

family

SUMMER 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

What Role, if Any, Should Children Have in Collaborative Law?

Feature Article

by Barbara Landau

In virtually all jurisdictions, collaborative family law (CFL) practitioners are recognizing the benefits of interdisciplinary cooperation. One of the most beneficial areas of cooperation is to ensure that children's voices are heard in the collaborative process. Involving children in a CFL process raises several questions, and also highlights several benefits.

Are children's voices needed?

In considering this issue, several questions are likely to be asked. There are a number of arguments that suggest children should NOT be involved in the collaborative law process (or, for that matter in any process involving parental separation). Are not parents the most effective and relevant voice? If the goal of CFL is to empower parents, why undermine their



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parental authority and expertise by involving their children directly? If conflict is so harmful to children, is it not unfair to invite them into the middle of disputing parents? Would it not create tremendous guilt for children if they were made to select one parent over another? Would it not induce parents to bribe or threaten their children if they know children would have a voice? Since children try to avoid rules and limits, would they not just select the parent who had the fewest expectations—which would be contrary to their best interests in the

long term? All of these questions are important considerations that need to be weighed when considering how or why children might benefit from having a voice in their parents' separation.

Why children should have a voice

Arguably, marital separation has a great impact on the children. Children feel the most out of control about a decision over which

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About Family Mediation News

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Editorial Policy

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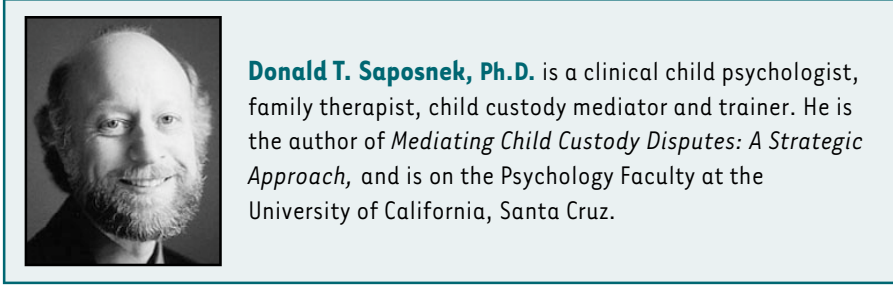
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Dear Readers:
“My Mom and Dad are getting dis-married,” said the six-year-old boy in my office last week when I asked if he knew why he was there. His explanation came in near the top of the long list of creative and eloquent comments children have told me regarding their parents’ divorces. Another child told me “I’m here because my Father has a new Step-Wife, and my Mom doesn’t like her very much.” And, last, I’ll never forget the young child whose mother told me, “Doctor Saposnek, the day after you interviewed my daughter (regarding her parents’ divorce), she asked me, ‘When do I get to go see Dr. Deposit again?’ When I asked her why she called you that, she said, “Well, ‘cause he’s the only one I can talk to about you and Daddy breaking up, so I thought I go to him to deposit my feelings!” It is just these kinds of wonderful, albeit tragic things that a mediator gets to hear when listening to children.

In this Summer 2005 Issue of Family Mediation News, we offer a couple of articles that deal with children. Barbara Landau’s lead



article discusses the benefits and concerns when interviewing children in Collaborative Law cases. Chip presents a “Creative Solution” to a divorced couple’s dispute regarding their teenager and his car. Then, moving away from children, we have Zena’s article that takes a new look at an old issue—that of power imbalances in family mediations, and Clarence offers reader feedback from last issue’s dilemma, along with an intriguing new dilemma that involves a mediator being evaluative of another mediator, with a possible conflict of self-interest. Clarence always asks us “What Would You Do?” We hope you answer him.

In this Summer Issue, we also invite you to read our last inspirational words from this past year’s Family Section Chair, Becky

Magruder. Her article compels us to pause and reflect on the sources of our own inspirations and what values they mirror for us. We owe much gratitude to the unrelenting energy, dedication and positive facilitation that Becky has offered during her tenure as our leader.

Becky, the Family Section Advisory Council and the Family Section membership join me in thanking you for your wonderful leadership this past year.

And now, onward...

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.

From the Family Chair: Inspiration and Gratitude

by Becky Magruder

Inspiration comes from the strangest places and often when I least expect it. Three popular characters, in particular, have inspired me. First and most recently, I was stirred by a movie based on the life of Jim Braddock, a boxer who triumphed over great odds because he had his priorities in the right order: he acted with integrity and honesty, he always took the high road, and he lived his values. Second, there is Harry Potter. Like several million readers, young and old, I just purchased my copy of the newest Harry Potter book and sat down to read the first chapter as soon as I got it home, eager to see where Harry was going next. Harry also takes the high road and acts with integrity; he is loyal and perseveres in the face of difficulty when any ordinary wizard might be inclined to call it a day. Pollyanna, the 1960s fictional movie character played by Haley Mills, is the third of my favorite literary and cinematic characters. She is hopeful, helpful, and has faith in the basic goodness of people, even when they do not seemingly deserve it. So, you might wonder what characters—both fictional and non-fictional—have to do with me or with mediation or with our work in this professional organization.

To do the work of understanding, clarifying and sometimes resolving conflict effectively, we have to persevere when all the other professionals may want to throw in the towel. As I heard Larry Fong say at a recent seminar, “My clients may



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give up on me, but I never give up on them.” I was glad to know that I was not the only mediator who is willing to hang in there with clients when there appears to be no hope, when I have pulled out of all the tricks in my bag, and when I cannot decide if I should pull out the clients’ hair or my own! Sometimes when the going has gotten so tough that I think maybe I should give up, I slow down and remind myself that there is always hope, that deep inside every client lies a good person who has temporarily lost his or her way. Part of my job is to help them see that the light at the end of the tunnel is not a freight train coming at them, but rather the beginning illumination of a better and clearer path. We are indeed agents of hope.

Some days, it seems that I perform magic with clients. Some of my favorite clients are the ones who come in with a look that says, “I dare you to help me,” or “We have never agreed, we don’t agree now, and we never will agree, so why are we wasting our time here?” I always know I am in for a rough couple of hours with looks or comments like these, or when I get calls from other professionals, particularly attorneys, who ask—or more often beg—me

to “work my magic.” It is pretty heady stuff to think that other professionals think I can do magic, but I try to step off of the pedestal quickly before I lapse into unconscious incompetence. I cannot be focused on the needs of my clients if I am so busy thinking how wonderful I must be. If I am honest with myself, I might agree that I would be angry and scared if I were in the shoes of some of my clients, and I might not act so rationally, either. I try to be helpful by listening deeply, by being respectfully curious, and by believing that people can act with integrity even in the worst of times. I like to think that part of my job is to help clients get back on the high road, as they define it. And I must admit that, on some days, it does feel like magic has happened.

The work of sustaining the Family Section can be daunting and overwhelming. I have sometimes thought that it was a dubious honor to serve as the Chair of ACR’s Family Section. There are days when I have wanted to throw in the towel, and wondered if the light at the end of the tunnel was indeed a freight train coming to run me over.

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What Role, if Any, Should Children Have in Collaborative Law?

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they have no choice. One child told me that “separation feels like being on a roller coaster without a steering wheel.” The vast majority of children, if given a vote in their parent’s divorce, would opt for the family remaining together and working things out. Since this option is not available to them, giving them a voice restores some feeling of control.

Children often have unique perspectives on their situation and what they need to assist their adjustment. Their issues are usually very different from those of their parents, who are often caught up in their own emotional pain and in a win/lose struggle for control over the children.

Children have opinions, and not asking for their input means their views and preferences might be overlooked. As adults, when our views and preferences have been ignored, we might resist even reasonable solutions. To achieve better buy-in and to ensure the children’s concerns are addressed, their voices need to be heard.

Siblings of different ages, genders, personalities, temperaments, interests or significant needs will have very different perspectives, which are often overlooked when children are not interviewed individually.

Younger children (as young as four years of age) are often able to articulate questions, concerns, fears and constructive suggestions. Not inviting their input means that their issues are left unaddressed or continue to cause unnecessary stress. Potential creative options are overlooked and undiscovered.

As children get older (beginning

Arguably, marital separation has a great impact on the children. Children feel the most out of control about a decision over which they have no choice. One child told me that “separation feels like being on a roller coaster without a steering wheel.”

around age 12) they may “vote with their feet” and refuse to follow a plan that is imposed on them. In these cases, parents often blame each other for ‘inducing’ a child to take sides.

Giving a child a voice does NOT mean giving a child decision-making power, and this must be clarified up front. Parents should make the decisions for children under the age of 14. Children of any age should NOT be asked to ‘pick a parent,’ as this puts children in a very difficult conflict of loyalties. Most preadolescent or adolescent children want to be assured they will not be asked to take sides.

Meeting with children also allows professionals an opportunity to discover issues of abuse, neglect or special learning needs that parents may not be aware of or willing to reveal.

How can children’s voices be heard in a collaborative family law process?

Collaboratively trained lawyers are not trained in child development and usually do not have the training or skills to interview children. Therefore they should NOT interview children themselves, as the potential damage would outweigh the benefits. It would be like bringing back the outdated practice of judges interviewing children in chambers; an experience that was frightening, often disrespectful of appropriate boundaries, and often insensitive of methods for framing questions. They should ask someone who is appropriately trained to meet with the children, such as a mental health professional.

The goal of interviewing children should be to provide the parents and collaborative lawyers with the information needed to have a constructive problem-solving conversation with the parents about significant issues that will impact the child’s development, or contribute to or prevent the successful completion of a parenting plan.

There is a number of resources available to help include children’s perspective.

A CFL lawyer can partner with a mediator or child therapist who has mental health training and is experienced in meeting with children. It is important to ensure

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What Role, if Any, Should Children Have in Collaborative Law?

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that this individual is bound by the same Collaborative Participation Agreement as the lawyers.

Invite impartial comments from the child's therapist, teacher, guidance counselor, day care provider or doctor with respect to any special considerations regarding the child's academic, health care, or social or emotional status. It is essential that the focus be on holding a problem-solving discussion of issues to protect the children's well being. For example, ask, "How can we best address the child's need for asthmatic medication?" or, "How can we best support the child's learning disabilities by involving a remedial specialist, following up on the specialist's recommendations, and encouraging our child's progress?"

What type of contribution would children likely make?

In my experience, children can

contribute to the collaborative process in a number of ways. They can indicate the relative importance of factors such as remaining in the matrimonial home, the same school, attending a private vs. public school, attitudes towards living in an apartment vs. detached home, being close to friends, etc. Often, divisive issues can be resolved by such input.

Children can indicate if/when they are ready to meet new partners of their parents. They can indicate their level of comfort with extended family members, such as a grandmother or uncle offering to take the children for the summer, and whether or not these relationships provide helpful sanctuaries from the conflict.

They can make suggestions about the degree of structure to visitation patterns that best meets their needs at the time, or the priority to be given to their own activities. For example, one child said that the plan being considered by his parents did not take into account his basketball schedule; another said she would not be able to participate in her friends' Friday night pizza get-togethers.

Including the children in the collaborative process allows for children's special concerns to be addressed: "Who will feed the dog and the goldfish?" or "How will I get the school bus from my Dad's?" Some children worry about whether a divorce means that they will only be allowed to see one parent. What a relief to learn this is not the case!

There are many benefits to giving children a voice within the interdisciplinary format of collaborative law cases. Clearly, giving children a voice in their

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parents' separation is an excellent opportunity for interdisciplinary cooperation. However the involvement of children should be managed with sensitivity to avoid some of the potential pitfalls set out at the beginning of this article. **FMN**

A version of this article first appeared in the January 2005 issue of Matrimonial Affairs, the Family Law Newsletter of the OBA, and is presented here with permission.

Editor's Note: Please note that the Fall 2006 issue of ACResolution plans to carry two book reviews of collaborative law books: Sheila Gutterman's Collaborative Law and Nancy Cameron's Collaborative Practice: Deepening the Dialogue. Watch your mailboxes in mid-November.

Car Problems

by Chip Rose

I don't know about you, but I just abhor car problems. They are such an inconvenience. Of course, when the car problem is in the context of a child in a post-divorce relationship, it becomes significantly more than an inconvenience. A case I had this week was a dispute between former spouses over their son's use of a car. The dueling parents were oblivious to the fact that it also demonstrated the chasm that exists between intentions and actions. As quick as each was to profess that the son (whom we'll call "Scott") was of utmost importance to him, and to her, each was even quicker to draw verbal weapons and empty the ammunition into one another, with no regard to the unintentional hypocrisy of their behavior.

The couple had completed its divorce through mediation five years earlier and had muddled through the intervening years by moving past issues, but never resolving them. Each had built up several years of frustration towards the other. The father (whom we'll call "Bill") had recently paid off the balance of an auto lease he had taken out several years earlier and was allowing Scott to use his car on a permission-basis only while staying at his dad's house. The mother ("Ellen") asked Bill if Scott could use the car when he was at her house as well, since no one else used the vehicle. Bill said he would agree to this arrangement if Ellen would reimburse him for her half of



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the lease payoff (about \$8,000) and reimburse him for half of the yearly auto insurance (about \$1000).

Bill accused Ellen of having agreed to these terms and as a result, he had allowed Scott to begin using the car full time, while Ellen denied that she had ever agreed. This fueled Bill's anger since he had already committed to letting Scott use the car and he resented the fact that if he now took the car away, he would appear to be the villain. To offset her 'refusal' to pay her half, Bill began withholding the \$350 per month child support payments he owed Ellen. After Ellen screamed and swore at Bill in a shouting match on the phone (overheard by Scott), both parties agreed to return to mediation to work on resolving the problem that was simultaneously degenerating and escalating.

After sitting down at the table and exchanging pleasantries, I invited each to share with me his and her description of the circumstances. Within minutes, the intensity of their emotions increased and the civility of their discourse plummeted. I sat quietly observing

their increasingly hostile strategies of attack-and-defense. I began imagining their son, Scott, sitting in the fourth chair at the table watching his parents volleying caustic accusations back and forth. The parents vented for about ten minutes before each finally seemed to run out of steam. I have always viewed the vacuum of silence that generally follows these types of outbursts as an opportunity that is pregnant with possibilities for intervention strategies.

One of my favorite approaches is to allow an uncomfortable silence to settle in, as the clients wait and wonder who is going to say what next. A simple inquiry, such as, "So how's this working for you so far?" can be very effective. It subliminally communicates to the clients that the mediator will not be rescuing them from their own dysfunctional dynamic. In response to their consistently predictable reply, "This isn't working at all," the situation is ripe for a follow-up question: "Would you each be willing to go about this a different way?" In 26 plus years of mediating, I have never had anything but an unequivocal

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Power Imbalances

by Zena Zumeta

After talking with many lawyers and mediators, I have come to the conclusion that, in general, family mediators pay far too little attention to power imbalances. This is important because neither facilitative nor transformative mediators have a good way to balance power, and only evaluative mediators are properly trained to do that. I am not referring to a power imbalance on just one issue, where the other party may have an advantage (or “power”) on other issues. For example, in a divorce, one party may have knowledge about finances, and the other about children, or one sibling may have financial savvy but the other has the trust of their elderly parent. I am instead referring to pervasive power imbalances that exist across most, if not all, issues in a particular mediation or family.

In cases where an imbalance on one issue can act as a tradeoff on another issue, overall balance is still maintained. However, if the same sibling has the financial savvy and the trust of the elderly parent, the other sibling(s) may feel unable to assert influence on the outcome of the mediation. Or, if a spouse is convinced that he or she does not have the ability to negotiate or conceptualize a mediated outcome, that spouse may not even try to assert influence on the outcome of the mediation, or may do so in an ineffective manner. For those of us not trained as evaluative mediators,



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what are we to do?

Years ago, when I began practicing divorce and family mediation, family mediation was distinguished from other types—such as workplace and civil—based on the long-standing relationships between the parties. And while workplace mediation shares this characteristic of long-standing relationships between the parties, there are two main differences between family and workplace mediation: 1) The issues in workplace mediation often can be revisited over time (which may be true in parenting and child support issues in divorce as well, but not property issues), and 2) The parties in divorce mediation are usually novices at negotiation, which may or may not be true in workplace mediation.

In both workplace mediation and civil mediation, there is an ethic that the mediator leave power where he or she finds it, and that it is not the job of the mediator to balance power. In these arenas, power is

just one more reason to settle or not settle in the mediation process. If the company holds all the cards, or if the union has political influence, that is just the way it is. Is the same true in family and divorce mediation? Or, do we as family mediators have a greater obligation to help balance power?

When I took my first divorce mediation training (in the early '80s, for those of you who are wondering just how long ago that was!), I learned that one obligation of a family mediator was to balance power, and we were taught appropriate techniques to do that. For example, we were instructed to advise both parties to get attorneys and to make sure that both parties understood the economics of the property settlement. We were to raise issues that would impact the parties, even if they did not raise these issues themselves. The sentiment made sense in those times.

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Car Problems

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“yes” response to that simple query. With their enmity vented and their agreement to a different approach confirmed, the stage was set for creating a constructive process.

I began by reminding them that there are fewer than ten months left of their child support relationship, since Scott will graduate from high school in June of 2006. I asked them if this is the parental environment they wanted for Scott as he completes his high school career and the remaining months before his 18th birthday.

Acknowledging that I had never met him before, I told them that I could nonetheless accurately predict what he would say were he a witness to the verbal fisticuffs they had just demonstrated. “Stop it!” is what he would say. What he would not say is, “Wow, you guys really love me, and I know that all the mean and cruel things that you are saying to each other are really expressions of the deep and incomparable love you have for me.” Undoubtedly, he would cast himself as the cause of the conflict between them, and the emotional consequence of that reasoning would do more harm to him than the car would do well as a transportation mode. Likely, he would tell them that he would just as soon walk everywhere as cause these kinds of problems for them. To their credit, the parents nodded in a melancholic assent.

Then, we turned to the white board to brainstorm all of the elements from which an agreement could be created. We identified the following: the use of the car; the ownership of the car; the costs of insurance; the maintenance costs; the fact that Scott’s use was already

the default (the inverse being the consequences of changing that arrangement); the term of Scott’s use of the car (e.g. through graduation; beyond graduation); the remaining months of child support that Bill was obligated to pay Ellen; and, the post-graduation concerns (e.g., applying for college, costs of college, transportation to college). In the course of exploring these considerations, I asked Bill what arrangement would work for him to continue to allow Scott to use the car while he was at his mother’s house without her having the ability to contribute to the purchase of the car. He offered that if she would consider the car as his contribution to child support, then that would work for him. In response to the same question, Ellen suggested that if he would simply contribute the unpaid child support to Scott’s college education that would work for her.

The parties ended up agreeing that Scott could continue to use the car, but still needed to ask each parent for permission, and Bill would cover maintenance costs; Bill would be credited with having satisfied his support obligation, and would contribute the remaining amount towards Scott’s college funds; and, Ellen would reimburse Bill \$1,000 for insurance by June when the bill was due. The frosting on the agreement was that, in June, the parents would jointly give the car to Scott as a graduation present, and they committed to come back in the spring to discuss their respective abilities to contribute to Scott’s college expenses.

Now, Scott can focus on his own car problem—the cost of gas! **FMN**

Family Mediation News Columnist, Clarence Cramer, Nominated for ACR Board

We are excited to announce that our own Family Mediation News Ethics columnist, **Clarence Cramer**, M.A., L.P.C. (the one who always asks “What would you do?”), has been nominated for membership on the ACR Board, to be determined in the upcoming ACR Board of Directors elections from August 23 to September 22.

ACR elections determine who our new leaders will be for the organization. All ACR members that are eligible to vote (includes Member, Practitioner/ Educator/ Researcher, Advanced Practitioner, Retiree, Student) should have received an email with voting instructions on August 23. We encourage you each to get to your computers and vote for your favorite candidates before September 22. Voting members of ACR can access the Board of Directors ballot by logging into ACR’s Online Member Center at <https://bridge.ACRnet.org/> and clicking on the ballot links in the upper right-hand corner.

Ethical Dilemmas: What Would You Do?

by Clarence Cramer

We received a number of responses to the FMN Spring Ethical Dilemma that involved Tom, the licensed attorney, and Mary, the licensed mental health practitioner, who are doing co-mediation. They are at odds on a current case as to whether it is suitable for mediation, due to the past occurrence of domestic violence. 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 Summer 2005 Dilemma

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



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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?

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.

Spring 2005 Dilemma – The Facts (reprinted here):

Tom and Mary co-mediate mandatory mediation referrals from the court. Tom is a licensed attorney; Mary is a licensed mental health practitioner. They are currently mediating a case involving the Pattersons, who are in the middle of a divorce. This is the initial session. The Pattersons agree to participate in mediation in order to develop a parenting plan, as well as decide on the distribution of assets and debts. During the process of mediation, the mediators have learned that Mrs. Patterson has been the victim of domestic violence. After careful questioning and interactions during the individual domestic violence screenings, Mary has formed the opinion that Mrs. Patterson is unable to participate in the mediation process in a meaningful manner, whether the sessions are structured as conjoint, shuttle or telephonic, due to the occurrence of domestic violence. Mary further believes mediation could be inappropriate and damaging to Mrs. Patterson because

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Power Imbalances

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I firmly believe that many of these cases involving power imbalance are treated too cavalierly, and that we as mediators need to examine closely our own ethical stances before we agree to mediate in such cases.

Nowadays we see a lot of power imbalances in divorce and family mediation that would lead to an unbalanced agreement. Let me give an example: Jack and Jill are in my office mediating their divorce. Jill has stayed at home raising their three children, now ages ten, eight and six, for the previous ten years. She has a master's degree in journalism, and from time to time had written articles for the local paper and some magazines; however that was a while ago and she no longer has contacts in the state. Jack now has a job in computers, but was laid off from his last job. It is not clear how secure his current job is, since his company recently started outsourcing jobs to India.

In a separate screening interview, Jill indicates that she wants the house and half of Jack's pension, and she wants Jack to assume the \$20,000 in debts that they have. Additionally, she expects Jack to pay alimony to her for at least three years, while she gears up to get a

job. She indicates that since her job search may actually take her longer, alimony should be open-ended. She justifies this by the fact that the divorce was not her idea. In his separate screening interview, Jack indicates that Jill has pretty much run the family for the full 15 years of their marriage. He is aware that his wife wants most of the assets and wants him to assume the debt and pay alimony. He thinks that is fair since he wants the divorce and she does not, but he is a little worried about his job security. Neither has retained an attorney and both indicate that the cost of attorneys is prohibitive for them.

Without any mechanism to balance power, the agreement Jill and Jack are proposing would lead to an unbalance agreement. However, there are ethical problems involved in the mediator balancing power. How can a mediator balance power and still remain impartial? If the mediator tries to protect Jack by raising issues, won't that impact Jill negatively? Does that leave the mediator impartial? And what happens to self-determination if the mediator balances power? While both Jack and Jill are saying they want this outcome, is Jack truly capable of negotiating for himself after years of being subservient to Jill? The Model Standards of Practice for Family and Divorce Mediators include the principles of informed consent and capacity to mediate on the part of the parties. Is there really informed consent on Jack's part?

How are we as mediators to balance these ethical requirements in the face of a power imbalance? In the example above, should the mediator insist that the parties hire

Too often, mediators take one extreme or the other; either we leave the power as it is, and reassure ourselves that self-determination has occurred (even if the outcome seems quite unbalanced), or we take the position that the clients need our help and we weigh in on the fairness of the outcome.

attorneys? If Jack does not seem to be able to act based on his feelings of economic insecurity, should we force the issue by sending him to a financial advisor? If Jill objects, then what is our obligation?

Too often, mediators take one extreme or the other; either we leave the power as it is, and reassure ourselves that self-determination has occurred (even if the outcome seems quite unbalanced), or we take the position that the clients need our help and we weigh in on the fairness of the outcome. If we leave the power as is in the case above, Jill would get her way with an unbalanced agreement. If we act to balance the power, we might point out that the courts would divide the

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Power Imbalances

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property 50/50, but then self-determination is compromised. In both, there is a question of informed consent.

We can work to balance the power in several ways. We can decline to mediate if we feel that impartiality, informed consent or self-determination would be compromised. Or we can refuse to continue unless the parties hire attorneys or financial advisors, or both. And then, do we insist that both hire attorneys, or just Jack? If we insist that both do, are we being more impartial? Is it OK to become more directive as to process?

Ann Milne, in her chapter on domestic violence in *Divorce and Family Mediation: Models, Techniques and Applications*, edited by Jay Folberg, Ann Milne and Peter Salem, wrote a section called "Confessions of a Mediator." In it she "confesses" that she does become more directive concerning process when faced with domestic violence, or other extreme power imbalances. She may require that they see attorneys or financial specialists. She may insist that they have a more detailed parenting plan. Is this okay? Does the mediator need to make that clear to the parties when he or she is doing that? Or, are we on firmer ground as long as the mediator is not meddling in the outcome? Is it still OK if our becoming more directive about process advantages one party?

Some mediators may turn to more evaluative techniques in these situations. Is that OK? Can we employ evaluative techniques depending on the mediation at hand? Or do we need to withdraw and suggest the clients seek more thorough evaluative processes with

Nowadays we see a lot of power imbalances in divorce and family mediation that would lead to an unbalanced agreement.

another, evaluative-oriented professional? The AFCC is involved in a very interesting experiment in the Connecticut family courts. The Court administers a triage instrument to decide in what type of process each family ought to participate. Where there are power imbalances, the families are ordered into more evaluative and less facilitative processes. Should we all be doing that?

I firmly believe that many of these cases involving power imbalance are treated too cavalierly, and that we as mediators need to examine closely our own ethical stances before we agree to mediate in such cases. I believe that we should withdraw from a case if we do not believe that the mediation can be done with impartiality, informed consent and self-determination. Finally, I believe that, for those mediators trained in evaluative mediation, if we employ evaluative mediation techniques, then the parties need to be informed and to agree specifically to our doing so. Let's begin to look more closely at our own practices. How often do we screen for power imbalances? How often do we withdraw from a case? And how often should we have done so in hindsight?

FMN

Inspiration and Gratitude

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But even at the most stressful of times, I have always believed in the basic goodness of people, including the ACR staff and Family Section members, and the hope that our professional organization can help us to become better practitioners.

When asked by a friend and colleague why I wanted to be the Family Section Chair, I replied that I wanted to give something back for all the good things that I have received by being a member of AFM, then SPIDR, and now ACR. I have been to annual conferences every year since I joined in 1995 and have learned so much at workshops and in late night discussions. I have used the publications to further my research and understanding of the field. And I have grown wiser as a practitioner through numerous consultations. It was time to give back, to serve. In my work as Chair, I have had the opportunity to practice all the principles that I use with my clients. I have tried to take the high road, to work with integrity and honesty, and to live my values. I have learned a tremendous amount through these last few years of service on the Advisory Council. I am a better person and a better practitioner for having had the experience, and I am grateful to have had this opportunity for growth. I leave you in the very capable and confident hands of my successor, Clarence Cramer.

FMN

Editor's note: The success of ACR and the Family Section is dependent on volunteers like Becky and Clarence. I hope that you might also consider the benefits of volunteering in a leadership role with ACR's Family Section.

Ethical Dilemmas: What Would You Do?

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of the lack of bargaining equality between Mr. and Mrs. Patterson. Tom disagrees and believes that although the domestic violence has affected Mrs. Patterson, she can be empowered to negotiate and make informed decisions. Tom and Mary call for a break toward the end of the session and discuss their views. Neither person changes his or her opinion. Prior to bringing the Pattersons back, Mary reluctantly agrees to continue with the co-mediation, even though she believes Mrs. Patterson will be unable to participate in an informed and meaningful manner. What would you have done?

READERS' RESPONSES

I am a little confused about the sequence of meetings in this case. I do screening in separate sessions held on different days with each party. At the end of these screening sessions, I make the decision about whether to mediate. My decision is based on 1) whether both parties are able to negotiate and speak up for themselves, 2) whether they are both able to reach a voluntary, non-coerced agreement with each other, 3) whether they will be safe and comfortable both during and after each mediation session, and 4) whether I am comfortable and competent at mediating the case.

I find that it is very helpful to do this screening prior to bringing the parties together, so that there is no pressure to continue the meeting with them together, and so that there is time for me to think through whether I am willing to proceed with mediation. It sounds like the sequence used in this case

did not allow Mary that time. If Mary is convinced that Mrs. Patterson is unable to negotiate for herself or reach an uncoerced agreement, and that bringing in attorneys, holding separate meetings, or mediating over the telephone or by Internet will not change that dynamic, she should not mediate the case.

Zena Zumeta
Ann Arbor, MI

One piece of information that is not listed in the facts is whether Mrs. Patterson feels as if she can participate in the mediation process in a meaningful manner. At the very least I would want to know her thoughts in the matter. If I was convinced that there were security/safety issues and/or that the power balance was askew such that Mrs. Patterson could not participate safely and make decision in her own best interest, I would not participate in the session. The big concern that I would have would be how to disengage without creating more safety issues for Mrs. Patterson.

Martha New Milam
Durham, NC

There is still a lot of questions in this case. Since Mrs. Patterson agreed to mediation, does this mean she currently feels safe? Do the mediators believe she is safe regardless of the decisions made in mediation? If safety is not an issue, then it becomes more a matter of Mrs. Patterson being able to thoroughly understand her options and act in her own and her children's best interest.

Since Mary disagrees with Tom on the decision to continue mediation because Mrs. Patterson may not be able to participate in an "informed and meaningful manner," she and Tom should have discussed and agreed on what language and behaviors from Mr. or Mrs. Patterson would show Mary and Tom that mediation should be terminated. What would be evidence that Mrs. Patterson was or was not participating in an empowered way? How would they assess whether she was making informed decisions? If Mary and Tom agreed on objective behavioral guidelines, Mary might feel less reluctant to continue with the comediation process.

Sherry Kaufeld
Batavia, IL

Before I describe what I would do, it feels important to describe the nature of the people involved. Also, given the various types of personalities involved in domestic violence, I am going to focus on the type of abuser who is always abusive; I would define those who become abusive when under the influence of alcohol or drugs in a somewhat different category. While women are as capable of being abusive as men, it appears that the majority of the time the abusers are male and the victims are female. For the sake of brevity, I will use that gender breakdown in the following description.

Under rare circumstances, when a victim of domestic violence has received counseling and has had sufficient time to heal from the

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RE: Oliver Ross's article, "The Impact of Grief on Divorce Mediation" in *Family Mediation News*, Spring 2005, p. 14

It is good that more is being written about the manifestation of grief in separation and divorce and the emotional impact on the parents and their children. Often when people think about bereavement and issues of loss, they focus on death, not on the many other losses that people experience which can also be traumatic. As Oliver Ross said in his article, "Grief is relevant in divorce mediation, and everyone is vulnerable in experiencing it."

However, I do disagree with some of Mr. Ross's statements regarding how mediators should respond to the emotion of grief. Mr. Ross states it is important to 'normalize' grief for the parties in the mediation. He helps them with the emotions involved with grief by telling them about his own experiences.

Separate from my practice as a mediator, I am a therapist with a specialty in bereavement and grief. I believe that a mediator 'normalizing' any significant loss, whether it is a result of death, divorce, separation or other significant change, only diminishes it for the parties. Everyone experiences loss in his or her own way. The emotion that results from loss is no longer thought of as happening in stages, as Elisabeth Kubler-Ross had written. It is not a linear process. Additionally, I have found that both parties going through a divorce or separation are not in the same place with their emotions. One person may be ready to move on while the

other is profoundly feeling the loss, manifested by anger, depression and/or other emotions. Men and women also tend to respond differently from each other when they are grieving.

When a mediator 'normalizes' grief for the parties by telling them of his own experiences, it really becomes more about the mediator's emotions than the parties' emotions. Also, it may compromise the mediator's neutrality by having these separate discussions with the parties about their emotions.

Mr. Ross wrote, "The parties tend to develop more trust when mediators reveal their own grief." Certainly, parties can develop trust in the mediator and the process without the mediator self-revealing in order to 'manage' their emotional outbursts, as Mr. Ross states. Self-disclosure does not necessarily lead to trust. The mediator discussing his experiences can feel patronizing and disingenuous to the parties if they are not feeling the same way. In fact, they can feel even less understood, as a result.

An individual's response to grief is determined by many factors, including other stresses in his or her life, past losses, circumstances of the divorce and coping ability. Mr. Ross' self-revealing seems like one way to get the ball rolling so the mediation can move on. If it is true, as Mr. Ross states, that, when there is a lot of emotion, parties gain more trust when the mediator is self-revealing, should mediators be self-revealing

about everything? For example, in a mediation of the dissolution of a partnership where there are strong emotions, should a mediator talk about his father's and his Uncle Harry's anger when they broke up their business? Where there is family conflict, should the mediator reveal the conflict with his adolescent daughter? What about mediations regarding guardianship? Should a mediator talk about how his mother and his aunt disagreed about end-of-life issues concerning his grandmother?

For the parties to express their emotions around grief and loss and "broaden their perspectives," I believe it is important they hear each other, not the mediator in a pre-mediation consultation. The mediator can use his skills of listening, reflection and summarizing, so the parties can hear each other in a different way and gain empathy for each other. It is really only then—when they can talk about their grief—that they can begin to trust and move forward in the mediation.

Barbara Foxman

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What Would You Do?

Reader Response

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post-traumatic stress disorder (PTSD) that results from living in an abusive relationship, a mediation approach may be helpful if the victim has been well coached, is able to act strategically on her behalf, and has made a significant transition in her life to the point that she no longer is motivated to be the caretaker for her abuser. However she should always have at least one witness [in addition to the mediator(s)] present at the negotiation. From the minimal information given in the description of the case, I am presuming that Tom does not fully understand the nature of abusive personalities. The following information comes from three sources: *The Verbally Abusive Relationship* by Patricia Evans, *The Sociopath Next Door* by Martha Stout, and my personal experience working with abuse victims.

In the abuser's mind, the abuser is the only victim. If he hurts someone, it is the victim's fault, i.e. "You made me do it." The abuser is incapable of taking responsibility for his actions. He is also unable to identify himself as abusive. I have experienced this numerous times. When faced with an inescapable truth about something he has done, the abuser either freezes and is incapable of even speaking, let alone saying, "I'm sorry," or, he persistently distracts by verbally directing the conversation elsewhere. Unless the abuser feels that to say the words "I'm sorry" appears to be the best strategy at that moment, no apology will ever be offered, and certainly not one that is sincere and valid.

The abuser's main goal is to stay

connected, maintain control and 'win' every interaction with his victim. He will spin logic in an argument to the point that facts are confused and distorted beyond reasonable comprehension. By so doing, he maintains his goal of staying connected even though it is negative intimacy. The longer the argument (or the longer and more complicated the mediation), the more chance he has to regain some measure of control. Every minute you stay engaged in his argument, he is winning.

Victims who have been able to leave abusive relationships sometimes make an effort in some way to part on friendly terms. They struggle to get their partner to understand them even though that never worked in the relationship. It is often difficult for them to comprehend that their ex-partner lacks any capacity for empathy and has no interest in making a fair resolution. As a matter of fact, if an abuser senses that a mediator is not going to allow him to prevail, he will have no interest in participating in the mediation.

At this point, you have probably figured out that once I discern an abusive relationship, I am no longer unbiased. A mediator who has studied the nature of abuse and understands, as best as possible, the motivations and thinking processes of abusers, he or she will not be able to effectively mediate when trying to be unbiased and provide a level playing field for the abuser and victim. Naïve mediators, in the hands of charming abusers, have actually been instrumental in exposing the victims to further abuse.

Depending upon the circumstances, if it appears safe to talk to the victim in caucus, I may provide her with information about women's shelters or legal resources trained in working with abuse victims. After that, I'll probably end the mediation. If I'm dealing with a court-ordered mediation, and the court appears to be unconcerned with the abusive elements of the relationship, I will work to provide the victim with insight, negotiating skills and other resources to help her prevail as best as possible in the mediation. At no time do I forget that after my job is finished, more than likely, she will still have to deal with her abuser on some level, and her very life may be in danger.

Matt Kramer

Cotati, CA

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.

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