

family

FALL 2005

MEDIATION news

*A Publication of the Association for Conflict Resolution
a Professional Organization Dedicated to
Enhancing the Practice and Public
Understanding of Conflict Resolution*

THE QUARTERLY NEWSLETTER OF THE FAMILY SECTION

Feature Article

From the New Family Chair: Susan Edwards

A funny thing happened on the way to the Exhibitors' Reception at the ACR Annual Conference in Minneapolis, MN in September. I moved from being Family Section Chair-Elect to Chair in what seemed like a time warp. I aged the usual year in about 10 minutes. (Please see Clarence Cramer's article on page 4 to find out how this happened.)

As a way of introduction, perhaps you would like to know a little about who I am. In my previous life, I did things like social work, counseling, and drug and alcohol evaluation, as well as some administrative assistant office work. I have been a family lawyer since 1980, and I have been doing family mediations since 1993. I find myself loving it more each day. In order to get my practice off the ground, I volunteered for untold numbers of hours for the Philadelphia County custody court. I learned a lot, made



Susan Edwards has been a family law attorney in practice since 1979 and a family mediator since 1993. She is also a member of a local Collaborative Family Law Affiliate, does negotiation and mediation training, and is a conference presenter on ADR and family mediation.

a contribution and regret not one minute of the billable time I gave away. I also do negotiation, peer mediation and family mediation training. I increasingly love it. What I look forward to each year is giving to the Project Peace and teaching conflict management to local fourth graders.

For the past year, I have been Membership Chair of the Family Section. As such, I have had the genuine pleasure of working with and getting to know the terrific folks who make up the Membership Committee and the Advisory

Council, as well as many of the Section members. I have learned to appreciate their achievements and contributions as well as the greater potential of this organization.

So here I am. Now what?

I have been given this unique opportunity, for mediation and for mediators, to try to advance some ideas I care about— getting the word out about mediation and

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Association for Conflict Resolution (a merged organization of AFM, CREnet and SPIDR)
1015 18th Street, NW, Suite 1150, Washington, DC 20036
Phone: 202-464-9700 Fax: 202-464-9720
www.ACRnet.org

ASSOCIATION FOR CONFLICT RESOLUTION

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AFM, CREnet and SPIDR*

1015 18th St., NW
Suite 1150
Washington, DC 20036
202-464-9700
202-464-9720 (fax)
www.ACRnet.org

EDITORIAL STAFF

Publisher

*Association for
Conflict Resolution*

Editor

Don Saposnek

Family Section Chair

Susan Edwards

Columnists

*Clarence Cramer
Chip Rose*

Contributors

*Clarence Cramer
Barbara Landau
Susan Zaidel*

ACR Publications Manager

Alison Talbott Durland

About Family Mediation News

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The views expressed in this newsletter are those of the various authors for the purpose of encouraging discussion. Unless expressly noted, they do not reflect the formal policy, nor necessarily the views, of the Association for Conflict Resolution.

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news

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FALL 2005

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Family Section 2004–2005 Advisory Council

Susan Edwards, *Family Section Chair*,
svemediates@comcast.net

Clarence Cramer, *Ethics Committee Chair*,
Clarence.Cramer@co.pinal.az.us

Julie Denny, *Secretary and Publications Chair*,
juliedenny@resolutionsforyou.com

Rebecca T. Magruder, *Past Chair, Budget
Committee Chair, Nominations Committee
Chair*, RTMmediate@sbcglobal.net

Russell Gerrard, *Legislative and Public Policy
Committee Chair*,
russell@gerrardmediation.com

Christy Walker, *Diversity Committee Chair*,
christy_walker@fccourts.org

Paula Trout, *Member-at-Large, ACR Board
Liaison*, pjtroutmlm@aol.com

Steve Abel, *Conference Committee Co-Chair*,
sabel@igc.org

Ken Neumann, *Conference Committee Co-
Chair*, kenneumann@juno.com

Mary Ann Lawson, *Training Chair*,
malawsc@juno.com

Don Saposnek, *Family Mediation News Editor*,
Ex-officio member, dsaposnek@mediate.com

EDITOR'S NOTES

Dear Readers:
It was not that long ago that Robert Benjamin implored us to deal with our own conflicts. He pointed out the irony of an association of conflict resolvers having trouble with its own conflicts. There are two levels of conflicts in our field that may need resolving: 1) conflicts that are the ordinary stuff of the politics of any decision-making organization such as ACR, and 2) conflicts having to do with the structure, process and turf-battles about the 'correct' ways of doing our work.

Within this issue of Family Mediation News are the latter kinds of conflicts. In two independently submitted articles, Barbara Landau and Chip Rose discuss stimulating issues that continue to arise over the often testy relationship between Family Mediation and Collaborative Divorce. Chip, being the eternally optimistic mediator that he is, continues to see the complementarity of these two seminal approaches and points out the many ways in which they are 'non-rivalrous siblings.' Barbara takes the relationship further by innovatively proposing a blend of



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.

the two approaches—to create Collaborative Mediation—but then presents the resistance in the field to this blend. Is such resistance a healthy and natural growing pain of innovation, or a serious obstacle that will just further exacerbate unnecessary turf battles? As Clarence would ask, "What Would You Do" with this proposal?

Speaking of Clarence, his Ethical Dilemma column this issue has to do with whether the ends justify questionable means when co-mediators work from incompatible values around individual caucusing. And, he also has several interesting responses to his dilemma from the Summer 2005 issue of FMN.

And speaking of Clarence's personal dilemmas, he presents us with his real-life dilemma concerning his decision to resign as the incoming Family Section Chair.

Read the details within.

And speaking of the Family Section Chair, we have a new one now—Susan Edwards, who graciously stepped up to the plate as Clarence ran to first base. So, Susan replaces our previous Chair, Becky Magruder, whose last "From the Family Chair" article provoked a thoughtful piece herein by Susan Zeidel. Susan Z. questions whether perseverance of our efforts is always the best thing in a case. She challenges the unfettered optimism of Becky M. and Larry Fong in their strong and emotional pleas for us to persevere to the end in each case. Wait! This is beginning to sound like a soap opera!

Enjoy,

Don Saposnek
Editor

Call for Submissions to Family Mediation

You are invited to submit content (and accompanying graphics) to the newsletter in the form of unpublished articles, general interest columns, news updates, Section news, calendar information and letters to the editor.

Submission Procedures

Please submit unpublished articles that provide pertinent and engaging information, research results, practitioner tips, and/or examples of programmatic success in the area of family mediation. The editor will review submissions on a rolling basis and will recommend for publication those entries that provide fresh ideas and perspectives. The author will be asked to provide a photo to accompany the article, preferably via

email. Authors will also be asked to sign a Permission to Publish agreement.

News updates, Section information, calendar information, and letters to the editor are also welcome. All submissions should be emailed with complete contact information (name, address, phone, fax, email, professional affiliations) to Don Saposnek at dsaposnek@mediate.com.

SPECIAL ANNOUNCEMENT

My Resignation as Family Section Chair-Elect

by Clarence Cramer

As the “Ethical Dilemmas” columnist for Family Mediation News, I found myself in a “What Would You Do?” situation after the most recent ACR Board of Directors election. Entering into that election, I was the Chair-Elect of the Family Section Advisory Council, ready to take over the one-year term as Chair on Friday, September 30, 2005, at the ACR Annual Conference in Minneapolis. Then, as the Chair of the Family Section, I would be responsible for committee structure, policies and procedures, leadership, membership and general Section issues.

However, I was also elected to the ACR Board of Directors as the Sections Director for a three-year term. According to ACR, the Sections Director shall be the designated ‘point of contact’ between the Board and the members and leaders of ACR’s Sections and shall act as liaison between ACR and its Sections.

Being that one of the duties of the Sections Director is to act as an ‘advocate’ for all the sections of the ACR, this did create a problem for me; in the least, there would be the appearance of a conflict of interest if I was to assume both positions. So, after asking myself, “What Would I Do?”

I decided it was in the best interests of all not to move into the Family Section Chair position. It is



Clarence Cramer is Chair of the Family Section Ethics Committee, and Director of Family Services of the Conciliation Court in Coolidge, Arizona. He can be reached at: mediator@co.pinal.az.us

I decided it was in the best interests of all not to move into the Family Section Chair position. It is my belief that I can better serve ACR by accepting the Sections Director position on the ACR Board of Directors.

my belief that I can better serve ACR by accepting the Sections Director position on the ACR Board of Directors.

My decision not to move into the Chair of the Family Section position did create a bit of a last minute crisis. Who, at this very late juncture, would be willing to step into that role? Normally, the Chair-Elect has a year of preparation before assuming the position. Not this time.

However, when told of the crisis, Susan Edwards, who was slated to become the new Family Section Chair in one year’s time, agreed to accept the position of Chair without blinking an eye. In my mind, to accept that role without any transition or preparation is pure dedication.

And the immediate past Chair, Rebecca Magruder, who toiled endlessly this past year, agreed to help Susan. If that isn’t loyalty and devotion on both their parts, then I don’t know what is.

In summary, Family Section members can rest assured that they are in good hands with Susan Edwards, and that the leadership is competent, committed and ready to lead in a moment’s notice. All I can say is that I am very thankful and grateful for the dedication of the Family Section membership, especially the Advisory Council members. Otherwise, “What would I do?” *FMN*

From the Family Chair

Continued from page 1

For the past year, I have been Membership Chair of the Family Section. As such, I have had the genuine pleasure of working with and getting to know the terrific folks who make up the Membership Committee and the Advisory Council, as well as many of the Section members. I have learned to appreciate their achievements and contributions as well as the greater potential of this organization.

helping mediators improve themselves and the practice of mediation.

As members of ACR's Family Section, our particular shared interest is families and their conflicts. Mostly, however, we do not see families until they have fallen apart and are in danger of being sucked down the vortex of the adversarial process.

Of course, that does not mean it is too late to help the family move into its new, albeit divided, form as gracefully as possible. And, maybe

in the process we can help our clients learn new ways to resolve their disputes. Through our practices, we can teach one disputing family at a time that differences do not have to result in open warfare. (I have often thought of offering divorcing clients in the initial consultation a box of popcorn and a copy of the movie *War of the Roses*.)

Mediating relies heavily on referrals and word-of-mouth. Competent mediators make for happy clients. Happy clients spread the word (as do unhappy ones!). Providing a good service benefits our clients, our organization and our profession.

I would like us to encourage our members to strive for the high standards we expect of Advanced Practitioners. And, I would like to see benefits for our APs that appropriately acknowledge their hard work and their contributions to our profession and to society in general.

ACR is a big organization. It is made up of knowledgeable and committed practitioners of peaceful conflict resolution. Among those individuals are many who care enough about making their world a more peaceful place to volunteer their time to spread the word to the public. My goal is to bridle our passion, our energy and the size of ACR to get the word out about the work we do. As mediators, and members of society, we will all benefit. Please let me know your ideas.

When Becky Magruder handed me the traditional ceremonial talking stick, I felt very proud and honored, beyond words. I treasure the trust that came along with it. However, I recognize that I am new

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at this and will have growing pains as I try to fit myself into this job. I will be grateful for your patience and even more grateful for your help. Please let me know how you would like to see the ACR Family Section shaped. I know that every new Committee or Section Chair in every organization says this. I do not promise that I will be perfect. I do promise that I will try.

I believe that it is important for us to take our work, not ourselves, seriously. It is OK to have some fun. By the way, one of the fun things about ACR is working with other committee members via email and phone calls and then meeting them face-to-face at conferences. (And, I have to say that the Family Section has the best receptions at ACR annual conferences!)

To launch our new year, we will soon be offering brochures for sale designed for referral sources and for consumers. Keep watching the Family Section website for more information. And, thank you for allowing me the privilege of being your Chair. I hope I earn your trust.

FMN

FEATURE

When to Give Up and When to Persevere

by Susan Zaidel

After reading Becky Magruder's article, "From the Family Chair: Inspiration and Gratitude" in *Family Mediation News* (Summer 2005), I was left wondering just how good a mediator I am. In her article, Becky referred to performing "magic" and persevering "when all the other professionals may want to throw in the towel." I began to question whether I "throw in the towel" prematurely. Not that this was the first time I questioned my skills as a mediator, or confronted myself with the question, "What could I have done that would have resulted in a better outcome?" I have always been impressed by the success of one of my attorney-mediator colleagues, whose stubborn determination appears to be an important factor in her success with difficult mediations of both family and commercial disputes. Am I less effective as a mediator because of my training and experience as a therapist?

Undoubtedly, my tendency to "give up" and not urge clients to continue the mediation stems from my professional background as a psychologist and therapist. Clients who do not truly want to work on their problems will not remain in therapy, or will not "improve" even if they continue to come. The element of client motivation is a critical factor in successful psychotherapy and in marital counseling as well. Therapists do not perform magic—nor do they claim to. In fact, at the onset of



Susan Zaidel, Ph.D. is a clinical psychologist and divorce mediator in private practice in Haifa, Israel. She recently published the second edition of her second book about divorce mediation (in Hebrew). The name translated from Hebrew is *Divorce and Remain Friends*, but the official English title printed on the inside of the book is *How to Get an Amicable Divorce: Handbook of Divorce Mediation*. She can be reached at susan.zaidel@bezeqint.net.

marital therapy, I often tell clients that I do not have a magic wand and I will not be able to transform them into the ideal couple. I am generally rather modest about my ability to make major changes in the personality of one or both of them or to provide them with different in-laws. Nevertheless, I offer to do my best to improve their situation and point out that they are the ones who will have to do the hardest work.

Nineteen years ago, I flew to New York for mediation training with John Haynes and began to offer divorce mediation as part of my private practice. The couples who came to me for mediation at that time were the "cream of the crop" of the divorcing population—the rare couples who had heard about the mediation option and wanted to avoid an adversarial divorce. There was no need to perform magic—only to guide and facilitate discussions among spouses who wanted to get through the divorce with minimal damage to their children and with minimal financial and emotional cost to themselves.

During the past decade, more

difficult cases have been arriving in mediators' offices as mediation became more widely known and the courts, or individual judges, began referring some cases to mediators in the private sector. With these cases, the success rate has been much lower. The clients themselves are not interested in resolving the conflicts in "a mutually satisfactory" way, and more often than not, the attorneys involved are not interested in resolving the issues in mediation. I doubt that anyone's magic, or the most hopeful optimism, would have made any difference.

In her article, Becky quoted Larry Fong as having said, "My clients may give up on me, but I never give up on them" and went on to express her relief that she was not the only mediator who is willing to hang in there with clients when there appears to be no hope, after having tried all the tricks in her bag. I was left wondering if "giving up" is the mark of a mediocre mediator who may be doing a disservice to her clients, or whether "giving up" is

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When to Give Up and When to Persevere

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out of respect for client self-determination and for the client's assessment of his alternatives. I do not mean to belittle Larry's or Becky's remarks or beliefs—I have great respect for both of them—only to question whether I should use their standard of mediator behavior to evaluate my own performance as a mediator. When is it prudent to “throw in the towel” and when is it premature?

For one thing, the issue of mediator perseverance must be placed in context. Are the clients paying for the mediation or is it a free service? In the context of an unlimited free service, and one in which there is a mix of therapeutic sessions with the separate parties alongside the mediated negotiations, the positive outcomes appear to be the result of a lot of hard work and persistence on the part of the therapeutically oriented mediators. For example, the Family Courts in Israel do not offer mediation to all litigants, but social workers in the Courts' Social Service Unit conducts mediation at no cost with selected high-conflict families; there is no time limit regarding number of hours or sessions. The Social Service reports a relatively high degree of success with these difficult cases—much better than when similar cases were referred to private mediators. With the implicit authority of the court in the background, the clients are more likely to remain in mediation as long as the mediator has not given up. The situation is quite different when there is no court pressure to mediate and when the mediation service charges a substantial hourly fee. The same degree of “persistence” on the part of a private mediator may be seen as self-interest of the mediator, since

Client self-determination is an ethical principle that implies respect for the clients' decision-making, including their decision to begin and to terminate mediation.

he is paid for his time regardless of outcome.

Apart from the situational factors alluded to, there remains the question of how the mediator responds when the parties appear determined to remain “miles apart” in spite of all his best mediator interventions. Is it “giving up” on our clients if we stop, or is it recognition of their lack of readiness or willingness to move forward? Experience has shown me that when both spouses want to move forward with a separation, my guidance is sufficient to enable them to achieve their goal. All too often, however, there is at least one party who does not want to divorce, at least one party who is unwilling to pay the financial price (not enough income to support two households) or the parental price (children cannot be simultaneously in two homes) of separation. Ambivalence about separating may be the reason some couples drop out of mediation, as the unofficial status quo (some form of separation without a legal agreement) may be preferable to any final settlement. Some may

eventually return to mediation or process their divorce months or years later, while others will stay together forever. And for others, an adjudicated settlement may be easiest to live with.

Client self-determination is an ethical principle that implies respect for the clients' decision-making, including their decision to begin and to terminate mediation.

After all, participation is on a voluntary basis, and a mediator cannot “stubbornly persist” without some level of involvement on the part of the clients. Therefore, we are really looking at how active the mediator should be in keeping the mediation alive. When a couple reaches an impasse in a mediation session, I schedule no further appointment, leaving the clients time to think things over. When one of the clients phones to cancel the next mediation session, it is clear that at least one of the parties is not interested in continuing. The persistent mediator will be active in phoning each of the parties to clarify how things are going or why one client has cancelled, and will encourage them to make another appointment. A less persistent mediator will be more accepting of the termination and feel that any attempt to convince them to resume mediation would be out of place. Is that “throwing in the towel” or is it being respectful of client self-determination? Am I rationalizing my passivity? Would I respond differently if the mediation I offered were a free service? Becky was referring to her behavior during a mediation session—not a response to client termination but to client obstinacy and impasse. Nevertheless,

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Collaborative Law and Mediation: Adversaries, Bedfellows or Partners?

by Barbara Landau

I am known quite widely as an optimist. I start from a place of trusting others and assuming best intentions. When Collaborative Family Law (CFL) began to take off, I was an instant cheerleader. [Note: For those readers new to this area of practice, Collaborative Law is the approach used by Collaborative Family Lawyers. The special feature of this approach is the presence of a "Collaborative Participation Agreement" which is signed by both parties and both lawyers stating that everyone is committed to a non adversarial process and that no one will go to court. If one or both parties wish(es) to go to court, BOTH lawyers must resign and the clients have to find new counsel. Also, the Collaborative Family Law process consists of a series of four-way meetings in which the lawyers act as co-facilitators to encourage the clients to take a problem-solving approach to the issues in dispute.]

In my role as a mediator, I embraced Collaborative Lawyers as more than "kissing cousins"; I welcomed them as valued immediate family. More recently, I have had reason to question my enthusiasm and become more guarded about whether many Collaborative Lawyers share my vision. I am beginning to believe that Collaborative Lawyers may see themselves as sibling rivals or competitors with mediators for the same clients.

By way of background, I am a



Dr. Barbara Landau, President, Cooperative Solutions, is a psychologist, lawyer and Certified Comprehensive Family Mediator. She is a former Board member of the Academy of Family Mediators and chaired the Domestic Violence and International Committees. In 2003, Barbara received the "Distinguished Mediator Award" from ACR. Barbara offers courses in Family Mediation and Collaborative Practice and is the co-author of the *Family Mediation and Collaborative Practice Handbook*, 2005, Lexis/Nexis. For more information, her website is www.coop-solutions.ca.

psychologist and lawyer who gave up my law practice in 1995 after 15 years and became a full-time mediator and trainer. I am currently a "non-practicing" member of the Law Society and therefore refer my clients to Collaborative Family Lawyers for independent legal advice. Had I known about Collaborative Family Law, I would not have left the practice of law—I would have continued as a mediator and Collaborative Lawyer. Over the past year I referred all my mediation clients to lawyers trained in CFL and no longer accept clients represented by lawyers known affectionately as "barracudas." I enthusiastically embarked on teaching lawyers, mediators, financial analysts and divorce coaches how to practice collaboratively and have modelled this approach with my clients.

Lately, a number of concerns have raised red flags about the potential for a collaborative relationship

between mediators and CFL Lawyers.

Collaborative Lawyers may see CFL as an opportunity to "reclaim" control of clients they have "lost" to mediation. The rationale is that they are in fact "protecting" clients from the risk of a failed mediation, and that any power imbalances are better addressed by having two lawyers present, rather than a mediator.

The CFL field has moved quite quickly to set fairly rigid boundaries as to who can or cannot participate "officially" in a Collaborative process, how to define a "true" Collaborative process, who can join the organization and what the qualifications are for trainers. Mediators and other professionals who have worked cooperatively for decades are finding themselves marginalized in Collaborative processes, even though they have the advantage of years of successful

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Collaborative Law and Mediation: Adversaries, Bedfellows or Partners?

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experience in numerous family cases.

As mediators we have several options for addressing this situation:

Take the "THIS TOO SHALL PASS" approach: Reflect on the fact that the mediation field went through a similar period of establishing its identity and setting somewhat exclusive boundaries, fairly rigid rules as to what was "real" mediation, how the process should be conducted, who could join the mediation organizations, etc.

EXTEND AN OLIVE BRANCH: Invite members of the Collaborative Law community to join with the mediation community as fellow dispute resolution professionals in joint endeavours such as creating a conference, participating in joint trainings, co-presenting plenary sessions and writing articles that reflect cooperation.

WORK TOWARDS A COLLABORATIVE MUTUALLY RESPECTFUL RESOLUTION: Arrange a meeting with representatives of each organization and ask a neutral facilitator, chosen by mutual agreement, to create an agenda and process for discussing sensitive or divisive issues to repair relationships.

DISENGAGE: Both fields go their separate ways, possibly with mediators making less effort to encourage clients to go to lawyers or being wary of involvement with Collaborative Lawyers if they should "take over" or undermine the relationship between the client and the mediator.

COMPETE: Both fields see themselves as rivals for client business. Both advise clients about

options so that clients select EITHER mediators OR Collaborative Lawyers. Marketing materials, training, membership requirements and conferences or publications are exclusive and do not include "the other."

In my opinion, it would be a tragedy for our field and our clients if we chose the path of Disengagement or Competition. My hope is that we can find a way to work together respectfully. It would be helpful to remind ourselves that mediators and Collaborative Lawyers have so much in common, namely that both:

- share the goal of avoiding litigation and an adversarial relationship.
- encourage a transparent, fair process with a win-win outcome.
- use an interest-based approach that focuses on constructive problem-solving.
- encourage greater self-determination by clients in decision-making.
- model and coach clients in respectful and constructive communication skills and discourage threats or intimidating tactics.
- encourage clients to retain experts jointly to act in an impartial manner.
- require clients to act in good faith and make full disclosure of all relevant information at the earliest opportunity to ensure a fair and expeditious settlement.
- processes are less costly and less emotionally stressful than litigation.

From a mediator's point of view, what seems to be missing in CFL is a single professional who can take a "family systems" perspective, and has a duty to screen for domestic violence, protect children and behave impartially. Such a model maximizes cooperation between mediators and Collaborative Lawyers, is cost effective, and takes into account both client needs and the skills and training of the different professionals. I use such a model, which is described below.

Collaborative Mediation Model

Collaborative Mediation begins with clients selecting mediation as their preferred method of dispute resolution. These clients frequently have not yet seen a lawyer or retained counsel. They are usually fearful that lawyers will escalate the conflict and frustrate their hopes for a cooperative, non-adversarial negotiated outcome. Also, they prefer a process that encourages them to design their own terms for separation, and tend to be worried about losing control of decision making, incurring high costs and ending up in court. This is particularly true when there are concerns about their children and their ongoing relationship as parents, not an area where lawyers have special skills or expertise.

Collaborative Mediation can address these concerns. Mediators, who may be required to send clients for independent legal advice, can now refer clients to Collaborative Lawyers who will not take the case to court and who

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THE CREATIVE SOLUTION

The Creative Solution: Compared to What?

by Chip Rose

As I listen to the conversations amongst and read what is being written by colleagues comparing the mediation and collaborative practice fields, I have noticed how the comparisons are changing. Initially, each dispute resolution discipline accepted as truth the value of its own intrinsic process, while skeptically examining the design flaws of the other. In these comparisons, mediation comes up short either because the clients are at risk if they are not being represented by counsel or because the “agreements” reached in mediation are dismantled by reviewing attorneys, creating a disconnect for the clients in the process. On the other hand, collaborative law practice is seen as cumbersome and expensive, with its team of allied professionals, and the collaborative lawyers generally taking too much control over the process; in so doing, they co-opt the process and turn it into nothing more than “friendly” settlement conferences.

When I first began providing training to groups of attorneys interested in the collaborative approach, I was marginalized by some as “merely teaching mediation” and told that the collaborative approach was “completely different from mediation.” Most of the time these comparisons tended to be naïve and innocently corrupted in their oversimplifications. The whole dynamic



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.

reminded me of two funhouse mirrors facing one another, each magnifying and distorting the image of the other. (I recall the same dynamic in the growth of family mediation during its first two decades, and the corresponding reaction from most bar associations.)

Like water flowing over a stone, good ideas ultimately shape the environment onto which they flow. As the initial excitement of discovering and critiquing a new idea wanes, more thoughtful responses displace knee-jerk reactions. For example, in workshops all over the country, attorneys in the collaborative process are discovering that the contractual commitment to remove litigation from the process only eliminates the litigation option; it does nothing to increase their skill in creating a successful, client-centered process. They are also learning that collaborative processes require not one, but two or more sets of professional skills (such as an understanding of family systems, relationship dynamics, financial planning, etc.). This increases the difficulty algebraically, not

arithmetically. As this movement grows out of its birth phase and into childhood and adolescence, I find that workshop participants are increasingly ready to embrace the effective concepts and practical skills that have anchored the work of mediators in all areas of practice, and family mediators in particular, for the past three decades. Success in collaborative practice will come from recognizing the need to understand the following questions:

Who are our clients?

How do they come into the process?

How do we help them identify their shared goals?

What are their real (as opposed to their “perceived”) process needs?

How do we design a process that responds to those real needs?

How do we structure the process for addressing their substantive issues?

On the other hand, there is much that the mediation movement can

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The Creative Solution: Compared to What?

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As this movement grows out of its birth phase and into childhood and adolescence, I find that workshop participants are increasingly ready to embrace the effective concepts and practical skills that have anchored the work of mediators in all areas of practice, and family mediators in particular, for the past three decades.

learn from the field of collaborative practice. In its earliest stage of development, the collaborative movement was polarized between attorneys who viewed it as a different way to practice law and the pioneering mental health professionals who saw the legal process of divorce as but one square in the larger quilt of families in transition. The slogan, "Litigation is to divorce as surgery is to illness" captures the essence of this view. While the professional tension between these two approaches to their processes has not been eliminated, the collaborative

practice field as a whole is beginning to recognize the inevitable multi-faceted needs attendant to family separation and divorce in the legal, psychological/emotional, and financial domains.

The interdisciplinary team concept has served to raise the consciousness of the legal professionals to an understanding that most of what creates the difficulty in negotiations over property, finances and children is not about the law. The system design of the collaborative process acknowledges this, and the institutionalization of the role of mental health professionals addresses the impact of the divorce process on the relationship dynamics and the psychological and emotional needs of the parties. By way of contrast, most mediations performed by attorneys may offer the recommendation that the parties seek mental health assistance, but few that I am aware of require it as part of the process design. On the other hand, mediations performed by mental health professionals are frequently characterized by a kind of disconnect between the mediator and the representing attorneys that results from the mediator not having legal training and the attorneys failing to understand the value of a client-centered process.

Since my first conversation with Stu Webb, whose concerns about shortcomings in mediation led to the birth of Collaborative Law, what has always excited me about the collaborative model was the receptivity of the legal community. It has always saddened me that the legal profession never meaningfully embraced the "facilitative" and

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"client-centered" potential of mediation, co-opting it instead into a quasi-legal process. In the same way that legal professionals benefited enormously from their association with mental health professionals in the early days of AFM, that synergistic dynamic is being repeated on a much larger scale in the collaborative movement. The rapid assimilation of this process model into each professional community is a direct result of the work that committed professionals have been doing in mediation for four decades. It is time that we recognize our mutual accomplishments and engage in thoughtful and challenging discussions about what the two dispute resolution models can learn from one another and how each of us can better serve our clients.

FMN

ETHICAL DILEMMAS

Ethical Dilemmas: What Would You Do?

by Clarence Cramer

We received responses to the *FMN* Summer 2005 Ethical Dilemma that involved Nancy, a family mediator, Robert, the director of an ADR agency and Donna, a mediator for the ADR agency. Robert wanted Nancy to evaluate Donna's performance as a mediator, but did not want Donna to know she was being evaluated. That dilemma and the responses are printed later in this column. But first, let us look at a new dilemma:

What would you do in the following situation?

New Fall 2005 Dilemma

The following is from a reader's letter, asking for comments on a particular dilemma.

John and Debbie have co-mediated for several years for a community mediation center. Both are experienced senior mediators. They are asked to co-mediate the modification of a parenting plan. The parents have been divorced for ten years and their son is now 12 years old. The father wants to modify the parenting plan to one that is more appropriate for a 12-year-old child.

The mother specifically requests shuttle mediation, stating she does



Clarence Cramer is Chair of the Family Section Ethics Committee, and Director of Family Services of the Conciliation Court in Coolidge, Arizona. He can be reached at: mediator@co.pinal.az.us

not want to be in the same room with the father.

The father specifically requests that no other parties be present at or be a part of the mediation session.

The mother and father were informed by the community mediation center that their mediation would be shuttle mediation and that no other parties were to be present. The parties arrive on time for their mediation and are shown to their separate rooms. The mother, however, brings her new spouse with her. When Debbie informs the mother that this is unacceptable, her co-mediator, John, tells Debbie that it does not matter whether the other party agrees to allowing the new spouse join in or not, since this is shuttle mediation.

Debbie believes that this mediation cannot occur in good faith if the mother is so willing to violate the initial agreement regarding no other parties being present, and she wonders how the presence of the new spouse will influence the outcome of the mediation. John disagrees,

reiterating that since it is a shuttle model of mediation, the father need never know about the presence of the mother's spouse, so there is no harm done.

Against her better judgment, Debbie reluctantly agrees to proceed with the mediation. The parties reach an agreement, but Debbie cannot help but wonder what the agreement would have looked like if it was just between the two parents, and what will happen if the father finds out that the mother's new spouse was included in the mediation.

What Would You Do?

Before you forget to respond, please email your response now, while reading this, to Clarence Cramer at: mediator@co.pinal.az.us or mail it to 119 W. Central Ave., Coolidge, AZ 85228. Please include your name and address.

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Ethical Dilemmas: What Would You Do?

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Summer 2005 Dilemma – The Facts (reprinted here):

Nancy is a family mediator and an advanced practitioner member with the ACR Family Section. She is a well-known and respected professional mediator in her community. Robert is the director of the ABC Dispute Resolution Agency that provides a variety of dispute resolution services, including family mediation. Professionals in the community compete for mediation contracts with ABC; each contract is for a two-year period. ABC contracted with all the current agency mediators prior to Robert being hired. Robert does not have much of a background in family mediation; however, he believes the skills of one ABC contract family mediator, Donna, might be questionable. Robert approaches Nancy and requests that Nancy sit in on a mediation case with Donna to evaluate her skill level, and to report back to Robert. Robert further tells Nancy that he will tell Donna that these will be consultation sessions, but will not tell her that she is being evaluated. Robert further tells Nancy that Donna's contract is up in eight months and encourages Nancy to apply, because he believes she is very qualified for the position. Nancy is interested and tells Robert that she very well might apply. However, after thinking it over for a few weeks, Nancy is not so sure about the situation regarding sitting in with Donna or applying for the contract. What would you do?

READERS' RESPONSES

Wow, Nancy should absolutely not be evaluating someone for a position she herself might be interested in; that would be a clear conflict of interest. Furthermore, I believe it is unethical for Robert to be evaluating a contractor without her knowledge, unless her contract specifically allows for this. Nancy would be involving herself in an untenable situation if Donna were lied to and told the sessions were consultations when they were in fact evaluations of her ability.

Nancy should respectfully decline to be involved in the evaluation. She might offer her assistance in providing additional training, assuming however that Robert tactfully confirmed (using someone who did have family mediation experience) that Donna's skills did indeed need improving.

Gillian A. Brady
Davis, CA

What would I do...? If I were Robert, I would discuss my concerns about Donna with Donna, after I became more educated on the unique aspects of family mediation. I would apologize to Nancy for attempting to triangulate her into my concerns about a contracted mediator.

If I were Nancy, I would only agree to evaluate Donna if Donna is informed about my role, and if Donna is willing to have me sit in, and if Donna is informed up front

about whether or not I intend to apply for the contract. Further, as Nancy, I would have serious reservations about applying to work or working with Robert because of his indirect, manipulative style and would consider telling him my reservations if I cared about having or maintaining a professional relationship with him.

Kristie Browning
Boise, ID

I would hardly call this a "dilemma," as the situation is so clearly unethical. The dilemma, perhaps, is whether to report Robert to the ethics committee! Under no circumstances is it "OK" to lie to Donna about the purpose of the consultation sessions. Although it is not necessary to begin by telling Donna of his concerns, Robert should make it clear that the consultant, Nancy, will be reporting to him about the consultation. Perhaps the renewal of the contract will be dependent upon a positive evaluation, a linkage that is reasonable and perhaps should be a policy regarding all the mediators at the ABC Dispute Resolution Agency. Nancy should not agree to meet with Donna, or observe her mediation sessions, without Donna being informed in advance about the purpose for it.

The second issue is the need to separate "self-interest" from the evaluation process, which requires that the mediator called in to

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Collaborative Law and Mediation: Adversaries, Bedfellows or Partners?

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make a commitment to assist in reaching a non-adversarial outcome. Everyone, including the lawyers, mediator and both clients can be included under the umbrella of a Collaborative Mediation Participation Agreement, which commits everyone to resolve matters cooperatively. In the event that one or both parties decide to litigate, both lawyers and the mediator must withdraw.

In Collaborative Mediation, the mediator may assist the parties to mediate all issues (comprehensive mediation) or the mediator may help the parties to develop a Parenting Plan, and then transfer responsibility for negotiating financial issues to the Collaborative Lawyers. The steps are:

1. Clients first meet with the mediator and sign a Collaborative Mediation Retainer.
2. Mediator assists the couple to work out a Parenting Plan and helps to improve communication.
3. Mediator refers clients to CFL Lawyers for independent legal advice and to assist with the preparation of financial disclosure.
4. Mediator meets the children (if agreed upon by both parents) to determine their views and preferences.
5. Mediator invites Collaborative Lawyers to a meeting to:
 - sign a Collaborative Mediation Participation Agreement,
 - review and finalize the draft Memorandum of Understanding with respect to the Parenting Plan,
 - determine how property will be valued (for example, by using impartial valuers), what financial disclosure is needed, and what are

the expected time lines for sharing financial information,

- discuss any legal questions that might create an impasse, and
- clarify roles, including next steps.

In Comprehensive Mediation, the mediator continues to meet with clients to resolve financial issues and drafts a Memorandum of Understanding. A Certified Divorce Specialist, financial planner or other impartial valuers may be asked to contribute his or her specific expertise (as needed).

Once a draft Memorandum of Understanding has been prepared with respect to financial issues and reviewed by the clients, the mediator invites the Collaborative Lawyers to a second five-way meeting. At this time, the Collaborative Lawyers help with any unresolved issues and finalize the Separation Agreement in a cooperative and timely manner. The Separation Agreement may be signed in this meeting or separately in each lawyer's office.

If the mediator is dealing with parenting issues only, the mediation ends with the signing of the Parenting Plan and the clients deal with the financial issues with the Collaborative Lawyers, following a typical Collaborative Family Law model. A Certified Divorce Specialist, financial planner or other impartial valuers may be asked to contribute their specific expertise (as needed).

I am trying to hold onto my usual optimism about working collaboratively with the relatively new field of CFL and hope that what I have seen are growing pains. I would welcome hearing the experiences and successful strategies of other mediators or financial advisors. *FMN*

When to Give Up and When to Persevere

Continued from page 7

With the implicit authority of the court in the background, the clients are more likely to remain in mediation as long as the mediator has not given up. The situation is quite different when there is no court pressure to mediate and when the mediation service charges a substantial hourly fee.

I question to whom responsibility belongs to keep the process going: the mediator, or the parties themselves, or both?

I suppose this is a professional dilemma, not just a personal one, so I invite other family mediators to respond. How do other experienced mediators handle the dilemma I have described: respecting the clients' lack of "readiness" or "willingness" to settle in mediation, as opposed to "hanging in there" as agents of optimism and hope? Is it possible to create "guidelines" regarding the efficacy of either response? Perhaps the pro-active approach of a persistent mediator is the mark of excellence and I should change my ways. I doubt I will ever perform magic, but I might be able to become more stubborn and persistent, if that is the right thing! *FMN*

What Would You Do? Reader Response

Continued from page 13

evaluate Donna (or any other mediator on contract with the agency) not be a candidate him or herself for a future contract. Nancy should explain her concerns to Robert; perhaps he can be guided to more ethical behavior toward the agency staff.

Susan Zaidel
Haifa, Israel

I think that Nancy should request another meeting with Robert and explain her dilemma. To not do so (especially if coupled with her declining Robert's requests) would send him an ambiguous message and would likely result in Robert seeking the complicity of another mediator to do this secretive evaluation, which I believe would not result in a positive outcome. Further, a blanket refusal could also damage Nancy's options for participating as a contractor for ABC in the future.

Nancy could share that she is not comfortable evaluating Donna without Donna being aware of her role in doing so. She could explain that she's confused about what advantage Robert sees in keeping information about an evaluation from Donna. She might point out that misleading Donna about her role feels unethical, without much apparent purpose. She could reality-test a few possibilities with Robert. If Donna does, in fact, lack skills as a mediator, she (and the entire mediation community, including ABC Dispute Resolution agency)

would be well-served if she were made aware of that fact.

With appropriate feedback, Donna could seek additional training and/or take a hiatus while she works to improve her mediation skills. Without that information, Donna may take any dismissal or contract non-renewal as resulting from some issue unrelated to competence, and she may continue to practice bad mediation without knowing she's doing so—a result that could damage not only Donna herself, but the community she serves and the greater practice of mediation as a whole. If, on the other hand, she is found to be a capable mediator, the validation of a peer review could enhance her reputation and confidence.

If there have been complaints about Donna (you do not give any reasons for Robert's skepticism about her skills), an evaluation of her work seems only one piece of a process of investigation that may also include delving further into the allegations of the complaining parties (within the bounds and guidelines of confidentiality, of course).

That said, I believe that Robert's underlying idea of mediator skill reviews is a good one, and Nancy could point that out. ABC and its clients would be well-served by ABC, including a periodic peer review as part of its performance requirement among all of its mediator contractors. If that seems practical, the procedure for evaluations and who should be

selected to do them is a topic that Robert needs to spend some time considering. He may want to gather practical advice, not just from Nancy but also from other programs where such reviews are currently performed.

As to the second issue of Nancy's own application for a contract with ABC, that seems an almost entirely separate issue. Apply if she wants to. At least one exception, however, comes if the only vacancy would be the one currently held by Donna. That puts Nancy in a position of evaluating someone she has an interest in replacing. That could definitely be viewed as a conflict of interest and make her the wrong one to do an evaluation of Donna. If that is the case, she should choose between whether to evaluate Donna or to apply for a position with ABC, but not both.

Stanley Majka
Chicago, IL

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