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| I.  | <b>Reflections on the purpose of the AAAA Mediation Committee.</b>   |   |  |
|     | A.   | Prepare advanced training and workshops for committee members.  |  |
|     | B.   | Publicize the work of AAAA mediation committee members and make our members available for mediation of all varieties of adoption issues throughout the country.   |  |
|     | C.   | Prepare a written protocol of AAAA mediation practices.   |  |
|     | D.   | Fill the void for specific adoption mediation training for lawyers involved in adoption practice.   |  |
|     | E.   | Educate members of AAAA, other lawyers, and members of the public as to the need for specific adoption mediation training and help attorneys, judges, and other participants understand that because adoption issues are legally, psychologically, and emotionally complicated, that mediation training in miscellaneous "family law" matters is not sufficient for the specialized mediation training that adoption disputes need. |  |
| II. | <b>How adoption disputes get to mediation and the need to consider other forms of alternative dispute resolution in resolving adoption disputes.</b> |   |  |
|     | A.   | The states vary significantly in statutes, rules, and local practices governing how adoption disputes enter the mediation process.  |  |
|     |  | 1.  | Some states have mandatory dispute resolution provisions.  |
|     |  | 2.  | Other states have voluntary dispute resolution provisions.   |
|     |  | 3.  | Many parties seek their own alternative dispute resolution before there is any judicial involvement whatsoever.  |
|     |  | 4.  | Many adoption agencies, social workers, and county social service agencies have their own mediation programs separate from the judiciary.  |
|     | B.   | Brief overview of Minnesota rules effecting mediation.  |  |
|     |  | 1.  | Rule 114 of the Minnesota General Rules of Practice for the District Courts provides that all <u>civil</u> cases are subject to alternative dispute resolution.  |
|     |  | 2.  | Certain specific types of court proceedings are excluded from Rule 114, including family court matters (Rule 301 to 312 of the Minnesota Rules of General Practice apply to family court proceedings), juvenile court proceedings, and civil commitment proceedings.   |
|     |  | 3.  | Query: Are all adoption proceedings governed by Rule 114?  |
|     |  | 4.  | Minn. Stat. §259.58 dealing with communication or contact agreements specifically provides that "if there is a dispute under an open adoption agreement, the matter is to be enforced through a petition or motion in family court, which must be accompanied by an affidavit stating that the parties have mediated or attempted to mediate any dispute under the agreement." |
|     |  | 5.  | In most states, mandatory or voluntary alternative dispute resolution has arrived and it is affecting the area of adoption law.  |
|     | C.   | Various types of alternative dispute resolution processes.  |  |
|     |  | 1.  | Alternative dispute resolution processes can be grouped into the following categories (Minnesota Provisions):  |
|     |  | a.  | Adjudicative Processes.  |
|     |  | (1)   | <i>Arbitration.</i> A forum in which each party and its counsel  |

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|  |  |  |     |                         | present its position before a neutral third party, who renders a specific award. If the parties stipulate in advance, the award is binding and is enforceable in the same manner as any contractual obligation. If the parties do not stipulate that the award is binding, the award is not binding and a request for trial de novo may be made.   |
|  |  |  | (2) |                         | <i>Consensual Special Magistrate.</i> A forum in which a dispute is presented to a neutral third party in the same manner as a civil lawsuit is presented to a judge. This process is binding and includes the right of appeal.  |
|  |  |  | (3) |                         | <i>Moderated Settlement Conference.</i> A forum in which each party and their counsel present their position before a panel of neutral third parties. The panel may issue a non-binding advisory opinion regarding liability, damages, or both.  |
|  |  |  | (4) |                         | <i>Summary Jury Trial.</i> A forum in which each party and their counsel present a summary of their position before a panel of jurors. The number of jurors on the panel is six unless the parties agree otherwise. The panel may issue a non-binding advisory opinion regarding liability, damages, or both.  |
|  |  |  | b.  | Evaluative Processes.   |  |
|  |  |  | (1) |                         | <i>Early Neutral Evaluation (ENE).</i> A forum in which attorneys present the core of the dispute to a neutral evaluator in the presence of the parties. This occurs after the case is filed, but before discovery is conducted. The neutral then gives a candid assessment of the strengths and weaknesses of the case. If settlement does not result, the neutral helps narrow the dispute and suggests guidelines for managing discovery.   |
|  |  |  | (2) |                         | <i>Neutral Fact Finding.</i> A forum in which a dispute, frequently one involving complex or technical issues, is investigated and analyzed by an agreed-upon neutral who issues findings and a non-binding report or recommendation.  |
|  |  |  | c.  | Facilitative Processes. |  |
|  |  |  | (1) |                         | <i>Mediation.</i> A forum in which a neutral third party facilitates communication between parties to promote settlement. A mediator may not impose his or her own judgment on the issues for that of the parties.   |
|  |  |  | d.  | Hybrid Processes.       |  |
|  |  |  | (1) |                         | <i>Mini-Trial.</i> A forum in which each party and their counsel present their opinion, either before a selected representative for each party, before a neutral third party, or both to define the issues and develop a basis for realistic settlement negotiations. A neutral third party may issue an advisory opinion regarding the merits of the case. The advisory opinion is not binding unless the parties agree that it is binding and enter into a written settlement agreement. |
|  |  |  | (2) |                         | <i>Mediation-Arbitration (MED-ARB).</i> A hybrid of mediation  |

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|  |    |                                    |   | and arbitration in which the parties initially mediate their disputes; but if they reach impasse, they arbitrate the deadlocked issues. |
|  |    |                                    | (3)   | <i>Other.</i> Parties may, by agreement, create an ADR process.   |
|  | D. | Overview of training requirements. |   |   |
|  |    | 1.                                 | Training requirements vary from state to state.   |   |
|  |    | 2.                                 | Minnesota training requirements are as follows:   |   |
|  |    | a.                                 | A “neutral” is an individual or organization who provides an ADR process.   |   |
|  |    | b.                                 | A “qualified neutral” is an individual or organization included on the State Court Administrator’s roster who has completed the requisite training.   |   |
|  |    | c.                                 | The State Court Administrator has established one roster for neutrals for civil matters and one roster for family law neutrals. The civil neutral roster includes two separate parts: one for facilitative and hybrid processes, and a second for adjudicative and evaluative processes. The family law neutral roster includes three separate parts: one for facilitative and hybrid processes, the second for adjudicative processes, and a third for evaluative processes. |   |
|  |    | d.                                 | Civil Facilitative/Hybrid Neutrals are to receive a minimum of 30 hours of classroom training with an emphasis on experiential learning.  |   |
|  |    | e.                                 | Civil Adjudicative/Evaluative Neutrals are to receive a minimum of 6 hours of classroom training.   |   |
|  |    | f.                                 | Family Law Facilitative Neutrals are to receive or teach a minimum of 40 hours of family mediation training which is certified by the Minnesota Supreme Court.  |   |
|  |    | g.                                 | Family Law Adjudicative Neutrals are to have at least five years of professional experience in the area of family law and be recognized as qualified practitioners in their field.  |   |
|  |    | h.                                 | Family Law Evaluative Neutrals also must have at least five years of experience as family law attorneys, as accountants dealing with divorce related matters, as custody and visitation psychologists, or as other professionals working in the area of family law who are recognized as qualified practitioners in their field and complete or teach a minimum of 2 hours of certified training on management of presentations made during the evaluative processes.         |   |
|  |    | i.                                 | All Family Law Neutrals must also complete a minimum of 6 hours of certified training in domestic abuse issues.   |   |
|  |    | 3.                                 | Most states do not have special training requirements in the area of adoption. Our committee should consider putting such requirements in our protocol. Suggestions include:  |   |
|  |    | a.                                 | Required attendance at a AAAA sponsored training session of 20-30 hours of training focused specifically on adoption disputes.  |   |
|  |    | b.                                 | Membership in AAAA as certification of being an experienced adoption attorney with knowledge of all aspects of adoption law.  |   |

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|      |  | c.  | In particular for those mediators working in the area of direct placement adoptions, a demonstrated knowledge of interstate compact law and an understanding of conflicts of law issues.  |
|      |  | d.  | For those adoption mediators working in the area of state ward cases, a demonstrated knowledge of the complexities involved in child protection, termination of parental rights cases, and an understanding of the statutory provisions in the various states as to open adoption agreements. |
|      |  | e.  | An understanding of child development theories, bonding and attachment theories, and an understanding of the nature and functioning of the “adoption triad.”  |
|      |  | f.  | An understanding of child abuse, child neglect, and the various related issues to that.   |
|      |  | g.  | An appreciation of the cross-cultural, transgender, and racial issues that often are involved in adoptions.   |
| III. | <b>General Considerations for All Mediations and Unique Aspects of Adoption Mediation.</b> |   |   |
|      | A.   | When does mediation have the best chances of success? |   |
|      |  | 1.  | Attorneys and parties are open to settlement and willing to give and take.  |
|      |  | 2.  | Both sides have strong incentives to settle, but have been unable to reach agreement because of ego problems, emotional responses, or other similar reasons.  |
|      |  | 3.  | The attorneys are closer to settlement than the clients.  |
|      |  | 4.  | The parties are interested in maintaining ongoing relationships.  |
|      |  | 5.  | Confidentiality is a concern.   |
|      |  | 6.  | The matter will involve very complex issues and litigation and you have an inexperienced judge.   |
|      |  | 7.  | Your mediator has experience in all areas of the law so as to be able to work towards creative solutions.   |
|      | B.   | When mediation may not be effective:                  |   |
|      |  | 1.  | You have extremely uncooperative clients.   |
|      |  | 2.  | The case involves issues needing resolution, either by judicial precedent or the parties need their “day in court.”   |
|      | C.   | General considerations for all mediations.            |   |
|      |  | 1.  | Adoption disputes frequently involve issues of culture, race, gender, and age as well as the rapidly changing nature of our family structure.   |
|      |  | 2.  | The nature of the family unit and changing views of “the family.”   |
|      |  | a.  | Family law disputes involve highly personal and highly emotional issues that are at the very core of our society.   |
|      |  | b.  | Every human being has been a member of a family and involved in a parent/child relationship at some time or another.  |
|      |  | c.  | Individuals carry the baggage from their upbringing and all of their other life experiences to family law disputes in a way that is different from all other disputes.  |

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|  |  |    | d.                | Significant issues of gender, family roles, child rearing, personal financial practices, and the like are inherent in every family law dispute.  |
|  |  |    | e.                | Family structure in the United States is evolving at an incredibly fast rate and significant disputes exist among not only experts, but among persons involved in a family structure. The disputes include what a “family” is, what a person’s role in a family structure is, and how disputes will be resolved in that ever-evolving structure.   |
|  |  |    | f.                | Increasing numbers of third party and relative custody and visitation disputes.  |
|  |  | 3. | Gender issues.    |  |
|  |  |    | a.                | Mediator self-awareness: is <u>my</u> gender impacting my performance as a mediator?   |
|  |  |    | b.                | Party perceptions of the process/mediator.   |
|  |  |    | c.                | Party perceptions of the issues: <u>why</u> is this so important to the party and who knows more about the issue?  |
|  |  |    | d.                | Eye contact is critical.   |
|  |  |    | e.                | The gender of the mediator is critical and male/female co-mediators may be necessary.  |
|  |  |    | f.                | Balanced eye contact, body language, and physical position of the mediator is critical.  |
|  |  |    | g.                | Balanced oral communication is critical.   |
|  |  |    | h.                | One must be careful to not make statements or observations that embody gender stereotypes.   |
|  |  |    | i.                | Even the process for taking breaks and using the restrooms must be considered.   |
|  |  | 4. | Power imbalances. |  |
|  |  |    | a.                | It is critical for the mediator to identify the existence of power imbalances and high risk participants in the mediation process.   |
|  |  |    | b.                | Among the factors to consider are such tangible factors as income, education, and occupation; intangible factors such as personal characteristics, emotional states, relationship patterns, and belief systems. Personal characteristics that influence negotiating power include intelligence, status, and attitudes towards risk. Emotional states that might influence a participant’s negotiating power would include an exaggerated need for psychological closure, guilt, depression, low self-esteem, and low expectations. Relationship patterns to be watching for include dominance, dependency, physical and emotional abuse. |
|  |  |    | c.                | Query: <u>should</u> the mediator try to correct power imbalances? Is that your role?  |
|  |  |    | d.                | Suggestions for addressing power imbalances.   |
|  |  |    | i.                | As the mediator, avoid inadvertently manipulating the process to produce the substantive result that you, as the mediator, may prefer and which may, in fact, favor one participant over the other.  |

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|  |  |    | ii.                 | Be cognizant of the fact that while mediation is intended to focus on context and particularity, rather than formal legal rights and procedures, this emphasis may, in fact, disempower the claims of the participants and appeal to individual standards.  |
|  |  |    | iii.                | While there is an emphasis in mediation on focusing on the future and not the past, recognize that certain individuals who participate in the mediation process may feel the need for moral accountability and responsibility and thus may feel a need to discuss past history including hurts, anger, transgressions, and sadness. You should not fully eliminate this discussion which could result in important principles not being fully considered, nor a context as a basis for the decisions that are being made. |
|  |  |    | iv.                 | Very carefully assess the role each participant has occupied in relationship to the other participant in the mediation session, as well as with the children involved in the dispute.   |
|  |  |    | v.                  | Assess the educational levels and employment backgrounds of the participants, and determine what skills the participants may or may not possess that would either assist them or hinder them in the mediation process.  |
|  |  |    | vi.                 | Note the possibility of meddling grandparents, siblings, friends, and relatives who might be coaching participants and providing them with information, perhaps inaccurate, and work to figure out where this information is coming from and the impact that it has on the participants.  |
|  |  |    | vii.                | In addition to the formal educational levels and employment experiences, also observe whether either of the participants may have difficulties in communication, whether one person is more articulate than the other, and whether one party is represented by counsel while the other may not be.  |
|  |  |    | viii.               | You need to consider what you can do to encourage or restructure the discussion to achieve better balance and, if necessary, use caucuses as a means of moving the mediation forward.   |
|  |  |    | ix.                 | You may ultimately reach the conclusion that, because of power imbalances so extreme, the mediation should be terminated.   |
|  |  | 5. | Culture and values. |   |
|  |  |    | a.                  | Mediator self-awareness of <u>self</u> .  |
|  |  |    | b.                  | Mediator knowledge of culture.  |
|  |  |    | c.                  | There appears to be wide agreement on three points concerning culture:  |
|  |  |    | i.                  | that culture affects people's values, beliefs, perceptions, and behavior;   |
|  |  |    | ii.                 | that both individual and cultural differences contribute to   |

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|  |  |     |      | differences in values, beliefs, perceptions, and behaviors; and   |
|  |  |     | iii. | that the degree of interculturalness is a continuum rather than a dichotomy.  |
|  |  |     | d.   | Impact of cultural and values of the process.   |
|  |  |     | i.   | How parties present themselves.   |
|  |  |     | ii.  | What is important to them.  |
|  |  |     | iii. | Resolutions that make sense to them.  |
|  |  | 6.  |      | Children in mediation.  |
|  |  |     | a.   | Mediators vary in their response to the question of whether children should be involved in mediation concerning their custody and visitation.   |
|  |  |     | b.   | Each mediator must evaluate this question based on his or her comfort level of having the children present, the views expressed by the participants, the age of the children, and the unique issues that are before the mediator.   |
|  |  | 7.  |      | Gays and lesbians in mediation.   |
|  |  | 8.  |      | Foster parents in mediation.  |
|  |  | 9.  |      | The role of the Guardian ad Litem in mediation.   |
|  |  | 10. |      | The role of government attorneys, social workers, and psychologists in mediation.   |
|  |  | D.  |      | Special considerations in the mediation of adoption issues.   |
|  |  |     | 1.   | Adoptions of necessity will almost always involve mediating multi-party disputes: you will need to build your skills in bringing together people from different professional, socio-economic, and cultural backgrounds.   |
|  |  |     | 2.   | Adoption mediation will always of necessity involve children: you will need to know something about child development theory, knowledge of children's rights issues, and be especially sensitive to making sure that the children are heard and their interests represented in these disputes, whether those children are represented by lawyers, Guardians ad Litem, or have no representation at all. |
|  |  |     | 3.   | You may have special needs children who bring such issues as reactive attachment disorders, learning disabilities, physical handicaps, unique racial and cultural issues, and other such special considerations.  |
|  |  |     | 4.   | The multi-party nature of the dispute will almost always involve an adoption triad, i.e., the child being adopted, one or more birth parents, and one or more adoptive parents.   |
|  |  |     | 5.   | You must be sensitive to bonding and attachment issues, and you need to be familiar with the vast and growing literature in this area.  |
|  |  |     | 6.   | There will be grief and loss issues faced not only by the birth parent or parents giving up the child, but extended family members related to the birth parent or parents, as well as the adoptive parents coming to the table perhaps with fertility issues.   |
|  |  |     | 7.   | There will very frequently be significant cost and expense issues, involving such things as what can and cannot be reimbursed, and mediation may add one more layer of expense to an already expensive process.   |

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|  |    | 8.  | There may very well be confidentiality issues. When dealing with state agencies, there may be secrecy and confidentiality issues involved in private adoptions. You will need to be sensitive to the needs of the parties mediating before you and figure out creative ways to protect confidential information.          |
|  |    | 9.  | Adoption disputes contain some of the most important and difficult issues involved in any form of litigation: this would include terminations of parental rights, adoption plans where there will be no ongoing contact with the biological family members, and situations where ultimately the final “prize” is a child. |
|  | E. | Types of adoption disputes where mediation could be most useful.                          |   |
|  |    | 1.  | Child protection cases or terminations of parental rights cases pending in juvenile court where the court must move towards permanency and the primary dispositional option is adoption.  |
|  |    | 2.  | Disputes under an open adoption agreement.  |
|  |    | 3.  | Cases where the child is an older child who has relationships with relatives and families that will need to be maintained in the context of an adoption.  |
|  |    | 4.  | Voluntary termination of parental rights initiated by family members who want to continue to be involved with the child.  |
|  |    | 5.  | Direct placement adoptions where a birth father may be supportive, but is not yet on board.   |
|  |    | 6.  | Mediation of adoption subsidy agreements.   |
|  |    | 7.  | Mediation of consent or termination of parental rights issues.  |
|  |    | 8.  | Mediations of disrupted adoptions.  |
|  |    | 9.  | Disputes involving allegations of fraud.  |
|  |    | 10.   | International disputes involving Hague Convention, problems with foreign country requirements, etc.   |
|  |    | 11.   | Disputes under the Indian Child Welfare Act.  |
|  |    | a.  | Tribal court involvement.   |
|  |    | b.  | Good cause disputes.  |
|  |    | c.  | Enrollment and eligibility.   |
|  |    | d.  | Selection of experts.   |
|  |    | e.  | Contact agreements between tribes and adoptive parents.   |
|  |    | 12.   | Negotiating, drafting, enforcing, or interpreting assisted reproduction agreements and issues of all varieties.   |
|  | F. | Nontraditional areas of family law mediation with direct relationship to adoption issues. |   |
|  |    | 1.  | Assisted Reproductive Technology issues.  |
|  |    | a.  | A growing area of practice raising extraordinarily complex legal and ethical issues.  |
|  |    | b.  | This area involves contract-type negotiations.  |
|  |    | c.  | Mediation can occur when setting up the contract or after the contract has been put into place, i.e., the child arrives and disputes arise.   |

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|  |  |    | d. | Mediators in this area need a knowledge of adoption law, family law, estate planning, and contract law.  |
|  |  | 2. |    | Juvenile court disputes such as CHIPS proceedings where no Termination of Parental Rights followed by adoption is to occur.  |
|  |  |    | a. | Various programs are in place across the country.  |
|  |  |    | b. | Mediation can be quite helpful in these cases.   |
|  |  |    | c. | Many potential stages in the process where mediation could be used: permanency planning, prior to arraignment hearing, adjudicating stage, and dispositional stage.  |
|  |  |    | d. | Extraordinarily complex and unusual power imbalances between victim vs. perpetrator, state vs. parents, social worker vs. parent, and the role of the Guardian ad Litem.   |
|  |  | 3. |    | Cohabitation and Antenuptial Agreements.   |
|  |  |    | a. | These disputes also involve contract negotiations and interpretation.  |
|  |  |    | b. | Mediation can be effective both up front in trying to negotiate the agreements and afterwards when a dispute as to intent and operation develops.  |
|  |  | 4. |    | Third Party Custody.   |
|  |  |    | a. | In these disputes, a person other than a parent is specifically allowed to seek custody, either by motion where a court has previously addressed custody, or by bringing a custody petition where the child is a resident or where the child is found. |
|  |  |    | b. | Often these are very hotly contested disputes between well-meaning family members, often with grandparents who have cared for a grandchild when the parents have had chemical abuse issues.  |
|  |  |    | c. | Often after an Ex-parte Order has been obtained, the matter escalates into litigation, and then parties attempt to work out a settlement.  |
|  |  |    | d. | In many of these cases, the relative, typically the grandparent, does not wish to have permanent custody and raise the child. Rather they simply wish to protect the child while the parents are working out their issues.                             |
|  |  |    | e. | Mediation can be very effective in these cases, assuming the biological parents are in a position to enter into mediation and the relatives are open to the child returning to the parents, or working towards a settlement.                           |
|  |  | 5. |    | Grandparent visitation.  |
|  |  |    | a. | Many cases nationwide in this area; significant constitutional challenges.   |
|  |  |    | b. | Similar to mediation of other visitation disputes, except for the family dynamics between the generations may be different and there may be difficult feelings between parents and in-laws that are enmeshed with bigger family issues.                |
|  |  |    | c. | It is important to understand the nature of proceedings where visitation requests can be brought, and what factors are to be considered.   |
|  |  |    | d. | Most often, the factors that are to be considered are as follows:  |

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|            |                                |   | i.  | Would visitation rights be in the best interests of the child?  |
|            |                                |   | ii.   | Would visitation rights interfere with the relationship between the custodial parent and the child?                               |
|            |                                |   | iii.  | What amount of personal contact between the parents or grandparents of the party and child has occurred prior to the application? |
| <b>VI.</b> | <b>Infant adoption issues.</b> |   |   |   |
|            | <b>A.</b>                      | Introduction.   |   |   |
|            |                                | 1.  | Often result from failure to have all necessary parties involved in the adoption plan.  |   |
|            |                                | 2.  | Adversarial attitude often results from participants' view of each other, rather than of their relationship to the child.   |   |
|            |                                | 3.  | Often result from a "let's close our eyes to reality" attitude.   |   |
|            |                                | 4.  | May involve significant and shifting multi-parties.   |   |
|            |                                | 5.  | Desires of combatants may not result in adoption being thwarted.  |   |
|            |                                | 6.  | Significant area for creative remedies through good mediation.  |   |
|            |                                | 7.  | Mediator must remember his or her role is to help negotiate an agreement, not to superimpose his or her own judgment or belief system on the issues.                            |   |
|            | <b>B.</b>                      | General comments and issues in infant adoption mediation. |   |   |
|            |                                | 1.  | Mediation is the beginning of a relationship not an end – it defines future contact rather than defining the end of a relationship.   |   |
|            |                                | 2.  | Mediation needs to end with clarity, but also with flexibility incorporated within the agreement.   |   |
|            |                                | 3.  | Parties may believe they have "rights" beyond what is recognized by law or statute.   |   |
|            |                                | 4.  | There are inherent problems relating to the multi-party nature of this type of mediation.   |   |
|            |                                |   | a.  | Participants come from different social and economic backgrounds.   |
|            |                                |   | b.  | There is a clear need to address the power issues whether they are social, economic, or cultural.                                 |
|            |                                |   | c.  | The role, attitude, and involvement of the adoption agency is unclear and must be clarified at the beginning.                     |
|            |                                | 5.  | There are often significant confidentiality issues running through all aspects of this mediation.   |   |
|            |                                |   | a.  | There are issues related to confidentiality of the process.   |
|            |                                |   | b.  | There are issues related to confidentiality between the parties, including information sharing by the mediator.                   |
|            |                                |   | c.  | There will be confidentiality issues after the agreement which must be incorporated with clarity into the agreement.              |
|            |                                | 6.  | All parties must be clear that your role as a facilitator is as a facilitator to reach an agreement acceptable to all parties rather than as a fact-gatherer or judgment-maker. |   |
|            |                                | 7.  | In most cases an informal atmosphere is best.   |   |

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|  |    | 8.  | If agreement can be reached that all parties are focusing on the best interests of the child, and a certain level of respect for the other parties is inherent, then mediation in one setting may be best. If these levels can not be reached, then shuttle mediation often is necessary to accomplish real progress. |
|  |    | 9.  | It is important that the roles of any attorneys representing the parties be clear that the attorneys are committed to the mediation process, and that they understand both the law and the process of mediation.  |
|  |    | 10. | It is critical that the mediator be creative, both legally and psychologically, to meet the need and desires of all of the participants.  |
|  |    | 11. | The mediator also must be flexible in using whatever technique of mediation works the best given the individual participants and players.   |
|  | C. |     | Special issues in infant adoptions.   |
|  |    | 1.  | Birth father's rights.  |
|  |    | a.  | Putative fathers.   |
|  |    | b.  | Presumptive fathers.  |
|  |    | c.  | Biological fathers.   |
|  |    | d.  | Legal fathers.  |
|  |    | 2.  | Birth mother's rights.  |
|  |    | a.  | Effective consent or relinquishment.  |
|  |    | b.  | Withdrawal of consent – is that the end of the story?   |
|  |    | c.  | Mediator should look at short-term and long-term goals of the birth mother in a contested situation.  |
|  |    | 3.  | Open adoption or contact agreements.  |
|  |    | a.  | Timing.   |
|  |    | b.  | Information sharing.  |
|  |    | c.  | Visitation.   |
|  |    | d.  | Changes after adoption is completed.  |
|  |    | e.  | Effective violation of agreements.  |
|  |    | 4.  | Grandparent and relative rights.  |
|  |    | a.  | What is the real intent of the grandparent or relative-maybe pushing for or maybe pushing against the adoption depending on their attitude towards the child itself?  |
|  |    | 5.  | Agency responsibility and liability issues.   |
|  |    | a.  | Who is the client – what are the client's expectations of the actions by the agency?  |
|  |    | b.  | What is the agency responsibility for the health of the child – AIDS death situation?   |
|  |    | c.  | What is the agency responsibility for the health of the birth parent?   |
|  |    | d.  | What is the agency responsibility for informing the birth parent about the complete background of the adoptive parents?   |
|  |    | e.  | What is the agency responsibility for being sure that the consent or relinquishment procedure is effective, binding, and legal?   |
|  |    | f.  | What is the effect of contractual obligations between the agency and birth parents and/or adoptive parents?   |

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|           |                             |   | g.   | Wrongful adoption issues.   |
|           |                             | 6.  |  | Private placement or independent adoption issues.   |
|           |                             |   | a.   | Reflect on all previous issues.   |
|           |                             |   | b.   | Who is piloting the ship?   |
| <b>V.</b> | <b>State Ward Adoptions</b> |   |  |   |
|           | <b>A.</b>                   | Introduction  |  |   |
|           |                             | 1.  | Child protection cases, with their focus on case planning, monitoring and services, are well suited to a process that allows family involvement and service design and decision making   |   |
|           |                             | 2.  | A permanent plan for a child is difficult to work out in a strictly adversarial mode. Alternative processes should be considered in lieu of traditional court procedures. Such processes should also be available as part of the court's repertoire for achieving case resolution                |   |
|           |                             | 3.  | Mediation and family conferencing have been successfully integrated into child protection cases in a number of jurisdictions (see attachment). While various formats and processes exist, they all function to achieve understanding of the issues and full or partial agreements of the parties |   |
|           |                             | 4.  | Alternative resolution processes are used prior to filing, at the outset of the case, or at any other time that agreed solutions can provide the best outcomes, including at the point of termination of parental rights and placement for adoption.   |   |
|           | <b>B.</b>                   | General principles in dealing with state ward cases |  |   |
|           |                             | 1.  | Mediation in state ward cases requires careful planning and a consideration of the following such issues:  |   |
|           |                             |   | a.   | What will be the court rules that apply, and is mediation to be mandated or strictly voluntary                          |
|           |                             |   | b.   | What are the program policies to be   |
|           |                             |   | c.   | What are the mediator qualifications to be, should they be lawyers, social workers, psychologists, or lay volunteers    |
|           |                             |   | d.   | Where will the funding for the program come from  |
|           |                             |   | e.   | What sort of quality control will be instituted   |
|           |                             |   | f.   | What kind of collaboration will there be between the bench, the bar, child protection workers, and the community        |
|           |                             | 2.  | Inherent problems will exist because of these disputes often involving multiple parties  |   |
|           |                             |   | a.   | Parties will come from different professional, socio-economic and cultural backgrounds                                  |
|           |                             |   | b.   | There will be conflicting issues, multiple issues, communication problems, and positional bargaining,                   |
|           |                             |   | c.   | It will be critical to address power dynamics in an adverse group and managing interactions in a collaborative fashion. |
|           |                             | 3.  | There will be enormous confidentiality issues  |   |
|           |                             |   | a.   | Mandated reporting issues will be of a concern  |

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|  |     | b. | There will confidentiality requirements of various participants  |
|  |     | c. | These confidentiality issues will affect the dynamic of the mediation and affect ongoing relationships   |
|  | 4.  |    | Innovative programs are emerging   |
|  |     | a. | Mediation- family group conferencing, hybrid processes   |
|  |     | b. | Co-mediation teams   |
|  | 5.  |    | The standards of practice  |
|  |     | a. | It is critical that a program written and understandable practices that everyone will follow so that people believe the system has integrity and will participate and cooperate fully  |
|  |     | b. | Standards of practice are especially critical in assessing whether domestic abuse child abuse has occurred to such a level that mediation will not work.   |
|  |     | c. | With concurrent planning, it is critical to know when the permanency issue must be interjected into the process.   |
|  | 6.  |    | Domestic violence and child abuse  |
|  |     | a. | Participants need to be acutely aware of the impact of potential power imbalances  |
|  |     | b. | There also needs to be recognition of coercive behavior  |
|  |     | c. | There also needs to be recognition of the complex relationship between child abuse and spousal abuse.  |
|  | 7.  |    | TPR process issues for the mediator  |
|  |     | a. | Impact of concurrent planning on mediation   |
|  |     | b. | Enforceability of on going contact after TPR   |
|  | 8.  |    | Unlike other types of mediation, in child welfare cases, the relationship will continue for a length of time after the mediation is over   |
|  | 9.  |    | Similar to divorce mediation, parties will likely need to continue to interact, so you will need to find ways to help them interact with as little conflict as possible  |
|  | 10. |    | The focus is on the future but not on the past. However, these cases are unique as you simply can not just put aside the past. The state has intervened for a reason, and it is this intervention that puts the parties in the relationship. Thus, there is a need to “revisit” the past to plan the future    |
|  | 11. |    | Maintaining the appearance of neutrality is especially challenging in these cases. The clients may be view you as just another person from the bureaucracy out to control their lives, while professionals may view you as someone who will be telling them how to do their jobs and what they are doing wrong |
|  | 12. |    | It is especially critical to never be in the room without both parties, especially in the “backroom” with the court system parties where the client is typically never allowed. There is no need to be distant, but just friendly with all parties   |

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|  |  | 13. | It is important that you acknowledge the professionals without alienating the clients; you need to disassociate yourself from the system with the client, and reassure the professionals that you are not critical of their work, but rather simply helping all parties to see all options   |
|  |  | 14. | It is important for all parties to understand that you are not the decision maker or fact gatherer, but rather the facilitator   |
|  |  | 15. | Informal atmosphere works best   |
|  |  | 16. | As many participants may be mandated, participants, it is important to stress the ability of the participants to take part in the final outcome versus when they are being told to do by the less involved third party, that being the judge   |
|  |  | 17. | While often divorce mediation works best by resolving smaller issues and working up to bigger issues, this may not work in these kinds of mediations. You may want to try to solicit or identify smaller related issues, and also get persons talking by explaining the mediation process and inviting conversation and give clients the feeling that their opinions are wanted and respected  |
|  |  | 18. | Note that frequent client characteristics in these cases are less sophisticated, less educated, and less knowledgeable about the system, and often feeling inferior and intimidated  |
|  |  | 19. | The power imbalances in these cases are enormous. There are often power imbalances even in client and foster parent disputes. The major power imbalance between professionals and clients in dispute arise because professionals feel they must take control and be decision makers, the clients feel powerless with little or no options, and the is that they are right. They have absolutely no control over what happens with their children and often no knowledge of their children's daily lives. The level of anger is high, much like divorce mediation, but in a unique way. Because of the major power imbalance, feelings of anger are magnified in all parties. The client feels powerless and feels victimized by government intervention since they did not participate in the choice for government intervention and the intervention resulted in major upheaval in their lives. Clients typically feel there is not inability to have a positive relationship with their children to this intervention, contact is so controlled and at the discretion of a professional. Unlike divorce mediation, there is no "sharing of the children's time." |
|  |  | 20. | In these cases clients have a tendency to vent much anger, while professionals have a tendency to keep their emotions inside   |
|  |  | 21. | There are often large numbers of people in mediation and this can be very intimidating for the client  |
|  |  | 22. | Frequently, attorney participation will enhance the mediation process, particularly if the clients' attorney is a participant. Legal advocates have a tendency to keep parties on a realistic level, open to exploring resolution because negotiation is a part of their duties, and can speak knowledgeably to success of options begin explored in mediation   |

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|            |   | 23.                           | It is critical to keep discussion in more general terms and make sure all parties understand what is happening. The mediator should act as the dumb one who does not understand terms or child welfare processes. Do not take for granted all parties understand the items that are being discussed.   |
|            |   | 24.                           | An effective technique is to highlight the positive for things clients are being asked to do or told they can not do   |
|            |   | 25.                           | Give parties equal time to talk  |
|            |   | 26.                           | You may find yourself as the mediator making more suggestions as to options. Clients may not really know the system to explore options and professionals may be hesitant to suggest or agree to alternatives to the plan in dispute because they may have to consider it, they are often overworked and this may seem as more work to them, and their focus is child protection which usually is defined with restrictive measures. It is critical to not underestimate the professional's investment in the case  |
|            |   | 27.                           | It is mediation techniques that have been quite helpful: caucusing; participation of others of information from others may enhance the flow of mediation   |
|            |   | 28.                           | It is critical for the mediator to avoid drawing your own conclusion as to what is in the best interests of the children. Often the case has many more facets than meet the eye or ever come out in mediation  |
|            | C.  |                               | Dealing with domestic violence and child abuse. (See attached domestic violence protocols)   |
| <b>VI.</b> | <b>Hypothetical fact Situations: Could Mediation Be Used?</b> |                               |  |
|            | A.  | Hypothetical Facts Situations |  |
|            |   | 1.                            | <u>Indian tribe and white foster parents dispute under ICWA:</u> three children (10,8, and 6) placed in long-term foster care. Children are all Native American and are enrolled members of an Indian tribe. They are placed in white foster home for five years. Bonding and attachment strong. Foster parents move to adopt. Tribe intervenes and wants to place children with relatives who have never met the children. Native American experts recommend placement in culturally appropriate adoptive home.   |
|            |   | 2.                            | <u>ICWA/Private Adoption/putative Father's Rights/Paternity:</u> Caucasian birth mother places child through private agency. Caucasian adoptive couple obtains consents and necessary documents for termination of parental rights of biological father. Adoptive couple removes the child from state of birth, interstate compact complied with by both sending and receiving states. Prior to finalization of adoption, birth father finds out about placement. The birth father is Native American and an enrolled member of a tribe. The birth father requests return of child.<br><br>Father convicted felon serving significant time. Time supports continued placement with adoptive couple as long as agreement to raise in culturally appropriate heritage. |

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|  | 3. | <p><u>Interstate Infant Adoption/ Putative Father's Rights:</u> Father and mother in long-term relationship resulting in pregnancy. Mother moves out on father. Prior to birth both retain counsel to discuss visitation and support issues. Just after birth of child, mother leaves state and goes to another state. Mother places child for adoption without notice to biological father. Adoption is completed in the second state with no interstate compact action. Father discovers placement and eventually discovers state where adoption occurred. Father brings action to vacate adoption and enforce his rights as father.</p>   |
|  | 4. | <p><u>Foster Parent/Birth Parent Dispute Concurrent Planning:</u> Child placed in foster care with older single foster mother. Placement with foster mother began at age three days, and continued for five years. Mother has a case plan as a result of welfare intervention. Mother fails case plan and state begins termination of parental rights proceedings. In order to avoid termination, mother independently contacts adoptive couple. Adoptive have no relationship with the child, but biological mother enters into a consent, pen adoption agreement, and a voluntary termination of parental rights condition on their adopting. County social workers and foster mother support foster mother's daughter for adoption. Homestudies show both proposed adoptive parents qualified for adoption. Child has significant special needs and therapist recommends no contact with mother after adoption.</p> |
|  | 5. | <p><u>State Ward/Relative Preference/County Involvement:</u> Child removed from parents and placed in foster home. Child one-half Caucasian and one-half African American. Child appears African American. Placement for 24 months with foster parents. Immediately upon placement paternal, African American professional woman express interest to welfare department in adopting. Aunt is told that until termination adoption is not possible and she should not interfere. Following termination of parental rights continues to show interest. Welfare department indicates to her the need for a homestudy, the need for completion of Interstate Compact, need for training on medical needs of the child. Cross petitions for adoption filed by aunt in order to raise child in African America home and Caucasian foster parents to joint their family of seven special needs children</p>                   |

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|  | 6. | <p><u>Agency Liability:</u> Two children are brought over from Russia. They both were placed in orphanages at an early age, and are currently four (4) and six (6). Nothing is known about their biological parents. The children do not appear to have any physical or health problems, and the initial time of placement goes fairly well. Within three months however, the children begin to exhibit significant behavioral problems which result in diagnosis of significant reactive attachment disorder resulting in aggressive and assaultive behavior, the smearing of feces on the wall, and complete disruption of the household. Upon further investigation, medical reports are discovered indicating likelihood of abuse prior to placement in the orphanage. These reports were in Russian and available to the agency but were never translated or passed onto the adoptive parents. Further investigation revealed additional reports from the orphanage in Russia indicating ongoing behavior problems, fear about other children in the company of these children, and description of the children as the “worst behavior problems” in the orphanage. These reports also were in Russian and sent to the adoption agency but were not translated nor passed onto the adoptive parents. Adoptive parents file lawsuit requesting termination of parental rights, removal of the children from their home, and substantial civil monetary damages against the agency.</p> |
|  | 7. | <p><u>Private Adoption of State Ward/Relative Rights Gay-Lesbian Issues:</u> Child removed from parents by welfare department and placed in lesbian foster home. Child remains in foster home for two years. Aunt and uncle express interest in child from beginning and have ongoing continuous contact with child. Termination of parental rights occurs on an involuntary basis, and cross petitions by relatives and foster parents are files. Biological parents sign consents to relatives having children. Welfare department recommends continued placement in lesbian foster home for adoption by one of the lesbian partners. (State War/Private Adoption/Cultural Issues and Statutory Rights).</p>  |
|  | 8. | <p><u>Withdrawal of Consent:</u> Birth mother selects adoptive couples from various information supplied to her on the background of adoptive couples. She meets with them, and makes a decision to place with them. Because of her own personal problems and difficulties, she specifically asks whether either of the adoptive parents have ever been treated for depression or mental illness, or ever been institutionalized. She is repeatedly told that neither has received any kind of treatment or counseling for depression or mental illness. The child is born and placed with the adoptive parents, and three days later the birth mother signs a consent to adoption. Under prevailing state law her consent becomes irrevocable 10 working days after her signature. Two weeks after signing the consent she discovers that the adoptive mother has been institutionalized twice for depression, and continues to take antidepressant medication. Birth mother brings an action to revoke her consent on the basis of fraud, requests for return of child, and requests damages against the adoptive parents for fraud.</p>  |

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|  | 9.  | <p><u>Disrupted Adoption after Finalization:</u> Young married couple approaches a local county agency to adopt two special needs girls ages 7 and 9. After homestudy and approval by the county, two girls are placed with proposed adoptive parents, adoption subsidy put in place and adoption finalized. Both girls have been victims of serious sexual abuse in the biological family. Approximately six months after adoption finalized, oldest girl reports to school teacher adoptive father has been sexually abusing her. Emergency hold hearing occurs, oldest child removed from the home and returned temporarily to foster parents. Youngest child remains in adoptive home, but adoptive father voluntarily vacates the premises. Both adoptive parents deny sexual abuse has occurred and the children's therapist raises significant questions as to the veracity of the oldest child's claim. County attorney has sexual abuse assessment and believes sexual abuse occurred. Adoptive parents are furious, seek to return the children to the county.</p>   |
|  | 10. | <p><u>County Placement in Concurrent Planning Situation Contrary to Birth Mother's Intentions:</u> Birth mother gives birth to third child. Prior two children have been involuntarily terminated upon by the County. County is concerned about the welfare of the third child, and tells birth mother that she must place the child for adoption or the child will be taken from her. Birth mother approaches private adoption agency and selects a young couple of the same religious orientation as herself for adoption. Meanwhile, County files a CHIPS petition and places the child with a foster/adoptive family as part of the new concurrent planning process and. As soon as the couple chosen by the birth mother finds out about the CHIPS process and the pre-adoptive placement, they file a motion to intervene in the County's CHIPS case and also file their own adoption petition. Birth mother denies the allegation in the CHIPS petition and an in-court consent to the adoption by the adoptive couple selected by her. County refuses to dismiss its CHIPS petition and insists it has the right to continue with its CHIPS petition and move towards either a voluntary or involuntary termination of parental rights. County also raises concerns about the impact of the birth mother's voluntary placement contrary to the County's wishes on its concurrent planning and foster/adoptive program.</p> |

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|  | 11. | <u>ARTS Agreement/Vacating Adoption for Fraud Upon the Court/Paternity/Custody/Visitation:</u> Lesbian couple enters into written sperm donor agreement with a homosexual couple. Sperm donations are made and insemination attempted on both lesbian women until one of the women becomes pregnant. The sperm donor agreement, which was drafted without legal counsel, provides for ongoing contact and visitation between the two homosexual sperm donors and the lesbian couple. A child is born to the lesbian couple, and the lesbian couple finalizes the adoption as to the child. Lesbian couple does not disclose to the Court finalizing the adoption the existence of the visitation/contact terms of the sperm donor agreement. A dispute subsequently arises as to ongoing visitation/contact. Sperm donor files a motion to vacate the adoption for fraud upon the Court, seeks a paternity adjudication, and seeks specific visitation rights. Lesbian couple files termination of parental rights action to terminate any rights the sperm donor may have. |
|  | B.  | Questions to consider regarding the hypothetical  |
|  | 1.  | Who are the participants?   |
|  | 2.  | What are the issues most appropriate for mediation, and when?   |
|  | 3.  | How would you structure the mediation?  |
|  | 4.  | What are the various options for settlement?  |
|  | 5.  | Who should do the mediation?  |
| <b>Appendix</b>  |     |   |
| A-1. Public Law 105-89   |     |   |
| B-1. National Conference of State Legislature's Bill Analysis of PL 105-89, Adoption and Safe Family's Act of 1997                               |     |   |
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| D-1. Minnesota Supreme Court Foster Care and adoption Task Force Final Report, Jan. 1997, regarding alternative dispute resolution.              |     |   |
| E-1. Mediation Flow Chart  |     |   |
| F-1. Project Summary Description for Lutheran Social Services of Washington and Idaho  |     |   |
| G-1. Showcase of Child Protection and Dependency Mediation Programs  |     |   |
| H-1. Advanced Issues in Child Protection and Dependency Mediation by Maxine Baker Jackson  |     |   |
| I-1. Santa Clara County Dependency Mediation and Domestic Violence Protocol  |     |   |
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