THE TRUTH ABOUT CHILDREN AND DIVORCE: DEALING WITH THE EMOTIONS SO YOU AND YOUR CHILDREN CAN THRIVE

Reviewed by Carl D. Schneider, Ph.D.
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The Truth about Children and Divorce, Bob Emery’s new book, has just joined the short list of books I recommend to my divorcing clients. Emery brings to his work the special combination of being at the same time a mediator, researcher and therapist. And, I would add, he is also a skilled writer who avoids a lot of academic jargon and communicates his research findings in a form that is accessible to the public as well as to practitioners.

Some readers will react to a book titled “The Truth About...” But it’s a publisher’s title. The book’s sub-title is Emery’s real concern: “Dealing with the Emotions So You and Your Children Can Thrive” As a therapist, he spells out clearly how handling one’s emotions in divorce where children are involved is the key task. As he puts it, “How you manage or fail to manage your emotions is the most important task of divorce.”

As a researcher, he has another goal: clarifying the conflicting data on the impact of divorce on children. Ever since Judith Wallerstein’s controversial book The Unexpected Legacy of Divorce suggested that parents might choose not to divorce for the sake of their children, we have seen divorcing parents anxious that they are harming their children. And on the other side, we have the self-help shelves offering the ‘good’ divorce.

In this book Emery takes his place alongside the judicious and thoughtful work of Joan Kelly as well as Mavis Hetherington. Emery offers an assessment of where the ‘truth’ lies about divorce: in the vast majority of cases, divorce, he notes, does not permanently damage children. But it is a major stressor and causes much pain. As he summarizes: “pain is not pathology. Grief is not a mental disorder. But it is also true that resilience is not invulnerability. The pain is real.” (p. 81).

Finally, Emery employed his research skills on his own work as a mediator. He studied a group of couples contesting custody. Though working with small numbers, he was able to assign people randomly to two groups: one was offered mediation; the other had no intervention and so continued litigation. Amazingly, he found in a follow-up study that nonresidential parents in the couples who mediated “were three times more likely to see their children at least once a week twelve years after the mediation or legal proceedings ended” (p. 228). This is just one of a host of similar findings of significant difference between the litigated and mediated group 12 years later! Emery offers one of the most dramatic findings I know about the impact of mediation. All mediators should be aware of this study.

This is a self-help book, written for parents in the midst of divorce, but one that a professional can recommend in good conscience. The way Emery is able to make familiar points with fresh images and apt metaphors leaves the book a cut above the rest of the field. For example, regarding new relationships: “You get to pick your partner, but whom you get involved with is an arranged marriage for your children.”
About dating: “You’re ready to date when you’re ready to tell other people—including your ex and your children—that you’re dating...Beginning to date after divorce is kind of like unprotected sex: You shouldn’t start doing it unless you’re prepared to deal with the consequences.”

About parents abdicating decisions to their children about schedules: “How many children would be truant if parents asked them every morning if they wanted to go to school—and actually let the children decide?”

And I love his vivid description of the difference between the leaver and the left in divorce: “...the leaver...has thought through why he wants a divorce, built up a case in his mind about why his decision is right, and probably even carefully considered where the children might live, how the property might be divided, how his life might be afterward. If there is an affair, the leaver has already made a leap into a future—perhaps even what seems a very promising future—without the current spouse. The leaver possesses something her [his?] partner may need a very long time to develop—a vision of the future, a future outside this marriage... This might have taken him years or perhaps only months, but he has already started distancing himself from the marriage; he has already begun thinking of it as something that once was—not something that is, will be, could be, should be, might be.” (p. 38).

Emery is passionate in urging that parents do the hard work of being adults in order to protect their children in divorce. His passion, as well as his wisdom, clearly shines through in this book. I recommend it.

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STAYING WITH CONFLICT: A STRATEGIC APPROACH TO ONGOING DISPUTES

Reviewed by Carl Schneider

Bernie is at it again! And we can be thankful for that. For the past three decades, he has consistently provided leadership in our field. A central part of his work has been his invitation for us to rethink just what our field is. Through his work, he has offered us an expanded definition of our role.

Last time around, with Beyond Neutrality, he argued for a broader field - one that encompassed more roles for us than simply that of the lonely 'neutral.' Our involvement can be much more diverse, to include such roles as third-party, ally, and system roles. We need to see ourselves as “conflict engagement specialists,” helping people through the “entire life cycle of a conflict - prevention,...management, escalation, de-escalation, resolution and healing.”

This time, in Staying with Conflict, he wants us to consider how misleading and confining our tag line of “conflict resolution” is. So much of what we deal with cannot be resolved! If that is our self-concept, he argues, we will often be irrelevant in our work. We need to stop equating “progress with solutions.”

We would do better, he proposes, to think of ‘constructive engagement with conflict.’ So many of the important conflicts of both our personal and political life – for example, “those involving global climate change, human rights, limited resources...and values about families” –“don’t readily end,” because they are “embedded in structures, systems, values, or identity” and connected to “differentials in power, privilege, and responsibility.” Yet, “as conflict professionals we exhibit a strong tendency to ignore the ongoing aspects of these conflicts and to focus only on those aspects that can be resolved.”

That does not mean those conflicts are simply at impasse. “Enduring” conflicts are not the same as “intractable” conflicts. Such binary thinking dooms us into feeling ineffective, or trying for solutions that miss the mark.

Instead, it is how we do conflict that matters, especially when it comes to long-term conflicts. How we do them can escalate and worsen a conflict, leading to violence or defeat. If, instead, we help people prepare to “stay with conflict over time constructively,” they may “have a more measured response, be more likely to sustain themselves in a protracted conflict, accept incremental changes as necessary and positive, think strategically, and learn to work with power effectively – not fearing it or abusing it.”

In reading Bernie’s book two strong associations came to mind. One is the work of John Gottman, a leading researcher in family and marriage therapy. Gottman has urged practitioners to realize that most conflicts in marriage do not admit to having a solution. Instead, Gottman suggests , the human condition is that we all, in effect, choose a set of conflicts to live with in our relations - whether it is a morning vs. a late night person, family time vs. personal time, or being parsimonious vs. generous. A good relationship, he contends, is one in which couples learn to play with the conflicts while recognizing that the differences do matter. Successful couples find a way to acknowledge the differences in a way that enables them to stay
connected over time, while respectfully disagreeing. Gottman’s work has transformed the field of marital therapy; Mayer invites a similar shift in our field.

The second association I had was to the pesky and persistent issue of styles of mediation. Though Bernie works out of a facilitative approach, in this work he has bridged a lot of the ideological impasses in the debate about styles. Facilitative mediation is enhanced and expanded in at least two significant ways.

First, he offers a strong caution that we can’t always get to “yes.” It is an ideological trap to think of ourselves simply as “problem-solvers.” “The story we often tell is that conflict is a problem...that...can usually be fixed.” We need, he urges, to let go of trying to reach an agreement as our primary role. “Instead of asking, ‘What can we do to resolve ...this conflict?’ we need to ask, “How can we help people...prepare to engage with this issue over time?” This approach, adds Mayer, is not about “separating the people from the problem.” In enduring conflicts the two are often inseparable.

I believe Mayer has also gone a long way toward bridging the divide with transformative mediation, incorporating much that Bush and Folger have invited us to see in their work. In long-term conflicts, our attention, he urges, needs to be devoted to how the parties are doing the conflict as much as what they are conflicted about.

Our aim should be to help empower parties to be their best in engaging the conflict – neither shying away from it, nor over-reacting to it, but responding with “courage, vision, resources, skills, and stamina.”

Mayer also urges that we integrate narrative mediation with facilitative mediation. We need, he states, “to work with disputants to construct conflict narratives that encourage an effective approach to long-term disputes.” Mayer helped me integrate my interest in both framing and narrative mediation, when he suggested that framing issues in conflict means dealing with “altering the conflict narrative” (emphasis added).

Mayer has also reflected long and hard on the issue of power throughout his career. His chapter on “Using Power and Escalation” rejects the conflation of power with “aggression, coercion, or force,” recognizing it instead as “the ability to accomplish one’s goals and have an impact,” This chapter has a valuable accompanying section titled “Effective Uses of Power.” The reader will benefit from his perceptive comments on escalation: “Because escalation looks like jumping into a conflict, it is easy to overlook that it is essentially avoidant.” “Escalation as a form of avoidance is fight as a means of flight.” Gems like these are scattered throughout this book.

Bernie reminds us of the task in enduring conflicts: “Like the old Jewish proverb, I may not solve the problem. But I am responsible to engage the problem.” This book will be both a textbook and an inspiration for those of us who deal with the hard stuff - the enduring conflicts. As always, thanks, Bernie.
BEYOND NEUTRALITY: CONFRONTING THE CRISIS IN CONFLICT RESOLUTION

Reviewed by Carl D. Schneider, Ph.D.
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It’s always a pleasure to participate in a Bernie Mayer workshop. He never lectures or tells us; he invites us to join him as he reflects on his experience and ponders the paradoxes of this field. His newest book, Beyond Neutrality, is written with that same gentle wisdom and invitation for reflection.

Drawing on his 25 years of leadership in the conflict resolution field, Bernie asks us hard questions: “Have we lived up to our promise? Are we actually getting somewhere?” He fears that we could come to be seen “not as a free standing field” but as (merely) a set of specific skills and cluster of roles. Our fate, he fears, could be that of community organization and group work, once strong fields in social work but now pale shadows of their former selves.

He sees a field in crisis, and that crisis is our failure “to seriously engage conflict in a profound or powerful way.” Why, he questions, were we not consulted to help with the aftermath of 9/11 or why are we largely absent from negotiations on everything from environmental issues to pressing social problems? On 9/11, he observes, “Diplomats, politicians, journalists, military experts, area experts, political analysts, pollsters, legal experts, and an assortment of other media favorites are repeatedly consulted, but not a conflict resolution practitioner is in sight in these discussions. “What we are mainly remarkable for,” he notes wistfully, “is our absence.”

The enemy, he argues, is our self-limitation – the restricted role and purpose by which we have defined ourselves. Bernie’s vision of the way forward grows out of his reflections on his own journey. In his younger days, Bernie created conflict as a union organizer, peace activist, and child advocate. Now, as a leading “conflict resolver,” he considers whether he left something essential behind. The recognition of what is now missing in his conflict resolution work provides him a key to what is missing in our field.

Steven Covey said, “if you want small change, learn a skill. If you want major change, get a new paradigm.” Bernie is after major change. Rather than touting ourselves as neutrals whose role is to help “resolve conflict,” he wants us to see our task as helping people to “engage conflict effectively.” According to Bernie, “people in conflict need assistance throughout the whole cycle of conflict – in preventing conflict, in understanding that there is a potential conflict, in raising that conflict to the level of awareness, in escalating a conflict to the point where some response is provoked, in conducting and carrying on a conflict until resolution may be possible, in engaging in a resolution process, in coming to resolution, and in healing from conflict. If we are to flourish as a field we have to become more involved in all aspects of this process.”

Bernie suggests that we may be putting too much energy into the trappings of professionalism. Our efforts to develop standards of practice, criteria for approved training programs, certification requirements and other professional policies and procedures may be a case of misplaced priorities. Whether conflict resolution becomes more widely accepted and influential depends less, he maintains, on developing the
infrastructure of a profession than on “strengthening the clarity practitioners share about the heart of what they have to offer and providing services accordingly. Conflict resolution is more... a vision, a set of values or even a movement than a professional discipline.”

In moving “beyond neutrality” and expanding our repertoire of roles, Bernie sees us becoming more comfortable as advocates, coaches, trainers, advisors and negotiators and accepting these roles as appropriate for conflict resolution professionals. This would be a major change, but, he contends, one that could move the field in new and more effective directions. Beyond Neutrality presents a thoughtful rationale and foundation for a more robust and deepened field. This book will be argued, revised, expanded – but it will be the agenda!

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Whenever experienced divorce mediators get together these days and start talking about their practice, someone invariably says, “They’re just getting crazier, you know!” If there is any truth to that widely shared perception – and I think there is – then Jeffrey Wittmann’s Custody Chaos: Personal Peace: Sharing Custody with an Ex Who Drives You Crazy is the book you need! The sub-title says it all. This is the book for high conflict clients who find their interactions with their ex to be at a hopeless impasse.

Wittmann immediately engages the reader in that situation by observing: “Of course, you’re quite sure you know what the problem is: your ex…. That’s crystal clear to you. What more do you need to know?” Then, gently but firmly distinguishing the “world of things we can’t control” and “the world of things we can control,” he invites the reader to shift his/her attention from all that the “other” has done, is doing, and continues to do, to what responses and skills the reader is bringing to this situation.

Never sentimental, never losing the reader, Wittmann nudges, invites, and challenges readers to focus on their own responses to the matters they are confronting. He is unrelenting in his belief that the actions of the other do not justify our negativity. As he reminds the reader in his homey way: “Consider your relationship with your ex as a soup that you both must eat.” “Whatever …ingredients your ex may add, decide to add only those things that will make it taste more tolerable for both of you.”

What is the core message of the book? Two foci, I believe. First, Wittmann has a message to the client about one’s own self and actions: conduct yourself according to the values you believe in. Don’t be reactive. In a lovely metaphor, Wittmann invites parents to see themselves as each standing in front of a classroom at either end of the blackboard, chalk in hand. “Your children are the students…. Scribbling in their life notebooks as they learn…the lessons that you teach.” He repeatedly challenges us to understand that the task is not a one-time effort. It is a sustained commitment to be who we want to be for our children.

Wittmann also has a perspective to offer to his readers about how they view their ex: let go of the moral high ground, he says, and “view…your ex as unskilful rather than evil” “Your ex is an imperfect traveler in a confusing world. Like you and like all of us, he or she makes mistakes along the path to self-protection and happiness.” “It is the difference between seeing someone as evil and seeing him as missing tools in his toolbox.”

Wittmann offers a wonderful mix of advice, encouragement, and skill-specific advice that leaves the reader feeling clearer, more solid, more hopeful. His section on letter-writing to an ex, for example, is especially useful. I copied it to give to my clients. Along with examples, he also gives the reader the ingredients for what makes the letter work — e.g., “a clear statement of the letter’s goal,” a statement of the writer’s “commitment to civility,” and “a specific positive request for the future.”
The reader can get a taste of the nuggets and gems strewn throughout this book from some of the following:

- If your partner has tossed you the ball, “When you pass the ball back, make it an easy lob and empathize.”
- “When your ex has a complaint about your new partner and voices it to you, you are being invited into a difficult triangle.”
- “Families can play a dual role in your life... they can be an island of security and love; they can also fan the flames of conflict.”
- “Be clear with your family about the help you want- and the ‘help’ you don’t want.”

While the tone is conversational, it is always a thoughtful conversation that helps the reader focus on where he or she wants to go. It rises above the many pop psych books flooding this field to confront the really intractable problems that are so disheartening in post-divorce relations. I kept expecting that Wittmann couldn’t keep up such a helpful, concrete tone for the whole book. I was wrong.

Initially, I also wondered if my enthusiasm was a product of knowing the author. I have found, however, that every professional who has followed my encouragement to read this book has come back wanting additional copies for clients.

I am also recommending this book to my clients. I believe in bibliotherapy. Wise books help clients. For many years I have faithfully given all my clients Isolina Ricci’s *Mom’s House, Dad’s House*. I still do. It, however, is for “normal” couples. I have increasingly felt the need for something different, something with more of an edge for my high conflict couples. *Custody Chaos, Personal Peace* is it.

Note about the author: Jeffrey P. Wittmann, Ph.D., is a licensed psychologist, family therapist, and divorce mediator in Albany, NY, whose private practice concentrates on services for divorcing families, including the “Kids First After Divorce” program.
The challenges for divorce mediators are two-fold. The most easily recognized is the task of working with people at the most helpless and stressed time of their adult lives. The less obvious challenge is actually more demanding: to resist the temptation to rescue people who seem so in need of our help. The zen of being a mediator is to intervene yet not control, to offer information and not advice, to identify options for clients without pressuring for a particular solution, to clarify choices without inserting our judgments about the right choice, to care passionately about outcomes yet not to be invested in any particular outcome.

As mediators we are challenged throughout the process: do we truly believe in this ascetic practice which abjures advocacy and advice? Can we hold to the simple faith that clients, if they will, can make their own decisions? But these subjective challenges arise only in the context of our objective work with the clients who opt to mediate, so let us first address the way the field deals with the challenges our clients face.

A couple entering marital therapy have reached an impasse in their relationship. Nevertheless, a hope remains of rebuilding the relationship. Often, therapy involves identifying patterns of interaction which are no longer effective for the couple. By helping them recognize these patterns and teaching what may be new skills in communication, the therapist helps the couple develop new ways to relate.

While the couple entering marital therapy may maintain a tenuous hope for rebuilding, couples approach divorce mediation with a very different set of attitudes and concerns. At least one party in mediation has reached a point where s/he has decided to end their relationship together and to move on without the other. It is a unique moment in their lives. They may feel a sense of shame and failure, anger or fear as they approach the mediation. And now they are being asked to sit in the same room and negotiate with the person whom, they feel, has caused these negative feelings. Many people in their lives may well have taken sides in the couples' conflicts and they wonder if the mediator will do the same. In addition they have heard stories about the adversary system in divorce and are wary and defensive. Will they give too much away or make an uncorrectable mistake? Often they feel a sense of loss - loss of the many dreams and hopes with which they entered the relationship, and the loss of the financial partnership they may have had. They are no longer interested in learning about the problems in their communication nor interested in learning new ways to communicate. Well aware of those problems, they have already concluded that they are insurmountable.

The mediator, then, must commence by creating an environment which feels both safe and hopeful. These qualities can be transmitted in a variety of ways, including via the structure of the mediation, the mediator's approach and the underlying philosophy of mediation. Ultimately, the process of divorce mediation helps the couple face the end of their marriage with a sense of mutual participation, and thus, ownership, in the decisions to be made. In this chapter we present a case which reflects an amalgam of a number of actual cases. We hope to illustrate how a focus upon the principles of separation and
individuation within a structured process enables a couple to move to a sense of closure about the past. This in turns opens each person's future.

**ORIENTATION & THE CONTRACT**

**The Mediators:** We are two mediators who are also licensed psychologists. One of us still maintains a major clinical practice; the other, after a decade as a full-time therapist, has shifted into doing full-time mediation and training of mediators nationally. We are capable of working individually; we offer clients the option of a co-mediation team. Sometimes this team is inter-disciplinary, with a therapist-attorney pair. In this case, we had decided to co-mediate as an opportunity to give further experience to the newer mediator. We have found that clients find co-mediation valuable for its male-female gender balance as much as for its disciplinary balance.

**The Case:** Marital mistrust was apparent even before our first meeting with Michael and Fran. The original contact with us was made through their attorneys who intended to accompany the couple to the first mediation session. Both attorneys had some knowledge of mediation; they had agreed to encourage mediation because both were concerned about their clients anger. The attorneys expected that complicated legal issues around inherited property were going to be crucial in this case. They were concerned that client anger would precipitate an extended legal battle which would quickly dissipate the limited funds this couple had. While it is not unusual for attorneys to refer clients for mediation (in some jurisdictions an attempt at mediation is required by the Courts), it is more unusual for the attorneys to request that they accompany their clients.

In the first session, then, in addition to joining with the couple and telling them about mediation, we had to work to keep the session from being framed in an adversarial way by the attorneys. We had to help the couple feel safe enough to risk talking directly and to be able to present their own interests without feeling the need for their attorneys' continued protection.

Michael arrived first, dressed in a three-piece suit. He was clearly a "Michael", not a "Mike." Fran arrived a short time later, a Fran not a Frances, dressed casually and on the verge of tears. Both attorneys, briefcases in hand, were ready to inform us of the issues they each felt were most important. We tried to keep the atmosphere informal. Rather than allowing the attorneys to start their cases, we chatted with them and the couple about traffic and mutual acquaintances. Michael and Fran said little, staring at us and not looking at each other.

We opened with the seminal question which parses whether someone belongs in divorce mediation or therapy. Turning to Michael and Fran we asked, "Do we understand that there has been a decision to divorce?" Both Michael and Fran looked a little surprised by the question. Michael answered with a curt, "yes"; Fran nodded in agreement. The issue is whether there has been a decision by at least one party to divorce. If so, that decision determines that there will be a divorce. The question is not how people feel about getting a divorce or whether they both want to get a divorce. Typically, it is not a mutual decision. One party is leaving, one left.

We went on to ask about the current living situations for each. Michael explained that he had moved out of the family house and into an apartment eight months before. He went on to state that Fran and two of their three children were still living in the house, that he was paying both his rent and the mortgage, and that this was becoming quite difficult. Michael seemed ready to expound further about the burdens he was
experiencing. We knew that allowing each person to start arguing their positions would not only be unproductive but also would give each the impression that the sessions were not safe. We therefore gently broke in:

- "Michael, we do need to hear more about these issues, but before we get too deeply into all that we want to tell you a little about how we work. First, we want to be sure you both know that this is a voluntary process. While your attorneys thought this was worth a shot, it is entirely up to each of you whether we proceed. Either one of you may decide at any point that you don't want to go on with this process. Here, you have both control and choice. We will make no decisions and have no power over you. No decision will come out of here unless each of you agrees to it.
- The process of ending a marriage, as you've indicated, Michael, is draining financially and emotionally. To end this marriage in a non-destructive way you each need to know you'll be okay. To make sure that is the case we'll have each of you fill out budget forms and will work with you to assure that you each have what you need. Our goal in working with you is to help the two of you reach an agreement which each of you feels is fair.
- One way to make sure you both feel the agreement is fair is for you to agree to full disclosure. Full disclosure means you will each provide full information and documentation of your assets and debts. It is important that each of you know that all the cards are on the table.
- We also want you to know this process is confidential. That means we will not discuss anything that happens in our sessions with anyone else. We will ask you to agree not to subpoena us if this process breaks down and your case is adjudicated. We think this is important so that you know that there is no benefit to trying to sway or to win us over to one side or the other to help if you do go to Court. Obviously, you each may discuss what happens here as you wish. There will be times that we encourage you to talk to people such as your attorneys to get information which may be helpful in making a decision.

**Michael:** So, we can talk to our attorneys? What if we don't like something that is suggested here?

**Mediator:** Well, there may be suggestions about the mediation process which we might make and there will be proposals that most likely will be made by either you or Fran. You may like some; others will not be acceptable to you. You absolutely will not have to agree to something you don't like and you certainly can talk to your attorney. If you do reach agreement, we will draft a memorandum on your decisions at the end of this process and we will ask each of you to review it with your attorneys before finalizing it.

As we addressed some of the fears both Michael and Fran were experiencing, we could see them relax a little. And as we acknowledged the attorneys' competence and value as resources for their clients, they also sat back in their seats.

We asked each party if they had questions. While Michael had been assertive, Fran had been quiet. When we turned to her she became openly tearful, apologizing, and saying that this was difficult. However, she wanted to go ahead and give it a try. When Michael did not respond we asked him specifically if he also wanted to proceed. He agreed, noting that he didn't have much choice.

We could not let that go by: our core belief as mediators is that clients do have choices.

**Mediator:** Michael, you say you don't have a choice. There are no victims in mediation; no one has to do this. You do have choices, the first of which is how you wish to proceed. You can work out this divorce
through settlement negotiations with attorneys, by way of decisions by the court, or you, yourself, can keep control of the process by mediating. Being in mediation is a choice and we want to be clear you are making that choice.

Michael seemed taken aback that his comment had been heard. He indicated that in fact he thought it was a good idea and as it might cut down on expenses, he would give it a try.

Michael asked how long this was going to take. We noted that each situation is different but generally the issues could be resolved in 6 to 8 sessions. We then queried whether Michael and Fran wanted their attorneys to attend future meetings. Both were comfortable meeting without their attorneys. We then put all this in writing and had the clients sign an agreement to mediate. We gave Michael and Fran asset and budget forms to be completed for the next meeting.

As we all were gathering up papers, however, Michael's attorney interjected to say that he wanted to emphasize a financial issue regarding monies which Michael had inherited and funds he had received as a buy out by his company. Michael had accepted a lump sum from his company in lieu of continuing to work when the company was down-sized. The attorney declared tersely that some of those funds were unaccounted for and there was an issue of dissipation of assets which needed to be addressed.

Our first session thus ended on a note of tension, foreshadowing the conflicts to come.

THE PROCESS OF MEDIATION

Mediation is a process with identifiable stages. As couples move through stages, knowledge is gained that aids the couple in reaching decisions together about how to "get apart." This is of primary importance because people often enter divorce settings with strongly-held positions about what they will or should get as they leave the marriage. It is a recurring problem throughout the mediation process. What the couple must learn is that the who-gets-what decisions are only made late in the game (stage 5).

Different mediators punctuate the process differently. However it is punctuated, all mediators need to have a clarity about the process and to trust that it works. They need to be aware constantly of the step by step stages and be clear where they are in that process. The model we have found helpful focuses on six stages.

1. **Initiating the Process**: First, mediators must **join** with the parties by establishing an emotional connection. Then, parties must **buy into** mediation and choose to work out their conflicts and issues through this process rather than the alternatives of either ignoring the issues or pursuing an adversarial solution.

2. **Gathering information**: Next, both hard and soft information is gathered concerning finances and needs and interests. Often, outside experts are used in this stage in a way that is quite different from the typically-isolated work of traditional individual or marital therapy.

3. **Framing issues**: The mediators must help the parties identify the problems and issues. They **frame the issues** in language that is neutral, future-oriented and involves the needs and interests of both parties. The issues are not solved here!

4. **Developing Options**: Once a problem is identified, options are explored which might deal with that problem. People regularly come to mediation with their own preferred solution - an approach that often immediately locks parties in unresolvable argument. By encouraging the couple to slow down
and consider options "outside the box," the mediators can assist them in developing alternatives they may not have considered. This is the parties' mediation: we encourage them to come up with their solutions rather than giving our solutions. The goal is to empower parties, rather than rescuing them.

5. **Negotiation**: Here, finally, parties negotiate and make decisions based on the options available to them.

6. **Finalizing the Process**: The decisions reached are finalized in a written Memorandum of Agreement.

Some mediators start with parenting, others with finances. But all full mediations (ie., mediations which are not simply custody mediations) must sooner or later deal with three major areas: asset division, support (maintenance), and parenting. We personally choose to begin with finances because we find it helpful to have a database to ground the discussion.

Mediation addresses very **concrete** issues: budgeting who will pay for the children's clothes, whether Dad will take the children to church on Sunday morning when he has them, whether the present value of the pension is calculated based on its maximum value, or how the number of "overnights" will effect child support. Issues such as missing funds are often an area of concern. While the marriage counselor approaches each session with eyes on intimacy and communications skills, mediators must also have the child support guidelines and a calculator.

**HE SAID, SHE SAID: GATHERING INFORMATION**

We began the second session by asking how Michael and Fran had done with their homework, gathering their financial information and records. Michael quickly started in on what funds he felt were missing and demanded that they be repaid. He complained he was paying the majority of the household bills and bearing the heaviest financial burden. Fran, meanwhile, was more and more withdrawn, her eyes filling with tears.

In the language of mediation Michael was locked into his position; he not only had a concern but insisted on his solution. He was ahead of the process. Michael, pushing for a particular outcome, was really at Stage 5. We were increasingly aware of his anger and desire to push his position. This often occurs at the beginning of the process and we assured Michael that his concerns would be addressed but suggested that we had found it most helpful to first gather concrete information about their assets (Stage 2, Asset Identification and Valuation), prior to negotiating who gets them (Stage 5, Asset Distribution).

We then spent some time discussing their work and financial history:

Michael and Fran had married soon after Michael left the military service where he had seen action in Vietnam. Their marriage had lasted 27 years; their three children were all over 18. Michael had gone on to work for a large corporation while Fran maintained a secretarial position. She had left that job when she was pregnant with their first child. Both, they acknowledged, had agreed that Fran should not work outside of the home after their children were born. Their youngest child, now 20 and in college part-time, was living at home and not working. Their middle child also attended college while living at home. Their oldest was living on his own and working. Meanwhile, Fran had returned to work as a part-time teacher's aide. Since their separation, she had been able to increase her hours to a full-time but low-paying position.
Michael had worked for the large corporation for 20 years, moving into a management position. Five years ago, the company downsized and offered Michael a "buy out" package which he had accepted. He had planned to develop a consulting business but had not started the business immediately.

Fran revealed that Michael really felt he had been let go by his corporation after twenty years and was seriously depressed after his termination. She found him unavailable and near impossible to communicate with during this period.

Michael protested that his feelings were understandable. He went on to say his last remaining aunt had become terminally ill during this period, that he had cared for her and had continued as the executor of her estate.

As Michael spoke, Fran noted quietly that she had helped with his aunt. When she declined, the Aunt had moved in with the family and Fran had reduced her hours at work to help care for her.

As we listened to this history, we both became aware of and commented on the stress both Michael and Fran had experienced in recent years. Perhaps because she felt her feelings had been recognized, Fran began more actively to participate in the discussion. Thus, while we had moved to information gathering (Stage 2), we also continued the process of joining with them.

After gathering this narrative history we put up the financial data each had gathered on a flip board. The goal here was to take the separate fragments from each party and knit them into a consensual document. The rhythm of divorce mediation is a constant dialectic between separating people and bringing them together. One or the other movement always going on. In mediation where the parties are mainly focused on getting apart, the first task, paradoxically, is to bring them together in agreement about their assets. They must come to an agreement about what they consider marital property and what it is worth. Only then do they proceed to an orderly and fair division of assets. In the adversary system this is a contentious process that can involve lengthy and expensive, formal, coerced discovery (e.g., depositions, interrogatories, subpoenas). In mediation the rubric is voluntary full disclosure. Though voluntary, however, it is not a process simply or primarily of trust: it is a process of disclosure that includes both documentation (e.g., tax returns) and a set of checks and balances (e.g., signed contracts for full disclosure including consequences for non-disclosure).

Fran, frightened at the time of separation about being able to pay household bills, volunteered that she had withdrawn money from a joint account and opened a savings account in her name. Michael and Fran had not been able to talk about this except with mutual recrimination. Now, Fran voluntarily shared critical information as well as supporting documentation of what had happened to the money.

As Fran shared the financial figures, Michael became increasingly angry. Michael felt that the sum Fran had taken was higher than she reported. Fran retorted that the couple had used much of the money Michael was referring to to pay household expenses while Michael was getting his consulting business started. She asked that he bring in the bank records to review. Michael balked. He feared, as do many people, that just to share the information threatened to give the other party an advantage.

This clearly was a hot issue. Fran pushed the issue further, asserting that Michael had inherited some family money and that he would also receive more funds when his aunt's estate was settled. Michael did
not respond to her statements. Prompted by the mediators, Michael agreed to bring in both a current bank statement and a history of transactions on that account.

This often occurs in mediation. Parties protest that the other has hidden assets. Mediation has a fundamentally different approach to the process of Gathering Information (Stage 2) than the adversary system. The adversary system does this by formal discovery and a series of consistently coercive measures - e.g., depositions, interrogatories, subpoenas - which carry a high transaction cost for the parties. Mediation addresses the same issue without coercion, but with a series of checks and balances that include a formal agreement for full disclosure, the use of financial Asset and Budget forms, voluntary documentation of assets, the clients' use of attorneys, and a commitment to informed decision making.

We continued to gather information, now about their income. Fran's income was low but had been steady. Michael's income had varied as he established his consulting business but had risen steadily. The mediators raised the question of the value of the business. Michael protested that he was the primary asset of the business; it was his knowledge which made it work. The mediators asked that he bring in copies of the tax returns for the last three years. Michael reluctantly agreed.

By the end of our second session the mediators, and more importantly, the parties had a good picture of their finances. Each had assignments to do for the next session. Assigning homework is a major role for the mediator. People come to us saying they want a divorce, but are bogged down and stuck. Researcher Ken Kressel says our job as mediators is to help clients orchestrate their divorce (Kenneth Kressel, THE PROCESS OF DIVORCE (New York: Basic Books, Inc., Publishers, 1985)). We help them move forward.

Michael and Fran, for example, agreed to talk to a real estate agent to find out what would need to be done to the family house to prepare it for sale and what its fair market value was. They were not committing to selling the house, but gathering information so they could later consider options (Stage 4) and make an informed decision about how they wished to proceed. The assumption in divorce mediation is that the parties got into their marriage without lawyers making that decision for them. Similarly, if provided with proper information so they can make informed decisions, they can work out the end of this partnership themselves.

In addition, we asked both Michael and Fran to complete individual budget forms for their future as they separated. Much of divorce mediation is reassurance about fears: the budgeting task is structured to help reassure clients who are understandably and predictably anxious about the future. Mediation offers clients the opportunity to plan concretely for the future beyond the divorce. It can reassure them that they will be able to cope financially.

The identification and valuation of Assets is a consensual task, requiring agreement on what they have and what it is worth in order to divide them up and to separate. Divorce mediation consists of an alternating rhythm of bringing people together and separating them. There is much work couples need to do together in order to separate non-destructively. The Budgeting process has a different dynamic. It is not a consensual task. The marriage is ending and the parties are planning for what each will need individually for the future. Here, the task is to help them gain separation/individuation as each concentrates on his or her own budgetary needs and lets go of their long-ingrained desire to criticize the other's life-style and values.
NEGOTIATION: FROM SHORTFALL TO DIVISION OF ASSETS

At the beginning of our third session we followed up on the assignments Michael and Fran had agreed to. Fran had brought the requested bank statements and her budget; Michael had brought only part of his budget and had not brought the bank statements that he had agreed to bring. The dynamics of our mediation increasingly centered on the issue of voluntary full disclosure. At this point Fran interrupted and said nervously that she had something she needed to discuss. She had contacted one bank for current balances on some of the accounts and had been informed that one account which was jointly titled but which Michael had taken over had a much larger balance than Michael had reported. This statement led to a moment of tense silence. Michael finally commented that he would look into the discrepancy.

As we talked together after the session, we realized that each of us felt more concerned about Michael's possibly hiding assets or attempting to avoid full disclosure. We each also felt the impulse to warn Michael of the consequences of nondisclosure. We held our counsel, however, recognizing that though this issue needed to be addressed, doing so here would likely break an already fragile relation.

Since Michael had not completed his budget, we returned to working on assets. Michael had a coin and stamp collection started by his father that he had kept up. It was actually now quite valuable. Fran said that she felt that it was Michael's, regardless of its monetary value. Michael quickly agreed.

As Michael and Fran talked, we increasingly confronted the mediator's key dilemma. We are committed to remain neutral and to allow the couple to reach their own agreement, regardless of whether we believe it meets our standards of fairness. Our role is not to attempt to control the content of the negotiations; our commitment is to the integrity of the process. We increasingly felt the strain of maintaining that commitment as Michael seemed to stonewall and Fran seemed repeatedly to be getting the short end of the stick. Michael blamed Fran for "dissipating assets" that she reported were easily accounted for. While complaining that he had less money than he should, it appeared that Michael might actually have more money than he was reporting. He also was withholding records which would clarify these issues.

This, of course, is the major critique that has been levied at divorce mediation by both the legal profession and sectors of the women's movement. It appears to them that mediation does not have adequate safeguards and women are often disadvantaged in the negotiations. They need protection. They need an advocate. Mediators abjure the role of advocate. Our commitment is to self-determination and to the empowerment of both parties to negotiate effectively with one another. As Gary Friedman has put it, "I won't do it for you, but I will help you do it, if you have something you wish to say." If mediators succeed in the process of empowerment, they believe they can get out of the way and allow the parties to negotiate their own interests.

This is the existential encounter about mediation truly being a choice - not only for parties involved in the divorce, but also for professionals. The question becomes: do people need rescue or empowerment?

Not only is this commitment to empowerment in mediation often an offense to the legal community, it is a deeply divisive issue within the mediation field itself. The field has for two decades organized itself around needs-and-interests-based negotiation, best articulated by Ury and Fisher's classic work, GETTING TO YES. Here, the focus is on outcome.
That theory has been challenged by the work of Baruch Bush and Joseph Folger, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION. Bush and Folger have argued that mediation’s fundamental commitment is to self-determination which requires the mediator to focus not on outcome but on process and the empowerment of the parties. When the mediator is invested in outcome (ie., getting an agreement) inevitably the mediator is no longer fully present. S/he begins to get involved in the substantive agreement - ie., is it fair? S/he begins to push in the present while focusing elsewhere - on the future.

For Bush and Folger the challenge in mediation is truly one of **trust**. Can the mediator truly trust that the process will work, even with difficult clients? When Fran stated that the stamp collection was Michael's we found ourselves biting our tongues, increasingly nervous about her ability to assert herself. The temptation for us to abandon the process and try to advocate - at least a little bit - for Fran and her future needs was increasingly hard to resist.

However, Fran’s offer to give Michael the collection seemed to have helped him relax. Michael stated that he thought most of their property could be readily divided if they met outside the mediation session. They agreed to try this and to get comparables on items such as the boat and the piano.

At our fourth meeting both Michael and Fran reported that they had met and had successfully agreed on most of the property. We asked about the bank statement which Michael had agreed to bring in. He told us that he had had time only to finish his budget. We found ourselves increasingly frustrated with what clinicians would identify as Michael's passive-aggressive style. However, we attempted to maintain our bond with Michael by reiterating one of his goals, which was to reach an agreement as quickly as possible in order to reduce costs; we noted sympathetically that the more work he accomplished between sessions the faster the process would go.

He again agreed to bring in a copy of the statement and we turned to the process of examining the prospective budgets. Mediators have to struggle to remain neutral here. Parties often inflate figures, trying to position themselves more advantageously for an anticipated support discussion. Again, the process is very different from the adversary system. There, budgets are often used as a position for requests to increase or reduce support. In mediation we truly are using the budget for purposes of **planning** for the future, to allay clients’ fears. Until clients can deal effectively **TOGETHER** with their shortfall and eliminate it, mediation recognizes that there will never be anything but a fight over support. Although a party may need support, support is an internal transfer of money. If there are not enough resources between the parties in total, then it is premature to negotiate support. Again, clients must come together in order to separate non-destructively.

It quickly became clear that Fran expected to shoulder a great deal of the expenses for their two children, whom she assumed were going to continue to live with her. She included costs of their car and health insurance, and tuition in her budget.

Michael, in contrast, had projected his ideal budget. He budgeted for vacations of the sort he had never taken before, for the expensive hobbies not yet undertaken, etc. His projected house payments were larger than the mortgage on the current family home! Michael was quick to justify all this as needs.

At the end of the process the mediators added up the total budget of each party and then put their income next to their projected needs. The difference was dramatic, as it often is. At this stage each couple often
experiences a surge of anxiety and despair. It seems impossible to them that they will be able to find a way to manage this financial short-fall. As Michael and Fran looked at the numbers, Fran announced that she would have to find a way to lower her expenses; Michael sat silently. We asked that each of them take time before the next session to look at ways not only to decrease their expenses but also to increase their income.

Before the next meeting, the mediators discussed their mutual concerns. Fran had spoken during one meeting about how her role in the family had been that of peacemaker and caretaker of people's emotional needs. It was difficult for her to disagree with Michael. We were aware of her having strong reactions to Michael's budget, yet she had not challenged his figures. Michael also seemed increasingly tense. We decided to caucus, that is, to meet separately with each party in the next session.

Caucus is one of the most controversial technique in mediation. Many mediators, especially in community mediation settings, use it routinely. After opening statements mediators go directly into caucus. Others, who appeal to the family-systems roots of mediation, object to its use at all. Going to caucus, for them, is to open oneself to inappropriate alliances and triangulation. They view their client as the couple. Anything that needs to be said, can be said in joint session. Acknowledging this split in the field, we have ourselves found caucus to be an invaluable tool among other things in clarifying interests, protecting client vulnerability, saving face, and empowering parties.

Thus, in the fifth session we caucused and met with Michael first, as he seemed most resistant to the process of mediation. We asked his reactions thus far. He quickly launched into a tirade about the expenses he had to pay towards his children, feeling that they should be sharing more of those expenses since they were over eighteen. He also spoke again of the amount he had to pay for the mortgage and rent. Michael went on to note that he felt the children could start working part-time jobs as one way to increase the family income. He had not had time, he reported, to try to address his budget and the deficit between his projected expenses and his income. His income was variable, since he was self-employed. He then complained about how long and costly this process was. The mediators tried to acknowledge his concerns; we noted that much of the control over how long this process took was actually in the parties' hands. The more work, such as gathering financial information, they were able to do between meetings the less time the mediation was likely to take.

When we met alone with Fran, she quickly became tearful. She spoke in a rush of her outrage over Michael's budget and her fears that she would be left destitute. The mediators acknowledged her fears and her role in the family of always working to keep yothers happy and smooth over problems. We wondered out loud if this was a situation that could simply be brushed under the rug. Might there be some benefit to her in addressing these issues, both in terms of reaching an agreement she would be comfortable with and in terms of learning a new way to approach problems as she prepared to move on alone? Fran sat silently for a moment and then laughed, telling us that we sounded just like her therapist.

Indeed, there are moments that mediation can be therapeutic, as it gives individuals the opportunity to explore new possibilities. In this regard, much of mediation is psycho-educational: teaching people how to negotiate effectively. The agreement is most likely to be sound and lasting if each individual has participated fully in reaching the decisions made, not only by sharing information but also by sharing in the problem-solving.
We returned to our joint meeting and their budgets. Michael began to speak about his feeling that the children should share more of the expenses. Fran, taking a deep breath, said that she wanted to review both projected budgets. She had, she said, found some ways to cut her budget and she wondered if Michael had done the same. Michael began to argue. Fran quickly interrupted. She stated firmly that she felt many of the figures given by Michael were inflated and could be cut with a little effort. She also went on to note that she expected Michael was concerned about her getting "his" money and she was willing to negotiate that. She said it would be impossible to negotiate if they did not start out with more realistic figures. Michael sat in silence for a moment and then asked what Fran had in mind. Fran went on to suggest ways she could cut her expenses and then turned to his budget with a similar approach. Michael hesitated, then said he could not commit to her proposals until they had reached some decision about the assets. It became clear that this continued to be a prime concern for Michael, so we turned to that area.

As the first step in that process was to review the list of assets, this was a natural moment to follow up with Michael about the bank statement he had agreed to bring. Michael somewhat hesitantly offered the statement, saying tersely that the balance was larger than he thought, and he was not sure why. He seemed hesitant to discuss it further, but Fran did not accept his non-explanation. She began to question him more actively, finally asking if the deposit was connected with his aunt's estate. Michael said he thought that was a possible explanation adding that, if so, it was his inheritance, he thought it should not be included in our discussions, and he believed that the law would support him.

Fran said she wasn't sure and added that she had actively helped care for his aunt. Fran felt that what she left to Michael was intended to go to both of them. As they squared off we encouraged them to talk with their attorneys about how the courts, were they to make a decision about this matter, would handle the grey area of inheritance. This would enable Fran and Michael to make an informed decision after becoming aware of the alternatives.

We then asked Michael about his concern regarding the "missing funds." It turned out he had also brought those statements and we reviewed them together. Fran pointed out that each of the withdrawals had occurred before they had separated. She reminded him of how the money had been used - for household expenses and for children's tuition. She acknowledged the withdrawal she had made at the time of the separation and she provided Michael with the current statement for the savings account she had opened. Most of the money she had withdrawn from their joint account remained. Michael acknowledged Fran's statements! Simply by reviewing the records, the issue of "dissipated funds" which the attorneys claimed was the heart of the case had disappeared.

Soon after this session, Michael called to cancel the next session saying that he was too busy to meet then and would have to call later to reschedule. He again expressed vague dissatisfaction with the progress of mediation and, as the mediator acknowledged his concerns, expressed more open frustration. We had not been listening to him nor sufficiently understanding of his concerns, he offered. The mediator spent far more time than he normally would on the phone with a client in an effort to try to find some way to connect with Michael. The effort was thoroughly unacknowledged by Michael.

**DEVELOPING AN AGREEMENT**

As our next meeting opened, Michael said that he had thought of some ways to decrease his projected expenses. We reviewed those changes with him and then moved to assets. We asked if they had spoken to their attorneys. Fran reported that she had gotten some information suggesting that those assets would be
considered marital property. Michael indicated that he thought she was wrong but had not spoken to his attorney. Nevertheless, we thought we would try working through the assets to see if there was ground that they both agreed on. Indeed there was. They quickly made decisions to cash in their whole life insurance policies. They also readily agreed to allow each of them to keep the full amount in the checking accounts each had established after their separation, to add up the amount of money that was in their various joint savings and checking accounts at the time of their separation and to divide the amount evenly. Michael also indicated that he understood Fran was entitled to 50% of his pension and agreed to that plan. Money that he had received and invested during the buy-out Michael also proposed should be split equally as he believed it would be considered a marital asset.

We then addressed spousal support, the most polarizing issue in divorce mediation. Fran stated that she felt she was going to need support for awhile. To increase her income she realized she needed to further her education. She looked tearful and anxious as she explained this to a stony Michael. Asked his thoughts, Michael said he had none. It was Fran's turn to become angry. She stated that she could not believe that he had never thought about spousal support in all the time they had been separated and in mediation. Hooray Fran!

In our next session, Fran, having spoken to her attorney, said she had some ideas about how much support she might get. Her attorney had also informed her that the laws about inheritance were complicated but that she might well be entitled to half the funds in dispute. Michael became more tense. Fran said she had a proposal. Given an even split of the marital assets, she proposed a decreasing schedule of spousal support which would give her increased short--term aid to finish her schooling. Michael did not respond.

We asked if he had any thoughts about a proposal. He indicated that he did not; he only knew that he could not continue paying what he was paying now. We took that as a starting point to explore Fran's proposal in more detail, breaking down the numbers so that both could see how they added up. Michael again raised his suggestion that perhaps the children should begin to assume responsibility for some of their own expenses. While Fran was hesitant at first, she responded to his suggestion and they proceeded to discuss options for the expenses for the children in a more cooperative spirit. Both seemed relieved as the size of the shortfall between their income and budgets decreased. The session ended on this positive note. We began to feel hopeful.

Before our next meeting, we received a call from Michael's attorney who expressed concern about whether we were making progress. Therapy as traditionally practiced has frequently been a very private activity. Mediation, in contrast, is inextricably involved with other professionals. Mediators must work with other cognate professionals including accountants, actuaries and attorneys. However, this collaboration can be a two-edged sword, as other professionals at times apply pressure on the mediation. Mediators, subject to peer pressure from colleagues, are not at liberty to discuss the content of the mediation sessions. Mediators are not unlike therapists, unable to talk to third parties about the case when family members call and complain about how long this is taking. But mediators must be able to work with attorneys. We encouraged him to speak with his client and help the client develop some options for support.

By our eighth meeting, both Michael and Fran had completed all their assigned tasks. The figures provided by the real estate agents regarding the market value of their house were quite close to each other and gave Fran and Michael solid numbers to work with. We again worked through the numbers and found that the difference between their two proposals was lessening. We encouraged them to brainstorm options,
including alternate ways to finance Fran's education and to handle the expenses involving the children. When we can actually get clients to this point, we can largely get out of the way. Clients have largely stopped blaming each other as the problem, and begun to problem-solve together.

Michael and Fran were clearly at an impasse on many parenting issues. Now, however, they agreed that their children could begin to assume more responsibility. They developed a plan which brought their numbers closer to each other. Each time we recalculated, they both looked somewhat relieved. It seemed to make them more eager to find a way to bridge the gap and come to a resolution.

At this point we returned to the question of support. Michael clearly was resistant to paying support of any amount. He was more open to increasing Fran's share of the assets. He still had a question about how much of his aunt's estate he would consider marital. We reminded him that, even if it was not considered marital, the courts could count it as part of his income in determining support. Michael paused and offered another option, to give Fran more of the proceeds from the sale of the aunt's house. Fran brightened. We gave them a draft of their agreement and gave them homework to explore options for financing Fran's education.

To summarize our progress to date we joined with Fran and Michael (stage 1) and facilitated their gathering information (stage 2). We developed a shared definition of the problem (Stage 3). The parties began to develop options (stage 4). At our next meeting, Fran reported that a portion of her tuition could be covered by a grant and that she would be eligible to obtain a student loan. Michael continued his concern about committing himself to pay support if his income dropped. Fran countered that he might do significantly better in his business and she would be left struggling. We suggested that they could deal with these uncertainties with a contingency agreement, simply adding those conditions to the agreement. We went on to explain that they could modify support if either party's income changed more than a certain percentage in either direction. Both appeared pleased that this was fair and responsive to possible changes in their circumstances.

While therapy is present-oriented, mediation develops agreements that bind the future in spite of major unknowns and uncertainties. Here again, the mediators interrupt interminable arguments about unknowns with contingency agreements that protect and reassure both parties. A large part of divorce mediation involves reassurances of parties' fears. What was so difficult for us in dealing with Michael was how defended he was about ever acknowledging the fear behind his anger.

By the end of that meeting we had a fairly detailed agreement worked out. Again, we agreed to send each a draft to review both alone and with their attorneys. We scheduled what we thought might well be our final meeting.

CONCLUSION

Whenever possible, we have found it helpful to include the children in a final meeting so that they have the opportunity to hear from their parents and us that their parents have committed themselves to be there for the children in spite of and after the divorce. The children also have an opportunity to ask questions about the arrangements. With Michael and Fran their children had clearly been affected emotionally by all the events in the family, even though they were not minors. We offered the opportunity to have a family session to Michael and Fran, but after a brief hesitation, they declined. We don't force it on couples. For clients who do meet together with their whole family it is often a ritual time of closure on the marriage.
We scheduled our last meeting for a few weeks away. We sent both Michael and Fran a draft of the Memorandum of Agreement; they were to review it with their attorneys. Shortly before what was to be our final meeting, however, Michael called and canceled the session, saying he was busy and would reschedule "later." As weeks went by, we attempted to contact him without a response. We began to believe that Michael was making himself unavailable, effectively ending the mediation.

After the weeks of work we had put into this mediation, we felt simultaneously frustrated and concerned that perhaps we had made an error in the process. On reflection, we recognized that as Fran became stronger in the mediation Michael pulled back. There is debate in the field as to whether mediators should advocate for "fair" agreements or make decisions about the substance of agreements. Here, though tempted, we had resisted and trusted the process. We felt good that we had not rescued Fran but helped empower her. We also felt good that we had resisted the temptation to control Michael and had focused instead on supporting them both.

It seemed, however, that Michael could not accept making concessions to his wife. In the face of the requirement for full disclosure, Michael dropped out. By empowering each party, a system of checks and balances is operative in mediation. Fran found a voice and was increasingly able to assert her concerns and wishes. Michael had been unwilling/unable to voice his fears and pain; however unsatisfying, he felt safer holding onto his perception of himself as the victim in the marriage and the mediation.

As we discussed our work with Fran and Michael, we had many mixed feelings. Fran's growing sense of self-confidence was rewarding to see. She had grown individually. However, we were frustrated by our inability to truly connect with Michael and to create an atmosphere in which he could give fairly. Our inability successfully to join with Michael, the very first task of mediation, signaled what we feared was the fatal flaw of this mediation.

We had begun to accept this state of affairs and were drafting a letter to formally end the mediation, when we received a phone call from Michael, asking to schedule the final meeting. We were surprised and cautious, but set a date. Shortly before we met with Fran and Michael, we received a phone call from Michael's attorney, who informed us of events in the intervening weeks. Michael had been prepared to go to Court, believing the Court would declare him right. His attorney, however, in looking over the draft of the Memorandum of Agreement, had been quite candid with Michael about the possible outcome if he did go to Court. He pointed out that he Michael might well have to pay substantial alimony and court costs. Apparently, this conversation prompted Michael to reconsider the mediation.

Michael grimly entered the final meeting. After welcoming them both back, we asked them to update us, including telling us what response they had each gotten from their attorneys to the Memorandum. Fran spoke first, noting that her attorney told her it was possible that she could get more alimony if they went to Court. However, when Fran sat down and calculated the potential financial and emotional costs of such a choice, she felt that was not the option she wanted to pursue. She turned to Michael and said:

- Michael, I know you're angry about giving me anything at all. For years, I avoided making you angry in any way that I could, and it’s very hard for me to know how angry you are now at me. But that’s not the reason I’m not going to fight with you in Court. I want us to accept this agreement because, for all the problems we've had, we deserve to end this with as much respect as we can. I mean, respect for ourselves and our kids, even if you don't respect me.
• I think this is fair and I'll be okay with the way we've worked it out. I also know you'll be okay, and believe it or not, that matters to me. I hope you can accept this too.

Michael was silent. Then he said his attorney had told him he could fight it out in Court but that he decided he would spare Fran that stress.

We were silent for a moment and we later realized that, as mediators, we were stunned. Michael had found a way to accept the agreement while saving face and seeing himself as the stronger one once again. While this might not have been a satisfying outcome if we were conducting therapy, it was a very satisfying way to bring the mediation to a close. Fran and Michael signed the Memorandum. Fran thanked us and left somewhat tearful but looking relieved. Michael shook our hands and left without a word.

We would have wished for more connection and a greater sense of closure. Yet ultimately the process of mediation worked to the degree we resisted the temptation to rescue someone who seemed so in need of our help. Mediation may indeed be transformative, but it often is a small "t". Clarity and understanding frequently enable people to make choices where they thought they had none. Fran was able to care for herself and yet still provide an opening for Michael, allowing him to give something. Because we resisted the temptation to advocate, there was an opportunity for empowerment. But it is an opportunity only. We can only create the space; people still have the choice whether to move into it. Here one availed herself of that choice. One resisted choosing. In the end, we were brought back to our beginning place, that this is truly about not our wishes, but their choices.
The importance of apology as the acknowledgement of injury is familiar to some forms of mediation, including victim-offender mediation, but has been much less understood in divorce mediation. The act of apology represents one of the core reparative opportunities in damaged relations. But it's not easy. This article will describe the opportunity that apology presents, the difficulty we have in seizing that opportunity, and the role that third parties can have in inviting apology. It will identify: 1) what is involved in a genuine apology, identifying the three essential components of apology; 2) the place of apologies in mediation including the recognition of apology as an acknowledgement of injury and the identification of how to assist clients in offering an apology; and 3) the relation of apology to the adversarial system.

I. WHAT IS AN APOLOGY?

Originally, the Oxford English Dictionary (OED) tells us "apology" meant a defense, a justification, an excuse. Its modern usage has shifted to mean "to acknowledge and express regret for a fault without defense." This modern definition captures the core elements of apology: a) acknowledgment, b) affect, and c) vulnerability.
What are the Elements of Apology?

a). Acknowledgment:
Jeffrie Murphy (Murphy and Hampton, 1988, p. 28) speaks of the role of ritual in apology. Often, when an apology is called for someone has attempted to degrade or insult the other; to bring them low. "As a result, we in a real sense lose face when done a moral injury...But our moral relations provide for a ritual whereby the wrongdoer can symbolically bring himself low - in other words, the humbling ritual of apology, the language of which is often that of begging for forgiveness."

There is a "ritual" of apology. As the OED says, there must be an acknowledgment - a recognition - of an injury that has damaged the bonds between the offending and offended parties. The offense has to qualify as a genuine injury - one that has involved some transgression of a moral or relational norm that has both damaged the offender's social bonds and called into question his/her membership in some community. Tavuchis (1991, p. 13) calls this injury "an act that cannot be undone, but cannot go unnoticed."

In turn the offending party must personally be accountable for it. This can't be a Marv Alpert "I'm sorry if she felt she was harmed" passing stab. It is not being sorry that she is the sort of person who feels that way. Rather, it is acknowledging my role as the offending party in inflicting injury. I have no excuse for what I did, yet it was indeed my action.

Contrast this with Nixon's classic non-apology. In one fell swoop he withheld any acknowledgment that he was responsible for any specific wrongs, hedged on whether there even were any wrongs, and skipped over any direct responsibility for the harm that had been done.

b). Affect:
In order to truly accept responsibility, the offending party must also be visibly affected personally by what s/he has done. I am troubled by it. Scholars who have tried to parse this experience variously name that sense as "regret" and "shame." Whichever the affect, the feeling has to be there! Nothing more offended commentators about President Clinton's "apology" than its lack of felt regret. As Mary McGrory (1998 p. A3) said about Americans listening to it, "Lying and adultery they could handle, but not being sorry, especially after you're caught and cornered, is unacceptable."2

It is, of course, possible to be over the top with this. Ted Turner offered what one observer called "the mother of all mea culpas" to television critics after his Cable News Network (CNN) retracted a report that the United States military had used lethal nerve gas in Laos that targeted United States defectors. "I couldn't hurt any more if I was bleeding," said Turner. "He went on," said Peter Boyer, "to say that his humiliation was so complete, his mortification so deeply felt, that no other sorrow he'd known in his fifty-nine years - the suicide of his father, the breakup of his first two marriages, the 1996 World Series defeat of the Braves by the Yankees - compared with what he felt now. What had happened at CNN was, indeed, 'probably the greatest catastrophe of my life.'" (Boyer, p. 28).

c). Vulnerability:
Finally, an apology is offered without defense. A key aspect of apology is the vulnerability involved. An effective apology may be accepted, but as Erving Goffman (1971) taught so well, an apology may be offered, forgiveness may be begged for, yet it may be refused. The offender may have owned up to the wrong inflicted, but this does not guarantee that the offended party will accept the apology. Instead, the offended party can ignore or punish the offender for the wrong done. The offended person may feel that
the offense, although acknowledged, is so incalculable -- so enormous -- that it is simply "unforgivable." Martha Minow notes that "Albert Speer, the only Nazi leader at Nuremberg to admit his guilt, also wrote, 'No apologies are possible.'" (Minow, p. 116).

The offending party is placed in a potentially vulnerable state in offering the apology knowing that the chance exists that it may be refused. More than anything else, it is vulnerability that colors apology. Indeed, many of us know well the moment in relationships when the other party has been offended by something and we weigh whether we will attempt to repair it. We know that attempting to restore the relation will take effort. It won't be easy. Is it worth it? We all have debated whether the relation was important enough to us to bother. It is not only effort, but exposure we are weighing. If this doesn't work, things may be worse.

The Exchange of Shame and Power

Where a serious injury has been done, an offer of reparations may accompany the apology. It is crucial, though, that the person apologizing recognize that there is truly nothing s/he can offer tangibly that will suffice for the damage done. Nic Tavuchis (1991, p. 33) pinpoints the paradox of apology: "an apology, no matter how sincere or effective, does not and cannot undo what has been done. And yet, in a mysterious way and according to its own logic, this is precisely what it manages to do." "An apology is inevitably inadequate" (Minow, 1998, p. 114). It is a ritual exchange. "What, we may ask, is offered in exchange? Curiously, nothing, except a...speech expressing regret." Thus, the powerful formula of Aaron Lazare (1995, p. 42, italics added):

"What makes an apology work is the exchange of shame and power between the offender and the offended."

Apology thus also involves a role-reversal: the person apologizing relinquishes power and puts himself at the mercy of the offended party who may or may not credit the apology. This dynamic is also much in evidence in what has become known as Family Group Conferences or community conferences that have developed in Australia and New Zealand. Youthful offenders who have confessed to a crime agree to meet in a group with the victim and his/her relatives and friends. As David Moore (1993, p. 6) says, "the act of apology is clearly a central part of the process that occurs." In this setting the offender submits to the power of the group and thereby helps remove shame from the victim by taking it on himself.

The empowerment that occurs here is not some 'power-balancing' that the mediator manipulates. The ritual exchange involves a moral rebalancing offered by the offender. "The apology reminds the wrongdoer of community norms because the apology admits to violating them. By retelling the wrong and seeking acceptance, the apologizer assumes a position of vulnerability before not only the victims but also the larger community of literal and figurative witnesses" (Minow, 1998, p. 114).

Restitution/Reparations

For some observers other elements must also be present for a "true" apology. There must be a plea to repair the relation; the offending party must mean it. To demonstrate this some require only that the offending party genuinely appears sorry. Others require a clear indication that the situation will not happen again. Still others require the offending party to make some attempt at restitution. A casual "sorry" to a store owner after dropping and breaking a glass vase won't cut it. Damages are owed. Or, as Bishop
Desmond Tutu says, "If you take my pen and say you are sorry, but don't give me the pen back, nothing has happened."

There are others who require some change in behavior. John Hope Franklin, the black historian, discussing the appropriateness of an apology for slavery observes (1997, p. 61), "You can tell me you're sorry, but it won't make me feel any better, it won't get me a better situation in life, a better job, an extra month in school."

Although restitution or changed behavior are often indispensable components of an acceptable apology, the author believes they are not essential elements of an apology per se. Many times in apology the offending party faces the fact that nothing can be done to right the wrong. The past cannot be erased: the damage is done and cannot be undone. Here, the offender can only pray that the offended may find the grace to forgive, but not because the offender has found some equivalence to make up for the injury.

**Repair Work**

Apology is *repair work*. As Wagatsuma and Rosett (1986 p. 487) nicely put it, "while there are some injuries that cannot be repaired just by saying you are sorry, there are others that can only be repaired by an apology." This is the power of apology - indeed, sometimes its necessity - that it is the reparative mechanism available when relations have encountered something that cannot be fixed, but which also cannot be ignored (Tavuchis, 1991, p.34).

And repair work is difficult. Need trousers cuffed? No problem. But repair a torn pair of pants? You need to be a tailor.

Wash dishes? Sure. Repair broken china? A lot more delicate. And the work of apology is both more difficult and more delicate.

**II. APOLOGIES IN MEDIATION**

*Apology is an Acknowledgment*

Mediation has long been viewed as "an alternative form of dispute resolution." And "dispute resolution" does capture the nature of much mediation. So regarded, mediation is a form of problem-solving. There is then a clear end-point to mediation and it is to achieve a settlement.

Apology, however, is clearly not about problem-solving. Nor is it about negotiating. It is, rather, a form of *ritual* exchange where words are spoken that may enable closure. An apology represents more than an occasional event in mediation. It is embedded in the very nature of the process. Mediation, after all, is frequently about disputes in which at least one party feels *injured* by the other. Along with negotiations over the facts of the case, demands for compensation, and denunciations of the other side, there is often a felt need for some acknowledgment of harm done, a need for some acceptance of personal responsibility for the injury inflicted. In short, an apology?
Assisting Clients with Apology

Can people authentically apologize in mediation? Yes, but in the author's experience, many people need some assistance. People often need to get past the defensiveness and fear of blame that preclude apology. The divorce mediation case of Alice and Brad offers an example.

Alice and Brad

Alice and Brad disagreed about the support Brad would pay for their child. In earlier years both Alice and Brad had held good jobs. As their lives unravelled, however, Alice found herself having to borrow money to make ends meet and wanted $700 a month in support from Brad. Brad had also lost his job and found himself working in a local Wal-Mart earning less than $200 a week as a "stock-boy." When Alice and Brad engaged in the mediation budgeting process, it became clear that Brad needed $1900 a month just to get by, let alone satisfy what Alice wanted. When asked what seemed "fair," Alice, after looking at the numbers on the flip board said, "Well, if you just look at that, it seems fair, but...," she trailed off.

The mediator responded: "It seems like there are other considerations for you," "Yes," Alice said. "He left the marriage. I am trying to ignore that, but none of this would have happened if he hadn't left. He had the affair. He acknowledges it himself. I thought we had a partnership: I supported his three kids from his first marriage and now that that's done, he takes off. (Fighting off tears) I feel like a maid!"

"So you feel there should be some compensation?" asked the mediator.

"Yes!" exclaimed Alice.

The mediator, meeting separately with Brad, asked "Do you have a response to Alice's comments?"

Brad's first responses were defensive. The mediator continued: "It seems important to the process that these concerns be spoken. Do you think you could acknowledge her feelings?"

Brad responded: "What that means is that I give her more money?"

"No, not necessarily," the mediator said. "But it seems like when her feelings aren't acknowledged, it keeps intruding on the financial decisions. The personal issues have no other way to be raised. My experience is that it makes a genuine difference if you can acknowledge how each other feels. I hear Alice not blaming, but saying, 'I thought we had a partnership. Your leaving, after I supported your kids, feels like I'm being used. Your decision has caused damage - to both of us and our daughter.' It feels unfair to her."

"Look," he blurted out, "we were fine, and I had an affair. I screwed up! But I also feel like I gave her all my money for years."

"So it sounds like you have a concern too. You feel like Alice hasn't acknowledged all you did. You did screw up, but there was more to your marriage than how it ended." "Yes."

When the parties were brought together again, the mediator announced that Brad had something to say.
"I did the best I could..." he started defensively. Then, he said, "I screwed up. ... (pause) I'm sorry."

Alice was near tears.

Brad: "I also did what I could."

The mediator turned to Alice: "I hear Brad also saying, it is important for him that his efforts are acknowledged."

Alice quickly threw off: "I did that. A couple of years ago. I said. 'I thought we were doing okay.'"

The mediator said, "I think we are talking about right now, not the past. You may have tried to say it; I don't think Brad heard it."

Alice: "I think you did the best you were capable of..."

"And is there a thank you for that part of it?" the mediator queried.

Alice (paused, then a smile) "Yes, thank you."

Both were in tears. The mediator commented: "I hear that this is not anything you wanted, a divorce. It has changed things. Brad, you acknowledge that you screwed up and it has hurt you, Alice, and caused damage. You're sorry for that. But also that both of you put a lot of yourselves into this marriage and the acknowledgment of that is important. Many people aren't able to do that."

The moment quickly passed, but the following week Brad brought in the documents he had not produced until this point. The outstanding issues, including support, were soon resolved?

**How It Is Done**

Several things are worth noting about this apology in mediation. Alice and Brad needed help to get to this apology. It was not imposed; it was offered. But Brad and Alice could not get past either their blame or their defensiveness by themselves. A critical step in the process was the caucus. Parties often need preparation before they are ready to offer an apology. Finally, the parties needed help with the words. There is a piece of back-leading here on the part of the mediator, but the parties won't go along with this if they are not ready. An apology involves such vulnerability that it is safer - often, the only way it is safe enough - if the mediator puts the apology in words and parties simply indicate their assent.

A powerful example of the outcome of assisting a party to apologize occurred at the hearings of the Truth and Reconciliation Commission in South Africa. After three dozen witnesses had testified over nine days about murders, assaults and abductions associated with Winnie Madikizela-Mandela and her protection squad, Madikizela-Mandela herself finally testified. But her testimony was combative, denying even the most minor allegations against her as "fabrications" and labeling the testimony of witnesses as "lies."

Lynne Duke, reporting on the hearing (1997, A1, 48), observed,

Madikizela-Mandela, 63, offered no hand of reconciliation to assembled victims of her protection force - until Archbishop Desmond Tutu, the truth commission chairman, begged her to do so. Invoking a historic bond of the
Mandela and Tutu family names, Tutu said that something in Madikizela-Mandela's once-great life had gone "horribly, badly wrong. I beg you, I beg you, I beg you. Please. You are a great person. You don't know how your greatness would be enhanced if you said, 'Sorry.'"

Luke reports that

silence spread through the packed hall. After a long pause Madikizela-Mandela finally responded. She apologized to the families of her club's most brutally slain victims....: 'I am saying it is true: Things went horribly wrong.' Madikizela-Mandela said, the sting of the day-long hearings absent from her voice. 'For that I am deeply sorry.'"

Here we see the great skill required for a third party to step in and assist in birthing an apology. The risks were huge, the stakes high, the vulnerability enormous. Yet, Tutu managed in the midst of very powerful group pressure to block it all out and make a deeply personal appeal that did not make Madikizela-Mandela feel trapped or coerced. It allowed her to save face.

**Apology as Power-Balancing**

We speak much in mediation about *power-balancing*. Often, however, our solutions tend toward heavy-handed techniques: controlling the powerful, limiting their dominance in the session, doing "reality" confrontations, threatening the disasters that the alternative of a trial would bring, etc. The example that follows, though, is an instance of power-balancing that parties themselves achieved. The powerful offer their *vulnerability*. Through recognition, the humiliated are empowered.?

**Gary Geiger and Wayne Blanchard**

An extraordinary example of such power-balancing is the story of Gary Geiger, a young man who was shot at point-blank range during a robbery at a motel in New York. The man who shot him, a 21-year-old named Wayne Blanchard, was later captured. Blanchard was sentenced to 12-25 years in prison. Gary was not killed, but he was severely wounded and traumatized. Recurrent nightmares, a massive dose of post-traumatic stress, and the loss of his job all followed.

After years of watching his life disintegrate Gary finally decided the only possible way to reverse his situation was to confront his attacker. Contacted by Dr. Tom Christian through a Victim-Offender Mediation program within the New York State penal system, Gary went to the New York prison where Wayne Blanchard was incarcerated and met him face-to-face in a mediation.

The encounter became part of a TV show, "Confronting Evil." In it Gary at one point with exquisite politeness asks Wayne: "Why, if you can possibly help me, did the robbery get so violent?....Can you tell me, please, why you shot me?" Elsewhere, Gary in an amazing exchange says: "I know you've lost a lot. But I lost quite a lot too. The first phase was nightmares. I couldn't sleep. I'd start shaking. I wondered, am I always going to be like this?"

Visibly moved when directly confronted with the damage he caused, the convict, Wayne, responds: "I'm really truly sorry for what happened in that motel that night... I'm not only sorry for the pain you feel but what your family had to go through that brought your life to what it is now. I have a lot of pain in me, too. I haven't had a chance to live...because of the stupid things I did... I'm sorry,...I really am."
"I'm glad that you're sorry," adds Gary.

The exchange of shame and power between the offender and the offended is a dramatically powerful encounter. Gary approaches the table with years of fear, powerlessness, and trauma. Wayne, who had terrorized his victim, offers instead his vulnerability and apologizes.

Several key elements of apology are visible here. This clearly was a ritual exchange. Isolated and out of context, the speech here is formal to the point of being rather weird: Gary: "I'm glad that you're sorry." Or again, "Can you tell me, please, why you shot me?" "Please"? It is a humbling ritual which allows "the wrongdoer/to/symbolically bring himself low," pleading for an opportunity to make things right with the victim. "If there was something I could say or do that would help you, I'd gladly do it."

And it raises up the victim. Fascinatingly, Gary is empowered in this exchange. Before the conversation Gary says that for years he had "thought the offender was a monster," a being whom he had fantasized as horribly powerful. The end of this ritual of apology has Gary shaking off his shame and paralysis and identifying in a different way with the power Wayne held over him: "The last time you and I met you extended your hand to me in anger. Now, I want to extend my hand to you as a sign of healing for both of us." Here we see both sides of what transformative mediation talks about: both parties have been empowered and they have gained new understanding of each other.

We have said parties need help to have such an exchange. In the Gary-Wayne exchange the mediator began by encouraging both parties to join in a ritual dance. He invited the two men to speak as equals: "I want you two to talk to each other. This is your process. Look at each other. Talk like two human beings, man to man." In other words, not as jailed and free, not as victim and perpetrator. Meet on a level playing field, man to man!

They do. Each man has one kind of power over the other. Wayne has the power of fear, of physical violence. Gary has both moral power - he is the victim - and the power of freedom - he can walk out of the prison after this conversation. Yet Gary relinquishes his power and identifies with the shame of Wayne's position: "You've lost a lot; I have too....You're in prison; I've been in a sort of prison myself." He validates Wayne as a participant in this conversation with legitimate motivation, not just a convict. "It really takes a man to admit when he's wrong and apologize as you just did. I waited 11 years to hear that and I didn't know if I would ever hear it." And Wayne reciprocates, validating Gary as a man: "I'd like to thank you for coming in today and facing me after what I did to you."

One might be tempted to view such an exchange with cynicism; nothing has really changed. Wayne remained in prison. But this exchange occurred before Wayne Blanchard was up for parole in May 1994. From this experience Gary Geiger made a decision to appear at Wayne's parole hearing and to ask the board to give Wayne another chance. He asked for Wayne's release.

Since Wayne's release, Gary and Wayne have appeared throughout the state of New York speaking of their experience.

III. APOLOGY AND THE ADVERSARIAL SYSTEM

When we ask whether apologies are appropriate in mediation, perhaps the elements that most lead us to feel it is out of place are our system of law and the influence of the adversarial system. It is the pairing of
these two - the law and the adversarial system - that create such uncongenial soil for apology. Our system of jurisprudence is preoccupied with the defense of individual rights and the fear of the establishment of blame. It is this fear of admitting culpability that can effectively preclude apology.

Contrast our system with that of the Japanese, a country where the law operates with a different set of assumptions. For Americans, apology is often equated with an admission of individual liability under law; apology for the Japanese, by contrast, plays a major role as a social restorative mechanism. It has an important ceremonial role in preserving and restoring social harmony (Wagatsuma and Rosett, 1986, pp. 466, 472).

The very nature of our adversarial system is antithetical to the setting needed to allow an apology to emerge. We have noted repeatedly that apology entails vulnerability. The adversarial system, however, is structured as a contest. It is organized to produce a winner and a loser and to issue judgments. It inescapably generates defensiveness. It is a system that relies on rationalization: there are differing standards of proof depending on differing kinds of wrong. It deals in degrees of culpability ("first degree murder, justifiable homicide, etc.) and rationalizes mitigating circumstances (it was due to an impaired self, diminished capacity, external forces) (Tavuchis, 1991, p. 19). Yet, this prevarication is precisely what apology is not, and cannot be, if it is to work. Excuses rationalize: there was a crisis at home; I was tired, distracted, not thinking, drunk, etc. In apology I was responsible. I did it. No qualifications, no excuses. I can only beg your mercy and forgiveness.

This tension between the legal system and apology was most dramatically seen in President Clinton's faux-apology on television. Some advisors recognized the critical necessity for an apology. Democratic political consultant Robert Shrum proposed a draft in which Clinton would have said: "'I let too many people down' - including his family, the American people and Lewinsky - and that 'none of this ever should have happened.' Clinton would have...said there was 'no excuse' for his behavior and expressly apologized for his behavior." But, reports The Washington Post (1998, A16), his personal attorney David E. Kendall "wanted Clinton above all to do nothing that might increase his legal jeopardy. This meant limiting apologies and being vague about precisely what actions he was expressing regret about." ?

Perhaps the best examples of our legal aversion to apology are those cases involving financial misconduct in which a company agrees to cease and desist from an activity with no admission of fault (Wagatsuma and Rosett, 1986, p. 471). The examples are legion: Sears' auto mechanics systematically charging for work not needed; Prudential Securities pushing bad limited partnerships; Salomon Brothers buying more bonds than permissible. In each case the company buys its way out of a jam and, as John Rothchild (1994, p. 51) puts it, "announces concrete steps to ensure that whatever they haven't admitted to doing will never happen again."

**A Place for Apology**

In American law, specific places do occur where apology may play a role. In criminal cases, for example, apology and remorse often result in a mitigation of punishment (Wagatsuma and Rosett, 1986, p. 479). Apology may also mitigate damages in a defamation suit and may function as a bar to libel actions (Ibid., p. 478, 479). There are also instances where an apology has been a critical element in settlements of lawsuits.

An apology was at the heart of a civil lawsuit brought against the Catholic Diocese of Dallas. Eleven plaintiffs claimed the diocese had failed to protect them from Rudolph Kos, a priest in the diocese, who
was accused of sexual molestation of the altar boys between 1981-1992. In the summer of 1997 a civil jury awarded the plaintiffs $119.6 million, the largest judgment ever against a diocese. The final attorney-negotiated settlement of $23.4 million dollars was stalled over the plaintiff’s demand for an apology, even after the sides had agreed on the damages to be paid! The apology, when it came, was a powerful one. Said Bishop Charles V. Grahmann: "I...want to, with very profound and deep compassion, renew my apology to the victims and their families for the immense suffering that has been a part of their lives..." "In exchange for the bishop's apology, the...plaintiffs agreed to vacate the verdict" (Blaney and Dooley, 1998, pp. 1, 15).

The Fear of Apology?

Nonetheless, in spite of such dramatic exceptions, the preoccupation of American jurisprudence with defending individual rights and fearing any admission of culpability effectively precludes apology in a great many cases. This, in spite of the frequent reports that often major civil cases could have been avoided with a simple apology. A recent example was the case of Alonzo Jackson, the black teenager who was stopped at an Eddie Bauer store in Fort Washington, Maryland. A security guard thought Alonzo was shoplifting a shirt and asked him to take the shirt off. He had purchased the shirt the day previously and the case flared up into an $85 million dollar lawsuit against Eddie Bauer. Alonzo's father, interviewed about the incident, said that at the time: "An apology would have sufficed...and maybe a free shirt for (my) son." (Jones, 1997, pp. C1,4) Alonzo Jackson similarly said, "If they had apologized from the start or given some response, the lawsuit wouldn't happen. It feels like they don't care." Eddie Bauer, though they did apologize publicly, never apologized privately, and indeed went on to lose this case.

President Clinton's handling of the Paula Jones lawsuit may be the best known recent example of the enormous damage that can flow from the failure to apologize. It now appears that Jones would have settled her famous lawsuit early on in the process if she had received an apology. Jones' co-counsel at the time, Joseph Cammarata, suggested the modest apology that might have sufficed: "We are not trying to demean him. We don't need /details/...I think we need.... something that acknowledges that he may have done something that is offensive and that he regrets it..../along with/ an expression of regret and recognition that she did nothing wrong"(Lehigh, 1997, E1). Asked whether such a settlement might be considered, Robert Bennett, Clinton's lead attorney, gave a one-word reply through an aide: "No." A costly decision for us all.

Mediation, Apology and the Law

Even though mediation is meant to be an alternative to adjudication, when attorneys step into mediation they seldom leave behind their adversarial instincts. When attorneys are present it is generally far more difficult to hold open the space for apology. "When nonlegal issues were addressed in mediation sessions," noted researchers, "lawyers acted as 'watchdog(s)' guarding against their client's unwitting forfeiture of legal entitlements" (McEwen et al., 1994, pp. 171-72 cited by Levi, p. 1186). Thus, an apology arouses suspicion for in apology I relinquish all my justifications. I do not plead an impaired self, diminished capacity or external forces (Tavuchis, 1991, p. 19). I forswear covering myself in excuses, and allow myself to appear morally naked, unjustified, undeserving in front of the other (Ibid., p. 18). This worries attorneys.

Attorneys would prefer for their clients to keep a respectful silence when in the presence of the other party lest they unwittingly give away the store. Leading questions are favored by attorneys as inquiries capable of one word answers - a safeguard against clients speaking too freely. In apology, in stark contrast, a client
is invited not only to speak freely, but to appear nakedly, without defense. From this perspective an apology in relation to the adversarial process resembles David encountering Goliath. The one is loaded down with protective armor; the other appears in utmost simplicity.

The following is a fairly typical instance of the difficulty many attorneys and defendants have with grasping the importance in employment disputes that apology can have. A mediation client, a 77-year-old woman, filed a complaint because her employer, having discharged her, reassured her she would not be embarrassed before her colleagues on her last day. He promised to provide a cover story for her and say that she was going on "leave of absence." When she arrived that last day, however, she was humiliated to find that several employees already knew she had been discharged. She took the discharge very personally, protesting that there had never been a complaint about her work. A new, young personnel manager who had taken a dislike to the older worker after she had some recent illnesses, complained, "I don't want any grandmother working for me!" The worker filed an age discrimination suit.

Whether the complainant could prove age discrimination was questionable. Although she had been treated shoddily, shoddy is not illegal. The worker was grasping for some redress. More than money, this woman wanted an apology. The attorney for the defendant, however, and the personnel manager wanted to know what it was that the complainant wanted. The client said again that what she wanted was an apology.

"But we need to know what you want," persisted the attorney, looking only for the dollar figure for which the woman would settle.

The complainant again dissolved into tears. She had wanted to retire with "grace and dignity," she said. Instead, she felt humiliated in front of her colleagues when she realized others knew she had been fired.

In caucus the mediator suggested to the personnel manager that if she could offer it, an apology here would make all the difference.

Manager: "I'm not going to apologize. I've done nothing wrong," she said.?

Attorney: "How much do they want?"

Mediator: "I don't know, but I believe it will be a lot less if there is an apology first."

The personnel manager finally said she would try. When the joint session resumed, the manager started well, but quickly slid into defensiveness.

"Ethel, I like you. We have worked together well. I'm sorry you felt we discriminated against you, sorry you felt we were unfair. We never intended to hurt you, and we never discriminated. We had a lot of work to do; we felt it wasn't being done and we spelled that out in a meeting with you."

Ethel looked at the mediator for help. The mediator acknowledged her distress: "Ethel, was this an apology for you?"

In the author's opinion, this was not an effective apology. It failed on every count: it was not an acknowledgment, there was no affect, and finally, there was no vulnerability.
CONCLUSION

Apology - its invitation, its expression, its reception - has been only minimally explored outside mediation, and rarely in the literature and workshops of mediation professionals. At most, apology has a place as a sub-set of discussions of forgiveness. This reflects both an omission of an exchange vitally important in its own right, and a loss of a key reparative opportunity.

This essay has attempted a limited task: to clarify to nature of apology, to claim for it a place in mediation, to describe some of the work involved in preparing clients for apology, and to distinguish the nature of apology from the character of the adversary system in order to highlight the impact of the one on the other. Much work remains to be done if we are properly to understand apology: the relation of apology to reparations, of the symbolic to the material; the issue of the technology, art, and timing of apology; whether preparing people to recognize, accept and respond to opportunities for apology is necessary or properly the role of the mediator; the place of apology in different kinds of mediation - victim-offender, divorce, commercial, and international; and more. But we conclude here with the modest beginning of staking out the significance of apology.

An apology may be just a brief moment in mediation. Yet it is often the margin of difference, however slight, that allows parties to settle. At heart, many mediations are dealing with damaged relationships. When offered with integrity and timing, an apology can indeed be a critically important moment in mediation. Trust has been broken. An apology, when acknowledged, can restore trust. The past is not erased, but the present is changed (Kastor, 1998, p. D5).

Archbishop Desmond Tutu chaired the South African Truth and Reconciliation Commission for two years. At its conclusion he spoke of the missed opportunity to heal the wounds of apartheid if only whites had been able to match the willingness of their black victims to forgive. His remarks captured the opportunity that apology presents, the difficulty we have in seizing that opportunity, and the role that third parties can have in inviting apology.

"My dear white compatriots... you have been let down by most of your leaders who have made you out to be too mean-spirited to respond to the incredible magnanimity and generosity of the victims. Please grasp this opportunity - or do you really agree with those leaders...? Is there no leader of some stature and some integrity in the white community who won't try to be too smart, who is not trying to see how much he can get away with, but who will say quite simply: 'We had a bad policy that had evil consequences. We are sorry. Please forgive us,' and not then qualify it to death?"(Reuters, 1998, p. A20).

Divorce mediation offers just such an opportunity for clients to acknowledge they have acted in ways that have created injury and are sorry for the damage they have done to their marriage and their spouse. At the core, mediation can help people face damaged bonds and sort through whether anything is still intact. If the marriage vow has been broken and trust betrayed, does anything remain? Has everything been destroyed? An apology is often a means of saying, "Yes, there has been a terrible wound here, for which I am truly sorry. My intention is not to destroy you. I am ending this marriage, but I would like to close that door gently, not slam it shut."
Wil Neville (1993) tells of meeting a woman who said she was getting ready to go back to court for the seventh time with her former husband.

Wil exclaimed: "Wow, what is it you're wanting?"

She said, "More money."

He said, "I don't think you get money from court; I think you pay more to go to court."?

The woman asked: "What do you think I want?"

Neville said, "I don't know, but if you're going back for the seventh time, it says there's something really deep and really personal for you. My hunch is you'd like to hear him say, 'You were a good spouse. We did have some good times. I am genuinely sorry that the good times didn't go on.'"

Neville commented, "I noticed her tear up."

Finally she said, "If I could ever hear that, I would never bother him again"!

**References**


**Notes**

President Clinton's initial "apology" in the Monica Lewinsky affair has joined Richard Nixon's as a classic example of a failed apology. See for example, Michael Kelly's harsh assessment:"Our Bill has never really
apologized for anything in his life, and he didn’t now. He never used the words "I'm sorry," and he acknowledged "regret" only glancingly and euphemistically. Indeed, as he made quite clear, he wasn’t sorry, except, as all adolescents are, for getting caught. His passing imitation of an apology lasted for all of one sentence. By contrast, he devoted nearly nine full paragraphs to offering excuses..."(Kelly, 1998, A21).

2The press reported that Clinton's advisors recognized the need for a felt expression of regret. The Washington Post reported that Paul Begala, one of Clinton's advisors, who drafted the speech, included in his speech "far more forceful language of regret." (Harris, 1998, P. A16).

3An interesting example in the American setting of the recognition of the value, and perhaps necessity, of apology in a sexual harrassment case is found in Ken Cloke's recommendation of a "surrogate apology." If, he suggests, "the perpetrator is unable to apologize, the mediators may do so as 'surrogate' apologists, saying: "Perhaps what ___ should have said to you is, I'm very, very sorry for what I did and I know that nothing I can say can make up for what I have done." The mediators should say what they would want to hear if they were the victim" (Cloke, p. 21).

4Lon Fuller has identified the distinctive mode of expression in adjudication as a "device" that "gives formal and institutional expression to the influence of reasoned argument in human affairs. As such it assumes a burden of rationality not borne by any other form of social ordering..." (italics added).

"Professor Fuller observes that the demands made outside the courtroom may or may not be supported by principles. For example, one may appeal to generosity or offer to exchange some benefit for satisfaction of the demand. Once one enters the adjudicatory arena, however, a demand must become a claim of right supported by principles," notes Levi, (1997 p. 1170, citing Lon L. Fuller, "The Forms and Limits of Adjudication," 92, Harvard Law Review, (1978), 353ff.). (David Hoffman called the author's attention to the Levi article.)

"/I/t is no surprise that apologies are not a part of the courtroom repertoire. Unless legally recognized...they do nothing to adjust the allocation of rights rationally between the parties."

The formalizing of the injury is only one part of the deconstruction of the space in which an apology might appear. The effect of the adversarial system in occluding the original insult which initiated a conflict also means that people may long since have lost sight of why they were fighting. As McEwen and Milburn note (1993, p. 28, cited by Levi, p. 1198, n. 142), initial tangible goals of apology, changed behavior and compensation often are lost in the "emerging metadisputes" which "highlight goals of victory, vindication, or retribution."
"IF ONE OF YOUR NUMBER HAS A DISPUTE WITH ANOTHER": A NEW/ANCIENT PASTORAL PARADIGM AND PRAXIS FOR DEALING WITH CONFLICT

Carl D. Schneider

The current crisis of pastoral care is reflected in the increasingly shared recognition that the old model is no longer adequate. It has not encompassed the needs and concerns of minorities, African Americans, women, gays and lesbians, victims of abuse and violence. It has not transcended the individualism at the core of its model or dealt with the institutional and social determinants that create and perpetuate the structures of oppression and injustice that cripple, deprive, and exclude so many persons--and yet few alternatives have appeared to take its place. Though we keep railing about the inadequacy and idolatry of individualism, reminding of the importance of social justice, and urging the need for a social consciousness and context for pastoral care, until recently social theory has by and large failed to make available a framework and technology equally compelling and usable to organize pastoral care.

True, social theory has enabled us to identify and analyze the impact of many social issues. Witness this volume: It is organized around a long list of issues with which we wrestle--political and economic concerns, race, sex, abortion, gender, aging. But, as the sociologists Thomas Scheff and Suzanne Retzinger have noted (1991), classical social theory--Marx, Durkheim, Weber--is highly abstract. Its horizon is the macrostructure, with little guidance as to how to deal with all this in micro process. The result is that most of us have little sense of what a technology of social change would look like. When we try to tackle social issues, we often sound ideological and rhetorical, with little sense of direction or concrete means of implementation to guide us in any practical way.

The psychological model, on the other hand, which has so dominated the modern pastoral care movement in the United States, provided precisely that: a practical guide to how to help people individually. Although the therapeutic model has been roundly criticized and frequently lamented, rarely has the reason for its dominance been noted: modern psychotherapy supplied a theory and practice that could readily be appropriated by the church. Few images and technologies have been available as an alternative. The role of Sigmund Freud and Carl Rogers in the pastoral care movement has many critics, but the metaphor of individual psychology (and more recently, its complement, systems theory) has shaped pastoral care for two generations because it has had few viable competitors. Pastoral counseling centers embody the technology of therapy, offering training programs that impart the skills necessary to help people concretely. Seminary courses in pastoral counseling are also standard fare in training even pastors not specializing in pastoral care.

A NEW MODEL

I want to propose, however, that a new model, with an accompanying technology, is now available. That model offers an alternative approach to handling conflict, the concern of this volume and the problem of which our American church, with its culture of politeness and "niceness," is so afraid. The new model, conflict mediation, has significant continuities with therapeutic care and counseling, but also significant differences. It stands as a distinct professional and theoretical model that can be appropriated by the
churches to supplement pastoral care and counseling in important ways, giving ministry a competence in working with social conflict that it has not had in the therapeutic pastoral tradition.

In the last two decades alternative dispute resolution (ADR) has become a movement in the United States. It is reshaping the way we handle disputes in many arenas, especially with respect to our legal system. It is called "alternative" dispute resolution because it has appeared as a viable alternative to the adversary system, which is the formal name of the American legal system, which has been the normative forum for dealing with disputes in our society.

Alternative dispute resolution encompasses many mechanisms, including arbitration, mediation, multi-door courthouses, and early neutral evaluation. In this essay, I want to focus on just one component of ADR, mediation, and talk about its usefulness to the church.

Mediation is a method of helping people and disputes through the use of a neutral third party, who assists them in reaching a voluntary agreement. Mediation is a method of handling conflict that has been used by many cultures throughout the ages (cf. Augsburger, 1992). For many, it has been the primary method employed to resolve disputes. However, American society has made very limited use of mediation.

I personally practice divorce mediation. Normally I have to explain to people what I do, because most people have never heard of divorce mediation. It arose only within the last two decades, after an attorney named O.J. Coogler himself went through a difficult divorce and felt that "there had to be a better way." He devised the idea of mediation--of a neutral third party working directly with a divorcing couple to arrive at the agreements they need in order to divorce--as an alternative to the adversary system where someone else, lawyers or a judge, makes decisions for the divorcing couple.

Divorce mediation is the best known use of mediation in a family conflict, but mediators work with a broad range of family conflicts - family-eider care, parent-child disputes, family-school conflicts such as special education disputes, and so forth.

Mediation also can and has been used in other areas of our society; for example, the United States has had a Federal Mediation and Conciliation Service since 1945. Many of us, however, know of mediation only when we hear on a newscast that mediators have now been called in to resolve some kind of deadlocked labor, school, or international dispute.

Few lay people have had much direct experience with mediation. Yet in the last two decades, mediation has appeared in a wide variety of contexts in the United States, from the development of a network of Neighborhood Justice Centers and Community Mediation Centers, which largely handle interpersonal and local disputes (landlord and tenant, barking dog complaints, and the like), on through large-scale public policy mediation of important environmental disputes.

Unfortunately, to date this development seems to have made little inroad with the church. This is regrettable since mediation holds the promise of offering a model for the church every bit as powerful as the psychotherapy model which fueled the growth of an entire profession-that of pastoral counselors (membership in the American Association of Pastoral Counselors now numbers approximately three thousand).
THE PROBLEM

There are probably many reasons why the church has not handled conflict well and why so many calls for advocacy and social justice go unheeded. To respond would mean changing the power balance and, for many, losing privilege. There are financial implications: Conflict threatens funding. To deal with social conflict is hard work; it is complex, confusing, and so on. But one particular reason is that many people don't know how to deal with such conflicts. We have lacked a praxis, if you will, for conflict. And this is precisely the promise of mediation: It offers a technology for dealing with conflict that avoids both the limitations and the deformations of the adversary system. The adversary system is limited because it is time-consuming, expensive, and cumbersome. Its deformations are that it is organized in a way that pits people against one another in a contest the outcome of which is usually a win/lose solution.

The reader may wonder what all this has to do with pastoral care. Is this not the domain of the legal system? Yes, except that our legal system colors for us how we handle disputes throughout our society. It is a peculiar characteristic of American society that we typically frame disputes in terms of individual rights, a product of our viewing disputes in terms of legal rights and entitlements. Most Americans fail to recognize how distinctive and singular our system for resolving disputes is. With a lawyer for approximately every 350 citizens, we have developed what Jerold Auerbach calls "the most legalistic and litigious society in the world" (Auerbach, 1983, 3).

A PARABLE

It may be helpful to step back for a moment and look at a simple dispute and how we go about solving it. My wife and I have been disagreeing about where to go for vacation this year. I think we should go to the mountains, preferably Vermont, a beautiful state. But she has just built a canoe and wants to go to the Okefenokee swamp. To me, that is hot, sticky, and there are no mountains. We have been arguing over this for weeks. We cannot agree. What do we do? What does anyone with a conflict do?

Sometimes compromise works. Except I feel I have compromised too much already. Sometimes taking separate vacations works. But I feel we have been apart too much. That is not acceptable to me. Sometimes flipping a coin works, but this is too important for me to settle in so arbitrary a manner.

When people are stuck in disputes, they argue, often for a long time. Eventually, however, if they are unable to resolve the dispute themselves, they usually begin to involve third parties. My wife talks with her family, telling her mother how insensitive I am. I go out with some of my buddies, and complain about how difficult it is to understand women. Neither of these strategies is likely to resolve the dispute.

But, still stuck, we may have to turn to other third parties. We start near at hand, perhaps asking help from our pastor, or a therapist. If finally that does not work, at an impasse, we may have to turn to attorneys and the courts.

We often have disputes we ourselves are unable to resolve, but which, with the help of third parties, we can work out. There is, moreover, a continuum of third parties to whom we can turn, a continuum that runs the gamut from the private to the public, from the voluntary to the coercive, and from the informal to the formal.
PRIVATE

family, friends, clergy,

PUBLIC

VOLUNTARY

therapists, attorneys,

COERCIVE

INFORMAL

courts

FORMAL

The people to whom we turn first are at the informal, private end of the continuum, that is, family and friends. When we turn to clergy, the context is more public since we are involving a professional, yet it is still fairly informal since we often simply drop in to talk and the advice we are given is free. By the time we see a therapist, it is becoming even more public, since we have never seen this person before in our life until we had this problem for which we needed help. But it is still relatively voluntary; the therapist, one of those people who try to "help" us make the decision, has no decision-making power himself or herself. Nevertheless, seeing a therapist is more formal: We now need to schedule an appointment and pay money to this person.

If we end up seeing attorneys and going to court, this is at the far end of the continuum of the formal and coercive: Unable to make a decision ourselves, we find that the courts will impose one on us. Should we not like the decision and fail to comply, the courts have the formal police powers of the state behind them and can hold us in contempt.

If all this seems like an extreme way to deal with a family impasse over vacations, we might pause to consider how frequently we find both the church and our society resorting to exactly such drastic measures to deal with differences and disagreements that may be difficult to resolve, may need communal involvement to get unstuck, but are hardly irresolvable. Perhaps it is a mark of sin that we so quickly capitulate to the powers of alienation and fail to bear witness to the reality of reconciliation to overcome separation.

AN ALTERNATIVE REMEDY

In all this, mediation has not been mentioned. Yet there has been much recent interest in mediation, which stems, I believe, from the recognition of what I call "the missing middle" in dispute resolution. Far too often we veer between being stuck ourselves, unable to resolve a dispute, and capitulating to the far end of the continuum, deciding to "Sue the S.O.B.!" without first looking at the available intermediate alternatives.

Mediation supplies what has been the missing middle in dispute resolution, offering a third party's assistance, often essential to resolving the dispute, while avoiding the time-consuming, cumbersome, expensive machinery of the full adversary system.

What difference does it make to have mediation available as an alternative? A big difference, I believe. A shift to mediation is not just a shift in locus or forum but a fundamental paradigm shift from the adversarial system's focus on rights to the focus within mediation on needs and interests (cf. Fisher and Ury, 1991; Glendon, 1991; Ury, Brett, and Goldberg, 1989). That shift means, more fundamentally than anything else, that it is possible to engage in a cooperative, constructive form of conflict resulting in mutually acceptable solutions, rather than in the competitive, ultimately destructive, form of conflict (cf. Deutsch, 1973). It means that we need not fear conflict but can embrace its creative potential. We can engage in conflict and
discover a different outcome: Instead of polarization, we can explore mutual interests and build collaborative skills.

When, instead, conflicts are framed in terms of individual rights, all too frequently the result is polarization and impasse. A number of the "social conflicts" enumerated earlier in this volume are ones that regularly end up in the adversary system, and rarely find a satisfactory solution. For example, Christie Neuger identifies many items which could form the basis of a profitable discourse between pro-life advocates and pro-choice people. But such a dialogue rarely occurs, since much of the current playing field of the abortion controversy is the courts. Restraining orders, conflicts over whether various cases will be heard by the courts, conflicts defined in terms of contradictory individual rights—this is the (insoluble) stuff of the current abortion controversy. Indeed, we speak of this conflict as the "abortion rights" controversy.

Again, Don Browning laments the loss of the two-parent family, the inadequacy of economic support for mother-headed single-parent families, and so forth. He finds that an ethic of mutual regard would help. Equally important, however, would be to move this conflict to a forum other than the adversary system, a poor setting indeed to attempt the family reorganization that needs to be worked out in divorce. Divorce mediation offers an alternative, which takes the issue of divorce out of a win/lose struggle, and enables divorcing parents to plan a future that will meet the needs of each parent as well as their children. Studies suggest that when such planning occurs, the results are likely to be both greater involvement of fathers in their children's lives and more consistent child support for the family (cf. Pearson, 1986; Wallerstein and Huntington, 1983).

Maxine Glaz writes about the hard dilemmas that families and hospitals are faced with when they confront contemporary "life-sustaining" medical technology. Again, we are all familiar with how such choices, painful as they are, are made excruciating when put into the vortex of the adversary system: The cases of Karen Ann Quinlan and Nancy Curzon were such epic dramas that they have become a common part of our shared experience.

James Poling speaks of the need to confront the new world of sexual harassment and alludes to the wrenching public hearings of Anita Hill's charges of sexual harassment against Clarence Thomas. The hearings unquestionably raised the consciousness of our society about sexual harassment, and that was a significant step. At the same time, those involved acknowledged the inappropriateness of the forum as a mechanism for dealing adequately and fairly with such issues. In contrast, as several persons have described (cf. Cloke, 1988, 1992), it is possible to deal much more effectively with such cases in mediation.

When made available, mediation has great appeal because it offers us an alternative to having strangers make decisions that may fundamentally alter our lives—whether these are hospital decisions about life and death or abortion, or legal decisions about who will have custody of children after a divorce. It returns these decisions to the people involved and lets them make the decisions the consequences of which they will get to live with.

But I find the significance of mediation goes beyond the element of self-determination.

As Robert Baruch Bush and Joseph Folger have proposed in their new work *Empowerment and Recognition* (1994), ethically mediation has an intrinsic dynamic that offers people the challenge of moving beyond individualism and realizing "the opportunities that conflict presents for moral growth" through the two dimensions of empowerment and recognition—strength of self and the ability to relate to others. Mediation
offers an occasion for transformation, for becoming a fully grown moral person, integrating concern and respect for self and respect for other" (Barr, 1993).

Theologically, I believe that to truly embrace mediation is to experience, beyond our penultimate struggles with aggression, competition, and estrangement, the interconnectedness of being and the foundational reality of cooperation and relationship. Such an experience, affirming the diversity of creation, connecting us to a larger whole, is both healing and hopeful.

WHY NOW?

If mediation is such a helpful instrument, why has it been so long in appearing? One answer is that it has in fact been around for centuries in many cultures, including our own (cf. Abel, 1982; Auerbach, 1983). But it has found limited use in our society until recently because we have so overwhelmingly embraced a framework of individual rights as the way to resolve disputes. Increasingly we are now discovering what insoluble nightmares such a relentless stress on legal and individual rights creates and have turned to look for alternatives.

Even the people responsible for implementing the adversary system recognize that it is overwhelmed and incapable of dealing adequately with the conflicts brought before it. The courts themselves are increasingly implementing ADR programs throughout the country. It would be ironic, then, if the church, in spite of its biblical mandate regarding conflict resolution, were to continue to handle its conflicts in an outmoded, legalistic way when the courts themselves are looking for alternatives. Yet many of our churches are indeed involved in an unreflective use of a system that is theologically questionable and practically clogged. As Speed Leas, one of our most experienced church mediators, observes:

Most congregations have no rules or structure for helping people negotiate or collaborate, only procedures for voting or appealing to denominational authorities .... I have not yet been in a church that has a decent set of understandings of how to deal with differences when they arise. Constitutions, Books of Order, and Disciplines are notorious for their vague or missing guidelines about appropriate ways to deal with differences. What is usually offered red is warmed-over Robert's Rules or directions for what to do after the conflict has become virtually unmanageable. Robert's Rules can be helpful when decision-making by voting is appropriate, but it is not helpful for developing consensus or negotiating. (1985, 56, 12)

There are hopeful signs of change: In 1992, The Lutheran Church Missouri-Synod made a denominational decision to embrace a version of mediation-arbitration as a more biblically congruent form of dispute resolution than its traditional highly legalistic system. But all too many current church conflicts-conservative-liberal controversies, disagreements between individual churches and denominations, sexual impropriety by church professionals--end up in court.

IMPLICATIONS

I have had a vision for at least a decade now that one day we will have a Pastoral Mediators Network that will be as significant and vital to the life of the church as AAPC has been over the last three decades and CPE over the last fifty years. Persons in such a network would be trained to help us deal more constructively with conflict. Just as the pastoral counseling movement has taken Jesus' words that he came that we might have life and that more abundantly as a warrant for its work, so too, pastoral mediators
would see the biblical warrant for placing dispute resolution at the heart of the church's function (Kraybill, 1981, 13).

Mediation would be seen as a more authentically biblical form of conflict resolution than the adversary system--again, following Jesus' word about how his disciples were to deal with conflicts (Matthew 18; 1 Cot 6:1-7).

Courses in conflict management would be as common and standard in seminaries as courses in pastoral counseling are today. Without practical skills in conflict management the church's stance in relation to conflict will continue to alternate between avoidance and pious pleas to pray over situations. Prayer is important. If it is all we have to say in the face of conflict, however, it becomes a sop, a confession of our helplessness, a counsel of despair rather than hope.

We have had a dearth of practical skill training in conflict management in theological education. In the sixties, as part of a significant attempt by the church to involve itself in urban ministry, we had technologies such as Saul Alinsky's to guide us in social conflict. Strategies such as Alinsky employed, however, really mirrored the problems of the adversary system and focused on confrontation. We may finally be at a place where we could have a more flexible and responsive technology for addressing social conflict, which could use confrontation where appropriate and collaboration when it is called for. And we could be equally comfortable with either-afflicting the comfortable, empowering the afflicted, and helping both form coalitions for change and transformation.

There have been church pioneers in the mediation area over the years. John P. Adams, a Methodist clergyperson, was a mediator in such disputes as Kent State and Wounded Knee (Adams, 1976). Ron Kraybill, Speed Leas, Sam Leonard, Will Neville, the Mennonite Conciliation Service, and the Alban Institute are among the church leaders and organizations which have been involved in initiating mediation on behalf of and within the religious community.

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If we return to the title and theme of this book—dealing with conflict—we can set a clearer vision of the future of pastoral care for the next generation. The prominence of counseling in the pastoral care field is, we have argued, partly an artifact of a ready-to-hand set of skills (e.g., active listening) that could be imparted to caregivers. But if we return to the continuum of third-party intervenors laid out earlier in this essay, we see that there are many kinds of third parties (not just pastoral psychotherapists) to which people turn for a variety of help. We will be able to provide a "full-service ministry," as it were, when we train a variety of professionals and lay persons to enable the full ministry of the saints. Dealing effectively with the social and structural context of the problems we encounter would mean not just, as Couture rightly notes, that we add on to the work of pastoral counselors additional social justice committee work. It would involve an understanding of ministry as empowerment and community formation, not just ministry as presence: We would train people in the skills of problem-solving, of administration, of community organizing, of group work, of goal setting, public policy, and negotiating as well as active listening and counseling skills. We need a more adequately incarnational theology. Until we have a level of skill development that matches the passion of our concern, our efforts will remain largely hortatory and ineffectual.

Is this a large agenda? Yes. Why is it necessary? Because early in Christendom the church not only cared for persons but also shaped the laws and institutions of Christendom. With the breakdown of Christendom and the emergence of secular culture, we have been trying to bridge a bifurcation between private and public life by falsely thinking that we could effectively minister to individuals, while being cut out of the loop of shaping the larger context within which those individuals live and function. We are increasingly confronted with the impossibility of adequately ministering to individuals without attending to the shape of the society and public policy within which those individuals live and work. I have endeavored here to identify one specific new "praxis" that would deepen and sharpen our ministry. It is no panacea. But it would be equally an error to get stuck yet once more in a false dichotomy between social advocacy and mediation as the route to the shalom we envision. Both are essential to the concerns outlined in this book—gender, race, diversity, aging, abuse, sexual harassment, economic marginality—and to our ministry of empowerment.
Assessing John Haynes' contributions to mediation must go beyond a simple book review. His shadow extends over the whole field of divorce mediation. John's books are essential reading in the field. In them, he is immensely helpful with practical interventions, while simultaneously being one of the key theoreticians of this new field. But to talk of John's books without also talking of his videotapes is to omit a core element. The tapes, invaluable in themselves to so many of us, are also actually the data in his books documenting the process of mediation. This is true not only of Mediating Divorce, but also of his latest book. The Fundamentals of Family Mediation. (Reviewed in this issue of Mediation News.) John's cases are like Freud's early cases - critical data on which much of the theory of the field rests.

What of his books? Haynes has given us three books. However, reading early Haynes is like reading early Freud; you not only glimpse a mind struggling to define a field, but you also watch as the Father of the field engages in practice that he later eschews. Indeed, Haynes now publicly disavows his early work, Divorce Mediation. Why the disavowal? The very subtitle of his first book, A Practical Guide for Therapists and Counselors, highlights the problem. In this book, John describes taking "time out" from the mediation, basically to contract for short-term therapy sessions. As he noted at the time, "I believe that it is inappropriate for the mediator to work with the couple as a therapist for more than a couple of time-out sessions." (p. 53.) He now, of course, disbelieves that a mediator should do therapy with a case which he or she mediates.

Mediating Divorce, Haynes's second book, is organized around five verbatim accounts, with commentary, of the well known videotapes that John has produced with Larry Fong. Apart from the several tapes that the Academy has produced for training purposes, no one else has put together anything like these tapes. These tapes are the mediation equivalent of the famous "Gloria" tapes in psychotherapy: they have trained a generation of mediators. John's book is analogous to the work of Robert Langs in psychotherapy - a unique compilation of verbatim accounts with commentary. I personally learn an enormous amount from this format, and John's tapes and book remain unique in the field.

The theory in Mediating Divorce, however, seems less helpful. John sums it up in the last chapter as organized around three areas: using language to change client's perceptions, the use of thinking styles, and identifying when mediation does not work. (p. 310.) This chapter, and the theory throughout the book, feel piecemeal and disjointed, curiously unsatisfying. In this book I sense John struggling to find a conceptual framework that would adequately capture what he does in mediation. It is as if he picks up and tries several different frameworks, and none quite do the job. They feel like post-hoc explanations, rather than what actually animates John's work.

John's latest book is the distillation of his years of mediating over 5,000 cases and training 15,000 professionals. It is, as John says, a "cook book" based on his own training program. As such, it is a workman-like text, giving people the basics they will need. It will probably, and deservedly, become a widely used text for introductory training in divorce mediation.

Despite the tremendous contribution of John's written work to the development of mediation, he has somehow not captured in his writing a quality that he conveys on tape and in person, a "presence" that
goes beyond technique. That presence may be similar to what Baruch Bush and Joe Folger refer to as "recognition," and they propose that mediation, at its heart, is an ethical enterprise, organized around empowerment and recognition. I find the dimension of recognition often missing in John's written work. His style of intervention is often characterized more by disattending than by acknowledgment.

It is only speculation, but I sense that John has intentionally limited himself in his books to dealing with technique. This may have been an important strategic decision that has enabled this field to gain acceptance by the public and professional communities. But now that it will shortly be twenty years that divorce mediation has been with us, I would like to see John take the wraps off and share the more personal side of his work.

John's three books to date comprise a core of fundamental reading in the basic technique of divorce mediation. But if John has another book left in him, I would hope, for him and for us, that he reflect on what I experience as the unnamed component in his work. He has given us the steps, now, in three books. When he mediates, though, he does more than follow steps; he dances. He has given us an excellent cook book that identifies the ingredients. John, however, does more than put the ingredients together correctly, like all good cooks, he has a flair, a personality to his cooking. Good cooking has soul. I would like to hear more from John on that.

There is, running through John's second book, Mediating Divorce, a chord that could let us hear the music, not just the notes: it is John's discussion of "that of God" in each of us. John writes:

"Part of this wisdom is "that of God" that each of us carries... the reader may feel more comfortable in spelling God with two "O's, so as to say that there is good in everyone...If there is "that of God" in everyone, then the mediator must in all humility seek it." (pp. 1728.)

"This concept goes beyond being nonjudgmental and becomes an active search to like and love the person with whom one is working." (p.264)

I find clients wanting more than simple agreements from us. They need that. But they hunger for some resolution, some healing to what they are going through. We can assist people with this in mediation. I think it is that component which has drawn so many of us to this field as mediators. John has given us our basic texts on technique. I look forward to his inviting us beyond technique, to share that extra something that we must in all humility seek. I suspect that extra something opens us as mediators to a dimension beyond agreements, to assisting our clients in resolution and healing.

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THE HANDBOOK OF DIVORCE MEDIATION

by Lenard Marlow & S. Richard Sauber
Reviewed by: Carl D. Schneider

This is a fascinating and, at times, maddening book. Marlow and Sauber have written a book like few others in the field. Most mediators have made a kind of peace with attorneys and the adversary system, and tend to practice out of stance which might be characterized as complementary and collegial. Not the present book.

Marlow and Sauber throw down the gauntlet. They wish to take on the adversary system directly, and they make a sustained case that the adversary system is in fact fundamentally harmful to parties, fails to live up to its representations that it protects clients, and is counterproductive to achieving settlements. They place themselves squarely in the breach, attempting to stem what they call "the unthinking incorporation into mediation practice of concerns based upon adversarial principles, principles that have nothing to do, and which are inconsistent, with those that should properly inform divorce mediation." No accommodators or appeasers here.

The book is full of quotable take-no-prisoners prose: the effect, Marlow and Sauber write, of the adversary system's characterizing the divorce dispute "in terms of legal rights has been to have dipped each of the parties in legal cement, and, as they will soon find out, it is also very fast-drying cement."

Marlow and Sauber at times throw out pearls that frame well-worn old issues in fresh ways. Regarding the issue of "discovery" and full disclosure of assets, they say, "To be sure, people do lie on occasion, but they also tell the truth. Thus, the question is not whether people are honest or are liars, but rather what circumstances and conditions (in what context) they are more likely to lie or more likely to tell the truth."

Again, regarding "having cast the proceeding s in a context that encourages the parties to dig deep holes in which to hide their valuables, it then becomes necessary to provide each of them with shovels to uncover them." They go on, matrimonial attorneys "will not find very much. The world is a very big place in which to hide things, and it is a lot easier to hide them than it is to find them."

The chapter on "Context" is a very rich and thought-provoking one. Marlow and Sauber argue that mediation is "not by definition a negotiating process[!]." Instead, they argue that it is best viewed as one of "mediating in a common cause," and that "the question is not what kind of a process divorce mediation is, it is what kind of process we wish it to be... what you see is what you get."

I applaud Marlow and Sauber in making a strong argument for their position, but fear that their language and stance in some areas will lead many to dismiss the book without really engaging its authors in their thought-provoking essay. Probably most disturbing is their treatment of the domestic violence issue, which is mentioned only in passing, as one of several items the authors think it is "misguided and ill-advised" to inquire about in the initial session. Similarly, though a proponent of joint custody myself, I thought unfortunate their characterization of women's groups opposed to joint custody as those for whom "when the yardstick of "fair" conflicts with what is best for women, that yardstick is simply discarded... these groups do not want what is fair for women; they only want what is best for them."
Marlow and Sauber see their book as one that would serve as both an introductory text as well as a guide for experienced mediators. The authors, however, have a great many things for which they do not present the pros and cons, but take a firm position on. Examples: mediators should use an "advisory attorney;" opposition to formal written agreements to mediate; seeing children in mediation should generally "not be done"; parenting issues should be mediated before financial issues; mediators should simply accept that "confidentiality does not exist" for mediation; mediators should "avoid" caucusing, and so on. In this respect, I think the book better advised for experienced mediators.

Regardless of our response to particular positions they take, Marlow and Sauber have done us the service of presenting a book introducing divorce mediation not simply in terms of technique, but as a practice which grows out of a thought-through perspective.

Reviewed by Carl D. Schneider, Ph.D., Atlanta, Georgia
Mediation is a dispute-resolution process in which an independent third party helps disputants to settle a conflict in a mutually acceptable fashion. The disputing parties, whether individuals or nations, are active participants. A goal-directed, problem-solving process, mediation occupies a position midway between self-help approaches and formal third-party decision-making processes. Mediation differs from formal litigation in that the process is voluntary; the mediator has no coercive power or authority to impose a settlement on the parties.

Conciliation is a term often used interchangeably with mediation; at other times, it is used to refer to a more unstructured process of facilitating communication between estranged parties.

Mediation and conciliation are perhaps best distinguished historically. In the family sphere, conciliation arose when the Los Angeles Family Conciliation Court was established in 1939, the first of a whole movement of conciliation services associated with domestic relations courts which grew up around the country; these affiliated in 1963 as The Association of Family and Conciliation Courts, an international association concerned with the provision of family counseling as a complement to judicial procedures. Family mediation developed as a broad art, movement in the 1980s, most significantly in the divorce mediation movement.

Along with ombudspersons, arbitration, and consumer complaint agencies, mediation has gained currency as there has been growing recognition of the difficulties and deficiencies involved in the heavy reliance in American society on the formal adversarial court system to handle disputes and to provide for social ordering. Proponents of mediation argue that among the benefits of the process are its privacy, informality, convenience, timeliness, lack of expense, and effectiveness. As Folberg comments: "It is ideally suited to polycentric disputes and conflicts between those with a continuing relationship, since it minimizes intrusion, emphasizes cooperation, involves self-determined criteria of resolution, and provides a model of interaction for future disputes" (p. 13). Research indicates that family mediation is effective in achieving higher levels of satisfaction and compliance with the agreements reached and in limiting the adverse impact of the conflict (Pearson, 1982).

1. Mediation: Limits and Issues.

The very aspects of mediation that constitute its advantage over the adversarial system also embody its problematic areas. Since mediation is a private, informal process less controlled by statutory law, precedent, and rules of procedure, many people have raised concerns about its capacity to ensure a fair process and a just settlement. Many question whether mediation is not unduly subject to the unequal bargaining power of the respective parties involved.

There are other problems and limits to mediation. Some disputes are not amenable to mediation. "One cannot negotiate everything. Deeply cherished beliefs and values are simply not negotiable... Either we believe in God, capital punishment, and a woman's right to have an abortion or we do not. These views may change, but they are not negotiable" (Rubin, 135-6). Some disputants are unwilling or unable to
employ mediation to resolve their conflict (e.g., the ideologically committed, the mentally ill, substance abusers). Mediation normally involves dealing directly with the other party. Some people find this too compromising, difficult, frightening, or painful and cannot or will not have their case mediated. However valuable, mediation is one form of dispute resolution, and it does not replace the need for a formal system of justice.

As a new field, family mediation lacks licensure or registration. Some people question whether it is or ought to be regarded as a separate profession. Tuff questions abound. There is much debate about how to ensure adequate quality control. More broadly, there are questions about the ethics of bargaining and negotiating and about how to make mediation services available to people at all income levels.

2. Divorce and Family Mediation.

The major American organization of neutrals, SPIDR (Society of Professionals in Dispute Resolution), includes mediators working in labor, community, and environmental mediation. In the context of the social revolution in which American society averages one million divorces a year, however, the most rapid expansion of mediation services and the area most relevant to pastoral care is that of divorce and family mediation. (Prior to 1981, the Family Mediation Association had one hundred members nationally; by the mid-1980s, several thousand divorce mediators had been trained.)

Conducted by mediators with training in family law, the divorce process, conflict management and family systems and therapy, divorce mediation deals with family disputes relating to a decision to separate or divorce. Its end product is a memorandum of agreement, a written document detailing the agreements reached with regard to the division of marital property, spousal and child support, and child custody and parental access.

3. Mediation and the Church.

The history of religious involvement in family dispute processing is inadequately documented. However, examples include the bet din, Jewish courts which date back to biblical times. A broad-scale contemporary expression of church involvement in family mediation is the evangelical Christian Conciliation Service, a ministry of the Christian Legal Society, organized in 1961, and now a national network which attempts to offer mediation and arbitration of disputes "based upon a biblical mandate and spiritual principles."

The modern pastoral care movement, however, has involved itself only minimally with mediation. The tendency of the church to view conflict as a negative phenomenon to be avoided contributes to this reluctance. This seems unfortunate since there appears to be not only historical precedent but also theological rationale for such activity. An examination of the biblical concept of shalom and the Christian doctrines of reconciliation and forgiveness would seem to give warrant to the claim that conflict resolution and mediation represent two contemporary forms of reconciliation and healing as expressions of the classic mission of the church and the work of the pastor (cf. II Cor. 5:17-20; Mt. 18:15-17; 5:22-24; I Cor. 6:1-5; Eph. 2:13-17).

Pastors ought not to assume, however, that they can do mediation without special training. Specific skills are necessary. When referrals are to be made, mediators may often be located through local or state
(family) mediation councils or through such national organizations as the Academy of Family Mediators (for family mediation) and SPIDR (for other forms of mediation.

As American society seeks more effective and informal means of social ordering and dispute resolution, pastors have an opportunity to involve themselves in mediation as a significant mode of ministry: Lon Fuller (1971, p. 328) speaks of this opportunity in his description of the "central quality of mediation, namely, its capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another."

**Bibliography.**

A COMMENTARY ON THE ACTIVITY OF WRITING CODES OF ETHICS

Carl D. Schneider

One bitter cold Chicago night, when I was struggling through a snowstorm to get to another meeting of our long-suffering ethics committee, I reflected on what a strange activity we were engaged in: gathering month after month in a North Side condominium lobby to argue at length about how we should properly describe our responsibilities as mediators. Why would anyone do such an odd activity? Why, indeed, was I doing this?

I would like to hazard here some comments, not only on the product of our efforts and the content of the Professional Standards of Practice for Mediators (PSPM) of the Mediation Council of Illinois, but also on the process of developing and implementing such codes.

The Process

The question of why anyone should even bother writing or reading a code deserves an answer before the reader is confronted with yet another such code. How do we account for this flourishing cottage industry? The answer is that mediation, especially family mediation, is emerging as an organized guild and claiming for itself the status of a profession, and it is precisely the mark of a profession that it be autonomous and self-regulating.

Professions are strange animals. They represent various groups of specialists who have made a successful case to the public that the larger society would benefit from granting them autonomy to perform specialized services, which they can do better than any lay or public agency. In turn, the profession asks that society sanction its authority within certain spheres by granting it a series of powers and privileges.


This bargain that the profession strikes with society is a risky one. The autonomy that a profession claims in order to perform its specialized service requires that the profession guarantee not only its skill and competence but also its honor (Garr-Saunders, 1930). The obvious opportunity for the abuse of such power, and the potential for degeneration of an association of specialists into an interest group lobby, requires that professions develop internal mechanisms for self-regulation and external reassurances that they indeed are subject to structures of accountability. As Greenwood (1957) puts it: "Through its ethical code the profession's commitment to the social welfare becomes a matter of public record, thereby assuring for itself the continued confidence of the community." Thus, writing codes of ethics is one of the ways professions arrange to regulate themselves, rather than suffering external regulation.
The Product

The Mediation Council of Illinois PSPM document is the product of a year-long project by an ethics committee of the Illinois state council which had given priority to developing a code of ethics. Over the previous three years, local and state mediation codes had proliferated, and we considered simply adopting one of the extant codes, but we also felt the available codes had significant omissions or deficiencies. First, they seemed to be constructed as ad hoc documents. Second, they lacked any provision for sanctions. As a result, two aspects of the Illinois PSPM are significant: its attempt to develop a code of ethics that is organized in terms of general principles, and its procedure for dealing with violations of the code.

Many of the codes we considered seemed more thematic than structural. They spoke to relevant issues but failed to be comprehensive. They seemed to be responses to issues that had arisen in particular localities but had not been sufficiently generalized to represent what could purport to be a general code of ethics for the profession. Some read more like practical advice for the practitioner.

We hoped instead to address the field of mediation in a more organized fashion. To do so, we endeavored to organize our standards in terms of general principles. This decision reflected our understanding of a code of ethics as the embodiment of the range of obligations and responsibilities of a profession, and not merely as a compilation of disparate problems and recommendations for good practice. An adequate framework of professional ethics needs to go beyond local and case-by-case specifics.

We recognized the difficulty of attempting a comprehensive statement in a field as new as divorce mediation. We also recognized that we were not professional ethicists and had limited skill in structuring such a document. We thus turned for help to the already extant codes from our respective professions, beginning with the Ethical Principles of Psychologists of the American Psychological Association and the Code of Professional Ethics of the American Association of Pastoral Counselors. We also consulted the Code of Professional Responsibility and the Model Rules of Professional Conduct of the American Bar Association. Our final PSPM document, modeled on the American Psychological Association’s Ethical Principles of Psychologists, is organized around ten sections (see Exhibit 1).

While we are not totally successful in organizing these ten sections in terms of principles, clear gains still ensued from our attempt. Thus, although two documents may have similar content regarding the expectation that mediators will participate in ongoing continuing education, one may put this expectation under a section concerning training and education, while the other (like the PSPM) puts it under the principle of competence. Thus, instead of the expectation standing as an ungrounded requirement, as it does in the first document, in the PSPM it is firmly rooted in a professional obligation to deliver competent service. Again, the content of the expectations regarding fees in mediation may be similar in two documents; but one may set out costs and fees as a separate section, with no prefatory explanation of why such matters should be regarded as an ethical concern, while the other (like the PSPM) sets its discussion of fees under the principle of the mediator’s obligation to respect the integrity and protect the welfare of clients.

The practice of organizing codes of ethics around principles offers obvious educational advantages. It enables practitioners to get a sense of their basic commitments as professionals and offers them an understanding of the elements that must be weighed in making difficult decisions. This is preferable to trying to enumerate all the problematic situations that arise in mediation, since none of us can anticipate the myriad forms in which such issues occur. To give ourselves principles to guide our deliberations about
our practice is, indeed, to treat ourselves in a professional manner—that is, as capable of self-reflection and self-monitoring—while to give ourselves instead a laundry list of ways a mediator should behave is to undercut autonomy, foster questionable conformity, and make our code a very time-limited document. Further, when we have disciplined our thinking in terms of principles, we are able to recognize better the full scope and nature of our responsibilities and tasks. One outstanding example of a document facilitating the organization of our understanding of our responsibilities as mediators is the Code of Professional Conduct for Mediators of the Colorado Council of Mediation Organizations. That code organizes the ethical guidelines in terms of five fundamental responsibilities for mediators: toward the parties, the mediation process, other mediators, agencies and the profession, and other unrepresented parties. Such an approach helps clarify the character of our responsibilities in a simple and comprehensive manner. It is not enough simply to use the language of specific and locale-based rights, duties, and principles. Such items fall short of illustrating the level of general obligation that would account for the particulars.

It may be useful to offer some examples of how a principled approach assists us as mediators: It provides an account of the multiple responsibilities of mediators in institutional settings; it delineates the responsibilities of mediators, not only in the delivery of mediation services but also in the transmission (training) and extension (research) of the field; and it assists mediators in developing the capacity to weigh the varying claims of competing principles in concrete situations.

First, many mediation codes fail to deal with other than individual mediator-client relations. This reflects the current reality that a great many mediators are in private individual or small-group practice. But such a framework does not adequately deal with those situations in which mediators are affiliated with organizations and larger institutions. The PSPM document attempts to spell out the procedural responsibilities of someone working as an employee in a larger organization.

Second, most codes to date have focused primarily on the delivery of services. This reflects the newness of the field. It fails, however, to take into account the responsibility of those engaged not simply in delivering service but also in transmitting and extending the field—in training and research. The PSPM document attempts to describe the responsibilities of teachers and trainers of mediation in their published statements. Given the number of people currently engaged in training, this is especially relevant. Most practitioners of mediation have only begun to recognize the need for research and to incorporate it in their work. Our document identifies the responsibility of those involved in research to respect the rights and dignity of participants, including the need for informed consent and protection of a person’s freedom to decline to participate in research. The inclusion of such sections helps avoid the distortion that stems from construing the responsibilities of mediators merely in terms of their responsibility to fellow professionals and to clients. The range of obligations we incur as professional mediators includes a responsibility to the public as well and must not be narrowed simply to individual relations. There are special ethical obligations that accrue to professional roles; there is an implicit social covenant between society and the profession, which a professional code of ethics should make explicit.

Third, because of the multiple values inherent in our practice and the several obligations we must balance, a code of ethics cannot spell out unambiguously what we should do in any and every situation. We cannot escape from conflicting claims, but we can gain clarity about the values and priorities involved. Freedman (1975), for example, notes the conflict that arises among the ethical claims of the practicing attorney toward three different parties—the immediate client, the court before which the attorney is pleading, and society at large. These claims often are in unavoidable conflict, which Freedman calls a "trilemma." The same sort of inherent conflict of rights and duties is daily encountered by the mediator. It is what lies
behind our many discussions of the nature of neutrality and impartiality and our attempts to respect client autonomy and self-determination while balancing our responsibility to unrepresented third parties and society at large. The way to deal with such dilemmas is not to ignore part of the conflict or seek simple formulas, but to learn as mediators how to recognize ethical issues as they arise, to consider as part of our necessary knowledge and skills as mediators the capacity to weigh the varying claims of competing principles in specific situations, and to be able to make informed ethical judgments so that we can recognize the elements of good practice.

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Another aspect of our PSPM document is its provisions for sanctions in dealing with violations of the code. Of course, codes of ethics have other functions besides regulation. They are also pedagogical and administrative tools—offering models of behavior, setting guidelines to good practice, defining the proper parameters of practice, and contributing to the development of competence and quality in service. Furthermore, those who have studied disciplinary action by professions against members of the profession have repeatedly noted how reluctantly and infrequently sanctions are applied. Nevertheless, self-regulation is an indispensable obligation of a profession and one of the essential functions of a code of ethics. It may still be true that informal regulation is at least as important as formal mechanisms of regulation, but codes of ethics fail to fulfill one of their functions if they lack any operational clauses. Milne
(1984), in her discussion of sanctions, recognizes their benefits but suggests that the newness of the field, the uncertainty regarding who belongs to the field and what constitutes good practice, and the lack of any appropriate body capable of claiming legitimacy and implementing and administering sanctions all present major impediments to developing viable mechanisms to regulate divorce mediation services.

It is true that until now we have not had a recognized national body that could claim such authority. While the national picture is still developing, however, it seems that state councils, as professional organizations, could appropriately exercise this function, at least in terms of codes of ethics that involve disciplinary provisions. As Milne notes, among the mechanisms of professional regulation--licensure, certification, accreditation, registration, and formal subscription to a standard of practice--the latter is the least restrictive formal mechanism of control available.

Although to date they have not been tested, the PSPM document offers detailed procedures for processing complaints regarding violations of the code. Our procedures are modeled on similar ones for adjudicating ethical complaints in related professional associations (Mills, 1984). I hope that similar provisions will be developed by other local and state councils; our procedures are only a first step. For such a mechanism to be functional, local ethics committees need to be trained; provisions need to be set for membership rotation on such committees; and formats need to be developed for ascertaining the nature of violations, dealing with anonymous complaints, requesting releases for obtaining information and records, and developing appropriate means of ensuring confidentiality of proceedings and providing for appeals. The functioning of these procedures also involves distinguishing among complaints "outside the ethics realm, related instead to legal issues, impoliteness or discourtesy, or, especially in advertising, to 'tacky' behavior, that is, behavior that may be in poor taste but is not technically unethical" (Mills, 1984). Such behaviors need to be dealt with in other forums.

So seen, procedures for adjudicating violations of the code can be a useful component of the whole range of regulatory forms--including entry-level criteria, professional schools and training programs, professional associations, consultation and supervision--that exist to maintain competence and integrity within the profession.

The gains should not be exaggerated; such mechanisms do not resolve the tension between the issue of individual autonomy and a profession's collective claim to autonomy (Moore, 1970). They do not eliminate the conflict between a profession's self-interest and its claim to serve the public interest, nor do they settle the issue of the place of lay participation in the regulation of professions (Barber, 1980). Such mechanisms do not resolve the dilemma of disciplinary action: Dismissal from professional association segregates those who are subject to censure and places offenders beyond the control of those who disapprove of their practice (Friedson, 1970). Finally, they do not solve the self-segregation of professionals into contiguous networks having marked differences in technical and normative standards, but little interaction (Friedson, 1970). But these are larger issues, for another time and place; codes of ethics have a more modest function.

### Exhibit 1. Mediation Council of Illinois (MCI) Professional Standards of Practice for Mediators. a

a Adapted, with permission from the American Association, by Carl D. Schneider, Nettie Breslin, Joy Feinberg, Helen, Rogal, and Burton Zoub.
Definition

Mediation is a voluntary procedure whereby an independent and impartial third party or parades promote and facilitate the resolution of a dispute between parties. Mediation is based on full disclosure of all facts related to the disputes so that a fair and equitable agreement can be achieved by the disputants. The end product is a written memorandum of agreement, detailing all the issues involved and the accord of the parties. In matters of divorce mediation, the agreement will encompass the division of marital property, spousal and child support, and child custody and parental access.

I. Competence

Mediators shall maintain high standards of competence. Recognizing the boundaries of their competence and the limitations of their techniques, they only provide services or use techniques for which they are qualified by training and experience, using consultation from other professionals, as appropriate. They maintain knowledge of current professional information related to the services they render. Mediators accurately represent their competence, education, training, and experience.

A. Formal Education. Mediators shall hold either a bachelor of law degree; a J.D. degree; a master's degree; or equivalent training or experiences in mental health or related disciplines. Mediators shall be members in good standing in the professional organizations of their disciplines.

B. Training. Mediators shall have undergone at least forty hours of training specifically in mediation, led by qualified mediators and/or by a recognized training organization before representing themselves to the public as mediators. Qualified divorce mediators shall have at least a basic awareness of applicable family law, and training in the divorce process, conflict management, family systems and therapy, child development, and the effect of divorce upon children.

C. Continuing Education. Mediators shall participate in continuing education and be responsible for ongoing professional growth. Mediators recognize their shared responsibility to join with other mediators and with members of other related professions to promote mutual professional development.

D. Self-Monitoring, Personal Functioning, and Bias. Mediators recognize that their capacity to mediate successfully depends in part on their ability to maintain effective interpersonal relations. They shall refrain from undertaking any mediation in which their personal problems are likely to lead to inadequate professional services or harm to a client; or, if engaged in such activity, when they become aware of their personal problems, they shall suspend, terminate, or limit the scope of their mediation activities or seek competent professional assistance to determine whether they should suspend, terminate, or limit the scope of their mediation activities.

II. Confidentiality

Mediation proceedings and all information obtained from and about the participants through the mediation process shall be treated as confidential unless this requirement is waived by informed consent of both parties. Where there is clear and imminent danger to an individual or to society, the obligation of the mediator to maintain confidentiality will not apply.

A. Safeguards/Invasion of Privacy/Keep Confidential. Personal or evaluative information is discussed only for professional purposes and only with persons clearly concerned with the case. Written and oral reports present only information germane to the immediate purposes, and every effort is made to avoid undue invasion of privacy.
B. **Public Use of Information.** Mediators who present personal information obtained during the course of professional work in writings, lectures, or other public forums need either to obtain adequate prior informed consent or to disguise identifying information of the persons involved.

C. **Limits of Confidentiality.** While the mediator should in every way possible seek to maintain and to protect the confidentiality of mediation, including agreements with the parties involved that the mediator and the records of the mediation process are not to be subpoenaed in any subsequent litigation, the mediator should also inform the parties involved of the limits of confidentiality. At present, this means in particular that mediation has no statutory protection of its confidentiality and is not recognized as privileged communication by law.

D. **Records.** Mediators make provisions for maintaining confidentiality in the storage and ultimate disposal of client records.

### III. Welfare of the Client

Mediators respect the integrity and protect the welfare of the families and individuals with whom they work. They make reasonable efforts to ensure that their services are used appropriately. These efforts include fully informing potential clients of the purpose and nature of the mediation process.

A. **Conflict of Interest: Employee/Client.** Upon recognition of an actual or potential conflict of interest between the client and the mediator’s employing institution, mediators shall clarify the nature and direction of their loyalties and responsibilities and keep all parties informed of their commitments.

B. **Conflict of Interest: Dual Relationships.** Mediators have the responsibility of monitoring their own needs and values, and of acting in accordance with their potentially influential position vis-a-vis clients and children of clients, in order to avoid exploiting the trust and dependency involved in the mediation process to their own ends or gratification. Mediators shall make every effort to avoid dual relationships with clients and/or relationships that might impair their professional judgment or increase the risk of client exploitation. Examples of such dual relationships include but are not limited to sexual intimacies with clients, service to students, supervisors, close friends, or relatives.

C. **Fees.** Financial arrangements in professional practice are in accord with professional standards that safeguard the best interests of the client and that are clearly understood by the client in advance of billing.

1. **Fee Arrangements.** The mediator should explain the fees for mediation and reach an agreement with the couple for payment at the orientation session. A mediator shall not charge a contingency fee or base the fee in any manner on the outcome of the mediation process. A flat fee for the entire mediation may be charged if agreed at the outset. Hourly rates may be established, either at a set rate or on a sliding scale, taking into account the financial means and abilities of the parties.

2. **Additional Professional Consultation.** Clients should be advised at the outset of mediation that other relevant professionals, in addition to attorneys, may have to be employed to assist the mediation process in establishing values, weighing tax consequences of alternative arrangements, and other technical information.

3. **Referral Fee.** No commission, rebate, or other form of remuneration may be given or received for referral of clients for professional services, whether by an individual or by an agency.

4. **Pro Bono.** Mediators contribute a portion of their services to work for which they receive little or no financial remuneration.

D. **Initial Advice.** At the initial orientation session, mediators should at a minimum advise potential clients of the following:

1. The issues to be mediated should be delineated from the outset. In divorce mediation, the parties should not begin mediation unless they are agreed that their marriage is to be dissolved and that they are voluntarily submitting all or certain of the disputed issues in connection with child custody, visitation, support, or property division for mediation.
2. Therapy is not a part of the mediator’s function. Therapists should not conduct mediation when their clients have contracted for therapeutic services.

3. Neither law nor therapy shall be practiced in mediation. Attorneys should not conduct mediation when their clients have contracted for legal services. Discussion of legal alternatives that develop during the mediation process shall be discussed by the parties with their respective legal representatives for purposes of review and explanation.

4. The parties should each be advised to obtain independent legal counsel to assist and to advise them throughout the mediation.

5. The mediation can be suspended or terminated at the request of either party. The mediator shall suspend or terminate the mediation if it appears that the parties are acting in bad faith, if either party appears not to understand the negotiation, if the prospects of achieving a responsible agreement appear unlikely, or if the needs and interest of minor children are not being considered by the parties. In the event of a suspension, the mediator may suggest a referral for outside professional consultation.

6. The cost of mediation in terms of hourly rates must be agreed upon (see G, above), as well as the method and responsibility for payment.

7. The participants need to be advised both that the mediation process is confidential and also of the limits of confidentiality.

8. Participants should be informed that the mediation process requires voluntary full disclosure. Each client in divorce mediation will be expected to submit and exchange with the other a statement of assets and liabilities, income information, and detailed budgets.

**IV. Impartiality**

The role of the mediator is to serve as an impartial third party with responsibility for structuring and monitoring the process of decision making between the parties. Mediators can serve effectively only when all parties to the dispute are confident of the mediator’s impartiality. Mediators shall disclose to both parties any ties, association, or potential biases they may have in working with either party. This includes acknowledgment of any prior relationship with either of the parties to the dispute. Mediators have a duty to disclose at the earliest appropriate time to the parties involved all contacts between the mediator(s) and either party or any other relevant third party, including the clients’ attorney. Mediators assume the responsibility for withdrawing from a case if they believe or perceive that there is a clear conflict of interest, or if a bias emerges that interferes with the mediation, regardless of the expressed desires of the parties.

A. **Nonconcurrence.** Impartiality is not the same as neutrality in questions of fairness. Although a mediator is the facilitator, and not a party to the negotiations, should parties come to an agreement that the mediator finds inherently unfair, the mediator is expected to indicate his or her nonconcurrence with the derision in writing.

B. **Role Conflict.** In order to avoid actual or potential conflicts of interest, a lawyer-mediator should not represent either party before, during, or after the mediation process. If the mediator is a mental health professional, there should be no professional relationship with the participants in counseling or therapy, before, during, or after the mediation process. In the event the mediator has represented or counseled one of the parties beforehand, the mediator should not undertake the role of mediator unless the subject matter of the earlier representation or counseling is clearly distinct from the mediation issues and unless both participants, having been advised of the prior representation or counseling, choose for the
mediation to proceed, by written waiver of the parties affected or upon appeal and opinion of approval of the MCI Ethics Committee.

It is questionable whether mediators should work with either client in a prior or subsequent therapeutic, legal, or other professional relation. Such dual relations should be entered upon, if at all, only with sensitivity to possible conflicts of interest involved and with proper advisement to clients regarding such potential conflicts, by written waiver of the parties affected, or upon appeal and opinion of approval of the MCI Ethics Committee.

C. **Best Interests of the Children.** While the mediator has a duty to be impartial, the mediator also has a responsibility to promote the best interests of the children and other persons who are unable to give voluntary, informed consent. Mediators take special care to protect these persons’ best interests. The mediator has a duty to assist parents to examine the separate and individual needs of their children, to consider those needs apart from their own desires for any particular formula for sharing their children, which might be motivated by factors involved in the relationship between the parents and not directly related to the best interests of their children. If the mediator believes that any proposed agreement between the parties does not protect the best interests of the children, the mediator has a duty to inform the couple of his or her belief and its basis.

**V. Professional Relationships**

Mediators shall acknowledge and respect the needs, special competencies, and obligations of their colleagues in mediation and other professions.

A. **Intraprofessional Relations.** Mediators acknowledge their limits and respect the areas of competence of related professions. They encourage the use of professional, technical, and administrative resources that serve the best interests of clients. A mediator shall not enter any dispute that is being mediated by another mediator without a clear understanding that the first relationship has been terminated. When co-mediating, each mediator has a responsibility to keep the other mediator(s) informed of developments essential to an effective collaborative effort. While present with clients, the mediator should avoid direct criticism of the co-mediator.

B. **Professional Decorum.** Mediators, whether functioning independently or as part of an organization, shall act professionally and with proper decorum at all times. When mediators function as employees of organizations providing mediation services, or as independent mediators serving clients in an organizational context, mediators seek to support the integrity, reputation, and proprietary rights of the host organization. When it is judged necessary in a client’s interest to question an individual’s or an organization’s programs or policies, mediators attempt to effect change by constructive action before disclosing confidential information acquired in their professional roles.

**VI. Informed Decisions and Fair Agreements**

The mediator has a duty to ensure that clients make informed decisions. The mediator should ensure that the parties have been advised to obtain legal counsel and a sufficient understanding of relevant statutory and case law, as well as local judicial traditions, to make an informed consent on the issue involved. In addition, the mediator should ensure that each of the participants has an understanding of, as well as a reasonable opportunity to weigh, the application of appropriate legal information to his or her situation before reaching an agreement. The mediator has a duty to ensure that the understanding of each of the parties with respect to the relevant information is adequate to allow balanced negotiation.
necessary, the mediator shall refer the parties to experts for consultation and/or evaluation. The mediator shall ensure that there is full financial disclosure and development of relevant factual information in the mediation process.

A. **Fair Agreements.** While mediators must be impartial between participants, they must not be neutral toward fairness. The objective of family mediation is not a settlement at any cost; rather, it is the achievement of a fair and reasonable agreement. While there can be no constant definition of "fair and reasonable," it is essential that mediators disassociate themselves from agreements that they perceive to be so far outside the parameters of fairness (as established by case precedent, legal requirements, and learned common sense) that they do not believe them to be fair and reasonable. In such an event, mediators should withdraw from mediation and terminate the process.

B. **Understanding Decisions.** The mediator should ensure that each person fully understands the implications and the ramifications of the options available. In this regard, the mediator should attempt to assist each person in understanding the interplay of his or her own emotions with the decision-making process during the mediation.

C. **Noncoercive Negotiations.** The mediator has a duty to ensure a balanced dialogue and must attempt to defuse any manipulative or intimidating negotiating techniques utilized by either of the parties. If the mediator finds that it is not possible to eliminate such bargaining techniques from the process, he or she should not permit the mediation to proceed.

D. **Independent Legal Counsel.** The mediator has a duty to advise the mediation participants to obtain legal counsel and advice prior to reaching an agreement. A referral for legal advice should be made before the decision-making process, and not after the participants have already reached a full accord to which they may have made an emotional commitment. Mediators, including attorney mediators, shall not advise either party as to their legal rights or responsibilities so as to direct the parties' decision on a given issue. Each party must be referred to independent legal counsel for that advice. A single attorney to advise the participants as to the law in the course of a mediation is not a substitute for independent legal counsel. Mediators should avoid any ongoing referral relationship with an attorney that hampers the independence of the attorney's judgment in giving advice or reviewing the agreement.

### VII. Public Statements and Promotional Activities

Public statements, announcements of services, advertising, and promotional activities of divorce mediators serve the purpose of helping the public make informed judgments and choices about divorce mediation and its alternatives. Mediators shall represent accurately and objectively their professional qualifications, affiliations, and functions, as well as those of the institutions or organizations with which they or their statements may be associated. In public statements providing information or professional opinions related to divorce mediation, mediators base their statements on acceptable professional opinion, current knowledge, and research data, with full recognition of the limits and uncertainties of such sources.

A. **Professional Identification.** When announcing or advertising professional services, mediators may list the following information to describe the provider and services offered: name, relevant academic degrees, relevant training in mediation, date, type and level of certification or licensure, appropriate professional affiliations and membership status, address, telephone number, office hours, a brief listing of the type of services provided, an appropriate presentation of fee information, and foreign languages spoken. Additional relevant or important consumer information may be included, if not prohibited by other sections of the professional standards.

B. **Misrepresentation or Abuse in Public Announcements.** In announcing or advertising the availability of divorce mediation services, products, or publications, mediators do not represent their affiliations with any organizations in a manner that falsely implies sponsorship or certification by those organizations. Public
statements, including but not limited to communication by means of periodical, book, list, directory, television, radio, or motion picture, shall not contain (1) false, fraudulent, misleading, deceptive, or unfair statements; (2) misrepresentation of facts, or statements likely to mislead or deceive by making only a partial disclosure of relevant facts; (3) testimonials from clients regarding the quality of mediators' services or products; (4) statements intended or likely to appeal to clients' fears, anxieties, or emotions concerning the possible results of failure to obtain the offered services; or (5) statements intended or likely to create false or unjustified expectations of favorable results.

C. Solicitation. Mediators shall not compensate or give anything of value to a representative of the press, radio, television, or other communication medium in anticipation of or in return for professional publicity in a news item. This does not preclude payments for publicity and/or advertising.

D. Accurate and Adequate Information. When functioning as teachers or trainers of mediation, mediators shall ensure that announcements and publicity are accurate and not misleading, particularly with regard to whether or not the event involved is being presented and intended as a training event for divorce mediators. Announcements, brochures, or advertisements describing workshop, seminars, or other educational programs accurately present intended audience and eligibility requirements, educational objectives, and nature of the material to be covered, as well as the education, training, and experience of the mediators presenting the programs, and any fees involved.

E. Obligation to Correct. Mediators shall accept the obligation to correct others who, when representing the mediator's professional qualifications or associations with products or services, do so in a manner incompatible with these guidelines.

VIII. Research

Mediators recognize that research is essential to the advancement of knowledge and that all investigations must be conducted with respect for the rights and dignity of participants and with concern for their welfare. Specifically, the conditions of the Human Subjects Experimentation, as designated by the Department of Health and Human Services of the United States Federal Government, shall be adhered to. When involved in research, mediators shall advise research participants of the funding source of sponsorship of the research and inform the participants of the nature of the study, either before or after the data collection.

A. Freedom of Choice. Ethical practice requires the investigator to respect the individual's freedom to decline to participate in, or to withdraw from, research. The obligation to protect this freedom requires special vigilance when the investigator is in a position of power over the participant, as, for example, when the participant is a student, client, employee, or otherwise is in a dual relationship with the investigator.

Ethically acceptable research begins with the establishment of a clear and fair agreement between the investigator and the research participant that clarifies the responsibilities of each. The investigator has the obligation to honor all promises and commitments included in that agreement.

IX. Public Mediation

The judiciary may mandate mediation programs to assist in the disposition of child custody and visitation disputes, but such programs should not be established for the principal purpose of abdicating judicial responsibility or reducing caseloads. The court mediator should have no right to ex parte communications without the express knowledge and/or permission of the parties. The court mediator shall make no
recommendations to the court and should have no decision-making capacity with regard to the couple. Such an arrangement is not mediation, but non-binding arbitration.

References


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