

Read more at <https://www.lynchowens.com/blog/>

Conciliation And Evaluative Mediation: Robust Alternatives To Litigation

January 21, 2021 | **Nicole Levy**

Categories: [Nicole K. Levy](#) | [Coronavirus](#) / [Mediation](#)

Conciliator and evaluative mediator Nicole K. Levy explains how divorce and family law litigants can benefit from robust methods while access to courts is limited.



Mediators draw on multiple dispute resolution techniques when mediating family law case. [Not every divorce mediator uses the same style](#); moreover, individual mediators may take different approaches depending on the [needs of the clients](#) and the circumstances of the divorce. By far, the most common approach used in divorce and family law cases is

facilitative mediation. *Facilitative mediators* generally seek to avoid dictating to the clients how to resolve the clients' case. Instead, the mediator plays a facilitative role by encouraging conflicted spouses to interact and reach solutions on their own, with the mediator helping the clients get "unstuck" while minimizing the mediator's role in dictating a specific outcome. *Evaluative mediation* is, in many ways, the polar opposite of facilitative mediation. An evaluative mediator actively offers his or her opinion to the clients, providing specific opinions and guidance to the participants regarding the strengths and weaknesses of each spouse's arguments and the likely success or failure of a client's specific position in a future trial. In short, the evaluative mediator acts more like a conciliator. A *divorce conciliator* is which is a type of mediator who offers direct feedback to clients and their attorneys on the persuasiveness of their arguments, while simultaneously seeking to encourage settlement. (The remainder of this blog will use the terms "conciliation" and "evaluative mediation" interchangeably since these techniques are so similar in substance.) Of course, not every mediation requires a strictly facilitative or evaluative approach. In divorce and family law cases, many clients seek feedback from their facilitative mediator about how to draft a particular provision to offer background on a point of law. Indeed, it is not unusual for both clients to ask a facilitative mediator to "break character" and offer his or her frank opinion about which party seems right or wrong on a particularly thorny issue. At the same time, even as an evaluative mediator or conciliator is offering his or her opinion on the strengths of each party's position, the mediator/conciliator must keep his or her eye on encouraging settlement and take pains to avoid the appearance that he or she strongly favors one client over the other.

The Covid Crisis Shuts Courtrooms and Drives Demand for Conciliation and Evaluative Mediation

As we have covered extensively on our [sister blog at lynchowens.com](https://lynchowens.com), the coronavirus pandemic has greatly limited access to Massachusetts Probate & Family Courtrooms. As of the date this blog is published in January 2021, we do not anticipate Massachusetts family courts to

reopen for in-person hearings until April 2021 at the earliest. Very few Probate Court judges are holding trials by Zoom and most courts continue to limit virtual hearings. The drastic curtailment of access to courts have driven a large number of divorce and family law litigants – that is, parties would be seeking to litigate their issues in court – towards mediation. Because these cases often include attorneys and highly contested issues, many such litigants are seeking a more robust, assertive style of mediation. Facilitative mediation, which focuses on allowing the clients to reach solutions in a cooperative manner, may simply be too passive for litigants who are seeking clear, definitive feedback on hotly disputed issues. Clients who are engaged in litigation are often seeking a more authoritative brand of mediation. Enter conciliation and evaluative mediation. These formats shift the mediator's role from the background to the forefront, albeit using slightly different approaches.

Evaluative Mediation and Conciliation: What's the Difference?

As noted above, conciliation and evaluative mediation are close cousins of one another. To the extent that differences exist between the two, these come down to style more than substance. Conciliation most often occurs in the context of active litigation. The parties are often represented by [attorneys](#) and the court case is often in progress when the conciliation occurs. Conciliation often more closely mimics a court hearing than a mediation session. Most conciliators ask the parties/attorney to submit a memorandum setting out their arguments prior to the conciliation session, and a portion of the conciliation session often includes the type of argument and counter-arguments by attorneys that looks and sounds like a court hearing. After reading the memos and hearing each attorney's argument, the conciliator offers feedback on the issue, much like a Probate and Family Court judge at a Pretrial Conference. Evaluative mediation tends to be somewhat less formal than conciliation. Clients often attend mediation without an attorney present, and evaluative mediators typically do not ask the clients for memos setting out their respective arguments before the session. Nevertheless, the "meat" of

the evaluative mediation session is often nearly identical to a conciliation. Like a conciliator, the evaluative mediator considers each client's position and offers substantive feedback, providing his or her opinion on how a judge would likely rule on each client's position if the matter were brought to Court. The evaluative mediator is encouraged to directly suggest solutions and compromises to the parties, and to attempt to persuade the clients why these suggestions make sense. The evaluative mediator is likely to point out flaws in one or both clients' positions and authoritatively explain the law and common practice in litigation. In short, conciliation is a more formalized approach to evaluative mediation, in which the conciliator mimics more closely the role and authority of a judge. The conciliation process is meant to be robust; the conciliator is expected to control the session, manage the attorneys and parties, and share his or her frank opinions, even if doing so results in frustration for one or more participants. Evaluative mediation looks less like a court hearing and more like a typical mediation session; only, with evaluative mediation, the mediator is expected to offer feedback, suggestions and criticisms that generally would not be present in facilitative mediation. Each option provides spouses and litigants with a stronger, more definitive forum for resolving differences.

How are Conciliation and Evaluative Mediation Different from Arbitration?

The powers of a conciliator (or evaluative mediator) can sound familiar to that of an arbitrator, but there are several aspects of evaluative mediation that make these more robust forms of mediation *quite different from arbitration*. First, those heading into arbitration agree to be bound by the decision that the arbitrator makes. A conciliator may be acting like a judge outside the courtroom, but an arbitrator really is a private judge, whose decisions are every bit as real and binding as those entered by a Probate and Family Court judge. Arbitration sessions are essentially private trials. The arbitrator hears witnesses, reviews documentary evidence, and conducts the arbitration sessions following many of the rules seen inside a courtroom. While the Rules of

Evidence may be somewhat relaxed during an arbitration, the arbitration process is highly similar to a formal trial. If a party who submits to binding arbitration does not like the arbitrator's decision, his or her options are extremely limited. While appealing an arbitrator's decision is technically possible, appellate courts review arbitration decision in extremely narrow grounds, and will not reverse an arbitration decision except in very rare situations. Despite these limitations, arbitration provides enormous benefits to litigants in two key areas: timing and cost. Amidst the pandemic, most Probate and Family Courts will not schedule trials for new filings until at least 2022. In contrast, an arbitrator can be ready to hear your case in a month or two. And while litigants must pay the arbitrator's hourly rate – and are not required to pay for courtroom trials – the cost of arbitration is often far, far lower than trial because the parties and attorneys have so much control over the schedule and “rules of engagement” in the case. Compared to legal fees and the many pretrial hearings required in court, the arbitrator's fee is often a blip on the proverbial radar compared to the avalanche of costs associated with trial. In short, hiring an arbitrator amounts to hiring a private judge to perform a trial. The arbitrator's primary role is not to encourage settlement, but rather, to listen to the evidence and decide issues on the merits. In contrast, the primary role of both conciliators and evaluative mediators is to encourage parties to settle their case without the need for trial. Conciliators and evaluative mediators spur settlement, in part, by persuasion. They offer their expert opinions to the clients and their attorneys in an effort to persuade the clients to adopt reasonable, legally supportable positions. They encourage parties to settle their cases by explaining which party is likely to prevail in litigation.

Consider Conciliation or Evaluative Mediation in Your Divorce or Family Law Case

With Massachusetts family courts closed for the foreseeable future – and subject to massive delays and backups when they finally reopen – conciliation and evaluative mediation offer strong options for parties who would like to litigate their case, but simply do not have the option.

L&O

ESTABLISHED 1995

Need a Family Law
Lawyer? Hire the Best



Need a Divorce Mediator?

CONTACT NICOLE TODAY!

Nicole Levy
Family Law Mediator

Divorce and Family Law Conciliation Services

*Do you need a conciliator for your divorce or family law case? Our divorce conciliators are statutory mediators and experienced family law attorneys. We provide [divorce conciliation services](#) to litigants throughout Massachusetts. If you have a divorce attorney, ask him or her about submitting your case conciliation with [our team](#). Our conciliation services are [priced competitively](#) to ensure efficiency and minimize costs to you. Do you need an attorney to represent you in your upcoming divorce or family law conciliation? **Schedule a mediation with [Nicole K. Levy](#) today at (781) 253-2049 or send her an email.***

Nicole is a divorce mediator, conciliator and mediation coach for South Shore Divorce Mediation, with offices in Hingham, Massachusetts and East Sandwich, Massachusetts. She is also a collaborative law attorney Senior Family Law Attorney for Lynch & Owens, P.C. Nicole is a statutory mediator under [M.G.L. Ch. 233, s. 23C](#) and a proud member of the Massachusetts Council on Family Mediation. To read more from Nicole, check out her [content on the Lynch & Owens blog](#). **Disclaimer:** The information you obtain at this site is not, nor is it intended to be, legal advice. You should meet with an attorney for advice regarding your individual situation. You are invited to contact our office. Contacting the office does not create an attorney-client or mediator-client relationship. Please do not send any confidential information to the office until such time as an attorney-client or mediator-client relationship has been established.

This blog is considered an advertisement for the Law Office of Lynch & Owens, P.C. d/b/a South Shore Divorce Mediation. The Massachusetts Rules of Professional Conduct broadly govern all advertisements and communications made by attorneys and law firms in the Commonwealth. Generally, legal websites and any other content published on the internet by lawyers are considered a type of communication and an advertisement, according to the Comments to Rule 7.2.

© Lynch & Owens, P.C. and www.lynchowens.com, 2019. Unauthorized use and/or duplication of this material without express and written permission from this site's author and/or owner is strictly prohibited. Excerpts and links may be used, provided that full and clear credit is given to Lynch & Owens, P.C. and www.lynchowens.com with appropriate and specific direction to the original content.