court.

Conciliation is a form of evaluative mediation, but when performed through the court referral process it is not fully confidential. The conciliation programs through the courts typically include two hours of conciliation with an experienced attorney in that county either free or for a small fee paid to the court or bar association administering the program. It is possible to have the fee waived for indigent parties.

### Practice Note

Many Probate and Family Courts have conciliation programs which are administered by local bar associations, and services are provided by volunteer attorneys. If you want to use this program, you need to make a request to the judge to make a referral to the program. Once the referral is made, the administrator will notify the parties and/or counsel and will make arrangements for the conciliation. There is sometimes a charge for administering the conciliation.

You can also choose to hire a private conciliator, which has some advantages. In private conciliation, you can use more than two hours of time, and you can choose your conciliator.

## Dispute Intervention Through Probation

In dispute intervention, a probation officer in the courthouse meets with the parties (and their attorneys, if any) to identify the issues before the court, explore solutions, and provide recommendations if requested by the court. In the area of family law in particular, judges feel that intervention by court personnel may help parents and former partners choose solutions that neither may like, but that both can accept. This avoids imposition of judicial win-or-lose verdicts, as well as the lengthy, painful, and expensive trial process. It also allows judges to find, through the court personnel, which cases can be resolved quickly, and which need more complex processes, such as major discovery or appointment of experts.

However, if mediation is defined as voluntary, confidential, and impartial, then court-ordered services as they currently exist may be helpful, but *are not mediation*. Massachusetts courts recognize the difference and call the services within the courts “family service” or “dispute intervention.” See SJC Rule 1:18, the Uniform Rules on Dispute Resolution, available on the Supreme Judicial Court website at <http://www.mass.gov/courts/case-legal-res/rules-of-court/sjc/sjc118.html>. The court has also published *A Guide to Court-Connected Alternative Dispute Resolution Services*, available at <http://www.mass.gov/courts/docs/admin/planning/ccadr0601large.pdf>, which provides detailed commentary on Rule 1:18. Parties are required to meet with a probation officer to organize the dispute so that it conforms to legal questions (e.g., who has custody, how much support is warranted, etc.) and to narrow issues the parties cannot resolve for themselves. Although not required to do so, the parties may make a partial or a full agreement (called a “stipulation”) about their dispute, which is written and submitted to the court for approval. See chapter 2, Overview of the Probate and Family Court.

Court services are *not voluntary*, because the litigants are required to participate, at least in an initial interview. If you have an abuse prevention order, or you have been abused or fear abuse, you cannot be required to meet in the same room with your partner. G.L. c. 208, § 34B; G.L. c. 209A, § 3; G.L. c. 209C, § 15. In court settings, probation officers may attempt to resolve issues without referring extensively to the past; a common statement is: “What’s past is past, let’s talk about the future.” Meetings may last anywhere from fifteen minutes to two hours and are usually conducted in small spaces.

Probation officer interventions are *not confidential*. “The purpose of dispute intervention is to provide an opportunity to the litigants to resolve their own differences; and to provide the court with information and/or recommendations as requested and/or ordered by the court.” See *A Guide to Court-Connected Alternative Dispute Resolution Services*, available at <http://www.mass.gov/courts/docs/admin/planning/ccadr0601large.pdf>. In some courts, probation officers report to the judge and make a recommendation. See SJC Rule 1:18, the Uniform Rules on Dispute Resolution.

Eighty-two percent of probation officers surveyed indicated that they share information with the judge. This may include background on pro se litigants that will give a judge a quick grasp of the facts. It may also include a recommendation. Most judges will listen to reports from probation officers, and in some cases will consider their recommendations. This is an important fact to think about: after meeting with you for a limited time in a semipublic setting, someone you have never met before, who generally is not a lawyer, a judge, or even a social worker, may recommend whether you should have custody of your children; this person may also recommend what support and parenting time is appropriate. Prepare for this interview carefully, as addressed further below.

Despite potential drawbacks, court-based family service intervention at early stages provides a fast, inexpensive, and often highly skilled response to family crisis that should not be underestimated. At the very least, it is free discovery and a chance to hear the other side's case. At its best, it may create an opportunity for a breakthrough in your dispute.

## Collaborative Law

**Collaborative law is a team approach.** Trained professionals guide the clients through the collaborative process in a private and confidential setting. In collaborative law, the team is led by a neutral coach or facilitator. In a divorce, the coach is typically a mental health practitioner. Each party is also represented by a collaboratively trained and settlement-focused attorney. In the collaborative law process, the parties may also jointly hire a financial neutral to help them evaluate the relevant financial issues in a case.

**Collaborative law is a settlement-focused process.** In order for this process to work effectively, there are a few critical components of collaborative law:

- **Disqualification.** The professionals agree to be disqualified from other roles they might typically take if settlement discussions fail. Lawyers are disqualified from representing a client in litigation arising from this dispute. Financial neutrals are disqualified from future financial relationships with the individuals. Coaches are disqualified from acting as therapists or parenting coordinators for the parties after the process. This ensures that everyone is focused on settlement and resolution of the case in front of them.
- **Active participation.** In collaborative law, the parties actively participate in all substantive negotiations. This means that there are no discussions between the lawyers regarding settlement of the issues in this case unless the parties are present. This may be less efficient in some instances, but in the long run it is building the parties up to an ability to communicate and advocate for themselves effectively after the process is over.
- **Voluntary.** While this means that parties can leave at any time, it also encourages open and honest cooperation, because without fair dealings, why would the other side continue to voluntarily participate?
- **Transparent.** Rather than having formal discovery, the parties in collaborative law, and the neutrals and the attorneys, agree to share all relevant information with each other. If a client asks one of the attorneys to hide relevant information and the client cannot be convinced to share it voluntarily, then the attorney must withdraw from the process. This supports cooperation and problem solving instead of positional negotiation.

These core principals are included in a written contract called a process agreement that the parties sign at the commencement of a collaborative law case.

## Arbitration

In arbitration, you select a neutral private arbitrator who provides a binding or nonbinding decision at your request. The arbitrator's decision is made after hearings and presenting of evidence which may be the same or less formal than court. Arbitration has many of the same pros and cons of litigation, but there are some advantages. In arbitration, you pick who the decision maker will be, and this gives you the opportunity to interview him or her to find out if he or she has any biases. This is not something you get to do with a judge.

In addition, arbitration gives you more control over the timeline, evidence rules, and other portions of the decision-making process that the court does not allow you to amend. This means that you together can choose to limit or expand the court rules to fit the needs of your case, and ensure that the decision being made by the arbitrator is as informed as possible.

## Pilot Programs

The Massachusetts Probate and Family Courts are trying to find the best ways to help families resolve conflict efficiently. As part of this effort, there are numerous programs taking place in different counties that fit into some of these traditional categories of dispute resolution, or which are trying something new and revolutionary.

As an example of a traditional program taking place in a courthouse, Mediation Works, Inc., has been in cooperation with the Norfolk Probate and Family Court to provide free, on-site mediation services. These mediation sessions are confidential and voluntary, and because they are at the courthouse they are also convenient for the people and the court.

Some nontraditional models are also being piloted in various counties, such as the Limited Issues Settlement Conference. The Limited Issues Settlement Conference is a program designed to assist parties in avoiding a trial and reaching a full settlement, when they have narrowed the issues after multiple court hearings. *See Limited Issues Settlement Conference, Parameters for Participation in Pilot Program, available at <http://www.mass.gov/courts/docs/courts-and-judges/courts/probate-and-family-court/lisc-guidelines.pdf>.* This is a free program where a judge meets with the parties to work with them closely to help settle their case.

To determine whether any pilot programs are available in your county, contact your local registrar's office or ADR coordinator as listed in **Exhibit 19B**.

## THE ROLE OF THE PROFESSIONALS IN DISPUTE RESOLUTION

In each dispute resolution process there are different types of professionals that are involved. An attorney might also be a trained mediator and conciliator, but their role in each of those processes is very different from when they are acting as an attorney. Below is a discussion of some of the typical dispute resolution roles, how they are similar, and how they are different.

### The Mediator

Mediation is a process characterized by consensuality, confidentiality, and impartiality. The role of the mediator is to help parties negotiate, disclose, and discuss freely, fully, fairly, and with a final outcome acceptable to both parties, the mediator, and the court.

#### Confidentiality

Most mediators consider confidentiality essential in successful negotiations, and consider themselves ethically bound not to discuss the contents or results of mediation. General Laws c. 233, § 23C protects this confidentiality. The statute provides a privilege to the mediator, like a doctor or an attorney, which means that their conversations and documents may not be deposed, subpoenaed, or made public. This privilege applies to the mediator's case files and work product. Any communication made by either of the parties in the presence of the mediator in the course of mediation is also privileged. G.L. c. 233, § 23C. In Massachusetts, a person must have completed a certain amount of training before he or she can qualify as a mediator. To do so, a person

- must have entered into a written agreement with the parties to mediate;
- must have completed at least thirty hours of training in mediation; and
- must
  - have at least four years of experience, and
  - be accountable to a dispute-resolution organization that has existed for at least three years, or
  - have been appointed to mediate by a judicial or governmental body.

G.L. c. 233, § 23C.

Thirty hours is not enough training to be a good mediator, and most experienced mediators suggest seeking out mentors, additional training, opportunities for experience, and/or opportunities for supervision.

**Practice Note**

Some mediators may also be mandated reporters, such as social workers or psychologists who are required to report suspected abuse and/or neglect to the Department of Children and Families. G.L. c. 119, § 51A. Many private mediators voluntarily exclude child abuse from the privilege (some also exclude current or future criminal behavior); some may exclude partner abuse. Mediators should tell you before the mediation begins what they will report, and their agreement to mediate should include specifics on any exclusions from the privilege. If you have questions, ask the mediator before you disclose anything. See Phyllis E. Federico & Peter F. Zupcowska et al., eds., *Massachusetts Divorce Law Practice Manual*, ch. 3 (MCLE, Inc. 3d ed. 2012 & Supp. 2014, 2016).

**Neutrality Versus Impartiality**

Neutrality means that a professional does not take sides or put either party's interests above the other's. Impartiality means that a professional provides equal treatment and promotes fairness. These are slightly different approaches to mediation, and whether a mediator views his or her role as neutral or impartial will influence the mediator's style of mediation. Neutrality implies a noninvolved and nondirective role, without authority to impose results, while impartiality suggests a nonbiased role, but with the ability to promote fairness and agreement through the process. Judges and couple's therapists, for example, are not neutral, but are expected to remain impartial.

In the divorce context, at least, some mediators also choose impartiality over neutrality for a variety of reasons having to do with trying to find objective fairness. For example, a divorce mediator may require full disclosure of assets and liabilities. He or she may ask the parties to consult an attorney, accountant, psychotherapist, or other professional if their lack of information about the law, finances, needs of their children, or each other would result in an unfair agreement. Many mediators provide such information and take the necessary steps to create a level playing field to prevent abuse of process by one party. However, mediators continue to debate what is advisable or required, and how to address power imbalances in mediation. The role of the mediator as pure neutral or simply impartial should depend on the type of mediation the parties have requested. If the mediation is intended to be transformative or facilitative, then the mediator should be more neutral. If the parties have requested an evaluative mediation, then the mediator will have to be more directive, and impartial instead of completely neutral.

**Skills of a Family Mediator**

A mediator can help clients separate and resolve the emotional division issues, such as who moves out and how, and can help design interim and long-range parenting plans particular to the parties and their children. A mediator can help the parties list and evaluate their property, and can provide or help the parties obtain information about the tax consequences of separation. He or she can also explore options and methods of dividing property and help the parties inform themselves about what the court might do during litigation. A mediator can also help the parties develop a mutually acceptable form of relationship after their separation.

A skilled mediator is well trained, experienced, and capable of complex and balanced intervention that enables the parties to reach fair and enforceable agreements. Do not assume that all mediators have these abilities; interview carefully, ask about the process, and insist on the right to terminate a process that you do not feel good about. See more information in "Finding the Right Dispute Resolution Professionals," below, and a list of questions you might ask a prospective mediator and for agencies and organizations you can contact for referrals and information.

**The Conciliator**

Conciliation is a process focused on informed and efficient settlement. The role of the conciliator is to help parties get informed about the strengths and weakness of their case, and negotiate effectively to a final outcome acceptable to both parties, the conciliator, and the court.

- **Confidentiality.** When ordered through the court, the conciliator is usually not asked to report fully to the court, but they are asked to report some information back on settlement progress. Private conciliation, however, can be handled more like an evaluative mediation, and if an agreement to mediate is used, and the conciliator has also had mediation training, then G.L. c. 233, § 23C protects this confidentiality the same as described for mediators above.

- **Impartiality.** Similar to an evaluative mediation, conciliators are not asked to be purely neutral because the evaluations they will provide will most likely favor one party or the other. In order to assist parties in settling in conciliation, the conciliator will be directive, and impartial instead of completely neutral.
- **Skills of a conciliator.** A skilled conciliator will have much of the same knowledge base of a mediator in terms of the emotional, financial, and legal issues that arise in family conflict. Conciliators are required by Rule 1:18 to take an eight-hour training. In addition to that training, many skilled conciliators will have taken a mediation training. Conciliators should have a knowledge base of typical outcomes in litigation cases in the county in which they practice, because parties in conciliation are specifically looking for information about the risks and benefits of their positions in court. One advantage of private conciliation is that you will have the ability to interview your conciliator to find out his or her knowledge base before hiring him or her.

## Probation Officers

Dispute intervention with probation is a process focused on identifying the issues before the court, exploring solutions, and providing recommendations if requested by the court. The role of the probation officer is to facilitate this process, sometimes to investigate litigants, and then to report the progress to the court, whether a settlement is reached or not.

*Probation officers are neither neutral nor impartial because they work for the court.* The Probate and Family Court has a responsibility to protect the best interests of children and to help them avoid harm. Court personnel are mandated reporters, which means they have obligations to report child abuse, and may have to report other matters as well. G.L. c. 119, § 51A; *see also* Phyllis E. Federico & Peter F. Zupcofska et al., eds., *Massachusetts Divorce Law Practice Manual*, ch. 3 (MCLE, Inc. 3d ed. 2012 & Supp. 2014, 2016). Arguably, these responsibilities are not so different from mediation, but in practice the process tends to be very different. Probation officers often do not have the time or authority to insist on full disclosure of income, assets, and liabilities. What matters are addressed and how deeply they are probed depends on the court and the personnel, the complexity of the case, and how far along in the process the case is.

Probation officers are knowledgeable about the court process and the typical outcomes in the court process. They receive training through the court, and many have also received outside training. There is no guarantee, though, that a probation officer is a trained mediator or has the same skills as a mediator or conciliator. Because they report back to the court, speaking with a probation officer should be seen as an extension of the court itself and you should be thoughtful about what you reveal in probation.

Probation officers take pride in helping people agree instead of fight. However, they are under tremendous pressure because of the high number of cases assigned to them. If you are concerned about the person assigned to intervene in your case, politely request an opportunity to speak with his or her supervisor. These are services, and you have a right as a consumer to be satisfied that the person to whom you will tell the intimate details of your separation is respectful, listens, and tries to help. Do not forget that emotions may be perceived as a sign of dysfunction; maintain a polite but firm approach.

The most serious questions arise in jurisdictions that allow or require a report or recommendation from the probation officer to the judge. *See Supreme Judicial Court Report, Achieving Equity.* Probation officers are not supposed to communicate with the judge except in open court and on the record, in part because that allows the parties the right to hear and rebut such testimony. (“We hold that, as a matter of statutory interpretation, reports of the Probate Court probation officers made to a probate judge pursuant to G.L. c. 276, § 85B, inserted by St. 1969, c. 771, § 3, must be in writing. . . .” *Duro v. Duro*, 392 Mass. 574, 575 (1984).)

Once approved by the judge, any stipulation or agreement becomes an order of the court, subject to legal enforcement mechanisms. You can be held in contempt for failing to comply with any of the terms, so read the agreement carefully before you sign it. An agreement reached in court-based dispute intervention is submitted to a judge, either while the parties are present or after they leave, depending on each judge’s practice. Be sure you receive an official copy.



**Practice Note**

Be sure to distinguish between a “dispute intervention” and an “investigation” by the family service office. The latter is a far more serious category—one that signals serious problems. Investigations include home visits, contacts with agencies or individuals, and written reports to the court. The same is true if a guardian ad litem is appointed for your children. See chapter 2, Overview of the Probate and Family Court.

**The Collaborative Coach**

The collaborative team approach represents a shift from positional-based negotiation to interest-based negotiation. Effective interest-based negotiation requires that the parties are able to express their goals and the collaborative coach assists in helping parties identify and articulate those goals.

- **Confidentiality.** The parties sign a contract in collaborative law to keep all discussions in the process confidential. While the discussions with the coach are transparent and shared with the team, they are confidential to the outside world and cannot be revealed to a court. This is similar to the mediator confidentiality but is not protected by statute in states like Massachusetts that have not passed the Uniform Collaborative Law Act.
- **Neutrality versus impartiality.** A collaborative coach is purely neutral when it comes to financial or legal issues and will not provide substantive opinions to the parties, but instead will focus on facilitating the communication. On child-related issues, the coach may bring specialized knowledge and, while still impartial, the coach may help the parties look out for the best interests of their children, which may not always result in neutral advice.
- **Skills of a coach.** The skillset that a coach brings to the negotiation table is different from that of an attorney or mediator. Coaches are typically mental health practitioners who are typically trained in family dynamics and child development, which can assist in settling complex custody and parenting disputes that might not be appropriate for mediation.

**The Neutral Experts**

In court, both parties typically hire their own financial expert, but in collaborative law the parties save time and money by having neutral financial experts work for both of them. Similar to coaches, these professionals are confidential to the outside world, but transparent in the process. In the context of a divorce, the financial neutral helps prepare various support scenarios and can assist with developing budgets and future cash-flow analyses to ensure that settlement options would be practical. Depending on the facts of the case, additional experts may be necessary; regardless of whether the case calls for a real estate appraiser or a plumbing expert, the parties save money and time in collaborative law by hiring one neutral expert.

**The Arbitrator**

Arbitration provides a binding or nonbinding decision made by an arbitrator. The arbitration is not typically confidential, especially if the arbitrator’s decision is subject to appeal or oversight. The arbitrator is not neutral, but impartial like a judge. The skillset of the arbitrator should be specific to the case he or she is hearing. In a divorce, the arbitrator would typically be a retired judge or an experienced divorce attorney who is familiar with all the issues that might arise in the case, and also familiar with how to write a complete and clear judgment.

**The Attorney’s Role in Dispute Resolution**

Collaborative law is the only dispute resolution process that requires that both sides have an attorney. It is also recommended, but not required, that you have legal representation to advise you when you participate in mediation, conciliation, dispute intervention through probation, or arbitration. The attorney offers a unique perspective by representing only your interests, and a strong privilege to protect any confidential information you provide him or her with. In each of these situations, though, the attorney’s role changes. In divorce mediation, for example, the attorney often advises the client without going to the mediation itself. This is more of an advisory role rather than an advocacy role.

Similarly, the attorneys' role in collaborative law is focused on settlement. While this is still an advocacy role because the attorneys are in the negotiation room most of the time, the attorneys do not try to "win." Instead, the attorneys assist their clients in expressing their goals throughout the process. In collaborative law, the attorneys work as part of the problem-solving team and upon resolution prepare the necessary legal documents.

When you choose a process like mediation, you may also want to consider what is the best type of skillset for your attorney to have to support you in that process. It is often helpful, for example, for attorneys to have taken a mediation training to understand how to most effectively advise a client who is in a mediation process. See more information in "Finding the Right Dispute Resolution Professionals," below, and a list of questions you might ask a prospective attorney and for agencies and organizations you can contact for referrals and information.

## COURT REFERRALS TO DISPUTE RESOLUTION PROFESSIONALS

Public, court-centered, court-connected, and court-ordered are terms used to describe services that parties may be ordered to use on the day of the hearing or at any point before or after. Court-connected dispute resolution is usually shaped by an impending legal process and may be mandatory (or at least attendance at a screening may be mandatory). The court has worked through the Massachusetts Supreme Judicial Court / Trial Court Standing Committee on Dispute Resolution to expand the opportunities for court referrals to dispute resolution and to streamline the process.

The Standing Committee on Dispute Resolution has prepared a booklet, *A Guide to Court-Connected Alternative Dispute Resolution Services*. It is available at <http://www.mass.gov/courts/docs/admin/planning/ccadr0601large.pdf>. This guide is intended to help court personnel and self-represented litigants to understand the differences in the various dispute resolution services available and to provide the names of service providers by county. The guide also provides a process for court personnel to refer cases to dispute resolution and requirements regarding providers sharing their services on a sliding scale fee basis.

In 2017, the chief justice of the Probate and Family Court also issued Standing Order 2-17, Family-Centered Case Resolution and Case Management in the Probate and Family Court Department, available at <http://www.mass.gov/courts/case-legal-res/rules-of-court/probate/pfc-orders/2-17.html>. In addition to offering an opt-in early case settlement process, Standing Order 2-17 mandates that all contested custody divorce and modification cases must be referred by the court for screening with an approved provider of court-connected dispute resolution services (with only a few exceptions). The standing order went into effect on June 1, 2017, while the court identifies the best way to arrange for these referrals and screenings to happen efficiently. However, this does indicate further movement and support from the court toward encouraging parties to find resolution through dispute resolution.

## FINDING THE RIGHT DISPUTE RESOLUTION PROFESSIONALS

Your style and your type of case should determine what is the best process for you and who are the best professionals for you to work with. For example, if you are seeking mediation to help resolve a family dispute, there are many private mediators and organizations with different fees, services, and philosophies. The Probate and Family Court has compiled a list of local dispute resolution coordinators. See **Exhibit 19B**. You can also check the phonebook, your local court or library, or resources such as the Boston Bar Association directory or the directory of the Massachusetts Council on Family Mediation (<https://mcfm.org/find-mediator>) or the Massachusetts Collaborative Law Council (<http://massclc.org/directory>).

You can also contact the Massachusetts Bar Association (MBA), the Academy of Professional Family Mediators (APFM), the Massachusetts Lesbian and Gay Bar Association (MLGBA), the American Bar Association (ABA), the Society of Professionals in Dispute Resolution (SPIDR), and the Association of Family and Conciliation Courts (AFCC). Cambridge Dispute Settlement Center, Metro West Mediation, Family Services of Central Massachusetts, and other local community agencies also provides low-cost or sliding-fee-scale services.

Give careful consideration to the best professionals for your case, because a poor choice could lead back to litigation and you could double your cost rather than save money. Do not be afraid to interview multiple professionals to find the right one, because working the right process and with the right people for your case can be a true savings in time, money, and stress. To find the best professionals for your case, consider asking the following questions:

- What issues do you usually work on? How many cases have you resolved through mediation, collaborative law, etc.? How often do you resolve cases like mine?
- What are the different options I could use to resolve my case?
- What advantages and disadvantages are there to each different type of dispute resolution?
- If I and the other person disagree about the best way to resolve our case or attain our goals, how would you assist us in resolving the impasse?
- What training have you had, and when was the last time you received training? Do you receive supervision? Do you attend continuing education courses?
- Are you certified? How? What organizations are you either a member of or affiliated with?
- How much do you charge?
- Do you have written materials you can send me or resources you can direct us to that would be helpful?
- What confidentiality do you offer?
- Do you use a contract? What is covered by it?
- What is the average number of sessions?
- Do you draft (separation, divorce, or other) agreements? What do you charge for drafting documents and for phone calls or e-mails?
- Do you suggest that we consult attorneys, accountants, or other professionals during this process? How much information can you provide about the following:
  - divorce, paternity, and nontraditional family issues;
  - parenting plans, custody, and child support;
  - the psychological stages of divorce and their effects on adults;
  - the effects of divorce on children;
  - the effects of abuse (including substance abuse, physical and psychological abuse, cycles of violence, treatment, and prevention) on the abuser and his or her family members;
  - tax consequences, businesses, pensions, stock options, investments, and inheritances;
  - spousal support or alimony and property division;
  - qualified domestic relations orders and qualified medical child support orders;
  - health and life insurance, trusts, etc.; and
  - the legal process (such as how to get a divorce in court).

If you are considering working in a dispute resolution process such as mediation, and you also want to work with an attorney, consider whether that attorney is a good fit for the process you have chosen. Following are some of the additional questions you may want to consider asking attorneys about dispute resolution when interviewing them:

- Are you trained in mediation or collaborative law?
- What do you see as the advantages and disadvantages of each type of dispute resolution?
- Do you understand my goals as I have explained them to you?
- How is the role of the attorney different in each option? For instance, if I choose mediation, what would your role be?
- How do you prioritize potentially conflicting goals, such as reducing conflict versus getting the best deal?
- If we disagree during the case about the best way for me to attain or prioritize my goals, how will you handle that disagreement?

In any of the out-of-court processes, if you hire a professional you are going to be required to sign a contract with him or her. The contract should specify the terms of the process you are hiring the professional to work with you in, and the potential limitations of the process.

**Practice Note**

You have the right to read any contract privately, and to have it reviewed by anyone you like before you sign it; take your time, study it carefully, and feel free to ask any questions before signing it. For a sample contract, see Phyllis E. Federico & Peter F. Zupcofska et al., eds., *Massachusetts Divorce Law Practice Forms* (MCLE, Inc. 2000 & Supp. 2007, 2009), and see **Exhibit 19C**, Sample Agreement to Mediate.

## STEPS YOU CAN TAKE TO PREPARE FOR DISPUTE RESOLUTION

Know your own needs and goals, and consider if there are issues that you will not compromise on (and, therefore, will let the judge decide). Make a short list of what is most important and be prepared to back it up with documentation as necessary. Every process of dispute resolution still requires informed decision making, and even if there is not a formal discovery process like in court, you should expect to receive all the information necessary to make decisions before you consider various settlement options. This is referred to as interest-based negotiation or joint problem solving, and can be visualized per the chart included as **Exhibit 19D**.

Preparing for any dispute resolution process should first include figuring out what your goals are. Consider the following questions as the minimum you should be able to answer before meeting with a professional:

- What is the most important issue for you?
- What do you need?
- What do you hope to accomplish in your case?
- What do you want your life to look like after your case is over?
- What do you want for yourself out of life?
- What do you want for the other people involved in your case?
- If your case involves children, what do your children need and what do you want for your children?
- Why are you choosing to meet with a professional and what do you expect from him or her?

Once you have identified your goals, you need to identify what information will be helpful to decision making in your case. You may know some of this information already, but experienced professionals should also be able to provide you with a list of important information for your case, and be able to guide you as to what documentation you should share.

When you choose a dispute resolution process, or if you are referred to a court-based service, you can take steps to avoid problems and maximize success. As the quality of court-connected services continues to improve, these steps may become unnecessary, but you are still your own best advocate. Following are some additional steps you should consider when choosing dispute resolution:

- Make a list of the issues you want discussed. Talk matters over ahead of time with a friend or attorney to help clarify what you want and why it is important to you. Talk over the worst that may be said about you or your case and practice answering calmly.
- Understand the legal terms and papers. Speak for your needs and your children's needs; do not argue against your ex-partner. "He or she drinks" is less useful than "I worry about the kids in the car if he or she is drinking." Know where you can compromise, because no matter how perfect your case may be, you will likely not get everything you want in a negotiation.
- Require an accurate financial statement from your partner; give and get full disclosure of income, assets, and liabilities. If you are unable to agree to disclose information voluntarily, you have a right to go through the court process and discover or subpoena witnesses and records (like wage records) that will help your case.
- Refuse to negotiate face to face with an abuser unless you want to. Be willing to negotiate with or through a third party who helps you feel safe.
- Make sure you have an opportunity to speak and be heard. If you are in a court process and a report or recommendation to a judge is not by law confidential, ask that it be stated in open court and on the record.
- Especially if intervention is not confidential, all documents should be admissible and follow the rules of evidence. If you are in doubt, ask. There is no obligation for court personnel to educate you, but you can object to unfair evidence and therefore preserve your right to appeal a decision you do not agree with.

- You have a right to end any process if you feel unsafe or if the process is not helpful. Do not let yourself be pressured into anything. Politely but firmly express your feelings. Do not just say “No”; say “Sorry, I wish I could, but I cannot because . . . .”
- If you are forced to leave a process, consider all the available options. Do not just resort to court proceedings because one dispute resolution process did not work for you. Consider what is the best process for your case going forward, with the additional information you learned in the first process.
- Do not under any circumstances sign an “agreement” that you feel coerced into signing. You will be held to anything you sign.

## ELEMENTS OF A GOOD AGREEMENT

Whether or not agreements reached in dispute resolution are reduced to a written agreement depends on the type of dispute. In a divorce case, for example, spouses can file a joint petition for divorce instead of a complaint for divorce if they reach a full agreement for settlement, but the agreement must be finalized in writing and contain certain minimum provisions for a court to approve it. If there is an open case in the Probate and Family Court, the court can also enter temporary orders. These can be by order of the court, or stipulation agreements can be presented and incorporated into a temporary order.

Stipulation agreements may be handwritten and can be anywhere from one to several pages in length. Full agreements for divorce are often much longer and ideally will be typed up. In each dispute resolution process, the professionals may help with some portions or all the drafting of the agreement. In dispute intervention through probation, a probation officer may write a temporary agreement, and should sign as a witness any agreement he or she has negotiated. A final separation agreement is expected to be more polished and complete, and to be produced by attorneys or by the parties themselves. Particularly if you are writing your own final agreement, you are strongly advised to show the agreement to an attorney before signing it.

In collaborative law, the attorneys will typically draft the agreement. In mediation, whether the final agreement is drafted depends on the type of mediator you have hired. Some mediators are attorneys and some are not. Some prepare agreements for court hearings and others may only prepare a summary of agreements called a memorandum of understanding. If you are considering hiring someone, ask what is included in his or her services. Standard divorce and dissolution documents can range from ten to sixty pages, and a memorandum of understanding will need to be converted into a full legal agreement to be presented to the court. Whatever the length and cost, a final agreement should include the following, at a minimum:

- procedural items, such as the parties’ names and a docket number;
- a statement of facts relating to divorce, including the names and addresses of the parties, the date of marriage and separation, the names and ages of children, and the basis for the agreement;
- a parenting plan if there are children, including decision-making authority, residential responsibility, a parenting schedule (both regular and holiday/vacation schedules), child support, educational issues, child-related expenses, and emancipation;
- a division of all real estate (real property) and all other property (personal property), including vehicles, accounts, investments, pension and retirement plans, businesses, and all other items owned by either or both parties;
- no-contact or abuse prevention orders, if any, or a plan for adherence and/or provisions for the division of the relationship and future conflict resolution;
- a provision dealing with alimony or spousal maintenance;
- a division of debts and liabilities, as well as language about all items owed by or to either spouse or both spouses;
- a provision for the payment of medical and other insurance for both the parties and the children, and decisions regarding the responsibility for uninsured expenses;
- a provision for the maintenance or ownership of any life insurance policies;
- a provision for resolving any tax liability, future tax filings, and tax deductions;
- a provision for where and how problems with enforcement will be resolved;

## ■ CHAPTER 19: DISPUTE RESOLUTION OPTIONS

- language about the effect of the agreement and what portions will be modifiable in the future (i.e., if it will survive as an independent contract or if it will be incorporated into a Probate and Family Court order); and
- language and procedural protections against coercion (e.g., that the agreement is signed freely and voluntarily, and is notarized by an independent official).

The agreement should be notarized and dated.

### Survived Agreements Versus Agreements that Can Be Modified

Final agreement provisions fall into two general categories. Each provision of the agreement either survives as an independent contract subject to contract law, or it merges into the Probate and Family Court judge's order and does not survive. Matters concerning children never survive—that is, they are always open to interpretation and change by a Probate and Family Court judge. On the other hand, after the final agreement, divided property will not be subject to redivision. Other provisions, such as alimony, may survive in some circumstances and merge in others. Obviously, this is a complicated area of the law that deserves careful thought, and each party should have advice from an attorney. *See* Edward M. Ginsburg, “The Place of Mediation in the Scheme of Divorce,” 8 *Mass. Fam. L.J.* at 2–25 (July 1990).

The basic choice is whether you want a final agreement or an agreement that can be modified when your circumstances change—for example, if one of you wins the lottery, becomes disabled, or gets a much better job. Child support and custody will always be open to change, but do you want alimony left open? There are many factors that affect this choice. A final agreement may specify survival, merger, or a combination. Even if the agreement does not mention a choice, there are consequences. You must understand the implications of your choice, and be able to answer the judge's questions.

### Enforceability of Agreements

Dispute resolution is sometimes characterized as “nonbinding,” which means that an agreement reached may not be binding until it is approved by a court. However, once approved by a court, an agreement produced through any dispute resolution process is as binding and enforceable as any other agreement or judgment, as long as it is in writing, conforms to the doctrines of contract (including being free from fraud or coercion), and does not oppose public policy. Agreements are subject to interpretation and must be drafted carefully to express the intentions of the parties. An agreement entered in Probate and Family Court in Massachusetts will be reviewed by a judge who may or may not accept it. Agreements must conform to procedural requirements, must be found to be voluntary, fair, and reasonable, must protect the rights of minor children, and must be based on full financial disclosure. The degree of review varies, but the majority of agreements are accepted, and any changes are usually minor.

The law regarding the review and enforceability of agreements is changing. Phyllis E. Federico & Peter F. Zupcowska et al., eds., *Massachusetts Divorce Law Practice Manual*, ch. 3 (MCLE, Inc. 3d ed. 2012 & Supp. 2014, 2016). We can expect the Probate and Family Court to take an active role in monitoring agreements, whether they are drafted within the courthouse or outside of it. Standards for intervention, for agreements, and for mediators will continue to emerge. Parties can assume, however, that courts prefer that parents and partners resolve their own disputes without an evidentiary hearing.

## CONCLUSION

In May 1998, the Massachusetts Supreme Judicial Court issued rules requiring that court-connected dispute intervention, including mediation and other dispute resolution processes, be made available to parties in all cases in the trial courts. *See* SJC Rule 1:18, Uniform Rules on Dispute Resolution. In 2017, the chief justice of the Probate and Family Court issued Standing Order 2-17, Family-Centered Case Resolution and Case Management in the Probate and Family Court Department, which further mandates the use of dispute resolution screening in custody cases. The long-term impact of these rules will have a dramatic effect on the practice of family law.

Courts now provide or refer to a range of resolution services as an adjunct or alternative to trials. Dispute resolution options—whether mandated by the court or chosen by the parties—are intended to increase access and participation, ensure quality and fairness, and foster innovative approaches to resolving family and other disputes. Because

litigation is costly both financially and emotionally, dispute resolution continues to offer an alternative to parents and partners who are dissolving their relationships; but these are more than just alternatives to court—they are also a method of developing better forms of conflict resolution and skills for resolving future disputes.

The dispute resolution movement deserves credit for getting the Massachusetts court system to develop and institutionalize better conflict resolution mechanisms. However, if parties are pushed to negotiate and pressured to agree because of the high caseload of probation officers, mediators, or other dispute resolution professionals, then the public may lose faith in dispute resolution in general. There is also concern that mediation on a large scale and the privatization of family disputes could reduce or eliminate the civil rights and other gains of the past decades. Trina Grillo, “The Mediation Alternative: Process Dangers for Women,” 100 *Yale L.J.* 1545 (1991); Maggie Vincent, “Mandatory Mediation of Custody Disputes: Criticism, Legislation, and Support,” 20 *Vt. L. Rev.* 255 (1995); Andree G. Gagnon, “Ending Mandatory Divorce Mediation for Battered Women,” 15 *Harv. Women’s L.J.* 272 (1992). Women in particular, but increasingly children as well, are being treated as equal partners under law, entitled to the protection of the law from both physical abuse and inequitable financial trauma. We must continue to develop intervention policies that support equity for families of all kinds and that discourage violent means of resolving conflict.

Mediation, and other forms of dispute resolution, have both been praised by some as a cure-all and maligned by others as destroying the legal process. In spite of the extreme praises or criticisms it receives, we should keep in mind that there are many tools for resolving conflict. Dispute resolution can accomplish miracles when the parties in disagreement cannot communicate well or negotiate equally but would like to do so. Parties who are willing, or can be persuaded, to negotiate toward solutions rather than fight can transform families and give children a better chance to succeed. However, choosing the right process and the right dispute resolution professionals is just as important. A skilled and experienced professional is more likely to be successful at resolving conflicts, but every case is unique and needs the right process to succeed.

*MCLE and the author are grateful to Cynthia L. Bauman, Esq., and Jacquelynne J. Bowman, Esq., for their contributions to a previous version of this chapter.*

## **EXHIBIT 19A—Mediation Confidentiality Statute**

Massachusetts General Laws, Chapter 233, Section 23C: Work product of mediator confidential; confidential communications; exception; mediator defined

Section 23C. All memoranda, and other work product prepared by a mediator and a mediator's case files shall be confidential and not subject to disclosure in any judicial or administrative proceeding involving any of the parties to any mediation to which such materials apply. Any communication made in the course of and relating to the subject matter of any mediation and which is made in the presence of such mediator by any participant, mediator or other person shall be a confidential communication and not subject to disclosure in any judicial or administrative proceeding; provided, however, that the provisions of this section shall not apply to the mediation of labor disputes.

For the purposes of this section a "mediator" shall mean a person not a party to a dispute who enters into a written agreement with the parties to assist them in resolving their disputes and has completed at least thirty hours of training in mediation and who either has four years of professional experience as a mediator or is accountable to a dispute resolution organization which has been in existence for at least three years or one who has been appointed to mediate by a judicial or governmental body.



## EXHIBIT 19B—List of Local Dispute Resolution Coordinators— Current List

### ALTERNATIVE DISPUTE RESOLUTION Probate and Family Court Department

Alternative Dispute Resolution, or “ADR”, is the general term for ways of settling disputes other than by the traditional trial. In Massachusetts, court-connected dispute resolution services involve a neutral third party (a “neutral”) helping the people in the case (the “parties”) to settle their dispute without a trial. In some types of ADR, such as mediation, conciliation and dispute intervention, the neutral helps the parties create their own resolution. In other forms of ADR, such as arbitration, the neutral makes a decision for the parties. You may want to speak with an attorney to help you decide which process would be appropriate in your particular situation.

Although some neutrals are attorneys who also practice law, ethical rules prohibit neutrals serving in court-connected ADR programs from providing legal advice in connection with the dispute resolution process. Because any agreement that you make will have long-lasting effects, you should consult with an attorney during the ADR process and a lawyer should review any agreement before you sign it. If you reach an agreement in a case which is in the Probate and Family Court, the agreement is subject to review by a judge. If the judge approves the agreement, it will become part of a court order or judgment which either party can ask the court to enforce in the future.

The Probate and Family Court has approved court-connected programs to receive referrals for ADR services from judges and other court staff. While individuals may seek ADR services from programs which are not court-connected, a primary benefit of obtaining services from the approved programs is that they have met a recognized threshold of quality. The programs monitor quality and compliance with ethical rules established for court-connected dispute resolution services.

There are fourteen “Divisions” of the Probate and Family Court, one for each county. A list of the individuals who are serving as Local Dispute Resolution Coordinators appears below. These individuals can provide information about ADR programs approved for use in their Division and may refer you to one or more programs which may help you resolve your dispute.

<b>LOCAL DISPUTE RESOLUTION COORDINATORS</b>	
<b>Revised: January 2017</b>	
Barnstable Division Michael Stevens Barnstable Probate and Family Court Main Street - P.O. Box 346 Barnstable, MA 02630 508-375-6718 Fax: 508-362-3662	Berkshire Division Clement Ferris Berkshire Probate and Family Court 44 Bank Row Pittsfield, MA 01201 413-442-6941 ext. 7209 Fax: 413-443-3430
Bristol Division Miriam H. Babin Bristol Probate and Family Court 289 Rock Street Fall River, MA 02723 508-672-1751 ext. 240 Fax: 508-822-9837	Essex Division Jeanne Condurelli Essex Probate and Family Court Shetland Park 45 Congress Street, Suite 170 Salem, MA 01970 Salem: 978-740-6054 Lawrence: 978-686-9692 ext. 2201

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<p>Franklin Division Deborah Luippold Franklin Probate and Family Court 43 Hope Street Greenfield, MA 01301 413 775-7459 Fax: 413-774-3829</p>	<p>Hampden Division Jocelyn Axelson Hampden Probate and Family Court 50 State Street Springfield, MA 01103 413-748-7749 Fax: 413-788-6664</p>
<p>Hampshire Division Mark Ames Hampshire Probate and Family Court 33 King Street; Northampton, MA 01060 413-586-8500 ext.129 Fax: 413-584-1132</p>	<p>Middlesex Division Alison McCrone &amp; Krishna Butaney Middlesex Probate and Family Court 208 Cambridge Street; P.O. Box 410-480 E. Cambridge, MA 02141 617-768-5843 (Alison McCrone) 617-768-5853 (Krishna Butaney) Fax: 617-494-6710</p>
<p>Norfolk Division Michael Barbadoro Norfolk Probate and Family Court 35 Shawmut Road Canton, MA 02021 781-830-1200 ext. 211 Fax: 781-830-4310</p>	<p>Plymouth Division Claudia Magnus Plymouth Probate and Family Court 215 Main Street, Suite 220 Brockton, MA 02301 508-897-5439 Fax: 508-897-5435</p>
<p>Suffolk Division Kim M. LaDue Suffolk Probate and Family Court 24 New Chardon Street Boston, MA 02114 617-788-8346 Fax: 617-788-8958</p>	<p>Worcester Division Alicia Doherty Worcester Probate and Family Court 225 Main Street Worcester, MA 01608 508-831-2241 Fax: 508-720-0820</p>

## EXHIBIT 19C—Sample Agreement to Mediate

### Agreement to Mediate

**Identification of Parties:** This agreement is made at Southborough, Massachusetts, by and between:

**JUSTIN L. KELSEY, ESQ., and SKYLARK LAW & MEDIATION, P.C.**  
9 Main Street, Southborough, MA 01772

(jointly, “**Mediator**”)

and

\_\_\_\_\_  
\_\_\_\_\_

(jointly “**Client**”)

**Effective Date:** \_\_\_\_\_

1. **What Type of Case Do You Have?** \_\_\_\_\_.

(hereinafter, the “**Case**”)

Initial: \_\_\_\_

2. **How Will You Resolve Conflict?** The Mediator and his firm have a collaborative approach to their legal and mediation services and recommend, whenever possible, that the following steps be taken to resolve conflict peacefully. We acknowledge and agree to this approach.

Initial: \_\_\_\_

3. **What Will the Mediator Do?** We, the Clients, are requesting the following specific services from the Mediator (write “yes” for all services you are requesting, and “no” for any that you are not):

\_\_\_\_\_ Provide education about the process options for resolving disputes (including mediation, collaborative law, arbitration, litigation, etc.) and assist in choosing the best framework for their Case

\_\_\_\_\_ Provide assistance in identifying Clients’ goals, values and interests

\_\_\_\_\_ Provide education on resources available to Clients

\_\_\_\_\_ Provide education on negotiation strategy and how best to share and gather information

\_\_\_\_\_ Provide education on positive communication techniques to assist in negotiation and future communication

\_\_\_\_\_ Provide Legal Information including references to statutes and case law

\_\_\_\_\_ Draft any Settlement Agreements reached

\_\_\_\_\_ Draft Planning Documents – If Yes, describe specific documents such as will, trust, prenuptial agreement, etc.): \_\_\_\_\_

\_\_\_\_\_ Provide information as to any court procedures necessary to enter their Agreement with the Court.

Additional Requested Services:

\_\_\_\_\_  
\_\_\_\_\_

We have accurately identified specifically what we want the Mediator to do with each “Yes” above. Any item identified with a “No” above, we intend to complete ourselves or through the use of additional professionals.

Initial: \_\_\_\_

4. **What Will the Mediator NOT Do?** The Clients both acknowledge and agree that the Mediator does not and shall not represent either Client as an attorney at any time in connection with this matter. This Agreement expressly **excludes** any obligation of the Mediator to protect either Clients’ interests as would an attorney hired to represent their individual interests, and the Mediator hereby expressly notifies both clients that the Mediator does not represent either of them as an attorney and has not created an attorney-client relationship with either Client, nor is such a relationship created by this Agreement. In addition, the Clients acknowledge that the Mediator has advised them of his inability to represent them individually when acting as a Mediator, and that the Mediator has advised them of their individual right to have their own attorney participate in the mediation process and/or review any agreements proposed during the mediation process. This Agreement pertains **only** to the Case above and does not include any obligation for the Mediator to work with the Clients in any other case nor any appeal of the Case. We may request that Mediator provide additional services and if Mediator agrees then we’ll sign a written amendment to this Agreement.

Initial: \_\_\_\_

5. **What Do We Agree to Do?** We acknowledge our desire to resolve these matters as simply and as sensibly as possible and desire to make a good faith effort to reach an agreement.

We acknowledge and agree that the entire mediation process is confidential pursuant to Mass. General Laws ch. 233 § 23C, and shall be treated as compromise negotiation for the purposes of applicable state and federal law. We agree not to disclose any information including offers, promises, conduct, statements or settlement terms whether oral or written, made by each other, our agents, employees, experts and attorneys or the Mediator in connection with the mediation, except where disclosure is required by law or court rule. As the only exception to the foregoing, the Clients agree that the Mediator may disclose to the appropriate authorities information obtained in the course of the mediation concerning (a) child abuse or neglect, (b) the risk of serious harm to an individual, or (c) the planned commission of a crime. The confidentiality provided for in this section also shall not apply to evidence relating to the liability of the Mediator in a subsequent suit against the Mediator or disciplinary proceedings against the Mediator. We may disclose information about the mediation to our respective attorneys, therapists and financial advisors, provided however that we shall inform all such individuals that the information is confidential and governed by the terms of this Agreement.

We agree that the Mediator will maintain the confidentiality of the mediation, and agree that neither Client will seek to obtain the testimony of the Mediator, or the disclosure of the Mediator’s file in conjunction with any court proceeding. We further agree that if either Client seeks such testimony or disclosure in contravention of this provision, that Client will reimburse the Mediator for all costs in connection therewith, including reasonable attorney’s fees and will compensate the Mediator for time spent, such compensation to be at the Mediator’s then-current hourly rate.

We agree that the Mediator may speak with either Client individually and separately as part of the mediation process and that in any such separate conversation, said party may request that the Mediator request that the conversation be kept confidential. The Mediator agrees to honor all such requests unless such a discussion involves (a) child abuse or neglect, (b) the risk of serious harm to an individual, or (c) the planned commission of a crime.

We agree that nothing contained in this Agreement shall prevent any party from offering an executed Separation Agreement, Interim Agreement or signed Memorandum of Understanding produced as a result of the mediation to a court.

We agree to fully disclose to each other all relevant information to our Case, and if relevant all aspects of our financial circumstances and to participate fully in any efforts to obtain financial documentation that could have an impact on this matter.

Initial: \_\_\_\_

6. **Payment for the Mediator's Services:** I agree to pay the Mediator, in full, for their services and costs as defined below, upon the issuance of a billing invoice from the Mediator. The fee shall be payable at the time of the service. Upon providing the billing invoice, I hereby authorize Mediator to charge the full balance of the invoice to my provided credit card automatically upon the first of the following to occur, or in the Mediator's discretion thereafter:

- a. For Flat Fee Cases: ½ of fee may be charged upon completion of a substantial portion of the requested services, in the discretion of the Mediator;
- b. For Hourly Rate Cases: Upon reaching a minimum of 2 hours of billable time per invoice;
- c. Upon reaching a minimum of \$200 in expenses;
- d. Upon reaching the end of a calendar month; or
- e. Upon completion of my case.

Flat Fee Cases Only: Agreed upon Flat Fee for Services: \_\_\_\_\_ (any services above and beyond those specified for the Flat Fee shall be charged at the below hourly rates).

Hourly Rate Cases: I acknowledge the current hourly rates for all members of Mediator's firm to be charged by Mediator for services under this agreement are listed and kept up to date at <https://www.skylarklaw.com/pricing/>. If changes are made to the current hourly rates, Mediator will provide client with at least thirty days' notice.

For hourly rate services, Mediator will charge in increments of one tenth of an hour, rounded off for each particular activity to the nearest one tenth of an hour and shall include all professional services including communications such as telephone or e-mail communications, and all travel time necessary for the Case. If, while this agreement is in effect, Mediator increases the hourly rate(s) being charged to clients, Mediator will send a request for Amendment. If Client doesn't agree to the Amendment, then Mediator may terminate services at that time.

In the unusual circumstance that client pays by check, if any Client payment check is not honored by the Mediator's financial institution when presented, then the Client agrees to also pay a sum equal to that charged to the Mediator by the Mediator's financial institution for any dishonored check that has been presented for payment. If the Client is owed a refund or portion of a settlement or other payment that was paid to the Mediator, then the Client agrees to wait until ten (10) days after all payments made by check are deposited to ensure that the check has cleared.

We agree that the mediator's services are to be charged to and paid by the clients as follows: \_\_\_\_\_

Being the authorized cardholder(s), by signing and initialing below we understand and agree to the terms set forth in this agreement, agree to pay, and specifically authorize to charge my credit card(s) for the services provided. I further agree that in the event my credit card(s) becomes invalid, I will provide a new valid credit card upon request, to be charged for the payment of any outstanding balances owed.

Initial: \_\_\_\_

7. **Payment for the Case Costs and Expenses.** I agree to reimburse all of Mediator's out-of-pocket costs or to pay directly, upon request, any costs incurred in connection with this agreement, which will include any costs payable to third parties, including expert fees, copying costs, travel and parking expenses, etc.

Initial: \_\_\_\_

8. **Payment upon Termination of Services:** Either Client may elect to terminate their participation in the mediation for any reason by written notification to the Mediator and the other party. If the Client elects to discharge the Mediator for any reason or if the Mediator elects to terminate this Agreement for any reason prior to the conclusion of the resolution of the Specified Case, then the Client is to then become immediately liable to the Mediator for any sums owed. These sums shall expressly include compensation to the Mediator for any reasonably-necessary actions that the Mediator shall take in order to disengage from the Mediator-Client relationship.

Initial: \_\_\_\_

9. **Mediator Cannot Guarantee Results or Costs:** We acknowledge that this Agreement is not based upon any promises of any anticipated or particular results. I also agree that Mediator has made no promises about the total amount of Mediator 's fees or costs to be incurred by Clients under this agreement.

Initial: \_\_\_\_

10. **Resolving Disputes between Client and Mediator through Mediation:** If any dispute between Clients and Mediator arises under this agreement, both Mediator and Clients agree to meet and confer within ten (10) days of written notice by either Clients or Mediator that the dispute exists. The purpose of this meeting and conference will be to negotiate a solution. If any dispute is not resolved through negotiation, the Clients and the Mediator will attempt to agree on a neutral mediator whose role will be to facilitate further negotiations. If the Mediator and Clients cannot agree on a neutral mediator, they will request that the Massachusetts Bar Association or the American Arbitration Association, or similar organization, select a mediator. The mediation shall occur within fifteen (15) days, or as soon as practically possible, after the mediator is selected. The Mediator and Client shall share the costs of the mediation, provided that the payment of costs and any attorney's fees may be mediated.

Initial: \_\_\_\_

11. **Paperless Office Notification:** I acknowledge that Mediator maintains a paperless office. Mediator does not permanently keep "hard copies" of client files or documents and during the case any "original" exhibits or contracts with "original" signatures will either be maintained in the file as needed for the Case or returned to me. When Mediator attends meetings outside the Framingham office, the Client's file will be downloaded to a tablet or laptop for reference. I authorize syncing across devices of my electronic files. In addition, throughout this matter, Mediator will use various Internet-based services (so-called "cloud computing") for various purposes, including storing, backing-up, and sharing documents (including confidential and privileged documents), tracking time and tasks for client projects, managing contact information, and sending electronic communications. By signing this agreement, in consideration of the cost savings and convenience afforded to me by virtue of Mediator 's use of cloud computing, I give express, informed consent for Mediator to use cloud computing in connection with this matter. I further acknowledge that Internet-based communications and cloud storage may be accessed by government entities (including the National Security Agency through its PRISM surveillance program), and I agree to indemnify and hold Mediator harmless for any harm to me arising from such access. I authorize Mediator to send all bills and notices indicated in this Agreement to my e-mail address provided below. I agree that all such e-mails once received shall have the same force and effect under this Agreement as a written notice.

Initial: \_\_\_\_

12. **Amendments and Additional Services:** This written Agreement governs the entire relationship between us and Mediator. All amendments shall be in writing and signed. If Clients wishes to obtain additional services from Mediator, a description of said additional services shall be signed and dated by both myself and Mediator.

Initial: \_\_\_\_

13. **Severability in Event of Partial Invalidity:** If any provision of this agreement is held in whole or in part to be unenforceable for any reason, the remainder of that provision and of the entire agreement will be severable and remain in effect.

Initial: \_\_\_\_

14. **Digital Signature:** Signature by either the Mediator or the Client by electronic device digital signature is expressly authorized and shall have the same force and effect under this Agreement.

Initial: \_\_\_\_

I have carefully read this Agreement and believe that I understand all of its provisions. I have signified my agreement with each provision by initialing above and signing below.

*READ, UNDERSTOOD, AGREED TO AND EXECUTED, AS IF UNDER SEAL, ON \_\_\_\_\_.*

**SKYLARK LAW & MEDIATION, P.C.,**

a Massachusetts Professional Corporation,

by:

\_\_\_\_\_  
**Justin L. Kelsey, Esq.**  
Email: jkelsey@skyarklaw.com  
(the “Mediator”)

\_\_\_\_\_  
Email: \_\_\_\_\_  
(the “Client”)

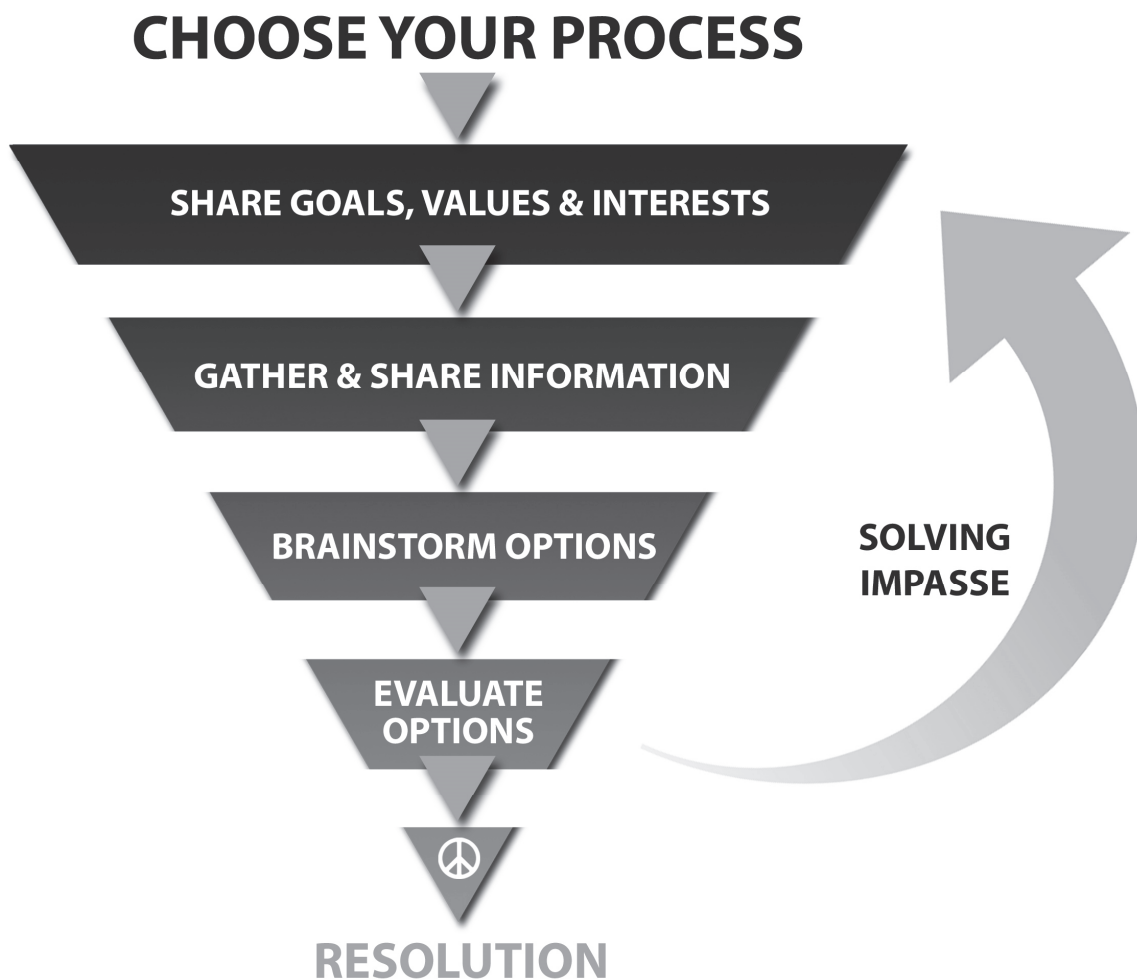
\_\_\_\_\_  
Email: \_\_\_\_\_  
(the “Client”)

## EXHIBIT 19D—Joint Problem Solving

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# JOINT PROBLEM SOLVING

(interest based negotiation)



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