The Professional
FAMILY MEDIATOR

Feature Article

SUMMER 2013

APFM™
ACADEMY OF PROFESSIONAL FAMILY MEDIATORS

Development of Kinship Titles for Step-Family Members

By Jocelyn Metsch

Jocelyn Metsch graduated in 2013 with honors from Stevenson College at the University of California, Santa Cruz, receiving her B.A. in Psychology. Being an adult child of divorce, she hopes to pursue her passion for psychology by working in both research and clinical settings with the goal to help children and adults reduce the negative consequences of divorce.

In his epic play of Romeo and Juliette, Shakespeare's character Romeo, once professed the famous words, "A rose by any other name, would smell as sweet." Though poetic and thoughtful, given the context of the play, I have to say Shakespeare had it all wrong. The importance of language and its pragmatics have historically been given much weight, and the trend continues today. We see instances, especially in the political sphere, in which using the right word, i.e. the known politically correct term, makes all the difference in conveying a non-pejorative appellation. The importance of language in politics parallels its importance in family life, especially when considering kinship titles. There is a similarity in the way that politicians and family members consciously understand the importance and use of language. Family relationships are commonly defined and understood through the title of each member. The implication of family kinship titles often conveys an understanding of a member's general role, authority, and responsibility within the family unit itself.

For example, in a more conventional sense, the title "Mom" evokes images of apple pie and a sense of nurturance. But, how does a child extend her emotions and attachment to a stepparent when the stereotype of the term "step-" has such negative connotations. Its significance is in the negative stereotypes and resulting adversity created in the binuclear family, when the desired goal is to create a loving and supportive environment. With the number of stepfamilies in American society growing, the way in which we define what and who makes up a family needs to be reconsidered.

It is with a realistic view of family systems and their development in today's culture of divorce that I declare: The "Age of the Nuclear Family" is dead… kind of. It is not that people have stopped striving for the "ideal" man-wife-two-kids-and-a-dog life, it's just that it isn't working out all that often. The divorce rate in American has flitted around the 50% line since the 1980s (CDC, 2012). One might assume that the large number of divorcées emerging each year after embittered and expensive marital dissolutions might be jaded and perhaps shy away from the idea of marriage, but this is not the case. Almost all who divorce will remarry (Sweeney, 2010).

As a result of the high re-marriage rate, the "nuclear family system," with its eight easily-defined dyadic relationships, which include: husband-wife, father-son, father-daughter, mother-son, mother-daughter, brother-brother, sister-sister, and brother-sister, is being replaced with the "bi-nuclear family system" (Ahrons, 1979; Bohannan, 1970). One of the major dilemmas posed for step-families is the subsequent reorientation and composition of the original family unit itself. Some family relationships may be turned upside-down and others may be unclear and ill- defined, such as the relationship between an ex-wife and a new wife, grandparents of a half-sibling, etc. Anthropologist Paul Bohannan explains that "the remarriage of one or both of the ex-spouses creates a vast number of relationships of a new kind," and he calls these quasi-kin relations "divorce chains" that bind people together on the "basis of links between new spouses of ex-spouses" (Bohannan, 1970, pp. 114-118).

Among the many difficulties involved in the formation of these new kinship relationships is their lack of proper English kinship titles. Some of the relationships created by divorce and remarriage that still are lacking developed kinship terms include: Mother-stepmother, father-stepfather, stepmother-stepfather, stepfather's child-stepmother's child, half-siblings from mother's marriage-half-siblings from father's marriage, and co-grandparents (Ahrons, 1979). The inadequate development of kinship titles for the growing number of step-families in the United States may in fact act as a detriment to the facilitation of positive, supportive relationships among expanded family members. Margaret Mead once wrote, "No institution is fully viable unless it has verbal as well as legal concomitants" (Bohannan & Mead, 1970, p.112). Perhaps, if titles were developed for such relationships, the roles of these newly existing family members might be better-defined, and indirectly foster more positive relationships and environments for the children and adults involved. However, before we can consider the absence of titles for certain extended family members and possible title developments, we must critically assess the titles currently in place for stepfamilies.

The etymology of the prefix "step-" is peppered with negative connotations. In Old English, the term was used to connote a sense of "loss," or to indicate that a child had become an "orphan" (etymologyonline.com, retrieved 6-1-13).

(Cont. on Pg. 12)

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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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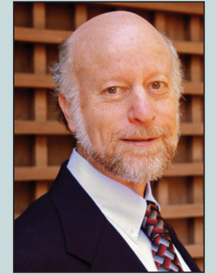
APFM
ACADEMY OF PROFESSIONAL FAMILY MEDIATORS

Editor's Notes

"Problems vs. Issues"

By Don Saposnek

Donald T. Saposnek, Ph.D., is a clinical-child psychologist and family therapist since 1971, a child custody mediator and trainer since 1977, and is a Founding Board Member of APFM. He is the author of *Mediating Child Custody Disputes: A Strategic Approach,* and co-author of *Splitting America.* He is past Editor of AFM's *Mediation News*, ACR's *Family Mediation News* and is the Editor of APFM's *The Professional Family Mediator*. He has been teaching on the Psychology Faculty at the University of California, Santa Cruz since 1977.



For some years now, the word "problem" has with increasing frequency been referred to as "issues" (e.g. "She's got issues"; "That man has serious mental issues"; "Their marriage has lots of issues"). While there are many opinions about the distinctions between these two words, one that seems most useful in our line of work is to view "problems" as potentially solvable, while "issues" as only manageable.

This distinction is meaningful in both therapy work and family mediation. Most therapy clients present with a conflict or a set of conflicts related to work, to marriage, to school, etc., and the therapist's first goal is to define specific problems to solve. When the interventions are successful, the client's problems are solved and the conflict dissipates. However, other therapy clients (e.g. children with Asperger's Syndrome) have a life-long issue that is not a problem to solve, but a condition to manage more effectively over time.

In divorce mediation work, we encounter both "problems" and "issues." Coming up with a property and asset division, a spousal and child support plan, or a specific parenting plan are "problems" to solve. However, dealing with parenting matters post-divorce in co-parenting counseling are almost always "issues" to manage. The parents are very unlikely to ever see their situation similarly or solve their problems, yet as divorce professionals, we can be of help in giving them strategies for managing and maintaining their bi-nuclear family relationships in ways that are least detrimental to their children—we can help them with their "issues" even if we can't solve their "problems."

As such, the "issues" in this Issue of The Professional Family Mediator are vital, the pun intentional, and diverse and vast in scope, but not solvable as "problems." I encourage you to read these fertile ideas, appreciate the differing points of view, and help us to manage, grow and move forward toward our goal of fully professionalizing the field of family mediation.

So, first to freshen things up in this "Issue" of TPFM , we offer a lead article that was written by one of my university students from my Children and Divorce course, Jocelyn Metsch, who presents to us some intriguing and innovative notions about the absence of suitable designations for the various new family relationships formed after divorce.

Then, in our President's Column, Rod Wells presents an informative update on the steps taken to date by APFM toward establishing certification of family mediators. He makes a bid to all our members to consider becoming actively involved in the process leading to the certification exam, which includes offering your special areas of expertise as a Subject Matter Expert, as well as participating in a number of other roles. Please respond to his call.

Larry Gaughan, one of the earliest pioneers in our field, in his article, "Towards a Unified Profession of Family Mediation," develops the notion that one mediator cannot have all the skills necessary to complete a comprehensive divorce settlement. This thought-provoking article may well shake up your thinking about our work.

In her Mojo Marketing column, Ada Hasloecher described how her husband, Bob (aka Sven Voodhead), came to find his passion in woodworking, and she elaborates on how we mediators need to find our passions by focusing more on being than on doing.

Steve Erickson's column on Standards of Practice further promotes the need for our members to step forward and help our organization clarify the standards by which we want to practice and which we want to fold into the certification process. To Rod's plea, Steve adds his own plea for active member participation in the certification process; please heed both their calls.

In a surprising turn of events, and possibly for the first time in publishing history, Chip Rose's Column focuses on the "Best Interests of Children," rather than on mediation process or issues financial. As usual, he offers creative solutions to even that topic.

In Lenard Marlow's second part of his two-part article, "Divorce Mediation: A House Divided," he explores the various dilemmas that arise over the issue of which professionals should be allowed to draft divorce settlements, and he attempts to bring clarity to the various divorce professionals' roles and competencies, as we approach family mediator certification.

Further in the vein of Lenard Marlow's article, Bill Eddy's Ethical Edge Column considers the boundaries or "ethical edges" between the practice of Professional Family Mediation and the practice of law, and he asks us "How Much Legal Information Should Family Mediators Provide?" These sorts of questions seem to be in the limelight of family mediators these days, as we all pursue clarification of our various roles.

Last, we include a pellucid book review by Frank Garfield of Lenard Marlow's latest book, *Common Sense, Legal Sense and Nonsense about Divorce*, to further stimulate your intellectual palate.

I leave you with these two thoughts:

Intellectuals solve problems; geniuses prevent them.

-- Albert Einstein

You can't control the wind, but you can adjust your sails.

--Yiddish proverb

Enjoy.
Don Saposnek
Editor
The Professional Family Mediator

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APFM's First President's Message

"To the Honored Dedicated Vital Few"

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.

Since our founding, the Academy of Professional Family Mediators has been preparing for the serious work of establishing our NCCA accredited mediator certification program. It will be done as a separate, non-profit corporation under the umbrella of APFM but independent of APFM in all aspects that relate to certification standards and requirements. One of the first steps is to identify a small, dedicated volunteer group of very experienced and knowledgeable family mediators. This group will be responsible for defining the profile and job description of a "professional family mediator." The group will define the set of traits, behaviors, knowledge, and skills that establish what a professional family mediator is and develop criteria and test questions to assure candidates meet those qualifications. While the members of the group will come from diverse backgrounds, professions and experience, they will be unified in their commitment to formalize family mediation as a new profession.

Why establish Family Mediation as a distinct profession? According to Wiki, a profession is a vocation founded upon specialized educational training (italics added), the purpose of which is to supply objective counsel and service to others for a direct and definite compensation, wholly apart from expectation of other business gain. In his book, Professionalism, The Third Logic, Elliot Freidson discusses:

"… what might be called 'discretionary specialization' (Friedmann, 1964, pp. 85-88) . . . are tasks in which discretion or fresh judgment must often be exercised if they are to be performed successfully. Whatever the case may be in reality (and that may be a matter of opinion), the tasks and their outcome are believed to be so indeterminate (see Jamous and Peloille 1970; Boreham 1983) as to require attention to the variation to be found in individual cases. And while those whose occupation it is to perform such tasks will almost certainly engage in some routines that can be quite mechanical, it is believed that they must be prepared to be sensitive to the necessity of altering routine for individual circumstance that require discretionary judgment and action."

Family mediators know well that family mediation requires special qualities of sensitivity, knowledge and understanding. Other practitioners of mediation often talk about family mediation as a different world from their own. Family mediators often just refer to this as process, but it is truly a special set of skills and knowledge gleaned over many years of practice and study. Like many professional practices that have an element of art, it has been hard to define and is often best known a posteriori, in our viscera. The members of the certification project will delineate the qualities of this specialized knowledge and draw the boundaries establishing this new unique profession.

Certification may mollify the critics that claim that anyone can hang a shingle, but, more importantly, it will stake a claim to this honorable and noble profession as peacemakers and problem-solvers. To that end, the Board of the APFM has established the Professional Mediators Board of Standards (PMBS). The declared purpose of the PMBS in the Articles of Incorporation is to:

- establish and maintain professional standards of mediator competency;
- promulgate and enforce through disciplinary procedures a uniform code of ethics for the benefit of the mediation profession and the protection of the public;
- set application requirements for professional mediator competency certification;
- develop and implement a competency certification process for professional mediators;
- grant a professional mark based on achieving certification and promote and protect the value of that mark;
- establish the procedure for consumer reporting of professional mediator malpractice;
- promote public awareness and understanding of mediator certification and the role certification plays in assuring best outcomes in the mediation process;
- lessen the burdens of government regulatory agencies by providing standards of competence, practice and ethics through cooperating with state and federal agencies to uniformly provide for appropriate effective mediation practice.

Establishing an accredited certification program is truly a noble goal. The lack of defined competency standards measured by valid and reliable objective and subjective criteria has held back our profession for decades. It is time to make it happen, and the APFM Board has reserved significant resources to support that goal.

The project's ultimate success depends on seasoned practitioners from our community stepping up to create certification as a legacy born of their valuable mediation experience. The 80-20 Rule says that eighty percent of results come from twenty percent of the sample. This rule is also known as "The Law of the Vital Few." It has been applied to everything from the yield of peas in a garden (80% of the harvest comes from 20% of the pods) to the sales yield from customer lists. Likewise, in every non-profit it is the Vital Few who make a difference by contributing their time, energy and creativity to manifest the vision.

APFM is blessed in having a disproportionate representation of the Vital Few among our membership. The purpose of this article is to identify and recruit the 20% of the Vital Few . . . the Crème de la Crème who are willing to volunteer. Volunteers will be committed to serve the noble goal and vision of creating an accredited certification program and, thereby, a new, distinct profession. They will manifest a legacy that has been merely gestating for thirty-five years.

(Cont. on Pg. 13)

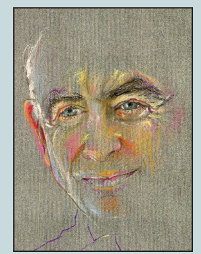
Toward a Unified Profession of Family Mediation

By Larry Gaughan

By the time the Academy of Professional Family Mediators was founded last year, professional family mediation badly needed an organizational home-base. Even though tens of thousands of divorce cases are kept out of court every year by mediated agreements, family mediation has not yet reached its full potential as a separate profession. There are still many mediators who believe that successful mediation mainly requires process skills, and that substantive knowledge is not very important. Other mediators (especially divorce lawyers who mediate as a sideline to their law practices) are excessively focused on the "legal" substance at the expense of a more inclusive process. But process vs. substance is a false dichotomy – professional family mediation requires the skills and knowledge of both, and at a high level. Indeed, a creative use of substantive options is an excellent process idea. APFM can take the leadership in setting professional standards for the entire field of family mediation, just as the American Academy of Matrimonial Lawyers has done in the field of family law.

Family mediation has the potential to do much more than just replicate what legal procedures offer. Parties can do many things in an agreement that a court does not have jurisdiction to do, such as (in many states) to make provisions for college for adult children. Often, mediation clients suggest creative options that go well beyond the law, or these are suggested by the facts of the particular case. There is far too little explicit future planning in adversarial divorce settlements. Courts only have power to settle those aspects of cases that fall within the scope of their jurisdiction, but they often lack both the jurisdiction and the expertise to deal with the full range of relevant issues in divorce settlements. Mediation can do both, through fair, creative and practical agreements.

When we demystify the law, as we should, it will be less difficult and more interesting for therapists and financial planners to deal with the legal parameters, including drafting agreements. Other professionals could help make it easier for attorneys to better understand areas such as separated parenting, child development, the emotions of the divorce process, and the goals of short-term and longer-term financial planning. There are also other important areas of expertise, such as career adjustment and planning and the tracing and valuing of assets, with which all mediators need to gain familiarity. If therapists, financial planners and other professionals are no longer intimidated by the legal system, and lawyers and judges stop assuming that they alone hold most of the substantive knowledge, the profession of family mediation can open up to its full potential.



Larry Gaughan has been a family mediator since 1980. From 1980-1989 he taught courses in Alternative Disputes Resolution at George Mason Law School. He is certified for Collaborative Practice.

Let's look at some of the specifics:

Parenting. The first clue to the lack of expertise in the legal system is the use of the outmoded terms "custody" and "visitation." Mental health professionals that have experience with children whose parents are separated or divorced and are also familiar with the stages of child development and the many individual needs of children through divorce, are often the best experts. What is lost so often in the adversarial system is the importance of promoting cooperative long-term parenting relationships. That is exactly what the adversarial system is unlikely to foster and most likely to impair or even destroy.

Child support. The advent of child support guidelines in the mid-1980's has changed forever the law of child support by making it fairer and more uniform, both among different cases and among the various states. Everyone who works with divorce settlements should take courses in the guidelines of their particular jurisdiction and possess the software to make calculations under those guidelines. But we also need to identify those situations where the guidelines don't work well and to be aware of the alternative ways of setting up child support. The mediator should always make sure that clients who have minor children are made aware of the guidelines, but they should also be told that generally they don't have to follow the guidelines in any particular agreement.

Spousal support. Every adult is responsible to do what he or she reasonably can to provide for, or at least contribute to, his or her own support. This principle is balanced by the reality that one party may suffer a short-term or even permanent career disadvantage due to the financial circumstances of the marriage and how the spouses divided marital responsibilities. Formulas for spousal support are much less likely to be used than those for child support, and they are less authoritative when they are used. Budget planning is a vital requirement in many cases involving support. Mediators need to know more about are the educational and career alternatives for someone who has been out of the full-time job market for years. The expert here is a vocational specialist, a professional whose services should be used more frequently.

Equitable distribution. At the technical level, there are some important differences in the family law from state to state, and a family mediator should be aware of these in her or his own jurisdiction. By far, the most common assumption is that money and property acquired by the efforts of the parties during their marriage are divided equally upon its dissolution, with the frequent exception of inheritances and separate outside gifts. However, there is plenty of room for options, tradeoffs and implementation of plans that do not necessarily follow the law.

Five kinds of challenging property situations may require an outside expert, usually an accountant, even in court cases. The five situations are: (1) tracing separate property that has been commingled with marital property; (2) tracing marital assets alleged to have been dissipated; (3) valuing a professional practice or a closely held business as a marital asset for settlement purposes; (4) sorting out the responsibilities of each party for marital debts and making recommendations for debt management, and (5) making certain that there has been a complete, current and accurate disclosure of all marital assets and debts.

(Cont. on Pg. 13)

Mojo Marketing and Management

"Sven Voodhead and the Attitude of Being"

By Ada Hasloecher

My husband, Bob, is a carpenter by avocation and a contractor by vocation. He loves wood. I mean he LOVES wood. Whether it is a spindly hemlock sapling, a strapping 100-foot, 70 year old tulip tree, or freshly sawn cedar planks, a woodland setting is his church, and the lumber yard is his candy store. One of my first dates with him was a trip to the hardware store. The vanity plates on his truck say: WUDISGOOD.

Get the picture?

He didn't start out as a carpenter. His father was a machinist, so he learned precision. In college, he studied aerospace technology. He worked for a firm that developed and honed his natural understanding of engineering and mechanics. He grasps and can explain physics to the uninitiated (that would be me) in a way that absolutely blows my mind. He learned to fly airplanes at the age of 18. He eventually brought all of these skills to his woodworking, along with his intense love of nature and his natural ability for and appreciation of the creative arts. Wood, for Bob, is a religion, and his ardor for it is what sets him apart from many others.

A number of years ago, when he started his contracting business, his friend Mike came to work with and for him. They shared many similar sensibilities about work, play and carpentry. Mike teased Bob about his German last name, his sometimes stubborn streak, and his obsession with getting things exactly right. This joshing finally culminated in a most hilarious nickname, Sven Voodhead. "Be the wood—be one with the wood" he would rib Bob. And it was indeed so—Bob was the wood.

So what does this have to do with mediation? When I walked into the professional world of mediation, I too became one with the "wood", so to speak. My excitement for this meaningful and compelling work propelled me in ways I could not have imagined. I identified so strongly with "being the mediator" that I found myself living, breathing, speaking mediation to the point of "Somebody get the hook!" When I bought my new car, I purchased "MEDIADA" vanity plates. I was, and still am a walking, talking advertisement for mediation.

Ada L. Hasloecher is the founder of the Divorce & Family Mediation Center on Long Island, New York, a 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.

In thinking about how we project ourselves in the context of promoting and marketing, I'm reminded that we must start with the "being" before we can get to the "doing." Be the mediator. Be one with the mediation.

There is an "attitude" of being that I think is important to keep in mind. In the realm of flying, pilots must consider what they call the "attitude" of the aircraft, which refers to the relationship of the aircraft to the ground. For our purposes, the attitude of mediation refers to the relationship of mediation to the world of conflict. Our "being" is an expression and response to that attitude.

Is mediation a vocation (a job) as well as an avocation (a calling) for you? If this is so, consider how you transmit that attitude. It's not so much what you do or what you say as much as how you "Be". When you come from a centered place of being, the ability to speak and express yourself naturally occurs without concentrated effort; the genuineness of who you are shines from within and translates immediately.

- Do you look forward to sharing with people what you do?

- Do you walk into a room and transmit that passion and commitment for peacemaking?

- When someone asks you what your occupation is, can you barely contain your excitement to tell them?

I always think that we should be called human *doings* instead of human *beings* because of our occupation with busy-ness and doing. But, before we explore the "doing" aspects of marketing our practices and promoting mediation, I believe understanding and consideration of the "being" characteristic must be the starting place.

What is your attitude, and it is in concert with your avocation? Sven Voodhead would want it so.

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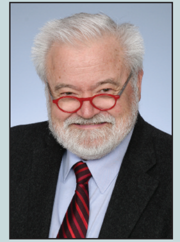
Standards of Practice

"Collecting Comments"

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.



The Standards of Practice for Professional Family Mediators have been posted at the APFM website. They are provisional at this time and you are encouraged to comment on them. They represent the collective wisdom of many family mediators who have participated in drafting them. We are continuing to collect comments of members and others who read through them. You may send your comments to me at steve@ericksonmediation.com and I will be organizing and summarizing them for later discussion in this newsletter.

The reason the Standards of Practice remain so critically important is that they are one of the foundational measuring rods of what is considered to be good family mediation practice. As such, the Standards play an integral part in the process of creating certification and licensing for mediators.

It is well known that APFM has made a major commitment to certification of mediators. In fact, one of the main reasons for the creation of the new organization is to realize the goal for the certification of professional family mediators. All the work of the organization, including organizing the conferences, creating the website, and growing our membership is being done with volunteer labor, because funds are needed to be available to pay for the costs associated with certification. These costs are primarily the fees to outside consulting organizations for test design, certification oversight and other aspects of the certification and test design process. This process is complex and exhaustive, and it is necessary for it to be acceptable to the ICE—the Institute for Credentialing Excellence (formerly named the National Organization for Competency Assurance). The ICE is the umbrella organization that assists new or existing professions in attaining credentialing, as well as maintaining and reviewing the credentialing processes of established professions. Whether you are an optometrist, a professional engineer, a dental hygienist, or one of hundreds of other professions, the chances are that ICE has had a hand in the credentialing process.

ICE, at its home page, defines credentialing in the following way:

Credentialing is an umbrella term used to refer to concepts such as professional certification, certificate programs, accreditation, licensure, and regulation.

• A certification program is designed to test the knowledge, skills, and abilities required to perform a particular job, and, upon successfully passing a certification exam, to represent a declaration of a particular individual's professional competence. In some professions, certification is a requirement for employment or practice.

• Similarly, licensure tests an individual's competence but is a mandatory process by which the government grants time-limited permission for that licensed individual to practice his or her profession.

In addition to weighing in on the standards, APFM membership will also be asked to assist on another aspect of the certification process—one that relates to professional competence. If a test is to be designed that measures the knowledge, skills and abilities required to perform a particular job, there must be general agreement about the necessary knowledge, skills and abilities that make one a competent professional—in our case, a professional family mediator. Hence, we will have a need for Subject Matter Experts. A Subject Matter Expert (SME) is a person who has experience in the particular field that is the subject of certification. In order to establish standards and good practice norms, current practitioners will be called upon to provide their collective wisdom about what constitutes competent, professional practice.

Rod Wells' President's Column in this Issue calls for experienced family mediators to serve as SMEs, and it is hoped that some of you will take the time to participate in that important process.

In preparation for your input, please review the Standards of Practice on the APFM web page and send me your comments so that we may start from a common base to refine the Standards of Practice.

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A Call for Submissions to *The Professional Family Mediator*

We invite you to submit previously unpublished articles related to family mediation, including clinical insights, innovative programs, research studies, practice ideas, news updates, and letters to the editor with your responses to any of our published articles or columns. The editor will review submissions as they come in and will consider for publication those submissions that offer unique and innovative ideas for practicing family mediators. Please send your materials by email to the Editor, Don Saposnek, at: dsaposnek@mediate.com. Authors should include name, city and state/province, and other materials as requested by the Editor. If an article is selected for publication, the author will be requested to sign a Permission to Publish agreement and submit a photo and a brief Bio.

THE CREATIVE SOLUTION

"Best Interests"

By Chip Rose

We all love our kids, don't we? Mostly, we hear from our clients that their children are more important to them than anything else in the world. Typically, there will be added emotional emphasis when this statement comes from the party who does not want the divorce and who wears this badge of love for the children as though it was a military battle ribbon and it was the fourth of July. From a professional perspective, how wonderful it would be if this love-of-child emotion brought the couple in such alignment with one another that they shared a definition of what would be in the best interests of their child or children. Then, there is the real world. So the challenge to professional family mediators is how to construct a process structure to which the clients will commit and how to maximize the opportunities for those parents to actualize decisions that are truly in the best interests of their children.

A first step is to ask the clients whether they even have as a goal achieving a maximized outcome (a contextual term I stole from Jim Melamed). Given the reality that litigation is most likely to produce their worst possible outcome, it follows that at the other end of the continuum of possibilities there must be a best outcome. It is also true, like the sun coming up tomorrow, that a competitive negotiation based on zero-sum reasoning will only create the appearance of winning—if even it does that. So, from a process perspective, the clients need a conversation about these kinds of macro goals, if one is to avoid just rearranging the deck chairs on the Titanic. This is an issue of mindfulness. Since the clients are ultimately accountable for the outcome, they need to be reminded that they will never actually achieve their most mutually-beneficial outcome accidently. It can only be done strategically.

A second critical element is their recognition and acceptance of the fact that they are two individual people with individual perspectives, individual belief systems, and individual outcome goals. That they may share some of these things is mostly serendipitous, but certainly nothing that is likely to pull them through the long haul of co-parenting. If they are willing to accept their differences (without necessarily liking them) and they have committed to work in the process in such a way that is consistent with their achieving a maximized outcome, they are well on their way towards developing a very effective process. Part of the conversation at this stage of the process is an explanation of interest-based negotiation and the necessity of each party being able to freely express him or herself, coupled with the incredible opportunity this provides for the savvy listener to harvest all kinds of helpful information about how to negotiate with the speaker. By contrast, the clients can compare the hide-the-ball approach to the development of information in the adversarial environment of the adjudicatory approach. Clients might consider the procedural name the legal profession created for this phase of a court divorce—Discovery—and all that that name implies (e.g. "If you don't ask the right question, we are not obligated to give you the right answer").

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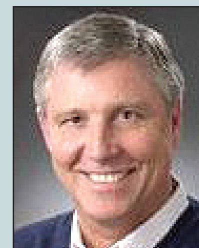

Then there is the default structure of any particular jurisdiction's methodology for resolving parenting issues. When clients tell me that they just want to know what their rights are, my response is to ask them in what other areas of their lives do they think the State of California has meaningful solutions to the problems they confront. As with almost all aspects of divorce, the state will come up with some answers to legal questions that represent a kind of default. It is important for clients to know these answers if they are to be fully informed, and, if they are truly "fully informed," then there is very little chance that they would trust something as important as the future of their children to the court system. That said, it is an option and needs to be discussed. What will always be absent from an adjudicated outcome is the wide range of possible solutions to specific co-parenting problems that grow out of a flexible co-parenting relationship. Because of the limitations of space, I will just make mention of the value of shared professional resources that the parents can employ in furtherance of becoming educated regarding the various developmental stages of children, including the wealth of experiences that co-parenting counselors and parenting coordinators can contribute in suggesting solutions to the parenting problems of the clients.

Then there are the "oil-on-troubled-waters" pearls of experiential wisdom that I like to weave into the conversations with the clients:

- Reminding the clients that the sands in the hourglass of their parenting will run out way faster than they are ready for it, and they will spend most of their lives knowing their children as adults. They might consider what they may hear from them about how all this went down.
- Reminding them that children can handle a wide range of types of relationships with a parent, if one defines healthy parenting as the combination of unconditional love and boundaries. That said, there will only ever be one Mom and one Dad, and that precious title is theirs to lose. The moral is: Don't freak out when a step-parent comes onto the scene and just hope that the other parent makes a good choice in partners.
- Finally, I like to ask this question in response to a particular unpleasant demonstration of polarizing dialogue regarding the parenting capability of either of the parties: "If the data from the mental health field makes it unequivocally clear that the single most harmful thing for children is the exposure to conflict between their parents, what would you be willing to do to give them a childhood free from that conflict?"
- The micro view of "best interests" of the children is an expansive briar patch with thorns enough to cause all of us (mediators absolutely included) a great deal of pain. The macro view is to establish broad goals that incorporate the positive intentions of the parties and the critical connection between process design and client commitment. Then there is an actual opportunity for the best interests of the children to be made manifest.

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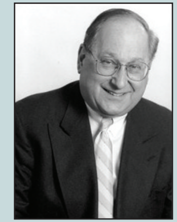
Divorce Mediation:

"A House Divided (Part II)"

By Lenard Marlow

Lenard Marlow, a graduate of Columbia University School of Law, has been a practicing attorney for over fifty years. A fellow of the American Academy of Matrimonial Lawyers, he has worked exclusively in the field of family law for over forty-five years. As a pioneer in the field of divorce mediation, he is the founder of Divorce Mediation Professionals, one of the oldest and largest divorce mediation facilities in the United States. Past president of the New York State Council on Divorce Mediation, and a respected leader in the field, he has lectured extensively on the subject, both in the United States and Canada, as well as in Europe and South America, where he has conducted numerous trainings and workshops.



As a follow-up to Part I of this article (with the same title) that was published in the Spring 2013 issue of *The Professional Family Mediator*, we continue with Part II by asking the critical question: How do the proponents of family mediator certification propose to eliminate divorce mediation's divided house?

This question was answered by the panel members of a plenary discussion at APFM's First Annual Conference in Cape Cod. The panel was asked the question of whether divorce mediators who were mental health professionals should be allowed to draft the parties' ultimate agreement. All of the panel members were lawyers (one was also a mental health professional) and they all argued that mental health professionals should write up the agreements. In other words, it did not take any special competence that could only be acquired by going to law school to do that. Needless to say, this is not an argument that a panel of mental health professionals would likely have felt comfortable making. In fact, it would have been very presumptuous for someone who was not a lawyer to suggest that he or she was qualified to perform what was obviously a legal function. As one of the panel members stated in his handout, "We should be carefully training new mediators . . . to make sure they are not giving legal advice, holding themselves out as lawyers, or practicing law in any manner . . ." Obviously, that would be the unauthorized practice of law. Nevertheless, and somewhat incredibly, that same panelist went on to insist that "we should be standing for mediation agreements to be uniformly excluded from such a definition."

How did he justify excluding the preparation of mediation agreements as representing the practice of law? He started by saying that "Settlement agreements in divorce mediation should be no different from settlement agreements in other matters." He then argued that students, clerks and volunteers are not only routinely employed "to mediate in small claims, municipal and landlord tenant courts" but that the court "trains and requires the mediators to prepare settlement agreements when the process is successfully completed." If that does not constitute the unauthorized practice of law, then neither does a divorce mediator's preparing the parties' ultimate agreement.

The document prepared by a divorce mediator is not a "settlement agreement" consisting of one or two pages. It is a very comprehensive agreement (When the parties have children, my agreements typically run to at least fifty or more double-spaced pages, not including attachments). None of us would suggest that a student, clerk or volunteer would be competent to prepare a partnership agreement for two people who were planning to go into business together. What makes them more competent to prepare an agreement for the two of them when they are dissolving their business? Nothing, and referring to it as a "settlement agreement" does not change that.

There was another argument made that was no better. This was based on the fact that so many people today get divorced pro se (acting as their own attorneys). They not only process their divorce papers on their own, but they also prepare (draft) their property settlement agreement or separation agreement by themselves, without anyone else's assistance. Let us grant that the attorney who advanced this argument has established that the parties who appeared pro se were competent to prepare their own agreement and perform an act that we thought was strictly within the competence of lawyers alone. Let us go further and assume that, carried away by what they have done, one of them decides to help others who find themselves faced with a similar problem. He is going to hold himself out not as a divorce mediator but as a divorce consultant. In other words, like divorce mediators who are mental health professionals, he is going to prepare the agreements that divorcing husbands and wives have come to and will ultimately sign.

And, like a mental health professional now acting in the same capacity as a divorce mediator, he is going to charge them for his services.

Are any of us going to feel comfortable with this? To put it more directly, will even the attorney who used this as the basis for her contention that mental health professionals acting as divorce mediators should be permitted to do this feel comfortable with this suggestion? The question is a rhetorical one. As a matter of public policy, we do not want to give lawyers such a monopoly when it comes to the law that private citizens cannot do their own legal work, whether they are competent to do so or not. But, this does not mean that we are willing to expose the general public to their incompetence.

However, the irresponsibility here goes beyond that. In the name of certification and the need that it has created to erase any distinction between the two principal disciplines that have contributed to this field, we seem willing to reduce to literally nothing the skills that go into becoming a lawyer. If I were to suggest that, on the basis of the two weeks that I spent in a Psych 101 course, I am competent to do psychotherapy, I would be laughed out of the room. But, that is exactly what we are saying when it comes to the practice of law. There is nothing so special about it. If you can read English, you can read and understand a legal decision. And if you can write in English, you can draft a separation agreement.

One panelist went further; in a private conversation he said that, on the same basis, a divorce mediator who was not an attorney could even express a legal opinion! No, he can't. To express a legal opinion is to make a prediction as to what a court will do in a particular situation.

(Cont. on Pg. 14)

The Ethical Edge: New Summer 2013 Question

How Much Legal Information Should Family Mediators Provide?

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.

The title of this article is the Summer 2013 Ethical Edge question for this column. I am seeking responses – sooner rather than later so you don't forget – which will be included in the Fall 2013 issue of *The Professional Family Mediator*.

This question really gets at defining the boundaries or "ethical edges" between the practice of Professional Family Mediation and the practice of law. Here are a few sub-questions for you to consider:

A. Does it matter whether the mediator is a lawyer or non-lawyer?
B. Can a mediator tell clients about the general state of the law in areas they know about?
C. Can a mediator give clients copies of laws, while recommending they get legal advice but not knowing if they did?
D. How much detail can ethical mediators give clients about child support, alimony and property division, as well as parenting litigation? And does it matter if the mediator is a lawyer, CPA, therapist, or is otherwise well-trained in these issues?

I look forward to your responses, partly because APFM is looking at Training and Certification standards and it would be helpful to know how far APFM members think we should go in this area without violating ethical standards for mediators or lawyers.

More on the question from the Spring 2013 issue of TPFM: Should Mediators Write Divorce Agreements?

I advertently left out one of the responses last time on this question and thought it should be included now, especially as it leads into the new question. These are the responses of Kate Cullen, a professional mediator and university teacher and trainer in Maryland, where these issues are being discussed in the judicial and legislative systems.

1. CAN a lawyer-mediator ethically draft the divorce agreement to be filed with the court?
"Yes"

2. SHOULD a lawyer-mediator ethically draft the divorce agreement, as a best practice?
"Yes, but without legalese"

3. CAN a non-lawyer-mediator ethically draft the divorce agreement to be filed with the court?
"Yes. I do this all the time both in my private practice and as an in-house court mediator in Maryland. The MOUs are divided into two; one as a parenting plan, and one as a financial and property MOU. If the participants wish, they can have their own attorneys review the MOUs, or they can use a neutral attorney. Most, however, do not use attorneys. They can also have a financial "advisor" come into the mediation to assist them if they wish, although this is a very small percentage of clients. Many will seek their own financial advisors and bring the information into the mediation process."

4. SHOULD a non-lawyer-mediator draft the divorce agreement, as a best practice.
"Yes. I do not like the term 'lawyer-mediators'; they are either acting as mediators or as lawyers. People do not say social work-mediators, or psychologist-mediators, or CPA-mediators, etc. We are mediators when serving in that role for participants. We cannot move forward and be recognized as a profession until we drop this perception/attitude. To continue to use this term keeps us as a 'legal' profession, which we are not."

<u>Bill Eddy's additional comments:</u>

I wrote extensively in the Spring 2013 Issue on this subject, but I'll add a few more thoughts:

Professions are changing rapidly these days. New professions with training and certification are establishing themselves where others used to have total dominance. I came up in the clinical social work field, and I know that there was a time when only doctors could testify in court and only doctors had a doctor-patient confidentiality privilege. Then psychologists came along and became recognized with some of the same skills, from a different perspective. They were the testing experts and couldn't prescribe medications. The ethical edges were established.

Then along came clinical social workers and licensing, and professional counselors, and marriage and family counselors. In addictions treatment, there are now recovery counselors, with their own standards for certification. These were turf battles to be sure, but each profession is well-established now.

In the legal field, there are paralegals with standards and training, although mostly not with state certification or strict requirements. They almost all work under a lawyer, which protects them – but some work on their own. Now, the turf battles over "unlicensed practice of law" are occurring again in some states. At the same time, law schools today are in a panic over a sudden drop in applicants and a wide-spread belief that lawyers may have priced themselves out of service to most individuals that need them. The relevancy of legal training is also a concern, with a growing emphasis on offering more clinics and hands on training. There is discussion of shortening law school to 2 years, moving up the bar exam and having more specific skills to apply right away – especially in areas currently underserved.

In this context, having mediators write divorce agreements may fit into the trends. The ethical edge may not be a sharp as it used to be. The fear of tackling this issue in the past was the unlicensed practice of law. But with clients abandoning lawyers (many states have one or both parties unrepresented in 75% or more of cases), and the judiciary and legislatures showing more concern about unrepresented parties, this subject appears to becoming ripe. Perhaps this is an opportunity for APFM to lead the way! We will see!

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Book Review

By Franklin R. Garfield

Common Sense, Legal Sense and Nonsense about Divorce by Lenard Marlow is written for divorcing spouses. The essential message of the book is simple and straightforward: Divorcing spouses must solve certain personal and practical problems that may or may not have legal implications. If they go off to separate lawyers in order to do that, they are starting a process that will result in financial ruin and emotional devastation.

"Common sense" refers to the parties' good judgment and the personal considerations that are important to them. According to Marlow, that's all they need to solve their problems. In contrast, he characterizes the idea that the parties have legal rights, that their legal rights trump all other considerations, and that only a lawyer can protect those rights as nonsense. To Marlow, the legal rights so venerated by lawyers are nothing more than arbitrary legal rules that vary from state to state. If and only if it will help them solve their problems, the parties may sensibly resort to the laws of the state in which they reside.

Marlow's argument in a nutshell is that the law does not necessarily provide the parties with answers to their questions, or solutions to their problems. This is primarily because the law as it applies to the facts of any given case is subject to interpretation. When the parties get answers to their questions from separate lawyers, the answers they get are different, because each lawyer interprets the law in a manner that is most favorable to the party he or she represents. The idea that the parties should get answers to their questions from separate lawyers – indeed, that they should be represented by separate lawyers – is the premise on which the adversarial system is based, and it is the efficacy of that system that Marlow questions in this book.

What Marlow means by "common sense" (the personal considerations that are important to the parties) and "nonsense" (a never-ending debate between the parties' lawyers as to how the law should be interpreted and applied) is tolerably clear. However, the meaning of "legal sense" and its role in the process deserve further explanation. By legal sense, Marlow means those principles of law that are helpful to the parties in resolving their situation. When those principles are definitive (i.e., not subject to interpretation), they control the outcome.

But, for sure, their application may not satisfy both parties. After all, one party or the other usually believes that the law is unfair in various respects. However, if the law is definitive, the parties are stuck with it. They may agree to a resolution that satisfies their own notions of fairness, but if they do not agree, the law is the default. In California, for example, the law mandates an equal division of the parties' community property. The parties may disagree about the value of a community asset, whether one party is entitled to reimbursement for the contribution of separate property to its acquisition or improvement, how the asset will be divided or awarded to one party or the other, and so forth. But, the law requires an equal division in every case regardless of the parties' notions of fairness.

Franklin R. Garfield, has been a California lawyer since 1971, a divorce lawyer since 1975 and a family mediator since 1992. In the past 20 years, he has mediated approximately 1,500 divorces.

On the one hand, the parties may agree to divide their community property unequally; they are not required to follow the law. On the other hand, unless there is consideration for an unequal division – for example, a waiver of the right to receive spousal support – an unequal division of the parties' community property is rare. In this respect, laws that are not subject to interpretation help the parties avoid their own version of the endless debate that lawyers engage in routinely.

The ultimate absurdity of the adversarial system is illustrated by two points: First, virtually no one wants to go to Court; second, only a very small percentage of all divorce cases are resolved by a judge. In the vast majority of cases, lawyers engage in a prolonged and expensive debate on behalf of their clients without ever providing the parties with answers to their questions or solutions to their problems. The reason for this is simple. As Marlow puts it: "Since your attorney is an advocate, not a law professor, he will not view his function to be to take [the facts of your case] and organize them so as to give you an objective picture of the law. He will view it, instead, to be to take those facts and organize them so as to make the best possible case that he can for you." If the parties knew from the outset that an adversarial procedure would leave them only with a range of possible answers instead of the right answer, no one would choose it. The case does not end when the parties are finally given the right answer. The case ends when the parties are financially and emotionally exhausted.

Marlow conceptualizes the problems that confront divorcing couples in the form of three questions: How will we dispose of our property? How will we raise our children? How will we manage financially? Marlow disputes the notion that these problems become easier to solve when they are translated into the legalese that lawyers routinely employ. Most divorcing couples understand that the legal system will not tell them the right way to co-parent their children. After all, raising children has nothing to do with legal rights and duties. It would never even occur to parties who are married and living together to ask whether they had legal rights and duties when it came to raising their children. It is only when the parties are no longer married and living together that they are encouraged to think in these terms. Although less obvious, this is equally true when it comes to dividing the parties' property and providing for themselves financially.

Common Sense, Legal Sense and Nonsense about Divorce is replete with illustrations of the author's points that are accessible to the lay reader. For example, confronted with a problem, a couple must choose the procedure they will employ to solve that problem. Marlow posits five requirements for any procedure, and notes that the flip of a coin meets four of them: It is quick. It is cheap. It avoids emotional wear and tear. And, it provides a definitive answer, although not necessarily the right one.

(Cont. on Pg. 15)

"Development of Kinship Titles for Step-Family Members" Cont. from Pg. 1

The use of the term step- makes sense when considering the unfortunate high mortality rate in the earlier centuries. Often, a husband or wife would die while their spouse was still relatively young. The necessity to marry for survival purposes was clear at the time, and, more often than not, the new spouse served as a replacement parent, rather than a parent in addition to their original mother or father, as is much more commonly found today. Furthermore, the perpetuation of fairy-tale stories in popular culture which portray the stepmother as "wicked" has not helped matters. When stepparent-stepchild relationships are created by divorce and remarriage, the understanding of who a stepmother is to the child is not only unclear, but is expected to be negative. Margaret Mead noted that the word "Stepmother", inappropriate in the case of divorce, has unfortunate implications and is outmoded (Bohannan & Mead, 1970). Modern examples of the negative nuances associated with the title "step" are seen frequently. An NPR broadcast titled "More blended families reject the 'Step' title" highlights the public's conscious awareness of the negative associations of being a step-anything, and these individuals push back against calling themselves step-families. Public awareness of this issue on radio shows and other public media suggests that the current titles are not working for people. But, how do we develop new titles for "step" family members?

Some stepchildren refer to their stepparent by their first name. However, "Using the first name may undermine a good authority relationship" (Bohannon & Mead, 1970). Yet, when both parties (child and stepparent) mutually develop and consent to a name, these undermining qualities may disappear. Another problem that occurs in developing kinship titles is the loyalty conflict some children experience. This conflict emerges when children try to balance the relationship between their two mother or two father figures. As can be expected, some children may experience stress because they want to refer to their stepdad or stepmom as "Dad" or as "Mom". This makes sense, especially when a parent is non-residential and mostly out of the picture, or when the child develops a positive and rewarding relationship with the stepparent. Similarly, the distaste associated with using the term "step-" to introduce or describe familial relationships may also play out in the development of these relationships. Perhaps in an effort to disown the word "step-" children and adolescents may ultimately resort to referring to their stepparents as "dad's wife" or "mom's husband". These occurrences point to the need for a more acceptable terminology that is conducive to the formation of positive step-family relationships.

While the current use of "step-" when referring to stepparents and stepchildren may not be the best kinship title for these relationships, at least they are somewhat institutionalized within step-families and society as a whole. As noted before, there is an array of relationships born of divorce and remarriage that still lack definitive identifying terms. In recognition of this need, various terms have been proposed to get the dialogue started. Ray C. Tulsa (Tulsa, 1996 as cited in Stewart, 2007, pp.40) wrote to the Ann Landers lifestyle column with a list of suggested terms to combat the issue of "How to address relatives other than by first name" that included the following:

Stepson = Ston
Stepdaughter = Staughter
Stepfather = Stather or Stad
Stepmother = Stother or Stom
Stepgrandfather = Stampa
Stepgrandmother = Stamma
Stepbrother = Stother (or stro if you are close)
Stepsister = Stister or stis
Stepcousin = Stousin (or Stuz if you are close)
Stepaunt = Staunt
Stepuncle = Stuncle.

These suggested terms only hit the tip of the iceberg and are certainly not ideal, but at least they are a start.

One other important set of relationships without formal identifying terms are long-term cohabitating couples who have chosen not to marry. These relationships frequently exhibit the same level of commitment and intertwining of lives seen in legally married couples, yet without the officiating legal documents, ceremonies, or titles. So, how do such couples navigate their relationships without formal identifying terms? One website, Parakin.com, has created a blog/resource online for long-term cohabitating couples who are not married but are just as committed to their life stability together. The creators of the site explain that we need words like "para-kin" and its derivatives (e.g. para-wife; para-husband; para-son; para-daughter, or P-wife; P-husband, etc.) "to help identify these loving relationships as a family" (Para-kin.com, 6-1-13). They liken the term "para-kin" to para-legal or para-medic in the sense that both parties accept "the responsibilities, obligations, commitments to a partner/child" (Para-kin.com, 6-1-13), but in the eyes of society are not fully doctors, lawyers, spouses, or step-parents. Yet, the lack of institutionalization of these families, evident in the absence of definitive identifying terms, serves to undermine the relationships these families might otherwise be able to foster.

As a society whose prevalence of step-families has been on the rise and there is no apparent end, we need to come together to consider the importance of creating long-lasting, non-pejorative terms for newly created kinship networks that surface after divorce and remarriage. Two major problems remain: 1) The terms already in place for step-families, like stepmother or stepchild, still maintain a stigma; and 2) There are many relationships that emerge from remarriage that entirely lack kinship titles. If we as a society are to encourage supportive and loving family environments, it is time to expand the definition of family and create appropriate and respectful titles for the growing number of expanded families in the United States.

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"To the Honored Dedicated Vital View" Cont. from Pg. 4

These Vital Few will:

- have mediated at least 500 full divorce cases (parenting, support, equitable distribution);
- have 10,000 hours of mediation practice experience of which at least 5,000 hours will have been face-to-face mediation time;
- have earned at least 60 percent of his or her income from the practice of family mediation each of the past seven years (the seven years may be waived for a member of the academic community whose active practice has been curtailed as a full-time faculty member);
- have specialized knowledge in mediation theory and practice and one or more of the core subject areas (family law, tax and finance, family and child psychology, or other relevant subject area); and
- have a special passion for contributing to a new era for family mediation as a distinct profession.

The cream of the Vital Few (the 20% of the 20%) will earnestly commit to:

- attend up to two in-person meetings of up to three days each in the first ten months of development (reasonable travel and lodging expenses will be paid);
- contribute an average of two hours per week (one full day per month) for ten months to work on the drafting the underlying program and the inventory of test questions; and
- place the goals of the certification's development in the highest priority among their responsibilities.

This group will be divided into two teams, as needed; one to define the profession and create the administrative structure, and one to develop the certification criteria and the testing instruments. Some cross-team collaboration will be necessary.

If you feel called to answer this invitation, please send a memo to Rod Wells attesting to the qualifications above (such as a biography edited for the purpose of the selection committee based on the above listed criteria). Also, include a statement of approximately 500-1000 words outlining why you think an accredited certification is important enough to commit yourself to this noble goal.

I trust that all who volunteer will be anxious to serve this vision in the pure spirit of generosity and altruism, however, we can also offer a little incentive; The Vital Few will have the option to be among the first to take the certification test and thereby be among the first to be granted the certification. The intention is to have the test ready by the third or fourth quarter of 2014.

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"Toward a Unified Profession of Family Mediation" Cont. from Pg. 5

When any of these situations exist in a given case, consideration should be given to involving an impartial expert.

Financial planning. When marriage ends, the parties should consider working out a financial plan for present income and expenses and a more comprehensive plan for the future for each of them, all the way to retirement. But, this happens all too rarely and the adversarial process does virtually nothing to encourage it. Whenever possible, the financial plans should be done cooperatively. If just one party to a divorce consults a financial planner, the advice is likely to be directed only to her or his separate needs, which may not be practical when the overall financial situation of both parties is considered. A mediator who is not a financial planner should always consider whether involving an impartial financial planner might be appropriate to assist both parties in making consistent and practical short- and longer-term financial plans. This can even be a useful conflict resolution technique in some cases.

Using "people" skills. "People" skills are the various ways that helping professionals (including attorneys) have developed to relate effectively to clients. These include active listening, reading body language, knowing when and how to use open-ended questions to elicit information, being able to deal effectively with anger and defensiveness, creating a safe environment for clients, maintaining professional boundaries, and the appropriate use of humor. Mediators add to these a wide range of conflict resolution techniques, ranging from the ideas in "Getting to Yes" to the Thomas-Kilmann model , and many, many others. How mediations are organized is often important to their success. Common skills are found throughout the helping professions, but they are often implemented and supplemented in different ways in each. The most useful "people" skills of a professional family mediator are a different mix from those of any other helping profession.

Drafting the agreement. The goal of the mediation process is the development of a legally enforceable agreement, so careful thought needs to be given as to how it is to be drafted. Unfortunately, no profession has anything close to a monopoly on good drafting. Attorneys should be the experts on drafting, but too many lawyers still draft a settlement agreement as if it were a corporate contract from half a century ago. Revising a mediated agreement should be a collaborative exercise among the mediator, the clients, and at times their attorneys, so it has to be both readable and accurate. The primary cause of bad drafting is outmoded office formbooks. There are not nearly enough courses in drafting agreements for mediators.

(Cont. on Pg. 14)

"Toward a Unified Profession of Family Mediation" Cont. from Pg. 13

It should not be considered the unauthorized practice of law for a properly trained family mediator of any profession to draft the resulting agreement.

Collaborative practice. Family mediators who have not been certified for collaborative practice should consider doing so. Collaborative practice is open to most, if not all, of the members of APFM. Collaborative practice groups are excellent places to make contacts with other professionals. Everyone who is certified for collaborative practice also must have basic mediator training. Many collaborate practice groups have regular meetings for the exchange of ideas and information among like-minded professionals. Mediation and collaborative practice are in a sense competitive, but they both represent a similar professional broadening of the field of marital settlements beyond the purely legal. They both demonstrate respect and consultation across professional boundaries. Nothing prevents using an impartial mediator in a collaborative case or having collaborative attorneys represent the parties in mediation. Both processes are open to integrating impartial experts, such as financial planners, accountants and vocational specialists, as needed.

Attorneys as family mediators. Attorneys with substantial experience in settling cases in the adversarial process have a good working knowledge of substantive trade-off options. That is how most cases are resolved out of court in the adversarial system. At its best, experience in the adversarial system is what enables a divorce lawyer to understand both sides of a case, to be aware of settlement options, and even to acquire instincts that work well in mediation. But there are five areas that lawyers should consider as possible obstacles to the most effective and comprehensive mediation: (1) excessive focus on the formal legal framework; (2) inappropriate use of "what the court might do" as a cop-out; (3) lack of openness to learn from other professions; (4) insufficient attention to the differences between mediation and law practice, especially at the level of relevant process skills; and (5) failure to recognize the full potential of family mediation. Very few family lawyers who do mediation have considered it important to affiliate with mediation organizations such as the Academy of Professional Family Mediators. As the legal profession continues to move toward greater use of mediation, APFM can help attorneys broaden the scope and goals of their mediation practices.

The Professional Family Mediator

The founders of APFM merit lots of credit for finally putting family mediation on the proper track to be a recognized profession. Rod Wells deserves our gratitude for his excellent job of leading APFM in the right direction in a crucial year of transition. So does Don Saposnek, for developing and editing *The Professional Family Mediator*. The members of APFM are an impressive group, both for experience and professional diversity. The past and upcoming annual conferences and the periodic teleconferences also demonstrate an organization in good hands, moving in the right direction. No other single profession comes even close to possessing all of the skills and knowledge of the "professional family mediator." It is most appropriate that APFM is actively working on standards and procedures for certification.

Jim Coogler used to say that mediation can solve problems, while courts only decide cases. So let us define the challenge as not just to achieve a fair and workable agreement to keep the case out of court, but also to promote cooperative parenting and sound financial and career planning post-divorce. Then, let us identify the process skills and substantive knowledge that are relevant to those goals, and help all family mediators who wish to do so possess these at a very professional level.

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"A House Divided Part II" Cont. from Pg. 9

The problem, as any competent lawyer will tell you, is that it is not possible to know that with any reliable certainty, which is why a responsible lawyer will be very careful when it comes to expressing a legal opinion. I won't even get into the fact that any opinion that a mediator expresses cannot help but favor one of the parties, which is why a competent mediator will be very careful when it comes to expressing any legal opinion. He is supposed to be a neutral third party, not an advocate for one of the parties.

The same is true when it comes to drafting a legal document. Knowing how to write a letter to a friend does not make one competent to draft an agreement, particularly one as complicated as the one under discussion here, which in most instances is going to define the parties' financial relationship with one another for years to come. In fact, drafting is one of the most difficult tasks a lawyer is required to perform, and if the truth be told, far too many lawyers are seriously deficient in this area.

What is the answer here? Pursuing that would take us too far afield here. All that I am going to say is that the answer is not to push for certification at the expense of blurring the distinction between being a lawyer and not being a lawyer. Providing legal information, expressing legal opinions and drafting legal documents are not activities which any divorce mediator has the right to engage in unless he is a lawyer, and to suggest otherwise is irresponsible.

There is one final problem here and it, too, bears on the issue of responsibility. Those who are championing the idea that non-lawyer divorce mediators should have the right to draft the couple's ultimate agreement, and who have based that on the fact that students, clerks and volunteers are permitted to do that in small claims, municipal and landlord-tenant courts, have implied that there is judicial authority for this. In other words, they are suggesting that it has been determined, as a matter of law, that this does not constitute the unauthorized practice of law. But, that is simply not the case.

(Cont. on Pg. 15)

"A House Divided Part II" Cont. from Pg. 14

That is why the courts mentioned enlisting the help of students, clerks and volunteers. But, they are not really performing legal services. They are simply acting as intermediaries. To be sure, it is our public policy to encourage private citizens to resolve their disputes quickly and inexpensively and to give them whatever assistance is necessary for that purpose.

For the same public policy reason, the court then allows them to write down the settlement agreement that the parties have come to, which is little more than a ministerial act, and certainly not the act of lawyering that is involved in drafting a complex separation agreement.

If there is really no formal judicial sanction for this practice, why have lawyers not questioned it? They have certainly questioned lawyers drafting agreements for the parties under these circumstances, and there are numerous ethics opinions taking lawyers to task for doing this. If it is not clear whether it is ethical for a lawyer acting as a mediator to prepare the ultimate agreement that the parties will sign, how can it be argued that there is no question that it is appropriate for a non-lawyer mediator to do this?

That raises another question: If the organized bar has questioned the propriety of an attorney acting as a mediator to draft the parties' ultimate agreement, why have they not questioned the fact that all of these students, clerks and volunteers are drafting "settlement agreements"? They have not questioned it because they do not care. The organized bar does not make its living in small claims, municipal or landlord tenant court. Nor do they make their living with divorcing husbands and wives who represent themselves pro se; couples who appear pro se cannot afford their services. But, they do make their living in those instances when divorcing husbands and wives turn for help, whether it is to divorce mediators or divorce lawyers, and as experience has taught us, they are not going to look away. On the contrary, they are going to be zealous advocates for their own cause, which is not to have people who are not lawyers and who therefore do not have the benefit of a legal education, take food out of their mouths. In short, they are going to challenge non-lawyers who have been encouraged to engage in this practice to defend the charge that they are engaged in the unauthorized practice of law.

This is where the issue of responsibility comes in. If any state or national organization passes a resolution authorizing non-lawyers to draft the parties' ultimate agreement, it should include a warning, to read something like the following:

"WARNING: The adoption of this resolution authorizing non-lawyer divorce mediators to draft or supervise the execution of the parties' ultimate agreement does not constitute a legal opinion and such conduct does not represent the unauthorized practice of law, and it should not be so construed. It is just the expression of the opinion of this organization, many of whose members are not lawyers. Accordingly, any non-lawyer mediator who is considering performing any of these services should not rely exclusively on the opinion expressed by this organization. Rather, they should consult with their own attorney and ask him or her to provide them, in writing, their opinion that such conduct is not in violation of the law and will not subject them to the charge of the unauthorized practice of law."

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"Book Review" Cont. from Pg. 11

While many people will bristle at the thought of deciding important issues with the flip of a coin, Marlow's point is that any alternative procedure should be at least as good. Admitting that the flip of a coin meets only four of the author's five procedural requirements, he reminds the reader that negotiating through attorneys meets none of them.
Lawyers whose livelihoods depend upon the adversarial system are unlikely to read this book, let alone promote it. The necessity of separate representation to vouchsafe the parties' legal rights is a hallowed principle of the Anglo-American legal tradition. Lawyers will defend that principle to the death.

Individuals on the verge of divorce are anxious about what the future holds and predisposed to consult attorneys; not to go it alone. The belief that an attorney will protect them and that they need to be protected is embedded in the popular consciousness. Along these lines, Marlow does not answer (or even address) several questions that occurred to me as I read this book: First, what accounts for the power of the myth that a divorce case is about the parties' legal rights, that they need to be protected from each other, and that only separate attorneys can provide that protection? Why is it so much easier for divorcing spouses to believe these lies than to accept the truth? In my opinion, it is because attorneys offer the parties hope for a better future than the one they envision. That hope invariably turns out to be false, but it is hope nonetheless. Second, as mediators, we already know the truth of what Marlow is saying – that divorcing spouses need to solve personal and practical problems with legal implications, that a mediator can provide them with all of the legal information they might need, and that the adversarial system does not deliver on its promises. So why do so many of us recommend (and some of us require) that our mediation clients consult independent counsel?

Common Sense, Legal Sense and Nonsense about Divorce is clear, concise and convincing. It deserves to find an audience. At a minimum, it should be required reading for every couple contemplating divorce.

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ANNOUNCEMENTS

APFM's Approved Training Standards

Carl Cangelosi and Anju Jessani will chair The Trainers' Forum, Session 14.8, at our Annual Conference in Denver, in October, titled: "Brain Storming and Pedagogy for Trainers on the Eve of APFM Certification." The Forum is an important opportunity for trainers to contribute to APFM's Approved Training Standards. If you are a Trainer or know of any Trainers please contact Carl (ccangelosi@njmediation.org) or Anju (ajessani@dwdmediation.org), so that mutual contact can be made before the Conference.

Opportunity to Participate in Mediation Research

APFM has partnered with an exciting research project to explore the dynamics and efficacy of mediators' use of language. The project is a collaboration with Professor Elizabeth Stokoe of Loughborough University. Professor Elizabeth Stokoe has worked with mediation services since 1997 and has received high praise for her past research. More importantly, she is very aware of the importance of protecting the confidentiality of research participants in mediations. This project is designed to pay particular attention to preserving confidentiality through the use of modern audio-visual technology. To borrow from an old Madison Avenue hair dye campaign . . . "Only the researcher will know."

Any videos used in training will have voices disguised with audio distortion and faces mask with blur discs. APFM members have already been providing tapes of their real life sessions to be analyzed, and the results will form the basis for advanced trainings for mediators in the effective use of language in mediation. Several tapes have already been analyzed, but, like with most research, a larger sample is better. The APFM Advanced Trainings that follows the research will be available to participating mediators without charge. Please consider supporting this project. If you are an APFM member and are available to contribute three or four videotaped sessions, please contact Rod Wells at roddywells@gmail.com. APFM will assist you with taping equipment if you do not have it available.

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