

When in Rome, Do As the Romans Do: What This Ancient Civilization Taught Us About Marriage, Children and Divorce

By Amanda K. Wentz

Matrimonium - [Marriage]

Gaius Julius Caesar Augustus was the first and most beloved emperor of Rome. During his long lasting reign, he arranged the political marriage of his sister and ally, Mark Antony, which he later used to expose Antony's untrustworthy and immoral character to gain the plebeians favor. Augustus initiated laws that gave elite women incentives to bear children and maintain loyalty to their marriage oath. He prided himself on being a family man who married a woman he deeply loved and trusted. She was more than a wife to Augustus; Livia was his confidant and advisor (Devore, 2009). It is said that



Amanda Wentz recently graduated from the University of California, Santa Cruz with dual degrees in Business Management Economics and Psychology. She currently is working as a Disease Prevention Analyst and preparing for graduate school in psychology. Her interests include research in conflict resolution and health and wellness. Amanda can be contacted at: awentz@orovillesportsclub.com

Emperor Augustus' last words were, "Livia, ostri coniugii memor vive, ac vale." [Livia, keep our marriage alive, and farewell] (Ow, n.d.).

Roman marriages were very different from what many consider a "traditional" marriage today. They were political partnerships that involved strategies to keep the

family bound together and to ensure that the children could carry on the family name with honor and *dignitas* [dignity]. The Romans believed that marriage was not supposed to be fun and that love was irrelevant to Roman married couples. Marriage was simply

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ASSOCIATION FOR
CONFLICT RESOLUTION

5151 Wisconsin Ave., NW
Suite 500
Washington, DC 20016
202-464-9700
202-464-9720 (fax)
www.ACRnet.org

EDITORIAL STAFF

Publisher

Association for
Conflict Resolution

Editor

Don Saposnek

Family Section Chair

Russell Gerrard

Columnists

Clarence Cramer
Chip Rose

Contributors

Stephen K. Erickson
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Amanda K. Wentz

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Ex-officio Member,
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dsaposnek@mediate.com

Dear Readers:

At a recent gathering, Santa Clara County Board of Supervisors member Dave Cortese told a story that generated a flash of insight about our response to conflict. One day, Dave was jogging through a park that had tall bushes along the side of the path. As he ran along on this beautiful day, he felt something pop out from the bushes and brush against his leg. Startled, he jumped back, and, with adrenaline pumping through his body, reflexively went into a “flight or fight” response. Flashing on fantasies of a pit-bull attack, a robber, or even a serial killer, he prepared to fight and, if need be, to violently defend himself. Then, he looked down and saw a morning dove on the ground where he had been. Suddenly, he was struck with the irony of a morning dove (the symbol of peace) triggering fear, aggression and a fighting response in him.

Dave is a man of kind conscience and progressive thinking who, with great integrity as a public servant and private citizen, stands for peace and non-violent communication approaches in both his government work and his personal life. Yet, he was struck (both literally and figuratively) with this violent response within himself that was in stark contrast to his beliefs. The cognitive dissonance created by this incident made him re-question the nature of humankind. After much reflecting on his reactions to this situation, he concluded the following: the seemingly inherent violent nature of human beings should be no more a limitation to



Donald T. Saposnek, Ph.D., is a clinical child psychologist, family therapist, child custody mediator and trainer. He is the author of *Mediating Child Custody Disputes: A Strategic Approach*, and is on the Psychology Faculty at the University of California, Santa Cruz.

our imagining achieving peace than gravity, prior to the Wright Brothers, was a limitation to imagining airplanes flying in the sky.

How often have we, as mediators, encountered a client within a disputing couple who challenged us so that we were pulled away from the center of our inner, peaceful beliefs to react externally to the client with self-defensive words, forceful retorts, and perhaps to unwittingly participate in an escalation of the discussion into a non-productive argument? Some mediators have described this as “losing my cool” or “lashing out impulsively” or “being unable to resist defending my point.” Afterwards, in reflection, we frequently realize that the apparent threat was just a misdirected morning dove whose intentions we misunderstood.

Remaining in a state of calm mindfulness can be challenging at times in our line of work. I remember John Haynes, the first President of the Academy of Family Mediators, once saying that before each mediation session he would take 10 minutes to close his eyes, take a few deep breaths and release all of his thoughts until he had a blank mind. Then, when as calm as he could be, he would enter the mediation room and begin to greet

his clients and begin their process. He further said that he wanted no pre-information about his clients or their case, so that he would not develop any prejudices about them and would be in a better mind-set to remain neutral, to be truly present, and to be able to listen carefully to each party. He said that was his unique way to resist the natural impulse to react personally to all the provocative stories that divorcing clients bring into the mediation room. In essence, he went jogging, fully prepared that a stray morning dove might fly into him and that he would accept it as just what doves might do; he would try hard to not attribute malice or provocation to the dove’s actions. Sometimes, this is easier said than done. Yet, we each must find our own way to maintain our intentions to make positive resolutions fly in what at times seem like gravity-laden conflicts.

“Perspectives ‘R Us,” as we enter this issue of *Family Mediation News*. Our feature article, written by another of my insightful students, Amanda Wentz, is an intriguing thought-piece that compares marriage and divorce in the days of the Roman Empire with marriage and divorce in contemporary times,

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necessary to carry on the family lineage (Dupont, 1993). Many marriages were political arrangements that were meant to show the plebeians their political alliance or new standing in society. One such famous arrangement was that between Pompey Magnus and Julius Caesar. Pompey married Julia, Caesar's daughter, but she died in childbirth. His reputation was slightly damaged when the public found out how much he cared about his wife. It was only after Julia died that it was appropriate for the two men to fight their infamous battle over Rome.

Today, we have drastically challenged the traditional norms of marriage. In the 1980s, about half of all first marriages ended in divorce. Some believe that the "Baby Boomer" generation, and its self-centered tendencies, is a key contributor. That generation of individuals, known as the "Me" generation, was the first to say that marriage should be something enjoyable, not a job. The boomers felt that love was the most important part of marriage, and if there was a lack of love then it was not a marriage worth being a part of (Crocker, 2007).

Roman marriages were not about love or sex. Whereas many marriages today end because of affairs, the Romans believed affairs to be normal and even positive. They believed that the man could seek sex anywhere and that a bride should consider herself lucky if he took a concubine (Wilkinson, 1979). In contrast, contemporary married couples view sexual monogamy as closely tied to our view of commitment. If someone cheats, we suspect there are problems in the

It is interesting that in a country where we pride ourselves on our diversity, we offer only one legal status for being bound by marriage.

relationship and often feel the most appropriate response is divorce of the unfaithful partner as soon as possible.

While the Romans also had a strong belief in marriage, they did whatever they could to uphold it. Juno, the goddess who protected legitimate marriages, emphasized that the more important role in the marriage went to the woman who bound herself more fully to the success or failure of the marriage (Grimal, 1967). Today, we view marriage as a partnership, and within that partnership, we expect that each has the responsibility to their children of keeping the marriage intact. Even though our practice of marriage is changing, our belief in it is not.

Matrimonium Quod Lex – [Marriage and Law]

Metellus Numidicus, (a highly ranked Roman public officer, known as a censor) said in a speech, "If we could stand being wifeless, citizens, we would all do without such encumbrances. But since nature has made us so that we cannot get enough pleasure from living with them, and since we cannot get along at all

without them, we should sacrifice transitory enjoyment in favor of having a chance of survival in the long run (Grimal, 1967, p.82)."

The Romans did not believe that there had to be a religious ceremony in order to have a legal marriage. However, many made sacrifices to four goddesses who would then bless their union. The legal process of marriage in Ancient Rome did not involve a particular ritual; it simply signified the union of two contracting parties of their own free will. There were three different legal ways to marry in Rome: *Confarreatio*, *Coemptio* and *Usus*. The first was the most traditional and was an indissoluble marriage by law. The second and third ways to marry simply legalized the bond, a contract that could be found in domains others than marriage, such as in a transfer of property (Grimal, 1967).

It is interesting that in a country where we pride ourselves on our diversity, we offer only one legal status for being bound by marriage. If there were more ways to legally bind partners, perhaps there would be a lower incidence of divorce. Couples with children, for example, could have a more extensive and counseling-supported marriage contract than those without. Couples that view their partnership more like a business contract could enter the marriage contract at that level. Those who believe marriage is purely religious could enter into contracts specific to their religion. Perhaps it is naïve to believe that the same marriage contract should work for all types of marriages.

During the great expansion of Rome, women became more

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liberated and independent. One expression of this liberation and independence was the revision of dowry laws. Women took control of their own dowries, and they could leave the marriage with what they started. Being able to control their own money was enacted to help women after divorce. Also, husbands and wives had separate wills and were not necessarily each other's heirs (Grimal, 1967).

In the late 1970s, women began to enter the workplace in great numbers. They challenged the gender stereotypes that resulted in new laws regarding families and the workplace. Women's liberation definitely had its positive aspects, but it also seems to correlate with higher divorce rates. Perhaps this has to do with the way that we view marriage and how we tend to give the power in the relationship to the man, and the responsibility of the relationship to the woman.

Liberi – [Children]

The children in Roman society were very important to the family structure because they were the ones who would carry on the family name, fortune and history. In Rome, parents and children had a reciprocal relationship of respect, which the law reinforced. Father and son could not prosecute or give evidence against each other because they were expected to support one another. Research suggests that within Roman families there was "close and frequent interaction between parents and young children." (Rawson, 2003) The men often were allowed to bring their family overseas when they were on duty, and responsibilities towards children were valid reasons to

The children in Roman society were very important to the family structure because they were the ones who would carry on the family name, fortune and history.

decline appointments. One Roman Senator declined nomination for the providence of Africa so that he could prepare his daughter for her wedding day (Rawson, 2003). There is little research regarding the effects of divorce on Roman children, but K.R. Bradley suggests that there were negative implications regarding a child's "emotional address" in the frequency of remarriage in Roman society (Rawson, 2003, p. 218). Since retaining the family name and lineage was so important, remarrying was frowned upon, although not uncommon. It may have even provided opportunities for a child beyond his natural-born class rank. For example, Livia's son, Tiberius, became his stepfather Augustus' heir to the throne because Augustus did not have a natural born son of his own.

Today, many of the same issues apply to children of divorce. The emotional aspect of a divorce is burdensome and may have long-lasting effects. Children who enter new families have to adjust to a new life, which has the possibility of being a positive or negative

experience. However, family ties are not enforced in our society. A child in a Roman family had great awareness of what family he was from and whose name he carried on. In our society, children may even change their name or choose to be associated with a new step-family after divorce.

Abruptio – [Divorce]

In the year 231 B.C., the first Roman divorce was granted to a man by the name of Spurius Carvilius Ruga. He loved his wife dearly and had no desire to leave her. However, he had discovered that his wife was sterile. After having taken a vow before the censors that he marry in order "to have children," the only honorable thing to do was to seek a divorce (Grimal, 1967).

According to the Romans, divorce was repugnant. When things got tough, the couple would seek a judge—a divinity named Viriplace, and, under the protection of the goddess, spoke freely and openly until the marital storm subsided. They could then return home united and stronger than before. However, at end of the Republic, divorces became more common. Divorces were easier to obtain and legal status of legitimate unions evolved. However, to preserve marriage, some of the elites entered into a union known as *Flamen*, or *Flaminica*. This was a type of priesthood that denied the right to divorce. But most marriages adhered to the traditional sense of *familia patrae*, in which the husband had complete control over his home and family. However, *manus* (the husband's authority) could be dissolved if the woman

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was away from her husband for three nights a year. Without *manus*, the wife was free to leave the marriage, of her own free will (Grimal, 1967, p. 67).

Today, we have our own version of Viriplace—a family mediator or family therapist. We also have the same situation that the Romans had: a drastic increase in the divorce rate due to the same reasons. Our freedom to leave a marriage is now known as “no fault” laws and our courts still require a separation period (although the six months required in California greatly differs from the three days in Rome). For these similarities, we need to take history into account and consider the fact that a divorce epidemic has been seen before, in history. What can we learn from the Romans regarding children, marriage and divorce, and how can we use that knowledge to reform our current situation?

Rewriting History: What the Romans Have Taught Us

They say history repeats itself, and in this case, it most definitely has. What can we possibly learn from the Romans? First and foremost, our view of marriage, children and divorce needs to be more focused on the family and not the individual’s needs. The Romans would be appalled to find out that we try to make a good name for *ourselves*, not our family. With this in mind, we must revamp the way that we think about marriage. We should think of it as the Romans did—a partnership that involves role taking, dedication and, occasionally, sacrifice. The contract is about the children, and the relationship is about love. We can have relationships without a

If we really believe that marriage is a binding legal contract, then we need to make some drastic changes.

contract, but since children have no voice in a marriage we should have a contract for their sake. Divorce is a long process that forces people to think it through. This is best for couples with children; those without should be freer to leave their relationship. That’s where we differ from the Romans: we have marriage for us, not for our children.

If we really believe that marriage is a binding legal contract, then we need to make some drastic changes. No one should enter a contract that fails to explain the penalties following the breach of that contract. We should hold people more responsible for maintaining their contract by giving them an option of how many years they agree to be in the marriage. Legal issues following divorce are becoming extravagantly expensive and complicated. For the sake of conserving resources, we need to find ways to make the divorce process, but not the act of divorcing, simpler.

Most importantly, we need to reassert the importance of family. Because of our individualistic outlook, we tend to think that if everyone acted in his or her own self-interest, everyone would turn

out O.K. But children cannot watch out for themselves because they lack the resources, both physically and emotionally. A picturesque Roman woman named Cornelia was once asked by a friend what her favorite jewel was. She gathered her children and said, “these are my greatest treasures (Devore, 2009).” The Romans believed in family over everything else, and I fear that we have lost sight of what family means to us.

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“Personal and Professional Evolution”

By Russell Gerrard

Several weeks ago I had a sleep-deprived night, as my five-year-old son awoke several times during the night. He complained about a pain in his leg, but I could not see any outward evidence of an injury. I was frustrated that I could not identify the source of his pain in order to seek some means of relief. As I spoke with my wife about it the next morning, she immediately diagnosed it as growing pains. I had never even considered growing pains because I couldn't remember ever having experienced them myself. However, I have experienced emotional growing pains during my own personal and professional growth over the last decade.

I found ACR after learning about mediation in an undergraduate course. It didn't take long for me to decide to abandon my preparations for law school and to pursue a graduate degree in Conflict Analysis and Resolution instead. Although I highly respect all of my attorney friends and colleagues, I recognized that my already directive personality didn't need any more help. I felt strongly that I needed to develop the soft skills of a good mediator—like empathic listening and self-awareness.

Like many mediators, I began by attending a 40-hour training in basic mediation. Then, I volunteered in the local court system to gain experience. I was hungry for knowledge and opportunities to develop the skills



Russell Gerrard founded Gerrard Mediation in 2003. He received a bachelor's degree in Communication and Political Science from the University of Utah, and studied in the master's program on Conflict Analysis and Resolution at Antioch College, and in the master's program of Nova Southeastern University. He spent two years (1995–1997) in Cote d'Ivoire (Ivory Coast) as a Christian missionary. In 2006, along with Shirley Pappin, he co-founded CR Technologies (CRT), which develops, markets, and supports web-based applications for conflict management professionals.

that I was taught in mediator training. I connected with ACR the year after the merger when I attended a national conference. At the conference, I learned about graduate programs in the field and met many long-time practitioners, many of whom were so willing to share their stories with me and to answer my questions. I returned from the conference feeling full of optimism, and I started my own mediation practice. I joined several Sections to learn more about areas of practice that interested me. That was the beginning of my path as a practitioner.

In October, I will attend my eighth ACR annual conference, which members of the conference committee excitedly tell me will be the best conference yet. I have completed my graduate studies and have worked hard to establish a regular clientele for my practice. But, most of all, I have developed many rewarding professional and personal relationships with peers in the field.

Over the last 10 years, I have

learned more about myself than I ever imagined I could learn. Through spiritual practices, like those learned at the Rocky Mountain Retreat and the Global Negotiation Insight Initiative Institute, I have learned to be more aware of myself in conflict. This newfound awareness has been very humbling to a person so accustomed to being in control. I have become more aware of the way that I affect others, whether they are my own family or my clients. All aspects of my life have become sweeter – not because I have gained more control, but because I have become more conscious. I am a better husband, father, brother, son, friend, mediator, presenter, church member, neighbor, employee and employer than I was 10 years ago. Humility and humanity are responsible for the most rewarding changes in my life. I pay great homage to the practice, the theory, and to the teachers and practitioners of this field for helping me to achieve what I only hoped

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Certification Update

By Stephen K. Erickson

The ACR Certification Task Force Report to the Board, authored primarily by Nancy Gardner, is similar for ACR to what we recently have been hearing about the anniversary of the moon landing—a “giant leap forward.” The report is not yet ready for public distribution, but here are the high points:

- a) The report sets forth a clear and achievable plan for making into a reality certification in one practice area.
- b) The report focuses on divorce mediation practice and builds upon the measuring rods of competency that are found in the Family Section’s Advanced Practitioner credential by “...providing a higher professional standard that is valid, reliable, and defensible. The standard will be attained by mechanisms that assess knowledge and performance-based mediation skills.” A primary goal of the task force is to develop a “model-neutral” assessment process that will put more emphasis on the core principles of mediation that are universally recognized and that differentiate mediation from other ADR processes, such as client self-determination.
- c) The ACR Divorce Mediation Certification Program is unique when compared to other credentialing programs in that:
 - i. It is the first of its kind in the USA to test competency.
 - ii. It will provide the Model Standards for Mediator Certification.



Stephen K. Erickson, J.D., currently co-chairs ACR’s Taskforce on Mediator Certification and was a co-founder and second president of the Academy of Family Mediators. He is well-known as a mediation trainer and speaker and has published numerous articles and books on the subject of mediation. In 1996, he and his partner, Marilyn McKnight, were awarded the Distinguished Mediator Award by the Academy for their outstanding contributions to the field of mediation. Steve finished his three-year term as board member of ACR in 2005 when he co-chaired the original Certification Taskforce with Marilyn McKnight.

- iii. It will establish best practices of the profession.
- iv. The intention is for it to become the national model of divorce mediation certification.
- v. It will establish accountability of divorce mediators, in part, through the creation and refining of a Code of Ethics for Certified Divorce Mediators by updating the existing Standards of Practice for Family Mediators—to be submitted for approval by Spring 2010.
- vi. It will enhance the credibility of Divorce Mediators.
- vii. It will be the first credentialing program that requires demonstrated knowledge of the specific laws of each region where practiced.

Our hope is that, through a certification program, the public will be protected from those practitioners who use the word “mediation” loosely and inappropriately to describe what they do. The public should be able to be more informed in their choices. While neutrality and competency cannot always be assured

by certification, the intention of the task force is to insist that knowledge of standards and ethics become a key aspect of the competency-based testing, as well as an integral part of keeping one’s certification status.

One of the goals of divorce mediator certification is to create model-neutral skills and knowledge that follows a learning model rather than a simple pass/fail test. I contend that the certification process is dynamic and not just a pass/fail, static measuring rod to serve as a gate-keeper for the profession of mediation. The intention is to upgrade the knowledge and competence of professional mediators, as well as to promote ongoing mediator education within the field at large, through the continual use of the certification process. It is also anticipated that subsequent certification programs in other areas of mediation practice will follow. At this stage, we are working on a three-phase approach.

Phase One, to be completed by the end of 2009, calls for

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“Hard Times”

By Chip Rose, J.D.

“Hard Times”

*“’tis a song... a sigh of the weary,
hard times... hard times come again
no more, many days you have
lingered around my cabin door,
oh... hard times come again no
more”*

From the scratchy harmonies of the first wax cylinder recording in 1905 to the plaintiff song in the current album, *Appalachian Journey*, by the collaboration of James Taylor, Yo-Yo Ma, and Mark O’Connor, there is a hauntingly melancholic nature to Stephen Foster’s 1854 empathic ode to the downtrodden. For a song that is a century and a half old, it seems all too contemporary in the first decade of the 21st century. The economic foreshadowing that was the tech bubble bust and the sobering of the post 9/11 economy were not powerful enough brakes to stop the runaway train of our national economy from its descent into this depressing recession. Working in the middle of family crises, mediators have no escape from the grim realities shouldered by our clients.

Challenges abound. Couples that are becoming estranged in their marriages or domestic partnerships are reporting the stress of their current financial circumstances to be an accelerant that only fuels the fires of friction and discontent. There are not too many events more critical and more devastating



Chip Rose, J.D., has a private mediation practice in Santa Cruz, CA, and is currently providing training throughout the United States and Canada on the emerging practice of collaborative family law.

than the loss of one’s job. With unemployment reaching 10% nationally and spiking higher still, regionally, there are very few people who are not touched by this phenomenon, one way or another. For family mediators, this presents the dilemma of clients who cannot tolerate living together and who cannot afford to move apart.

A frequent consequence of the loss of employment is the loss of the family residence. The number of clients I have had this year who are faced with staggering monthly bills that outstrip income or other financial resources is shocking. Cases in which bankruptcy, short sale, or foreclosure are the only options for the disposition of the family residence have multiplied at a staggering rate. The damaging fallout that radiates from this kind of core event is compounded for a family in which the relationship of the partners is disintegrating at the same time. The inability to retain the family residence presages the inability to afford two separate residences, regardless of how compelling the emotional and psychological need may be. The

tension that results from this forced companionship likely exceeds the capacity of the individuals to deal with it.

In the face of such desperate circumstances, what’s a mediator to do? In one respect, the integrity of a sound process approach helps frame an answer. Clients bring to the table what is for them a confounding set of problems and a finite set of resources with which address those problems. The idea that the legal system holds meaningful and predictable solutions to these types of domestic problems is one of the great myths of our culture. However, this is not to say that the legal system does not have helpful models for specific solutions to certain issues. While the system can serve as a model for resolution of a specific issue, it cannot predict the aggregate outcome of the totality of the problems. Since we know that engaging in a competitive, adversarial process, such as litigation, creates the circumstances to produce the worst possible outcome, we can help clients see

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Certification Update

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identification of competent knowledge and performance skills of mediators. This will result in finally establishing common understandings of what competent mediation practitioners do each day; this will serve as a baseline of good practices. At the same time, we will develop, for broad distribution and discourse, a draft set of Model Standards for Mediator Certification.

Phase Two calls for consultation with test design organizations and agreement as to steps to take for implementing and maintaining the ongoing operations of the program, and to obtain funding.

The rubber hits the road in **Phase Three**. A team of top-caliber people are working on determining methods

of assessing competency and establishing requirements for training, as well as exploring multiple gateways for satisfying certification requirements. Susanne Terry, Chris Hickey, Paula Trout, Nancy Gardner, Marilyn McKnight, Christine Packard, Lou Gieszl and Ramona Buck will meet in Vermont in August, 2009 to move the process forward and to collaborate on drafting Model Standards for Mediator Certification. Concurrently, Pascal Comvalius, an ACR member in Holland, and I will spearhead the work on revising and updating standards and developing a code of ethics. There also will be an Implementation Team, an Administration and Operations Team and a Marketing Team.

We are well beyond the talking stage. However, there remains much work to do in order to realize the goal of certification for Family Mediators. An independent corporation will need to be formed to administer the certification program. Money will need to be raised, a business plan and a marketing plan are in progress, and eventually, the ACR Board of Directors has to approve the final plan. I will try to keep you informed in future issues of *Family Mediation News*. Please send your comments and ideas to me at: steve@ericksonmediation.com, or to ACR Certification Task Force Co-Chair Nancy Gardner at: ngardner@we-mediate.com

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The Creative Solution

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that engaging in collaborative, interest-based negotiation creates the opportunity for the best possible outcome. "Best," in this context, means best within the limited resources of the clients' circumstances. It is the added value that comes from their willingness to explore and consider the interests, goals and objectives of each other that meaningfully enhances the pool of otherwise limited resources.

Aside from the empathic qualities that a mediator brings to bear, these circumstances require *creativity* and *flexibility*. Creativity begins with offering the clients a communication model that educates them about the benefits of replacing blame and accusations with exploration and communication. At first, it may appear counter-intuitive to clients when asked to shift from

externalizing blame for one's problems onto the partner to engaging in a constructive dialogue with that person in order to solve those problems. It is a process, however, that most clients have some successful experience with in other important areas of their lives, such as in their work setting. A mediator can creatively come up with solutions that are large enough to solve an immediate problem but small enough so as not to create new problems. For example, the mediator can work at obtaining very short-term agreements (e.g. for only a week, for only a month) that allow the parties to commit to solutions in measured steps and that let them control their fear of the unknown future.

Flexibility can come in the form of the services that a mediator offers

in response to client need. The collaborative problem-solving approach of mediation can be offered in any number of affordable and effective quantities. Clients can purchase time in whatever component a flexible mediator is willing to offer—including sub-hour portions of time, if that is all the clients can afford. Restructuring and scaling down the process of divorce mediation, while not optimal for mediators to deliver the highest quality outcome, may allow the clients to acquire the highest quality outcome *that they can afford*, instead. The challenge for the mediator to survive in this current marketplace has, once again, made necessary the mother of invention, at least until "...*hard times come again no more.*"

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Ethical Dilemmas: What Would You Do?

By Clarence Cramer

New Summer 2009 Dilemma

While vacationing, Eve received a call from her office manager, Joe, who related to Eve that a complaint was filed with her licensing board concerning the Armstrong case. Eve was expected to file an initial response to the complaint within 20 days. With this information, Eve decided it best to end her vacation early to deal with the matter.

Upon reviewing the Armstrong file, Eve remembered that the husband, Lou Armstrong, became quite upset during the last and final mediation session, expressing a strong belief that Eve was siding with his wife, Grace, in reference to the spousal support issue. Eve believed that the issue had been mutually resolved when each party agreed to an amount of spousal support that Lou would pay to Grace for a certain period of time following the divorce. Apparently, Lou was not satisfied, as he filed the complaint against Eve.

Upon reviewing the complaint and discussing it with her lawyer, Eve learned that, due to the convoluted information provided during the mediation, it would be necessary to reveal confidential information pertaining to both parties in order to adequately respond to the complaint. Eve's lawyer advised her it would be in her best interest to have the written



Clarence Cramer is Chair of the Family Section Ethics Committee and former Director of Family Services of the Conciliation Court in Coolidge, Arizona. He can be reached at: mediator2@cox.net

What would you do?
Please e-mail your response
to Clarence Cramer at:
mediator2@cox.net or mail
it to 561 W. Spur Avenue,
Gilbert, AZ 85233. Please
include your name
and address.

consent of each party prior to releasing information to the licensing board.

As it turned out, Grace's lawyer advised Grace not to consent, as the lawyer believed it would weaken her divorce case should Lou later use the information in court. Grace refused to sign a release of information.

At the suggestion of her lawyer, Eve consulted with Jerry, a faculty member at the state college, who taught mediation and negotiation classes. During the consultation,

Jerry inquired as to the content of Eve's written agreement to mediate. After discussion, Jerry learned that, although Eve's agreement contained the standard limits of confidentiality (i.e. mandatory reporting, threats, child and elder abuse and the like), it did not contain a limit to confidentiality regarding the complaint process. Jerry stated he could not help her with this matter but suggested that Eve include a statement that would cover this matter in future mediations. Jerry provided Eve with a sample statement that read:

Should any complaint against the mediator(s) arise as a result of the mediation subsequent to this contract, confidentiality is waived with respect to that information necessary to present or defend against such a complaint.

Eve was grateful and thanked Jerry but was now unsure about how to proceed with the complaint process.

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Ethical Dilemmas

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What would you do?

Please e-mail your response now to Clarence Cramer at: mediator2@cox.net or mail it to 561 W. Spur Ave. Gilbert, AZ 85233. Please include your name and address.

Spring 2009 Dilemma – The Facts (reprinted here):

What would you do in the following situation?

Paul, a private mediator who is on the court referral list, was mediating a court-referred case of never-married parents in an attempt to come up with a parenting plan. During the mediation, the mother stated that she feared the father would flee the country with the children, as he is not in the United States legally, and he has family in Mexico. The father denied that he would ever do such a thing and stated that the mother threatened to report him to the immigration authorities and have him deported. Paul believed he could proceed no further and requested that the parties return in two weeks for another session. Paul explained to them that he would staff the case with the mediation supervisor who is employed by the court, which is his usual practice in difficult cases.

Paul contacted the supervisor, Barbara, and explained the perceived impasse. When Paul mentioned that the father was perhaps an illegal alien, Barbara stated that he would need to report that to the court. Barbara further explained that the presiding judge was up for re-election and that politics was causing him to take a hard stand on the illegal immigration matters. Barbara reminded Paul that when he

agreed to be placed on the court referral list he, among other things, signed an agreement that he would be bound by the ACR Standards of Practice for Family and Divorce Mediators, and, in addition, he would report to the court any illegal activities or crimes alleged by any clients. Barbara stated, matter-of-factly, that he would need to declare an impasse and submit a written report to the judge regarding the father's alleged immigration status. Paul explained that this was unfair to the clients and would not help their children or their parenting situation. Paul did not want to report it to the judge. What would you do?

READERS' RESPONSES TO SPRING 2009 DILEMMA

Dear Mr. Cramer,

Your "Ethical Dilemmas" is the first thing I read in each issue of FMN. I enjoy the fact that there is an ethical dilemma to challenge me with "What would I do if I were in this situation?"

Your Spring 2009 dilemma is a blend of different rules and obligations. It appears that Paul signed an agreement with the court to accept court-referred mediations, and that signed agreement obligated him to abide by the Model Standards of Practice for Family Mediators and also abide by the rules set by the court. I believe that since Paul agreed to follow the mediation rules set down by the court, he is bound by those rules, as well as by the ACR Model Standards.

Standard VII.B of the Model Standards of Practice for Family

Mediators requires that the mediator "should inform the participants of the limits of confidentiality such as statutory, judicially or ethically mandated reporting." Paul is bound by this standard, which also binds him to the judicial requirement that he report to the court any illegal activities or crimes alleged by any clients. I do not have a copy of the court's mediation agreement that the clients presumably signed prior to the mediation but I have to assume that the agreement did state the limits of confidentiality in mediation.

Paul is probably correct that, in this instance, such reporting would not help the parents work out a parenting plan for their children. The issue of the judge's politics is irrelevant to what Paul must do, which is to report as required, or resign as court-approved mediator.

Thanks for taking the time to confound us ethically each quarter.

Best regards,

Frances Hayward, J.D.

Newport Beach, CA

fhaywardmediator@cox.net

Changing Lenses

In this situation, both mediators need to change their lenses and widen their views, because their biases and attitudes impeded their ability to mediate effectively. Mediators could facilitate the possibility of change by having an open and insightful perspective, which in turn could potentially reduce decisions made in prejudice or fear.

Perhaps if the mediators, Paul and Barbara, had asked more questions,

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By Steve Sovern

Steve Erickson is making an excellent contribution to the discussion on mediator certification. I told him so after his piece in the Winter 2009 issue of *Family Mediation News (FMN)*. Part 2 of his article in the Spring 2009 issue continues to raise important points. Yet, his closing reference to what a Transformative mediator might say to a client shows a woeful lack of understanding of the model. Here is the excerpt:

And, by crazy, I am referring to instances such as when a Transformative mediator says to clients (after taking their money for services as a mediator), 'I will not draft a memorandum of your decisions, as that might be considered too directive, and I am rather more interested in helping you achieve empowerment through acknowledgement and recognition.'

First, in the interest of full disclosure, I consider myself as a mediator practicing in what I have come to call the "Elicitive" model rather than the Transformative model. I won't take a lot of space here to explain why I use the term "Elicitive", yet, that may be worth mentioning. For me, and for some other Transformative mediation practitioners, using the term "Transformative" apparently implies too much of what the model is not. This could well lead to misunderstandings, the likes of which Steve Erickson's comments propagate. The model does not presume to transform people, yet, some erroneously conclude that this is the goal of Transformative mediation. Not true. The term

"Transformative" is intended to convey the model's central purpose, which is to help parties in conflict transform their interactions from negative and destructive to positive and constructive so that they become more capable of solving their problems and making clear decisions about their future.

Elicitive, I believe, is a term which correlates more readily to the descriptive terms, "Directive" and "Facilitative." Simply said, *Directive* mediators direct process, *Facilitative* mediators facilitate process and *Elicitive* mediators elicit process. The differences between Directive mediation and both Facilitative and Elicitive mediation are quite dramatic, in my view. The differences between Facilitative and Elicitive (yes, Transformative) mediation can be seen as more subtle, in comparison. A major difference, as I see it, is that Facilitative mediators generally follow a more linear or "stage" process. Elicitive mediators believe that, since the distinction between process and substance can be murky, the mediation process itself will become more effective if elicited, to a great degree, from participants. So, as a result of party input to process, Elicitive/ Transformative mediation may appear more non-linear and often serpentine.

All three models involve problem-solving. As an Elicitive mediator, I simply believe that the more I focus on the parties' interaction and process steps that they find most helpful, the more apt they are to solve the problems they define and, often, redefine in the course of

mediation. On the other hand, the more I focus on my fallible understanding of their problem, the more likely I am to divert them from their attention to and discovery of the actual matters of their conflict. I certainly don't hold out my chosen approach to be in any way superior to others. It happens to fit my beliefs about parties in conflict and their wisdom in generating authentic resolution.

Now to my issue with Steve Erickson's sideswipe of Transformative mediation in *FMN*. While any mediator might say or do things that any of us might see as crazy and nonsensical, to posit that a "Transformative mediator says to clients (after taking their money for services as a mediator), 'I will not draft a memorandum of your decisions, as that might be considered too Directive, and I am rather more interested in helping you achieve empowerment through acknowledgement and recognition'" is to unambiguously imply that a Transformative mediator is likely to make such a bizarre and outrageous statement. Frankly, it even suggests that Steve Erickson may hold such a misdirected view of the model. While I truly find that hard to believe, I am not able to conjure an alternative explanation.

I believe that Steve's comments are a not so oblique attack on colleagues who practice with the Elicitive/Transformative approach. I also believe that they deserve an adjustment. Such an observation from a member or contributor is one

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Editors Notes

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with conclusions that have a very fresh slant. Then, after being uplifted by the message from our Family Section Chair, Russell Gerrard, you can read Steve Erickson's third-in-a-row contribution, an update on the progress of Mediator Certification efforts. Chip Rose's "Creative Solution" this time explores the economic hard times that we are in and how mediators must be especially creative in helping divorcing clients come up with options they can actually afford. Clarence Cramer's "Ethical Dilemma" in this issue involves a mediator whose client files a complaint against her license and the resulting issues that arise over the limits to confidentiality regarding a complaint process that should have been in her written agreement to mediate. Clarence also presents several reader responses to his Spring 2009 ethical dilemma. Last, we have a pithy letter to the editor by Steve Sovern in response to Steve Erickson's alleged mischaracterization of Transformative Mediation in his last Certification article. **FMN**

I leave you with this quote:

"He who knows only his own side of the case knows little of that."

—John Stuart Mill

Enjoy,
Don Saposnek
Editor
Family Mediation News

From the Family Chair

Continued from page 7

was possible when I changed my course of study many years ago.

My experience is only my own. It has required, and will continue to require, significant sacrifices that I consider to be my growing pains. I believe in what we all do as family practitioners. The changes that I see in my own life are reflections of the changes that I try to help my clients and colleagues make, if willing.

As the 9th ACR annual conference approaches in October, I encourage as many Family Section members to attend as can afford to do so. I yearn for the opportunity to meet and interact with each of you. I am still hungry for opportunities to learn from you and your experiences. I have always valued the conference workshops and the acquaintances I have made at the conference.

Many of my favorite peers and mentors are those with whom I serve on the Family Section Advisory Council. I encourage all of you to become involved on the committees of the Family Section. You will work with terrific colleagues in the field and provide rewarding services to your peers in the Family Section.

If you have read this far, then I thank you for indulging my personal feelings about our people and our work. Please join us in taking the field forward together.

FMN

Ethical Dilemmas

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they could then have tailored clauses to the agreement that would have addressed the concerns of both parents and child(ren). It is not our responsibility to judge our clients' legal resident status, but rather to create a safe zone for dialogue. Mediators must not be afraid to discuss issues that are important and relevant to their clients. Agreements can address prevention and detail appropriate parameters that protect children from a parental abduction.

Knowledge is a powerful tool. In this token, most parental abductions (in the USA and in Canada) are carried out by citizens (and legal residents) of the USA and Canada.

Mary Damianakis
Quebec, Canada
mediation@gmail.com

Letters

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thing, but from a recognized leader in our profession and current co-chair of ACR's Taskforce on Mediator Certification, quite another.

So long as the individual standards of self-determination, impartiality, conflicts of interest, competence and all the rest are met, we must respect each other's differences as practitioners. Moreover, we should consider celebrating those differences as a way of providing choice to our clients. This can only enhance what I believe to be the most essential standard of all – party self-determination. **FMN**

Steve Sovern
Cedar Rapids, Iowa
sovern@mediate.com

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