The Professional
FAMILY MEDIATOR

Feature Article

FALL 2013

APFM
ACADEMY OF PROFESSIONAL FAMILY MEDIATORS

Marriage: A Promise We Shouldn't Make

By Amy Horowitz

Amy Horowitz is a graduate of Stevenson College at the University of California, Santa Cruz, with a B.A. in Psychology. She is planning to attend graduate school to continue her studies in child and family psychology in both research and clinical environments.

Although traditional marriages served the purpose of merging families to facilitate social and economic advancement and the preservation of a family line through reproduction, the Western world now considers mutual love to be the basis for marriage. Not only are two people who are deeply in love expected to eventually marry, but included in this concept of marriage is an expectation that they will remain together forever. However, an increasing number of marriages result in divorce, which suggests that everlasting mutual love may be quite uncommon. The negative legal, social, and emotional ramifications of divorce suggest that making a vow to a loved one to be faithful and monogamous forever is an irresponsible promise to make. Because we cannot possibly ensure the perpetuity of our feelings for another person, we allow for divorce, should those feelings fade. Because our current values emphasize attaining a permanent marriage, we encourage the preservation of a potentially unfeasible commitment. We should, instead, acknowledge the unpredictable nature of human emotions, and allow love to exist in as many forms as it can take, rather than encouraging couples to stifle emotions for the sake of a contract.

In his paper, An Argument Against Marriage, Dan Moller (2003) introduces the idea that marriage is not actually the best option for those who are in love. He explains the "Bachelor's Argument," which states that because we feel that marriage without mutual love is unacceptable, and because mutual love that exists at the start of a marriage may eventually fade, making the promise to commit to someone in mutual love forever is a mistake. Moller also asserts that a belief in the moral obligations that are present when we make a promise to someone, such as the promise to love forever, cannot possibly coexist with a belief in divorce. If we enter into a marriage with the realistic perspective that we may one day fall out of love, but make the promise regardless because we know we can simply get a divorce, then it seems that we are not truly committing.

Susan Mendus (1989) draws a contrasting picture of this marriage commitment. Rather than looking at a marriage vow as a prediction, she claims we should see it as "a present intention to do something permanently, where that is distinct from having a permanent intention" (Mendus, 1989, p. 238). She goes on to explain that even though couples may get married with the knowledge that it could end in divorce, the fact that they do not explicitly state that their union is conditional renders it a legitimate promise of unconditional love. Mendus' argument is grounded in her concept of love, which she says is an unexplainable emotion that transcends simple "respect for her husband, or admiration for his principles" (Mendus, 1989, p. 239). She asserts that if someone is willing to break a marriage commitment simply because his or her beloved eventually reveals characteristics or principles that contrast with the ones that the person originally believed him or her to possess, then that person was never truly in love. This seems to put love on such an elite pedestal that the average person should devalue his or her own feelings of uncertainty should the person's feelings for another falter. If I am in love with someone, but my feelings eventually change or fade due to my (or my loved one's) growth and development, Mendus would encourage me to remain married despite a change in feelings. This unnatural binding commitment constricts emotions in order to preserve a relationship that may no longer be suitable for one or both parties.

I believe it is in our nature to become infatuated with, or overwhelmingly interested in another human. I do not, however, believe that this interest is immune to alteration or influence from outside parties or circumstances regardless of its initial strength. If I do truly care for another person in an all-consuming way, the most important quality to preserve in my relationship with that person is honesty. Since I, along with Moller, do not believe that we have the ability to predict our emotions in the future, it seems to me that we are doing our loved one a disservice by making a promise about something that we cannot possibly foresee. I would rather make a commitment to a person with a promise to be with them as long as our love lasts, and not assume that the love itself is invincible. An argument has been made that, because we experience uncertainty in our relationships, the obligation of marriage may serve as a motivator to work on the presenting problems. However, it seems a more telling sign of the love between two people if partners remain committed to each other by choice rather than by obligation. If two people use the titles of "husband" and "wife" as the reasons to prolong a union that is not working for one or both parties, this marriage seems to represent a social and legal commitment far more than an emotional one.

The fact that almost 50% of first marriages may end in divorce (Keyes & Goodman, 2006, p. 219) indicates an inherent flaw in the argument promoting eternal mutual love.

(Cont. on Pg. 13)

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Editorial Policy

In efforts to present a wide range of perspectives on the many issues facing family mediators, the views expressed by each contributing author are intended to encourage consideration and debate but do not necessarily represent the views of the Academy of Professional Family Mediators or its editorial staff.

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APFM
ACADEMY OF PROFESSIONAL FAMILY MEDIATORS

Editor's Notes

A Slew of Issues

By Don Saposnek

Donald T. Saposnek, Ph.D., is a clinical-child psychologist and family therapist in practice since 1971, a family mediator, trainer and consultant since 1977, and a Founding Board Member of APFM. He is the author of *Mediating Child Custody Disputes: A Strategic Approach*, and co-author of *Splitting America: How Politicians, Super Pacs and the News Media Mirror High Conflict Divorce*. He has been teaching on the Psychology Faculty at the University of California, Santa Cruz, since 1977 and is Adjunct Professor at Pepperdine University School of Law, Straus Institute for Dispute Resolution.

Dear Readers,

We've got us here a well-packed Fall, 2013 issue of *The Professional Family Mediator*. Our lead article ("A Promise We Shouldn't Make") in this issue was written by another of my university students from my Children and Divorce course. Its author, Amy Horowitz, writes of the rationale for what seems to be a rising trend among young adults—the decision to not marry. Mostly, this trend has been fueled by the high divorce rate of their parents and these young adults' cynicism about the institution of marriage. Amy brings some well-written and piercing insights to us mediators and is certainly worth the read. It will be alarming for some, consonant for others, and, either way, I welcome your responses to this issue.

Rod Wells, in his President's Column, highlights his review of our Second Annual APFM conference in Denver, and the laudatory evaluations that we received. He also constructively addresses ways that we can and will respond to a few of the attendees' concerns about our Denver conference, so that our upcoming, San Diego conference is even better.

Next, we welcome back our prolific Canadian divorce researchers, Rachel Birnbaum and Nick Bala, who offer us the next installment of their research into judicial interviewing of children, with a focus on how we mediators might use these findings and strategies for including children more often in our mediation practices.

In his column, The Creative Solution, Chip Rose discusses the context of language in mediation, for both the mediator and the clients. He stresses the fact that how we frame this issue for the clients and how they utilize it will largely determine how the session proceeds and ends.

Ada Hasloecher's Mojo Marketing column hits us hard with the absolute need for networking (she does title this piece "Networking 101010101", after all), if we are ever going to get our mediation practices firmly off the ground (now *that* sounds oxymoronic!). Newer mediators need to heed her warning and follow her advice; it works!

Bill Eddy's Ethical Edge Column further considers the boundaries between the practice of Professional Family Mediation and the practice of law, as he once again asks us "How Much Legal Information Should Family Mediators Provide?" and then proceeds to answer this question himself. Apparently, this question asked in our last issue was so challenging to our readership that nobody responded; so, Bill decided to respond to it, and, as usual, his response is thoughtful and deep.

On another aspect of the pesky concerns regarding the role of lawyers in our work, Larry Gaughan returns again with a provocative article, on "Solving Drafting Problems." In this article, he suggests that, rather than arguing about whether lawyers or non-lawyers should draft the mediation agreements, APFM should develop a "formbook" for mediators of all disciplines that would provide guidelines and stock provisions for drafting a whole range of divorce circumstances. As an aside, in a personal communication, Larry also wanted me to let you know that he now agrees with Steve Erickson that it is important to have the APFM standards of practice in place as a matter of priority, and that he also agrees with Steve that it is not real mediation for a mediator to advise the parties as to the probable judicial outcome on the facts of their particular case.

Speaking of Steve Erickson, in his Standards of Practice column here, he invokes the names of two of our plenary speakers from our conference; Bill Doherty and Joan Kelly. He shares the insights that he gained in hearing them talk about "Discernment Counseling" and "Attachment Theory in light of new brain research," respectively, and he ponders the implications of making referrals of our clients to experts when such issues as ambivalence about divorcing, or feasibility of shared parenting with infants come up in our sessions.

Next, I offer a review of filmmaker Ellen Bruno's wonderful new DVD, "SPLIT: Divorce Through Kids' Eyes." This DVD, the production of which was partially funded by APFM, is an important contribution to our collection of tools for support of the families we serve.

Last, we have some further reflections on our Denver conference by two attendees, Mike Lease and Lisa Wolman, who were exhilarated by the intellectual stimulation, comforted by our friendships, and soothed by the open and welcoming spirit of our group. We welcome you two aboard.

I leave you with this thought:
"Ending a sentence with a preposition is something up with which I will not put."

--Winston Churchill

Enjoy.
Don Saposnek
Editor
The Professional Family Mediator

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APFM's First President's Message

"Perspectives on Our 2013 Annual Conference"

By Rod Wells

Rod Wells has been a steadfast advocate of mediation throughout his career. He is Past-President of the New York State Council on Divorce Mediation, Past-President (and founding member) of the New York Chapter of the Association of Family and Conciliation Courts. He is a Founding Board Member of APFM and Advanced Mediator, a Certified Financial Planner® Certificant, and a Financial Neutral in collaborative divorce cases. When he is not mediating, he teaches courses on couples and family relations with his wife, Sandy.

The 2013 Annual Conference evaluation surveys are still coming in and, so far, the overwhelming consensus is a repeat of last year's success and even better. Ninety percent rated the conference content and quality as "good" to "excellent." But that's just the survey. The real proof was the camaraderie, stimulating discussions, dancing, fun, and meals together, which resulted in smiling faces and long till-next-year hugs of goodbye.

A hearty thanks for all the lauds from our attendees. Whether you presented, contributed to the planning and execution, volunteered at the conference, exhibited, came as an attendee, or just sent good wishes from home, each and every one of you had a hand in making it all happen.

One of the nicest forms of feedback has come from non-mediators who were guest presenters or worked for the hotel. Several made a special effort to call me to relate their experience of our community as refreshing and welcoming; they reported that it felt like stepping into a safety zone of sensitive, caring people who sincerely want to help and support the best in families. I felt like a proud parent at a teacher's conference, hearing about how nice my first-grader plays with others. But, the real vote of confidence is our incredible rate of growth. Before the next newsletter, we will likely cross the five hundred members mark. That has happened in less than two years! Let's keep that trend going. I encourage each of you to invite a colleague to join before the next conference. If you do that, we can reach the one thousand mark within the year.

While there was a consensus that it was a great conference, still, there were some complaints about things that weren't there, and things that could have been done better. In the 2012 movie, The Magic of Belle Island, Monte Wildhorn (played by Morgan Freeman) is mentoring ten-year-old Finnegan O'Neil on how to become a young writer. My favorite quote from the movie is Monte's sage advice to Finnegan, "Never stop looking for what's not there." We have heard your concerns about what wasn't there. Wondering what could be in the place of what wasn't or isn't there is the framework of imagination. Living in a state of imagining will surely produce an awesome conference next year in San Diego. Your colleagues on the Conference Committee do live in that place. So, trust that it will be an even better conference.

One of the specific concerns that members expressed about the Denver Conference was that the cost of the rooms seemed high, even though it was for a suite. You'll be glad to know that we listened and negotiated a room rate of $149.00 per night for next year in San Diego. That's an incredible rate for a resort hotel, so, we encourage you to register early, before our block sells out. And, while you are at it, mark your calendars for October 16-19, 2014 for our conference at the San Diego Coronado Island Marriott Resort and spa (We promise to remind you at least another 100 times!).

We've been working on the details for our San Diego conference for several months, and now we need your help in imagining and conceiving the best in our community for the work we do. Watch for our Request for Proposals for the 2014 Annual Conference, Casting a Wider Net in the Ocean of Family Mediation. This title acknowledges that Family Mediation is not just about divorce, separation and parenting time. Rather, the title recognizes the diverse services a family mediator can offer including services for: pre-nuptials, post-nuptials, post-divorce conflicts, elder and sibling relationships, teen-parent conflicts, unmarried parents, family business, including employee issues, same sex relationships, and so many more. We are planning to continue our offerings of workshops regarding the mediation process, divorce, and separation. . . and, with our wider net, we are looking for what else we can catch in terms of provided services. Please consider offerings you might make from your oceans of experience, and also from suggestions by your colleagues.

If October 16-19, 2014 seems a long way off, don't worry. The Training Committee is planning at least two regional Advanced Trainings before next October, and the Membership Committee will be continuing the monthly Webinar/Teleconferences and the Book Club. We will continue to offer a quarterly webinar on practice development and public awareness. There will be more offerings for you, but those will be surprises presented in our monthly email updates.

One last thing—the Certification Team is in the final formative stage and expects to meet in early February 2014 to begin its final plunge forward. Some very exceptional mediators have come forward to contribute their knowledge, energy and time to support the success of the Certification designation and its accreditation. This project will leave a profound impact on mediators everywhere, and we expect that regulatory agencies will look to APFM's Certification as the standard of practice in the field. If you have a passionate desire to help, please let us know. Even if you are not helping first-hand, we still need your input. As the Certification Team works through the complicated task of determining what should be the requirements of certification, you may receive a survey or two asking for your input. Please respond promptly and thoughtfully. Your answers and input are important in developing a quality program.

It is so gratifying to know that you are all helping families find a better path to a better place and enhancing the image of mediation everywhere. Thank you for your work.

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Interviewing Children: The Role of the Judges and Mediators

By Rachel Birnbaum and Nicholas Bala

There continues to be controversy over children's participation in post-separation decision-making. In particular, the controversy centers around whether and how judges should meet children who are the subject of family disputes between their parents. Judicial meetings with children are now an accepted practice in Germany, Israel, New Zealand as well as in some states in the U.S. (e.g. Ohio and California), and to some degree in the UK. Guidelines for judicial interviews have been developed for judges in some of these jurisdictions, and in 2013, California Rules of Court (Rule 5.250) outlined for judges in California how and when judges may interview children.

In this paper, we review the different ways that children's perspectives and preferences can be shared in the post-separation decision-making process, with a particular focus on the controversy over the increasingly common practice of judges meeting with children who are the subject of these proceedings. Specifically, we discuss the empirical research on the experience with judges in different jurisdictions interviewing children, with a particular focus on the results of our recent survey of Canadian judges about their experience with this practice. Reflecting the positive international experiences with judicial interviewing, we conclude that the rights and interests of children will be advanced if there is increased adoption of this practice, though it is clearly not appropriate for all cases. As discussed in our conclusion, mediators also have an important role in ensuring that children are appropriately involved in family dispute resolution and given the opportunity to meet with the mediator..

The context for the controversy

The United Nations' Convention on the Rights of the Child creates an obligation for governments to ensure that children are provided with an opportunity to express their views about decisions that affect their well-being, consistent with their age, capacity and desire to participate. Although the USA has not ratified this international treaty (almost alone among the countries of the world), this document reflects widely shared views about recognizing the rights of children, and has been cited in American commentators and courts .

The social science literature and research on children's desire to be included strongly suggests that children want to be kept informed about the dispute resolution process, and many want their perspectives and views considered . Yet, tensions remain between those that believe children need protection and nurturance and those that believe children have rights and need to be able to exercise their rights, particularly during family disputes that involve their well-being. Most children want to be asked their opinions about the plans being made for their activities and living arrangements, though they generally do not want or expect to make decisions, and they should never feel pressured to "choose" between their parents—children want a voice, but they generally do not want or expect a choice.

While many professionals, including some mediators, express concerns about children meeting judges, opposition to the practice seems most pronounced in jurisdictions where it does not occur regularly. Research on the practice clearly suggests that children generally have better outcomes if they feel that they have a "voice" in the process, but that they often report feeling ignored. Even if they have had a lawyer, or a custody evaluation, a significant number of children would also like to meet with the judge; though children are often anxious before they meet a judge, they usually report having had a positive experience, and there is no evidence that children are traumatised by meeting a judge. Children are often emotionally distressed by having parents involved in high-conflict separations, but as regards their relationship with their parents, meeting the judge is very similar to meeting a lawyer or evaluator: the child is meeting with an independent professional to share views about the parents' separation.

Research has also shown that judges often find it helpful to meet children, but research on the experience of parents with judicial interviews with their children is limited. A recent Israeli study found that most litigating parents supported their children meeting the judge , and a German study suggests that most parents report relief that their child had met with the judge.

The Different Ways Children Can Be Heard

While much depends on the jurisdiction and any existing legislation about how children are heard in court, typically children can:

• have their views conveyed through a trusted and reliable adult who provides hearsay evidence about the child's "state of mind";

• have counsel, a guardian ad litem or an amicus curiae appointed for them;

• meet with a lawyer, or mental health professional who will then prepare a more focused "voice of the child" report to reflect the child's perspectives and preferences; and

• meet with a judge.

Significantly, there is no research demonstrating that, from a child's perspective, one method is superior, or that meeting a judge is any more stressful than meeting a mediator, lawyer or mental health professional. For children across the globe, the issue is to be heard. For the adults around them, the issue is how to allow them to be heard in a manner that is safe.

(Cont. on Pg. 14)

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THE CREATIVE SOLUTION

"What's in a Word?"

By Chip Rose

When it comes to communicating, we become multi-media platforms for the delivery of how we feel or what we want to say. Statements, expressions, body language, looks, tone of voice, timbre, volume, and expressions give rise to the almost infinite number of ways we communicate our stated or unstated, conscious or subconscious intentions to others. There are thirty muscles in the face and head alone that create a staggering number of possibilities for the expression of thought or feeling. To the extent that a mediator sees herself or himself as someone who models appropriate behavior and encourages the clients to engage in strategic behaviors with the goal of maximizing their success in the process, clients need to be reminded that words matter and there is something that they can do about that.

When we are engaged in a face-to-face conversation with someone, the length of the listener's negative reaction to something that was said is a function of the emotional memory of the listener. The deeper the wound, the stronger the reaction, and the more the listener will be inclined to hold onto his or her emotional reaction. In the asynchronous world of current technologies, such as email, texting, and twitter, the retention of this type of negative reaction depends on the offended party's exercise of the delete key—in the absence of which, the communication might exist forever. Who of us has not had the Oh-my-God-what-did-I-just-do experience of hitting the send button without having paused long enough to be sure it is what you meant to send, and that it was sent only to the person you intended to receive it? Even then, there is difference between receipt by the accidental recipient, causing you embarrassment, and the emotional reaction of the intended recipient, causing you to reflect on your failure to consider the negative consequences of the message.

Except for the highly-evolved among us, few people are so self-disciplined that they always consider the consequences of everything they are about to say before they say it. This is especially so with the clients who come into our practices. In those cases, the absence of such self-discipline can create significant road bumps and barriers to reaching any type of resolution, much less a maximally beneficial resolution. To address this aspect of their relationship communication, it is necessary to employ a number of different intervention strategies. The most logical first step is to bring to their attention the power of words and their capacities for negative, neutral and positive effect. Until the clients become mindful of the effect of their words, they are not likely to even think about filtering what they feel moved to say. By raising the concept preemptively at the outset of the process, one avoids making either client feel criticized by having to bring it up after an inappropriate comment has already been uttered.

The mediator can reinforce the value of their paying attention to their choice of words by drawing parallels between how they carefully select their words in a workplace negotiation or social setting and how they do so in their current conflict. It helps them to remember their competence at word choice in situations where emotions did not blind them to the negative consequences of an inappropriate word or comment. Some clients actually get it when you remind them that the object of their antipathy also happens to be their most important negotiating partner and the key to their best success in the process. A former colleague used the metaphor of the mediator and the clients all being roped together on the face of El Capitan in Yosemite. The point is that any one of these three individuals can create disaster, and it takes the best efforts of all three to achieve success in the ascent.

In the context of raising client awareness, categories of words can be identified that will create a predictable negative reaction in the listener. Words that accuse, blame, label, assume, and/or criticize—things the parties have no doubt been doing regularly throughout the latter stages of their relationship—are kinds of relationship fast foods; the guilty pleasure in the consumption is not matched by any useful nutritional value, whatsoever. The idea of becoming strategic about one's choice of words is an outgrowth of the need to individuate the process. A collaborative dialogue in a mediated negotiation should be seen as a journey of discovery. From the client's perspective, one is far better served focusing on what can be learned about one's negotiating partner than engaging in the illusorily cathartic act of accusing, blaming or labeling that person. The only path toward maximizing success in the process is for each client to respect the autonomy of the other and to recognize that the truly authentic currency in the negotiation will only be discovered in the thoughts, feelings, and outcome objectives of the other party. Viewed in this context, what each person likes or dislikes about those aspects of the other person largely becomes irrelevant.

Perhaps the single most important consideration for mediators with regard to the role of words is developing a mental muscle that strategically searches for and employs words that are safe, with safety being defined by how each client experiences them. This is a challenge for mediators who come from a background in law and who continue to work in the adjudicatory model while including mediation as part of their practice. Safety in communication is simply not a consideration in the world of litigation, and the conditioning that comes from working in that milieu is difficult to undo. The speed with which conversations in mediation flow can result in the use of words that cause the person to whom they are directed to react in ways that are unintended or could have been avoided. Given the opportunity the mediator has to model appropriate behavior, developing a safe vocabulary and a strategic awareness of the impact of words should be fundamental building blocks of a skilled mediator. The use of words that are respectful, inquisitive, curious and informative, and which are free from judgment, criticism, and condescension, will shape the environment of the process even when the mediator is the only one doing it. In relationship negotiations, words really matter.

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Chip Rose, J.D, has a private mediation practice in Santa Cruz, CA, and is currently providing training throughout the United States and Canada on the emerging practice of Collaborative Family Law. He is a Founding Board Member of the Academy of Professional Family Mediators.

Mojo Marketing and Management

"Networking 101010101: The Basics"

By Ada Hasloecher

Networking Event – Two words that strike terror in the hearts of so many! I implore you—don't be afraid. What is networking anyway but an opportunity to meet people who will either provide resources for you and your clients or for whom you can provide resources, for them and their clients? That's the long and short of it. AND, there is a wonderful added bonus to all this: You can make great friends and strong alliances along the way. Can I hear an amen? Not yet, huh? Okay, so here's my spiel about why this component of marketing is oh so important and can actually be fun. And, if you're an introvert, it can at least be enjoyable and a very, very effective tool for your marketing goodie bag.

Ada L. Hasloecher is the founder of the Divorce & Family Mediation Center on Long Island, New York, a former board member of the New York State Council on Divorce Mediation and is a Founding Board Member of the Academy of Professional Family Mediators. She is also a trainer at the Center for Mediation and Training in New York City. Ada is frequently asked to present workshops and seminars on divorce mediation as well as professional practice development, marketing, building, and practice management.

I've been networking for a significant number of years and I'm here to tell you that when I started mediating over 10 years ago, believe it or not, websites weren't THAT important yet. You needed one, yes, but they didn't have quite the clout, nor the imperative quality that they have today. And, social media?? The twins— Facebook and Twitter—not even born yet. It's unimaginable to us now that anyone could build a practice and get their name out there any way other than on the internet.

But, in the not so distant past, that was NOT the case. One could advertise in the Yellow Pages or the local newspaper, for example, but advertising was then, and still is an expensive proposition. There are several reasons for this. Not only have the costs for advertising remained fairly high, but in order for it to be effective, you have to be constantly consistent and that means continually having to throw money into it. You can't really do a hit or miss on advertising. You never know when someone is going to pick up the local paper and need your services. If you skip a week or a month, that might be the time that someone is looking for you! Unless you have boat loads of money, most of us simply can't afford to do it. So, how did we do it way, way back, when Cleopatra was floating down the Nile? And more importantly, is it still relevant today? I say yes, and for more reasons than you might realize.

By attending every single networking event that seemed relevant to my cause, I built my practice, one relationship at a time. Given all the initial costs of launching a business, when I started my practice I had to figure out an effective and fairly inexpensive way to promote it. Networking events seemed to fit this criterion.

- Did this take time? Yes.
- Did this mean breakfasts, lunches, and dinners out, sometimes several times a week? Yes.
- Did I attend some events that, ultimately, didn't work out for me? Yes.
- Did I try to talk myself out of getting out of bed at 5:30 am on a cold, wet winter morning for an early morning breakfast event? You betchya.
- Did I go anyway? Yes.
- Did it all pay off? Yes, yes and yes!!!

And, why? My belief is that there is nothing like getting up close and personal. Networking events provide the best opportunity for you to do this. For you introverts—I can hear you running for the hills right now— I'm going to try to make this as easy and painless for you as possible. I promise. This won't hurt… much.

Networking "events" can take various forms, but they generally fall into one of two category types. One type is typically an organizational meeting that has like-minded professionals who meet once a month for breakfast, lunch or dinner. The second type is a general networking, sort of meet-and-greet occasion which happens every once in a while and generally occurs after work. Some of these events can be by invitation only, but not always. So, let's pull these two apart and distinguish them. For the purposes of this article, I'm going to address the organizational meeting, as this is the one that has the most potential for referrals, and is the one you're more likely to attend.

The Anatomy of a Networking Event:

Meet—Greet—Eat—Complete: The four main components to a networking event! While they can vary a bit, depending on the event, there is a general thrust to them. How you engage in them specifically will be explored in the next installment. I want to give you an idea of what to expect, way before you walk into the room.

I'll give you an example, using one of the organizations of which I'm a member—The Long Island chapter of EAPA (Employee Assistance Professionals Association). This organization is made up mostly of mental health professionals.

(Cont. on Pg. 15)

The Ethical Edge: New Fall 2013 Question

How Much Legal Information Should We Provide? Part II: Some Answers

By Bill Eddy

Bill Eddy, L.C.S.W., J.D., has been mediating family disputes since 1979. He is a therapist, a lawyer and the Senior Family Mediator at the National Conflict Resolution Center in San Diego, and he is a Founding Board Member of the Academy of Professional Family Mediators. As President of the High Conflict Institute, he provides training in managing and mediating high conflict disputes. He is the author of several books, including *High Conflict People in Legal Disputes.* His website is: www.HighConflictInstitute.com.

This question and four sub-questions were posted in the Summer 2013 issue of *The Professional Family Mediator*. As I received no responses (C'mon folks – I'd love to hear your opinions!), I'll just go ahead and answer them myself – including a few excerpts from various state legal standards on the subject. Disclaimer: This article does not contain legal advice!

The issue of mediators providing legal information runs smack up against what is known in the legal profession as the "unauthorized practice of law" ("UPL"). In fact, the state's laws and ethical standards are somewhat vague, and the courts of appeal have said as such. However, there are some clear themes, as reported by the American Bar Association (ABA) website containing "State Definitions of the Practice of Law" as of October 15, 2013: (http://www.americanbar.org/content/dam/aba/migrated/cpr/model-def/model_def_statutes.authcheckdam.pdf). Here are some excerpts, primarily drawn from court cases on the subject (with my emphasis added):

California: "…the practice of the law … includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured…"

Colorado: "…one who acts in a representative capacity in protecting, enforcing, or defending the legal rights and duties of another and in counseling, advising and assisting him in connection with these rights and duties is engaged in the practice of law…"

Florida: "…the practice of law also includes the giving of legal advice and counsel to others as to their rights and obligations under the law and the preparation of legal instruments…"

Illinois: "The giving of advice or rendition of any sort of service by any person, firm or corporation when the giving of such advice or rendition of such service requires the use of any degree of legal knowledge or skill."

Massachusetts: "Directing and managing the enforcement of legal claims and the establishment of the legal rights of others, where it is necessary to form and to act upon opinions as to what those rights are and as to the legal methods which must be adopted to enforce them, the practice of giving or furnishing legal advice as to such rights and methods and the practice, as an occupation, of drafting documents by which such rights are created, modified, surrendered or secured ..."

Minnesota: "The line between what is and what is not the practice of law cannot be drawn with precision. Lawyers should be the first to recognize that between the two there is a region wherein much of what lawyers do every day in their practice may also be done by others without wrongful invasion of the lawyers' field."

New York: "The practice of law includes, but is not limited to: a. the provision of advice involving the application of legal principles to specific facts or purposes; b. the preparation of legal instruments of any character, including…agreements which affect the legal rights of an entity or person…" [The ABA 2013 website explains that this New York definition is recommended, but not yet adopted].

Just reviewing these various state standards, it seems that giving "legal information" is not forbidden, so long as it is not giving "legal advice." (Remember that my journalistic analysis here is not legal advice.). However, some states get close to forbidding legal information, such as "directing and managing … the establishment of the legal rights of others" (Massachusetts, above). But, other states seem to give non-lawyers leeway, since "much of what lawyers do every day in their practice may also be done by others…" (Minnesota, above). In short, it looks unwise – as a professional family mediator – to give legal advice or to in any way "direct or manage" the legal rights of others.

The solution is to be a "non-directive mediator" especially when it comes to legal information. With that in mind, let's answer the other questions from the Summer 2013 Ethical Edge column:

A. Does it matter whether the mediator is a lawyer or non-lawyer? A quick review of the various state standards suggests that the rule is about giving legal advice. Whether you are a lawyer or non-lawyer, giving legal information in mediation is not forbidden in these state standards. However, lawyers may be able to get away with more "directing and managing" since they are lawyers. Non-lawyers need to be particularly cautious to not be too directive in giving information.

B. Can a mediator tell clients about the general state of the law in areas they know about? From this review, this does not appear to be forbidden – so long as it's not legal advice or too directive.

C. Can a mediator give clients copies of laws, while recommending they get legal advice but not knowing if they did? Again, none of the state definitions I read forbid a non-lawyer from giving copies of laws. But Colorado disallows "assisting him in connection with rights and duties…" if you are in a "representative capacity." Since a mediator is not a representative, it does not appear disallowed. Illinois says that "any sort of service" which "requires the use of any degree of legal knowledge or skill" is the practice of law. Handing out a copy of a law does not require any legal knowledge, but it might imply such knowledge to a client – so it appears that a mediator must be very clear about his or her lack of legal knowledge if handing out copies of the law on any topic.

(Cont. on Pg. 16)

Solving Drafting Problems

By Larry Gaughan

Arguably, the drafting of the actual settlement agreement is the most important part of the divorce mediation process, since legally that's the only thing that counts in the long run. But, the worst way to convince any skeptic of the accuracy of that statement would be to hand them a program of the issues discussed at just about any mediation conference. Drafting is like the awkward family member that everyone would prefer not to talk about.

One big reason for the difficulty is that there are issues over professional turf. Many lawyers feel that drafting a marital settlement agreement is so important that it should only be done by attorneys. In some states, a mediator who is not an attorney could be charged with unauthorized practice of law for such drafting. There are also professionals who contend that it is not appropriate for the mediator to draft the resulting agreement, even if the mediator is a lawyer, since drafting goes beyond the mediator's role.

I strongly disagree. The agreement is not an afterthought; it is an essential part of the process. There are many issues that can be resolved by creative drafting that takes into account the concerns of both parties. Consider, for example, the situation in which one party wants a provision against having an unrelated third party spend the night when the children are in the household. The other party may consider that suggestion as nothing more than an attempt to control his or her relationships after the separation. If you go beyond those positions and explore the actual concerns of the parties from the standpoint of good parenting, and also consider the problem that the children might have to face as witnesses in court if such a provision were to be enforced, there are lots of ways to word a provision that both parties could find acceptable. For example, you could have a provision on appropriate parental modeling for the children, but not frame it in language that would invite attempts at judicial enforcement.

As to professional turf, let's be frank; lots of attorneys don't do a very good job of drafting readable settlement agreements. They use arcane and outdated words and rambling sentences and paragraphs that obscure readability. Often, they don't really draft much at all, but rather string together provisions from decades old office formbooks, with only minimal editing. The evil genie of bad drafting lurks in law office formbooks that haven't been updated in years. Instead of questioning those formbooks, some lawyers appear to treat them as if they were holy writ. Some of the best drafting of settlement agreements comes from lawyers who are retired judge advocates, because the military services require that official writing be clear and to the point.

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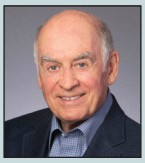


The way to get readable draft agreements that can be integrated into the mediation process is not to require that drafting be done by lawyers. Rather, there should be an APFM formbook that can be used by all mediators. This would be available on-line, or in CD or DVD formats, so that an initial draft could be assembled by numbers, putting together all of the appropriate provisions. A handbook would accompany the formbook to outline those areas where there are special or technical drafting issues. It would include state annotations so that the drafts would be in the proper form in the state for which the agreement is intended. An attorney member of APFM would be designated for each state to monitor changes for that state as necessitated by new legislation or judicial decisions. Every provision in the formbook would contain the date of its most recent revision. Depending on the circumstances and the state, there may still be occasions where an attorney may be asked to monitor the drafting process.

The clients can be enlisted into the drafting process in several ways. The most obvious way is in the preparation of annexes, which often do not need to be in any particular format. The most common of these is an annex (if it is even needed in a particular case) to set forth the division of the major household furnishings. The parenting schedule is often set up as an annex. Annexes may also be used for the division of accounts, but remember that an account number, or at least the full digits of the number, should not be in the agreement if the account can otherwise be clearly identified. Since the agreement usually becomes part of a public record in the divorce action, the parties need to be protected against the risk of identity fraud. Sometimes an annex is needed for the division of marital debts instead of marital accounts.

Each client should review every draft agreement and be given an opportunity to ask questions and provide comments and suggested edits. If the mediator has a monitor on the conference table (at least 42"), this can be used for collaborative editing. At each such meeting, both parties should also have a hard copy of the most recent draft. Each draft should be dated and have the number of the draft (first, second, etc.) at the top of the first page. "Track changes" is often a very good way for both the mediator and clients to do suggested edits.

At times, an attorney for one of the parties will want drafting changes. These may be helpful or problematic. If they are substantive in nature, they must be discussed as such with the parties. Within limits, it usually does no harm to humor an attorney who wants to insert an archaic or obtuse provision in the "boilerplate" section, although, hopefully, the APFM formbook will have a better drafted form of the same provision. For example, the mediator may have chosen to omit a provision as to what happens if a party declares bankruptcy because that is such a remote possibility and may even be insulting to the clients. If a party's attorney still wants such a provision but offers one in pure "gobbledygook", the mediator may include it, but substitute one taken from the projected APFM formbook.

(Cont. on Pg. 16)

Standards of Practice

"Going Beyond Impartiality of Standard IV"

By Steve Erickson

Stephen K. Erickson, J.D., is one of the founders of the original Academy of Family Mediators, started in 1980, and is a Founding Board Member of the Academy of Professional Family Mediators. He has practiced exclusively as a family mediator since 1980. He also helped create the first 40-hour divorce mediation training that took place in 1981, and he continues to write, teach and mediate.

Note: Bill Doherty's keynote presentation at our Annual Conference set out a process for assisting couples who are on the brink of divorce to discern whether to divorce or to work further on the marriage. Joan Kelly remarked in part on how some of the recent brain research on attachment is being used to show that infants in the first year or so of life should be placed with the mother, and younger children should be placed primarily with one parent (Sounds like the re-birth of the Tender Years Doctrine). Although such research is being challenged, it is gaining traction in the arenas of custody evaluations and contested custody disputes. Joan indicated that her review of attachment research indicates that both parents can form important attachments with younger children regardless of a parent's gender and irrespective of whether there are differences in parenting time.

Listening to Joan Kelly and Bill Doherty present their keynote and plenary speeches at our 2nd annual conference in Denver, it occurred to me that we might want to re-think how we address our own impartiality when confronted with one person's decision to divorce before the other is ready, as well as to re-think the use of experts in the process.

Standard IV of APFM's published standards of practice states that "A MEDIATOR SHALL CONDUCT THE MEDIATION PROCESS IN AN IMPARTIAL MANNER." I have always thought that this applied only to the person of the mediator in that the mediator should disclose potential bias and conflict of interest. But, as I look at the sentence more closely, the way we have written it appears to indicate more. That is, perhaps the mediator should also try to ensure an impartial process, not to just worry about one's own neutrality and impartiality.

This may mean that when one spouse indicates a belief that the marriage can be saved, the mediator could share information on Discernment Therapy; this may be helpful if one or both believe or hope that reconciliation is possible. Discernment Therapy may very well turn into marriage resolution counseling or marriage closure therapy. However, all of us have observed that, upon asking each of the parties whether he or she believes the marriage relationship should end, more than a handful of couples mutually are ambivalent (to varying degrees) in their responses, with one usually being stronger than the other in the desire to end the marriage. Instead of forging ahead with the divorce mediation, while knowing that the one who more completely wants the divorce holds the trump card, perhaps a more impartial response would be to offer referrals to competent discernment or marriage closure therapy, while commencing the divorce mediation process, if requested by one to do so.

Couples can begin the mediation process while at the same time entering into discernment counseling, if they choose. This recognizes that both parties may be at a different point regarding the decision to divorce, while also recognizing that we have divorce-on-demand in this country and that any one person can obtain a divorce by alleging an irretrievable breakdown of the relationship, or for other similar, statutory grounds. Offering both interventions is impartial and does not elevate one person's desire (either to divorce or to stay married) over the other.

Bill Doherty offered to work with APFM in developing protocols to be used at intake that would assist the couple in figuring out whether or not to move forward with the divorce. Such protocols would also inform the mediator about how to move forward with mediation when one party is uncertain about the divorce. A mediator having a better understanding of each person's struggle with divorce allows for a more impartial approach.

In listening to Joan Kelly talk about the controversy surrounding some of the recent research on attachment theory, it occurred to me that part of providing an impartial process means that the mediator, where possible, takes steps to avoid the competition between the experts. The duty to provide an impartial process may also mean that the mediator has a responsibility to provide couples with a referral to competent, impartial, neutral experts. Moreover, the Standards could be written in such a way as to favor the use of neutral experts (as opposed to competing experts who are ready to "view the facts in the light most favorable to the side that hired them") when experts are needed to assist in determining the validity of perspectives on issues such as attachment, alienation and other relationship issues that are currently the ammunition used in adversarial custody disputes.

The use of a neutral expert is an important part of a client-centered process of mediation. In an adversarial process, the parties view themselves as linked in such a way that the efforts of one to achieve his or her goals results in diminishing the chances that the other, with whom that person is linked, will achieve his or her goals. However, in a cooperative process, the parties are linked in such a way that when one achieves his or her own goals, it is more likely that the other will also achieve his or her goals (Deutsch, 1973). This means that where possible, the expert is not hired solely to show that one parent is more defective than the other, as is the case of a custody dispute. The expert used in mediation not only defines the problem, but also provides recommendations to the parents about how they can parent more constructively and build a stronger co-parenting relationship for the greatest benefit of the child(ren). Time is not wasted on determining who has the better or the stronger relationship with the child(ren). The expert is asked to determine some factual issue that will help in designing the terms of a future parenting plan, rather than bestowing a right of custody to one of them, based upon which expert says who has the strongest attachment to the child. Given this important, different focus, experts must be carefully chosen.

Perhaps the standards either in the impartiality section or the section on children could include a clause that states:

(Cont. on Pg. 17)

REVIEW of Ellen Bruno's DVD, "SPLIT: Divorce Through Kids' Eyes"

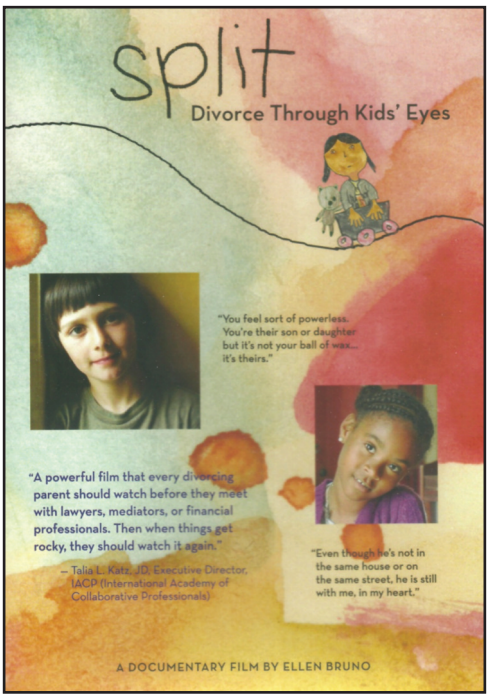
By Don Saposnek

Having designed, developed, and delivered one of the first Divorce Education courses in California back in the 1980s, I reviewed most of the videos regarding children and divorce that were produced soon thereafter. These were videos shown in divorce education classes throughout the California family court system when such classes became mandatory, and eventually in family courts across the country.

The early ones were crude, amateurish, low-budget videos that utilized local mediation staff members as actors—bad actors, mostly. However, they did manage to get the necessary content across; ongoing parental conflict is bad for children; parents need to communicate effectively; children need to be kept out of the middle; children need to be told it is not their fault that their parents divorced, etc. After a while, the newer videos showing divorce professionals lecturing about these important points were interspersed with scenes of real children speaking about the effects of their parents' divorce on them. These videos stepped the game up to the next level—real children expressing their real feelings. However, the cinematography in those videos was still rather rough and unrefined—mostly talking heads, with annoying background music.

Enter Ellen Bruno's new film, Split. This documentary, funded partially by our very own Academy of Professional Family Mediators, is the next level for understanding the effects of divorce on children. The movie is 28 minutes long and consists 100% of interviews of real children (no adults were ~~harmed~~ used in the making of this film!) telling about their experiences going through their parents' divorces. The movie is subtly divided into sections, titled *Families, Change, What Happened, Wishing, Moving On, Back and Forth, Two Homes, What Helps, Talking About it*; and *Life Goes On*. In each section, the children focus their talk around those respective topics, giving the movie a smooth continuity and flow through the divorce experience, from the children's early pain, sadness and anger, through what helped them along their way, to seeing a more positive future ahead.

Not only are the children's stories compelling and accurate, as any of us who work with children in divorce know all too well, they are replete with innocent humor and charm—the raw stuff of honest children expressing their feelings and observations. One particular example that struck me was a little girl describing the loss of her father in her life: "I miss having a father in the house—But—we do have a man in the house—But—he's not really a person—he's an animal—he's my rat—Don't worry, he's alright—he doesn't bite!" And, in another scene, a girl describes how she has coped with the divorce, "I just let go a little bit of tears."



The cinematographic in this film is beautiful. In between the wonderful close-ups of the children talking, actual color drawings made by the children featured in the movie are exquisitely turned into animated graphics that slowly float and move across the screen, symbolically matching and overlaying the verbal content of the particular scenes. The colors are aesthetically extraordinary, the symbolism right on message, and the delicate musical score seamlessly enhances the story, on a subconscious level.

"Split" has great power to influence parents and divorce professionals alike to do divorce better. There is no more poignant way to make the points of how we need to protect children in divorce than seeing and hearing directly from the children, and in such an artistic and elegant way. I can see this film being used in family courts across the country as an orientation video for separating and divorcing parents prior to beginning mediation, and as an orientation to the reality of divorce for judges taking on a family law calendar, and in law schools' family law classes. I can also see it being shown by private practice mediators to clients as an orientation prior to mediating, and to groups of children going through divorce, as it would offer sound acknowledgement of and support for their most difficult feelings. I would strongly encourage you to view this lovely film and discover even more ways to integrate it into your work of supporting families going through divorce. To order the DVD, go to: www.split-film.org

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Attendees' Reflections on Our 2013 Annual Conference

As a newly trained mediator, having trained with the Center for Mediation and Training in NYC and continuing that training with a 20-week practicum organized by the Center, I became familiar with names such as Ken Neumann, Rod Wells, Joan Kelly, John Fiske, Diane Neumann, Bill Eddy, Chip Rose, Don Saposnek, Stephen Erickson, Marilyn McKnight, and so many others, through articles we have read or to which we have been referred. Advanced seminars only further qualified the work of the "original" mediators as groundbreaking. My initial reaction to reviewing the list of workshops presented at the conference was that I would be attending an All Star Game, with all the players whose works I have read and whom I have admired presenting their different ideas and positions.

The dichotomy that I found at the conference was not in the age of the participants, but rather the vast amount of experience some of those members have, who were referred to by Rod as the "crème de la crème", in contrast to those now entering the profession. To sit at a cocktail table and discuss nuances, methods and practice with a gentleman such as John Fiske was a learning experience that cannot be duplicated in a classroom atmosphere. To discuss marketing with Ada (an "eleven year rookie") is always fascinating. Along with Dan Burns, Mark Bullock and Vic, the ideas and methods they use were inventive, and combined the old style of "by word of mouth" with the new styles of "social media." Meeting Diane Neumann, a name to some, but a visionary to others, was truly a delight of the weekend. Joan Kelly is a name attached to so much literature, with so much information, that there could be a three-day conference devoted just to her findings and observations.

The sense of humor of many of the presenters, Chip Rose, Don Saposnek, Michael Scott, Bill Eddy (amazing with the type of mediations he performs), the presence of both the Jaberwocky and Aikido in the workshops, and the amazing attitude of all of the attendees lent itself to a conference where no one was unapproachable, and the group as a whole showed its true devotion to cooperative discussion and peaceful resolution. New ideas, such as coaching, were adeptly handled by new presenters such as Emily Gould.

Getting together with the group I trained with and others to discuss the events of the day, the upcoming events of the APFM, and the various methods each of us use to market and to practice was the highlight for me and the other participants. It is not at every conference where a new trainee, a visiting trainee from Israel, a skilled mediator from Memphis, and the two heads of the conference have the opportunity to discuss future undertakings of the group. There were no egos brought to this conference—the President of the organization ran the audio-visual for the event.

All the credit has to go to the members of the profession trying to meld together the different rules of New York, New Jersey, Pennsylvania, Texas, Nebraska, Vermont, Oregon, California, Arizona, Maryland and the other States that were represented at the conference. For Rod Wells and Ken Neumann to bring together nearly 200 people from across the country and around the planet is a task that is fraught with peril, but carried off with the appearance of perfection.

Alternative Dispute Resolution in the form of family mediation now has a national organization that is committed to bringing together all members, working with different state committees, and bringing certification, accreditation and, most importantly, permanent credibility to a profession that is long overdue for recognition—not for the attorneys who may have taken on mediation to maintain their business, but for the visionaries who understand the respect, cooperation and productiveness that are the byproducts of mediation.

With so many disciplines ripe for mediation and Alternative Dispute Resolution, this is an organization that will grow, not exponentially, but, as the word spreads, by the proverbial leaps and bounds.

To those who treated me as an old hand at this, I appreciate the respect given to me and all of the other attendees, as well. It was not the length of time in the profession that mattered but rather the exchange of ideas.

Michael M. Lease
Oceanside, New York

This past spring, I attended a 40-hour divorce mediation training in New Jersey. Presentations were given by some of the happiest, most interesting professionals I had ever seen gathered in one room. Although their mediation styles varied greatly, they all had one thing in common—a passion when they spoke about what they did.

One presenter, Ken Neumann, stood out, his style was very unique, his love for what he does very evident, and new mediators were welcome to approach him without hesitation. Naturally, I signed up for his 40-hour mediation training in New York City, and I am now a student in his supervised practicum. I am a Ken Neumann "groupie", or what I now call myself, a "NEUbee."

Being a "NEUbee" and wanting to absorb everything about the profession, I happily traveled to the 2013 annual APFM Conference, in Denver Colorado. Not knowing what to expect, but knowing this was going to be an exciting experience, I was taken aback by what I walked into.

I happened upon a very interesting sight—hundreds of happy, smiling faces— smiling because they enjoy what they do. I witnessed enlightening presentations by those who are passionate about what they do, by those who welcomed "NEUbees" and want to nurture and guide them along the journey of becoming "better" by providing education, advanced training and leadership.

The selection of topics, with high quality presenters, covered all aspects of mediation, including marketing and research, and were taught using demonstrations, forums, and many other advanced educational opportunities.

(Cont. on Pg. 17)

"Marriage: A Promise We Shouldn't Make" Cont. from Pg. 1

A study reported in Keyes and Goodman (2006) on the emotional effects of divorce revealed that because there is so much emphasis on attaining a satisfying intimate and monogamous relationship, the failure to do so can, and often does, result in depression. This research found that those who were never married are less depressed than people who are currently married. While this may be due to the vicissitudes of marriage and family life, there is strong research documentation that the effects of going through a divorce have negative personal and social consequences for those involved, including loss of their loved ones, economic loss, negative changes in self-image and social life, and custody battles when children are involved.

Though love can have a powerful effect on our minds and bodies, we cannot expect it to be immune from the influences of personal and social growth and development. Some philosophers characterize two people in love to "perceive, feel and act as a single person, so that the perception, feeling or act does not exist unless both persons participate in it" (Westlund, 2008, p. 561). But, this is an unrealistic and perhaps unhealthy view. If such a "boundary between two separate selves becomes blurred or even erased as they are joined in love" (Westlund, 2008, p. 561), such a union restricts personal development for the advancement of a relationship which, realistically, has a large chance of ending in a separation. Should the union end in divorce, and two people have become so dependent on one another that they no longer have a sense of themselves as individuals, then the effect on their mental and physical well-being could be catastrophic.

Though there are many couples who are able to avoid divorce, the odds of finding eternal love do not seem to outweigh the risks involved in failing to do so. Because there are "powerful cultural norms that view marriage as desirable and necessary to happiness, the loss of this accomplishment may be seen as a personal failure" (Keyes & Goodman, 2006, p. 222) rather than as simply a normal and human response to a change of heart. We place so much emphasis on finding and committing to one single person that we fail to recognize the ever-evolving nature of all of our previous friendships and relationships prior to committing. Under no other circumstance are we expected to vow such permanence in our lives—from career changes to the evolutions of our friendships—we are constantly growing and changing as our self-exploration and development advances.

Many cultures encourage marriage for the purpose of maintaining a supportive and healthy environment in which children should be raised, promoting such a union with the opinion that marriage provides the proper framework for having and raising children. However, there currently is no "adequate evidence that the nuclear family is in fact the optimal context for childrearing" (Weaver & Woollard, 2008, p. 513). Moreover, the stories documented by Constance Ahrons (2004) of many successful, happy, and well-adjusted adults who were children of divorced or single parents, certainly challenge the marital bias. Parents in an unhappy relationship who are fighting and belittling each other in front of their children are in no way creating the "proper" framework in which children should be raised. Ahrons (2004) notes that many in her research said that the dissolution of their marriage allowed them to focus on providing a loving and supportive environment for the children. Rather than putting their energy into saving a failed and conflictual relationship, parents were able to become romantically independent, while maintaining a cordial coparenting relationship.

Extensive research on the effects that divorce has on children generally concludes that the nature of the parents' relationship before, during, and following a divorce has the biggest impact on the children's well-being. Where there is a high level of open conflict, which usually includes extensive custody battles, the children almost always show signs of emotional and behavioral disturbance for years following the divorce. However, the parents who manage to maintain, at the very least, a cordial attitude towards one another and work to create a supportive and protective environment for their children offer the best outcome for a healthy and happy child. With all of the negativity, stigma, and emotional strain that surround divorce, such a peaceful atmosphere would appear to be difficult to maintain. It is therefore a possibility that should a couple never be socially pressured to promise a "forever," they might avoid many of the negative consequences of breaking such a promise, and transition more easily to a separate but cooperative lifestyle in which children can continue to grow with the support of both of their parents.

With the societal pressure to mate with one partner for life and maintain (at least a facade of) happiness within that partnership, it is no wonder that divorce can have such negative physical, mental, and emotional effects on the parents and children who experience it. Instead of pressuring couples to attain the goal of everlasting love in a binding social contract, we need to emphasize interpersonal, individual, and familial happiness and growth. For those couples who find themselves no longer in love, a network of support rather than stigma should be automatic. The emphasis need not be on a contract or title, but rather on respect. Having multiple partners within one lifetime is not going to damage a person's spirit, nor will it disrupt a family, if society would simply cut back on the glorification of marriage. Changing partners in a disrespectful or shameful manner, or failing to be honest about relationships will do harm both to the individual and to the family. We do not need the title of marriage to define a commitment, nor do we need a permanent contract to justify our love for another person. Although marriage seems to represent a profound statement of commitment, all too often it ends in divorce, resulting in a disastrous breakdown of familial relationships. We should aim for a societal shift in the trend towards rushing to marry and promising a "forever." The breakdown of that promise, or rather what that promise is meant to represent, seems to leave disastrous relationships in its wake. It would be much more important and realistic for us to aim at practicing eternal mutual respect rather than promising eternal mutual love, both for the individuals in a relationship and the family that may grow from that relationship.

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"Interviewing Children: The Role of the Judges and Mediators" Cont. from Pg. 5

There is no single "best" way to involve children in the process, and it may be appropriate to use more than one method as a case proceeds. The nature and the stage of a case, the type of professional resources that are available, and the child's age and capacities, are important factors in determining how to engage a child. Furthermore, children should be asked about how they would like to be involved.

Research from Israel, where judicial meetings are now common, indicates that judges generally feel that they have a better understanding of cases if they meet with children, even though it is widely appreciated that a judge will not be able to gain as much reliable information about a child from a single interview as a mental health professional will be able to obtain from several interviews as part of a full evaluation process. In Israel, as in Canada, judicial interviews are not intended to replace other sources of information, such as child custody and access assessments or legal representation of children, but rather to complement them.

The legal context for judicial interviews in Canada

As is common in many jurisdictions, legislation and case law in every province in Canada establish that a child's wishes are to be taken into account in making best interests decisions about custody, access or other aspects of their care. Further, the Convention on the Rights of the Child, which is recognised as part of the law of Canada, provides that a child "shall … be provided the opportunity to be heard in any judicial … proceedings affecting the child, either directly, or through a representative".

In Quebec, the Civil Code explicitly states that children in family cases have the right to an "opportunity to be heard" by the court. Ontario's Children's Law Reform Act provides that judges "may" interview children to learn their "views and preferences". In most provinces, case law has long accepted that judges have the discretion to meet children to ascertain their wishes, without the consent of the parties, but judges should avoid having a private interview that attempts to resolve factual matters that may be in dispute between the parents. While, in most provinces, judges traditionally have been reluctant to exercise their discretion to meet children, some recent decisions have cited the Convention and emphasized that children have a "right to be heard" in the family courts and meet with the judge.

Survey of Canadian judges

We surveyed judges attending a national family law judicial education programme about their views and experiences with interviewing children. There were 62 respondents to the questionnaire (35 males and 27 females). These represented almost two-thirds of the judges attending the programme, suggesting high level of judicial interest and concern about this practice. Most of the judges worked primarily in family law cases, though some had mixed case loads.

Just over half (52%) of the respondents had experiences as a judge meeting with a child in a family law case. In some measure, the variation in their practices reflected differences in the law, with judges from Quebec (with its statutory "right" for a child to be heard) generally having had more experience in meeting with children. Differences in availability of professional resources is also a factor, with a number of judges reporting they do not feel that they need to meet with children because they have access to children's lawyers or mental health professionals who can interview children and present their views in court.

Although there are differences of judicial opinion and practice regarding meeting with children, even within jurisdictions, more Canadian judges now engage in the practice than they did just a few years earlier. About one-third of all respondents indicated that their attitudes or practices had changed in the past couple of years, with almost all of those who reported a change stating that that they had either started or increased the extent to which they engaged in the practice. They commented that they were more likely to meet children who are older, in cases where there is no assessment, when both parents consented to the interview, when the child requested it, or when there was urgency to the case (e.g., the child moving to another locale). While there is a growing trend for judges to meet with children, no judge considered it appropriate to meet with every child in every litigated case.

How and when judges interview children

Judicial meetings with children can occur at any stage of the proceedings, including at motions, pre-trial conferences, during the trial, and post-trial. For example, some judges will meet with children after they have rendered a judgment to explain their decision or will write a letter to the child for this purpose (with copies to the parties).

Judges who meet with children generally expect to obtain a sense of the child's personality and views and want to give the child an opportunity to ask questions. Judges also want to make clear to children that it is they, not the children, who must take responsibility for the decision; this communication to the child is an important function of the meeting.

The majority of the judges reported that they always tell the child the purpose of the "meeting" and that it will not be confidential. The most common reasons that judges gave for meeting with a child were to obtain their views and preferences, to meet the child and get a sense of his or her personality, and to allow the child to ask questions. Most judges met the child in their chambers (office) without the parents' lawyers present.. Only a very few judges reported that they met with children outside the courthouse, for example, in their school or a nearby coffee shop.

The vast majority of judges always have someone else present during a meeting, such as a court clerk or child's counsel. Some judges, notably in Quebec, and elsewhere in child welfare proceedings, are likely to meet the child in the courtroom with counsel for the parents present.

Concerns of Fairness and Confidentiality

Judges clearly are sensitive to providing the child with an opportunity to be heard, but they also want to explain to the child the purpose of the interview and emphasize that the judge is the final decision-maker. Many judges recognise the importance of discussing the issue of confidentiality with the child, but views about the extent of confidentiality were markedly varied. The diverse views about confidentiality found in this study are similar to the results of earlier studies based on interviews with judges in Ontario, Ohio and other jurisdictions.

(Cont. on Pg. 15)

"Interviewing Children: The Role of the Judges and Mediators" Cont. from Pg. 14

There are conflicting views and practices regarding the extent to which judges regard these interviews as confidential and how much information about them is shared with the parents.

This is an issue that clearly needs to be addressed in guidelines (or in legislation or appellate jurisprudence) to ensure a degree of consistency and fairness for both children and parents.

In our survey, a majority of the Canadian judges who meet children do not provide parents with a transcript of these meetings, or allow their lawyers to attend them.

Many judges have concerns about embarrassing children or potentially damaging their future relationships with a parent, and accordingly, only provide the parties with a summary of the children's statements. This point highlights that judicial interviewing is a practice unique to family cases; while the judge may rely on the information and insights obtained to formulate a decision, the evidence obtained is different from other types of evidence used in the justice system. The practice of only providing parents with a summary of the child's statements, while keeping a full record for an appellate court, seems to adequately balance concerns about fairness to the parents with protection of the welfare of the children who are the subjects of litigation.

The Role of Judicial Interviews of Children

It is significant that, among the judges surveyed, more of them are now meeting with children (albeit some tentatively) than was the case in Canada a few years ago, and more judges are considering doing this in the future. It is, however, also notable that some judges remain strongly opposed to this practice, and a number of others remain very cautious about starting to do so.

This study presents a window into the ongoing dialogue in Canada about judicial meetings with children and the tensions that continue to prevail. This study is limited and it may not be possible to generalize the results to all judges across Canada, and attitudes and opinions continue to evolve as more research into the practice of judicial interviews with children continues. Although the response rate among those surveyed was high, only a relatively small number of all judges in Canada attended this conference. Given the recently introduced Rules in California, it will be interesting to hear from California judges and mediators what their views are about these issues.

The one clear, unanimous message that the judges gave was that if they are to be interviewing children, then guidelines, training, and protocols must be developed for judges. The Rules in California, the guidelines in the UK and New Zealand are promising starting points as guidelines that have been recently published. Whether judges undertake the practice of meeting children or not, a common response from the judges is that there is a need for more research about the practice, and the development of protocols to provide guidance for judges in deciding whether, when and how to meet with children.

We argue that the time has come in Canada and other jurisdictions to focus on training all judges who deal with family cases on how to interview children, and then conducting empirical research about the effects on parents and children, as opposed to simply relying on the perceived benefits and risks identified by judges, lawyers and mental health professionals. As one judge commented: "…great tool [judicial interview] when used with wisdom and discretion."

Involving Children in Mediation

The focus of this article has been on the role of judicial interviews of children in cases that are being litigated. It is also clear that there is a role for children being involved in the mediation process.

A study from Australia reported that when children's views are shared with parents involved in the mediation process, fathers – who are usually not the primary residential parent – are more likely to understand their children's needs and stay engaged with them. This study involved the child meeting with a mental health professional who shared the child's views with the parents and mediator. That approach is relatively complex and expensive and has not been widely adopted, though it may well be useful.

The practice of mediators meeting directly with children, and then sharing their views with parents seems to be becoming more common. Some mediators will arrange for one or more sessions where parents and children meet to discuss plans. While more research and professional guidelines are needed, these practices may well be a valuable way to ensure that parents who are negotiating a parenting plan understand the perspectives of their children. Too often parents confuse the views of their children with their own views. Often, a parent honestly but erroneously believes that his or her children share the parent's views. This may partially reflect a tendency of children to tell each parent what they believe that parent wants to hear. But, there is also a very strong tendency for a separated parent to only hear (i.e., register and remember) the things that the children say that are consistent with that parent's views.

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"Networking 101010101: The Basics " Cont. from Pg. 7

Many of them work in the drug and alcohol treatment field, but a good deal of the members and other attendees (not everyone who attends the meetings are members of EAPA) are LCSW's, psychotherapists, psychologists, psychiatrists, M.D.s, etc., and are trained in a vast and diverse arena of mental, spiritual, physical and emotional health modalities. This has not only been a terrific resource for me, but the monthly presentations have expanded my understanding and knowledge base about human behavior and psychology. Bonus!

This is a breakfast meeting that meets on the second Wednesday of each month, beginning at 9:00 a.m. and ending by 11:00 a.m. Except for the holiday breakfast meeting in December and the big spring gathering in June before the summer suspension, there is a scheduled speaker (topic announced via email, snail mail and on the website). Upon arrival, one member of the board is sitting at a table greeting the arrivals. You hand over your check or cash and receive a receipt

(Cont. on Pg. 16)

"Networking 101010101: The Basics" Cont. from Pg. 15

(Not every group does it this way, since many now offer an online credit card payment option prior to the meeting.) There is a sign-in sheet and blank name-tag stickers.

Next: The method to the madness, falling somewhat into these categories:

Meet:
You have already started meeting people as you and they arrive. In the main room, there is a number of large, round tables set up with water glasses and the day's presentation or other related materials in the center of each table; a buffet breakfast is arranged on the other side of the room, and, in the front of the room is a screen, computer and other sundry items needed for the presentation. There is also a table set up for members to display their business cards, brochures, pamphlets, announcements, etc. There is usually a buzz around this table.

The first half hour or so is dedicated to informal networking; people are arriving, breakfast is being gathered, coffee is being poured, seats are being taken, hellos are being exchanged, traffic is discussed, reconnections are being made, confidences are shared, business cards are traded, invited guests are being introduced—the usual organized chaos.

Greet:
The president of the organization calls the meeting "to order," so to speak, welcomes everyone and makes general announcements. Then, there is a round robin of introductions. Table by table, each attendee stands up, introduces himself or herself and tells of his or her business/practice, gives a 10 to 30-second elevator speech, perhaps including some relevant information that the group would benefit from knowing about, and then sits down. This usually takes anywhere from 15 to 20 minutes, depending on how many people are in the room (and how long their introductions are—more on this to come)!

Eat:
At this point, the presenter is introduced and while the group is dining, the speaker conducts the presentation, which usually takes about an hour. Depending on the presenter, the seminar is generally a lecture followed by a question and answer period. However, sometimes the presentation is interactive and may request your involvement. Again, you're here to engage and this can offer an opportunity to do so, if you wish.

Complete:
The presentation is over and, for the most part, people think that is the networking event. Not so fast!! While the idea is to get everyone on their way by 11:00 a.m., this can be the most important part of the meeting, and by running out too soon you may be squandering an excellent opportunity to make the most significant connections.

Nothin' to it! I've now outlined the bones of a networking event and, in the next article we'll explore each one of these four facets in great detail. I'll start by asking you to consider this question: When does the networking event actually begin?

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"How Much Legal Information Should We Provide?" Cont. from Pg. 8

D. How much detail can ethical mediators give clients about child support, alimony and property division, as well as parenting litigation? It appears to me that the same standards apply as I have described above: Don't give advice and don't imply to clients that you have "legal" knowledge. Yet, I believe that many people have "general" knowledge of child support, property division, etc.

In conclusion, I do believe that this is a minefield. While mediators appear able to give some legal information, they should clearly avoid giving "legal advice." Don't try to give too much legal information and don't try to be too directive about it. Otherwise, you may appear to be giving advice and using legal knowledge. Keep in mind that there are many gray areas in these state standards – good and bad. Just to be safe, I would recommend that you get legal advice on any gray areas of this subject from a legal expert in your state. And, I would recommend that you repeatedly tell your mediation clients to get legal advice, for their own benefit – and yours! [I welcome your responses to this article.]

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"Solving Drafting Problems" Cont. from Pg. 9

Parenting provisions should be tailored to the parenting relationship of the clients. Two parents who have cooperated in the past and intend to do so in the future should not have to endure pages of provisions lecturing them on how to make joint parental decisions. Parenting schedules often change, so cooperative parents may only need the parameters of a schedule and a provision inviting them to sit down together from time to time and mark up a calendar. Some parents, however, need to have a much more detailed schedule because the absence of one will likely be a serious cause of future conflict. It is important to differentiate these situations.

Provisions on spousal and child support may need language as to both the applicable standard for and the process of dealing with future changes, such as a material change in the income of one of the parties. The termination dates for child support are customarily included, as are the circumstances under which any spousal support ends. At times, the parties may agree on a formula for future changes in support. The child support guidelines which exist in every state are based in part on the number of children, so that, when a child is no longer covered, there needs to be an adjustment in support for the remaining child(ren). The adjustment is usually not strictly mathematical; for example, in Virginia, if there are two children who are being supported, and then one no longer remains covered, the reduction is by approximately one-third rather than one-half, if one follows the guidelines.

(Cont. on Pg. 17)

"Solving Drafting Problems" Cont. from Pg. 16

One of the trickiest issues in many states is whether and how to set up future changes in support so as not to necessitate an amending agreement, or even a new court order.

Many formbooks contain long-winded provisions on various hypothetical situations where, for example, the parties disagree on implementing the sale of the marital home. A more effective way to accomplish the same objective in a much briefer provision is to include an arbitration clause for the unlikely event that such a disagreement occurs.

Any agreement dealing with the division of a defined benefit pension plan, or most defined contribution retirement accounts (IRA's are the exception), will require an implementing court order. So, the parties' draft agreement may only need to set forth their specific instructions to the drafter of the court order (who is almost never the mediator). Defined benefit plans are divided at the time of retirement, but defined contribution accounts are normally divided by a "rollover" tax-neutral transfer between accounts that is done around the time of the divorce. The most common term for these court orders is QDRO ("Qualified Domestic Relations Order"), although other terms are used for federal, state, military and Foreign Service plans and accounts. It is important for every mediator to establish a professional relationship with one or more experienced drafters of these orders.

The "boilerplate" provisions are standard language that is simply copied verbatim into almost every marital settlement agreement. Often, it is long-winded and virtually unreadable in office formbooks. The APFM formbook will annotate the boilerplate provisions so that the mediator may choose whether these provisions fit the situation of her or his particular mediation clients. Every legal term of art, such as "indemnify and hold harmless" that is kept in the agreement should also be translated, so that the parties are aware of what it is that they are signing. Finally, for every drafter of MSAs, here is a one paragraph primer of good legal drafting: Choose a simple title. Use the parties' and children's formal first names (or nicknames if they prefer). Stay in the active voice. Eschew archaic words. Translate technical terms. Avoid repetition and obtuse language. Keep sentences and paragraphs short. Stay clear of long provisions dealing with hypothetical situations that are unlikely to occur. Use general terms where appropriate. Be specific where you need to. And always, always, try to be clear and concise.

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"Going Beyond Impartiality of Standard IV" Cont. from Pg. 10

(New Standard) In order to remain impartial and to promote cooperative outcomes for both parents, the mediator shall assist the couple in achieving the goal of maximum parental involvement by both parents. When parents have disputes about the terms and conditions of their parenting plan, a neutral expert can be recommended who will assist the parents in overcoming any difficulties that prevent both parents from achieving significant relationships with their child or children.

Such a section, that we have identified as the "maximum parental involvement principle," will need to be debated and further discussed, but it would imply the use of one neutral expert whose focus is more on the future, than on the present question of who currently is more attached to the child or children.

Impartiality, perhaps, also needs to apply to the involvement of all neutral experts in mediation. Most family mediators use a "team" approach to mediating, which means that the mediator has a team of experts who are committed to working in mediation not as adversaries but as joint problem solvers. The mediator and clients include the neutral experts in their confidentially agreement so that the neutral will not need to provide information and recommendations in a defensive posture as if preparing for court, as they would in an adversarial process.

Consider the implications of the Standards of Practice having four major functions:
1. To serve as a guide for the conduct of family mediators;
2. To inform the participants in mediation as to what they can expect;
3. To promote public confidence in mediation as a process for resolving family disputes;
4. To maintain the integrity of the mediation process by creating and maintaining boundaries between adjudicative ADR processes and family mediation.

It would seem appropriate then that, in further distinguishing a mediation process from other adjudicative ADR processes, as well as informing the public of what to expect concerning the conduct of mediators, additional language describing the "impartial process" should describe how experts and expert information are used differently in mediation. Hopefully, any reader of the Standards could then conclude that expert information in mediation is used to solve present and future parenting concerns, with emphasis on improving the parental relationships, as opposed to presenting evidence about which parent is better qualified, under an application of the best interests test in the various states.

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"Attendees' Reflections on our 2013 Annual Conference" Cont. from Pg. 12

Presenters were approachable, humble and eager to guide and help further the careers of all who needed help.

My overall experience of the conference was beyond what I expected. I walked in knowing only a few fellow students, and of course, Ken Neumann. I walked out with a great deal of new knowledge, greater confidence, a stack of business cards, books, manuals, and even more excitement about my future as a divorce and family mediator.

I've already signed up for the 2014 conference in San Diego and encourage all, especially those who missed the 2013 conference, to go.

Lisa Wolman
New York

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Note on States That Have Changed "Custody" Language

By Larry Gaughan

There has long since ceased to be any justification (other than force of habit) to use the terms "custody" and "visitation". These emotionally charged terms detract from the proper focus on a sensible parenting schedule and cooperation in making parental decisions. They are poorly descriptive, and increasingly they are even considered by many parents to be insulting. Virtually every mental health professional that specializes in treating children whose parents are separated or divorced is critical of these old terms as creating far more problems than they resolve.

There are many terms that are more descriptive and businesslike, such as "parenting plan", "joint parental decisions", "parental time-sharing", "primary residence", and "shared parenting schedule". There could be a Code provision that ties these provisions into those of the Uniform Child Custody Jurisdiction Act, until such time as that law updates its terminology. The growing list of states that have completely purged "custody" and "visitation" from their parenting statutes, or have substantially limited their use, includes Alaska, Colorado, Florida, Georgia, Massachusetts, Montana, New Hampshire, New Jersey, North Dakota, Tennessee, Washington, and West Virginia. This is no longer a novel idea, and it shouldn't be controversial.

Note, interestingly, that this list contains a balanced number of red, blue and purple states from the political spectrum, suggesting that these decisions were not necessarily politically motivated by party divisions. Please let me know if you have any information about other states that have done this, or if you have any corrections to this list. You may contact me at ldgaughan@aol.com. Also, related to these ideas, I highly recommend Don Saposnek's new article, Ten Tips for Developing and Drafting Effective Parenting Plans in Mediation, (see: http://www.mediate.com/articles/saposnekparentingplans.cfm).

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Advanced Trainings - 2014

Jan. 11th - The Center for Mediation and Training, New York City.
Faculty, Ken Neumann and Rod Wells. http://divorcemediation.com
Drafting Separation Agreements: For Non-Attorney Mediators and New Lawyers.

Feb. 8th - The Center for Mediation and Training, New York City:
Scenes from a Marriage – And Its Relevance to Our Work.

Mar. 8th - The Center for Mediation and Training, New York City
How to Save Taxes as a Mediator, and The Marital Residence

March 20th - 22nd - Straus Institute for Dispute Resolution Professional Skills Program in Dispute Resolution, Baltimore, Maryland. Faculty—Irwin Joseph and Donald T. Saposnek
(http://law.pepperdine.edu/straus/training-and-conferences/professional-skills-program maryland/courses/family-law-mediation.htm)
Family Law Mediation: When Time is Not on Your Side.

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