ADR AND FAMILY LAW

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I. INTRODUCTION

Shakespeare's oft-quoted phrase, "First thing, let's kill all the lawyers,"[1] commits the cardinal sin by attacking the person rather than the problem. Mediators argue that it is necessary to attack the problem, rather than the person; therefore, if Shakespeare really wanted to find a solution, he should have said: "First thing, let's kill the system and design something that protects the parties, is less costly and works better." Mediators would say "You don't have to kill the system; let's just learn to live side by side in harmony."

As providers of conflict resolution services, attorneys have always been the target of uncomplimentary jokes and recurring low standing in the popularity polls taken to determine the public's view of various professions. For the most part, this view, while sometimes understandable, is unwarranted and unnecessary. History gives us recurring examples of how those who try to resolve conflict end up getting bruised in the battle. Usually, this is because they joined in the battle and got caught up in the heat of the controversy. Mediation keeps the professional out of the conflict because the mediator is neutral and not involved in fighting the conflict on behalf of one of the parties.

The tradition in many law firms has been to give the new lawyer the divorce and family law cases. After putting in a number of years on such cases, the lawyer finally would be given an alternative to the grueling practice of representing emotionally charged people fighting over children and property of the marriage. Even in many district court jurisdictions, the newly appointed judge was given combat duty in family court and then finally after a year or two, could graduate to the regular calendar. In short, for many, the alternative to practicing family law was to get out of it.

Beginning in 1974, another process emerged: mediation. This process allows attorneys to practice family law in a different manner, rather than graduating out of the field as the only alternative. However, the use of mediation and other alternatives to the traditional court process continues to be misunderstood and generally viewed with skepticism by a large portion of the practicing bar. The purpose of this article is to attempt to show how mediation creates different ground rules and an entirely different environment so that settlement can occur more easily. These new rules

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1. W. SHAKESPEARE, HENRY VI, Act 4: Scene 2.

permit the professional to avoid getting caught up in the couple's battle, focusing rather on how to end the battle in a constructive manner.

II. BRIEF HISTORY

The person generally credited with starting divorce mediation in the United States is an Atlanta attorney named O.J. (Jim) Coogler who, after experiencing his own divorce in 1971, decided there must be a better way to go about it. In 1974, he began to experiment with helping couples reach agreement on custody, support, and property division by acting as a mediator for both, rather than an advocate for one side. He was deeply spiritual and took much of his early inspiration from scripture passages that called for a mediator who would come between the alienated parties and bring reconciliation. He decided that to accomplish the goal of a cooperative divorce process, it was necessary to blend legal skills with mental health skills, and he sought early help from therapists and psychologists.

He asserted that in divorces with minor children, the family does not end, but is rather restructured. Jim once told me he could never act again as an attorney in a divorce matter because that would require one to act against the interests of the rest of the family members. Recognizing that he was asking couples to negotiate on their own what had formerly been the task of their attorneys, he attempted to give guidance to the couple with "Rules and Guidelines."[2] These were detailed principles of fairness meant to make then-existing Georgia statutes more fair and balanced. He particularly objected to the idea that fault was a factor in determining support and property division, and his rules required couples to agree, before entering mediation, that they could not assert fault as a factor in the negotiations. As is customary with many visionary people, Jim's concept of no-fault divorce was somewhat ahead of efforts in most state legislatures to pass no-fault divorce statutes.

Two of the most controversial aspects of his Rules and Guidelines related to attorneys. He believed that couples could not be cooperative when their attorneys were running the show, so he also required the couple entering mediation to agree to use one "advisory" attorney who would agree to represent them both. In addition, should mediation result in impasse, the couple was required to submit their entire divorce to binding mediation. When I modified his Rules in 1976 to fit our own situation in Minnesota, I removed these two clauses from our version of the "Rules". Shortly after Jim heard about how we were mediating divorces in Minnesota (requiring the couple to use two cooperative attorneys), I received an angry call from him accusing me of abandoning the "cause." He informed me

2. O.J. COOGLER, STRUCTURED MEDIATION (1978) (the following discussion summarizes a process detailed in ch. 4 and its related appendices).

that it was not possible for two attorneys to be cooperative, and the entire concept was in danger of being watered down.

Fortunately, the concept of mediating with two separate attorneys proved to be quite workable, and has become the standard model of mediation in the United States. Several Minneapolis area attorneys were willing in 1977 to assist the husband and wife while acting as cooperative attorneys who would respect the couple's desire to keep the divorce process from becoming acrimonious.

III. MEDIATION DEFINED

Jay Folberg, Dean of the San Francisco University Law School attempts to define mediation as:

> An alternative to violence, self-help, or litigation that differs from the processes of counseling, negotiation, and arbitration. It can be defined as the process by which the participants, together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs. Mediation is a process that emphasizes the participants' own responsibility for making decisions that affect their lives.[3]

Folberg continues by pointing out that a competitive process of conflict resolution focuses on the parties' differences, while a mediation process focuses on the parties' similarities.

Mediation is best thought of as a process of conflict resolution whereby the parties are encouraged to find the best result they can for themselves by using cooperative negotiation rules rather than a competitive or adversarial process. One of the main points of the cooperative mediation process is an effort to resolve the underlying aspects of the divorce dispute through focusing on the things couples really want, rather than focusing on who is more powerful or who is right. William Ury's recent book, *Getting Disputes Resolved*, suggests that there are three methods people have traditionally used to resolve conflict: power, rights, and interests.[4] A power-based system of conflict resolution focuses on who has the most power.[5] A rights-based system focuses on who is right and who is wrong using certain relevant standards or guideposts for a fair outcome.[6] However, the parties may also choose to resolve disputes by trying to reconcile

3. J. FOLBERG & A. TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION 7-8 (1984).

4. W. URY, J. BRETT & S. GOLDBERG, GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COST OF CONFLICT 4 (1988).

5. *Id.* at 7-8.

6. *Id.* at 7.

their underlying interests.[7] Ury argues that a system that reconciles people's underlying interests, while not invariably better than focusing on rights and power, "simply means that it tends to result in lower transaction costs, greater satisfaction with outcomes, less strain on the relationship and less recurrence of disputes."[8]

Perhaps influenced by Fisher and Ury's 1981 book *Getting to Yes*,[9] mediators in this country have tended to use an interest based approach to conflict resolution. This makes sense, because most couples have already failed at power-based negotiations within the relationship, and most couples lack the ability to understand and apply the complex legal principles of divorce law (rights). By focusing on the underlying interests of the couple, mediators have created a conceptual framework that attempts to reconcile both parties' need to have a good relationship with their children, the need to obtain some measure of financial security after the divorce, and the need to create a fair division of the accumulated property of the marriage relationship.

IV. Acceptance of Mediation by the Public and the Judiciary

The ABA Standing Committee on Dispute Resolution reports there are approximately 4,500 jurisdictions requiring mediation in family custody and visitation disputes, whereas no such requirement existed in any jurisdiction in 1977.[10] The Academy of Family Mediators, founded in 1981 as a non-profit Minnesota corporation, now has 1400 practicing members nationwide and in Canada. Most popular magazines have run articles about divorce mediation and in 1984, ABC Television News' *Nightline* featured live interviews with two Minneapolis couples telling Sam Donaldson about their wonderful experiences in mediation.

The question has now become, not whether mediation is a good idea, but rather, where does it fit within the system of courts, lawyers, and state laws protecting the public. Questions of mediator certification, legislation, confidentiality, spousal abuse, mandatory mediation, and a host of other issues now create debate. This is healthy, as any emerging field goes through an adolescence where the initial birth pains are quickly overshadowed by the work of raising the child.

V. How Cooperation Is Achieved in the Mediation Room

Mediators do not have the power to wave a magic wand and suddenly

7. *Id.* at 5-6.
8. *Id.* at 15.
9. R. Fisher & W. Ury, Getting to Yes: Negotiating Agreements Without Giving In (1981).
10. Melamed, *Attorneys and Mediation: From Threat to Opportunity*, 23 Mediation Quarterly 15 (Spring 1989).

people begin to cooperate. However, mediators do have the ability to influence what goes on in the room in a number of powerful ways.

A. Asking Different Questions

It has been said that the person who defines the problem has a great deal of power over the resolution of the problem. This is nowhere more evident than in custody battles. If you really think about it, only the adversarial system asks the question "Who will have custody of the minor children?" This question, by its very nature, creates a competitive battle for "ownership" of the minor children.

Just the words "custody" and "visitation" also create problems. The only other place in our language where "custody" is frequently used is in prisons. The word "visitation" is also used in connection with funerals. The words and the questions asked create a situation where parties fight over who will get the children. Mediators can reduce the fighting by simply asking a different question: Not *who* is a better or worse parent, but *when* will each of you care for the children.

The Idaho Supreme Court, in the case of *Stockwell v. Stockwell*,[11] recognized this concept. Justice Robert Huntley, writing for the Idaho Supreme Court, described the child custody case as "unusually acrimonious and expensive," and directed the parties to participate, under the auspices of the district court, in "a mediation process wherein all concerned focus on seeking the best interests of the children."[12]

With regard to mediation, the court stated:

> It is obvious that the parties have expended thousands of dollars in attorney fees, travel expenses, and loss of time from employment, while pursuing interests other than those which might be expected to be in the best interests of the child as distinguished from the best interests of the parents and their respective families. It is a case where all might benefit if they were to cooperate in seeking a mutually satisfactory resolution through a mediation process wherein all concerned focus on seeking the best interests of the children.[13]

The court directed the trial court, prior to conducting further custody hearings, to require the parties to "undergo a mediation process under the auspices of the district court before a qualified mediator."[14]

Justice Johnson, concurring, referred the trial court and the parties to J. Folberg and A. Milne, *Divorce Mediation: Theory and Practice*. He also

11. 116 Idaho 297, 775 P.2d 611 (1989).
12. *Id.* at 301, 775 P.2d at 615.
13. *Id.*
14. *Id.*

quoted at some length from one of the articles in that volume, S. Erickson, *The Legal Dimension of Divorce Mediation*. Justice Johnson quoted in part:

> The legal adversarial system asks, 'Who will be awarded custody of the minor children?'. . .
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> . . .
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> A more appropriate question to ask the divorcing couple is, 'What future parenting arrangements can you agree to, so that each of you can continue to be involved, loving parents?' This version of the custody question creates a different focus and a very different outcome. First, the question is mutual, and answering it requires cooperation. Asking 'Who shall have custody?' creates a competitive focus and is likely to produce an adversarial or fighting response, but asking the couple to agree to certain parenting arrangements requires collaborative discussions and mutual planning.
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> Second, the question is future oriented. Mediation pushes couples to look more to the future because it can be controlled and changed.[15]

Couples can usually discuss future parenting arrangements with little conflict because they are prevented from fighting over who was a more faulty parent in the past. This becomes easier to accomplish when a different question is asked.

B. Focusing on the Future

Divorce trials, by their very nature, focus on information about the past. Some time must be spent establishing factual data about incomes, expenses, and the nature of marital assets. However, once this is accomplished, the real focus must then be on the future. An interest-based approach to conflict resolution deals primarily with solving future problems. In divorce, these problems are always: 1) How will both of you be able to act as good, loving parents in the future, even though you are living separately? 2) How will it be possible to achieve some measure of economic security for both of you, given the fact that it now costs more money to live in two separate residences? 3) How can the property be fairly divided in order to meet your future needs for housing, transportation, and financial security? A rights-based approach, with its requirement of applying legal standards of fairness, tends to keep people in the past. An interest-based approach tends to focus people on the future, thereby eliminating a good measure of blaming and fault-finding, because the future can be shaped

15. *Id.* at 302-03, 775 P.2d at 615-16 (quoting S. Erickson, *The Legal Dimension of Divorce Mediation*, in J. FOLBERG & A. MILNE, DIVORCE MEDIATION: THEORY AND PRACTICE 105, 108-09 (1988)).

and controlled hundreds of different ways, and the past can only be fought about.

C. *Discourage Blaming and Fault Finding*

Conflict tends to escalate when parties seek to fix blame over some past events. Cooperation is easier to achieve when parties are told by the mediator: "No one in this room has the power to change the past; therefore, it is important to avoid using time and effort trying to determine who was more at fault for your present problems. Rather, let's try to turn past problems into an opportunity to find solutions that will prevent these problems from occurring again." This is a difficult task to accomplish with an angry, highly conflicted couple, but it creates a much better environment for cooperative problem solving.

D. *Avoiding Positional Bargaining*

When a parent in mediation states: "I want custody of the minor children," that person's underlying interest is in trying to avoid losing the children. More important, it is a positional statement that says, "My position is that I don't want to lose my relationship with the children; therefore, my solution is to demand custody." Positions can only be met in one way—either custody is won, or it is lost. By moving the couple to talk about their real underlying interest in remaining good, loving parents, the mediator can explore a range of options and eventually find some way to achieve resolution. A positional statement can only be solved in one way. An interest statement can be solved in hundreds of different ways. Therefore, opening statements are avoided and the future needs of the parties, rather than past problems are stressed, and options, rather than positions, are discussed.

VI. Conclusion

The exciting aspect of mediation is that it allows professionals to avoid getting bruised in acrimonious family law battles. To represent couples in mediation, or to act as a neutral in cooperation with the parties' attorneys, requires understanding of the underlying principles of mediation. Different rules, different questions, and effective control of the process make mediation more than another hoop to jump through for the attorney who hears the judge order a client into mediation. It presents a better opportunity for the client than could be obtained in litigation, especially when the financial and emotional costs of a contested trial are considered.

Rather than thinking that divorce wars are a part of the turf, created by the anger and emotion of a disintegrating marriage, divorce wars can be controlled and managed using the ideas and techniques learned and ap-

plied by divorce mediators in the seventeen years since Jim Coogler sat down with that first couple in Atlanta.