The Professional
FAMILY MEDIATOR

Feature Article

WINTER 2013

APFM
ACADEMY OF PROFESSIONAL FAMILY MEDIATORS

Self-Determination and Standards of Practice

By Larry Gaughan

Larry Gaughan is a Virginia attorney who has specialized in family mediation since 1980 and has handled approximately 3,500 mediation cases. He was one of the founders of the Academy of Family Mediation and is a founding member of APFM.

When I joined the Academy, it was my hope that this organization would provide a better forum than ACR for experienced family mediators to exchange ideas and experience. The Fall 2012 issue of The Professional Family Mediator was very consistent with the above goal, and although I was unable to attend the First Annual Conference in Cape Cod, I am told that was quite successful.

That being said, I'm not sure I understand why framing APFM Standards of Practice is a top priority. As I scroll through the membership of APFM, I see an impressive list of experienced, ethical mediators, most, if not all, of whom already have one or more sets of ethical standards to follow. For example, I am subject to two sets of imposed ethical standards. One is as a mediator certified by the Virginia Supreme Court, and the other as an attorney mediator subject to the ethics code of the Virginia State Bar.

If there is no pressing need for another set of standards for our own membership, then might I suppose we are thinking about the need for a set of ethical standards that may be looked at by mediators who are not members of APFM? But, if we're the "new kid on the block" coming in to organize the neighborhood, shouldn't we first make sure that we have established our own credibility.

So, for example, if one purpose for APFM to get involved in standards of practice is to deal with a concern over the impact on mediation of the consortiums of retired judges, this could well be a wasted effort, for two reasons: (1) those mediators are unlikely to join APFM and may not even have heard of our organization, and (2) retired judges are likely to have far more political clout than APFM on any issues regarding standards of practice in a particular state. Let us first establish our credibility as sharers of ideas and experience before we start lecturing to ourselves and to others about how to practice ethical mediation.

I have another concern, as well. As I look over our proposed ethical standards, I fully agree with the focus on self-determination of the parties and with the prohibitions against mediator coercion. However, I have a concern that the standards under discussion are based upon definitions of "self-determination" that do not take into account the full complexity of this issue. My concern is not that these definitions of self-determination are too broadly expressed, but rather that they are too constricted. Any writing and discussion about this very important issue of self-determination in the mediation process should take into account a range of specific situations and considerations, including the following:

1. Most of the people who come into mediation have, as a self-determined goal, to resolve the concrete disputes they are struggling with, so as to avoid becoming embroiled in attorney negotiations and/or court hearings. Just getting the case settled is often their most important goal.
2. The self-determined goal of most of these clients is also to resolve any disputes they may have in a fair and workable manner. And most people expect that their agreement will meet reasonably consistent community standards and that it be practical.
3. Many mediation clients also have the self-determined goal of having the mediator provide them with impartial and accurate legal and practical information so that they can make educated decisions. Education is often a very important part of mediation, especially when it has to do with helping the parties articulate the available options. Creative settlement options often involve legal and practical technicalities, such as pension or tax law, definitions of marital and separate property, and parenting options. These frequently require substantive knowledge (as well as process experience) on the part of the mediator.
4. Many of the problems in getting a mediated agreement have to do with the fact that the self-determination of one party is different from that of the other party. "Getting to yes" often involves finding an objective basis for choosing among the available options. The parties often depend upon the mediator to help them find settlement options that make sense in their situation and are reasonably consistent with community standards.
5. Clients should have the right, as part of their self-determination, to choose the kind of process they want for the mediation, whether facilitative, evaluative, or transformative, or some combination of these.
6. If the parties so agree, they can also self-determine to involve in the mediation process third party experts, such as custody evaluators, tax experts, real estate appraisers, business valuation experts, counselors, financial planners, retirement experts, etc. Often these third party experts are expected to provide non-binding recommendations.
7. If the mediation reaches an impasse, should not the clients be able to exercise their self-determination (if they both so agree) to request the mediator to make non-binding recommendations for a settlement? If the mediator accepts this role, careful consideration should be given to the manner in which it is carried out.

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Academy of Professional Family Mediators

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The Professional Family Mediator

The Professional Family Mediator is the newsletter of the Academy of Professional Family Mediators, a professional organization dedicated entirely to the practice of Family Mediation as a profession. The newsletter is published quarterly as a member service.

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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The Professional FAMILY MEDIATOR

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Editor's Notes

"So Much Polarization"

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.

Gun Control—Immigration Reform—Debt Ceiling/Fiscal Cliff—Certification for Mediators— All these political issues that have become (or continued to be) polarized can be understood within the same conceptual frame as we understand our high conflict divorce cases. Polarizations result in disagreements, then in POSITIONS, then in ANGER, then in IMPASSE (or in severe cases, in VIOLENCE). However, as we do in effective mediations, we should try to analyze the underlying feelings and resulting hidden agendas. A typical analysis looks something like this: On the surface, people in a dispute have a real need which they express overtly as a want; if this want conflicts with and is not acceptable to the other side, there is an impasse which gets inflamed to whatever degree it goes.

We know from psychology that what lurks behind anger is a more vulnerable feeling, such as fear of a loss. However, by staying in anger and not surfacing the underlying need, each person escalates the threat value to the other and solidifies two opposing POSITIONS. When we approach such positions as logical issues to simply discuss to resolution, we often get stuck; you cannot use simple rational discourse to resolve an essentially emotional need. We have a hard time recognizing this and, instead, may react to the dispute with our own emotions. However, this often winds up with us getting as stuck at the level of polarization as are the disputants. As a facilitator, you may either wind up feeling compelled to pick a side and subtly to overtly sway towards it, while risking losing your neutrality, or you have to move the discussion away from the level of wants down to the level of needs, emotions, and interests.

Ultimately, in an impasse, each side fears losing something: In disputes over Gun Control, it is losing more innocent lives vs. losing personal safety and protection; in disputes over Immigration Reform, it is losing talented people and necessary social contributions of immigrants vs. losing potential American jobs; in disputes over the Debt Ceiling/Fiscal Cliff, it is losing on-going social programs vs. losing tax money to excessive interest payments; and, in disputes over Certification for Mediators, it is losing quality control for consumers vs. losing personal/professional autonomy to future regulators.

Polarizations at low levels of intensity, with flexibility of disputants and openness to other points of view, yield compromise, creativity and resolution. However, once disputants get positioned, then more arguing yields more intensity and impasse. Our skills as mediators help us to find common ground and encourage new, creative and inclusive resolutions to disputes. I wonder how each of us would facilitate an effective resolution to the gun control discourse, which most recently was largely stimulated by the Sandy Hook shootings. It seems that the NRA and the ardent gun owners fear losing their second amendment rights of protection from an imagined future "tyranny of the government," while the other side fears losing its children to future gun violence. Others in the discourse cite, as better solutions, background checks to gun purchases, enhanced mental health resources, and reduction in violent video games and other media.

How similar this is to a high conflict divorce, in which a father may fear losing his children or financial assets, while a mother may fear losing her identity as a full-time parent and adequate financial support, both to the "tyranny of the courts" or the 'tyranny of the ex-spouse." Each parent offers solutions to the dispute as gaining sole custody of the children and receipt of financial support from the other parent. As they each continue to scare each other with verbal threats and attacks, the impasse deepens beyond reason; on a national level for the political disputes, and on the familial level for the divorce disputes. The dynamics of fear are rampant in both types of disputes. "Can we all just get along?" How could we use our skills in intervening in divorce cases to deescalate the national discourse on violence?

One way to achieve this is to read the articles within this issue of *The Professional Family Mediator*. Our lead article is by one of the elders of family mediation field, Larry Gaughan. In his article, he responds to remarks in Steve Erickson's Column from the Fall 2012 issue about the urgency for setting new Standards of Practice and, in particular, about Steve's interpretation of the Standard of Self-Determination. Larry offers challenging perspectives to these matters which, hopefully, will stimulate some of you to write in with your own reactions to the issues.

In order to help you really get deeply into the controversy, we have, in this same Issue, a rebuttal article to Larry's that is co-authored by Carol Berz and Steve Erickson, two of our Founding Board members. They counter Larry's propositions with some equally compelling arguments. Please let us know your thoughts.

Ada Hasloecher's "Mojo Marketing and Management" Column expands on her last entry about the importance of business cards for your mediation practice with the title, "What Does Your Business Card Say About You?" In this Column, she gives lists of essential vs. non-essential items to include in your business cards—some of which may surprise you.

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Response to Larry Gaughan's Article

By Carol Berz and Stephen K. Erickson

Co-Chairs, APFM's Standards of Practice Committee

In the lead article of this Issue of TPFM, Larry Gaughan observes that in a previous Column that Steve wrote about the self-determination standard, the definitions suggested are too restrictive.

After reading Larry's 18 points, we agree with him that we would be much more restrictive than he and we would discourage a mediator from predicting, evaluating, directing or channeling the participants. Moreover, we would be infinitely more expansive and energetic about encouraging creative, out-of-the-box thinking about what would work for people, even if the resulting agreement is inconsistent with "community standards" and does not follow prevailing thinking in the court or legal community. Since one of the roles of the attorney is to advise a client about the status of the current law, we think it is absolutely essential that professional family mediators restrain or restrict themselves from taking on that role and mixing the role of mediator with that of other professions (including lawyer), regardless of how tantalizing that may seem at the moment, or how qualified a mediator may be about defining for the participants "settlement options that are reasonably consistent with community standards."

The early mediators who founded this field avoided the unfairness of existing law by relying on the idea that fault should not be used as a factor in determining solutions, and by relying on the radical notion that all participants in mediation should be encouraged to create their own standards of fairness, regardless of whether their solution might deviate from state law. As a result of this non-restrictive focus, mediators have helped introduce the world to parenting plans, child support plans that use a joint checkbook for sharing the children's costs, and other creative solutions. As a result of this expansive encouragement of self–determination, professional family mediators have helped lead an international discussion about the true meaning of fairness for families that separate and/or divorce.

Larry seems to seek a middle ground by suggesting that mediation fits in along a continuum or "broad spectrum" of ADR and that a mediator may engage in an evaluative, directive, or arbitration/adjudicative role, if asked to do so either during or after the mediation is attempted. Certainly, there is a multitude of legitimate conflict resolution functions, created as variants, short of outright perpetual litigation. And certainly, people can seek out those systems and pay whatever they want for the professional who is willing to act that way. But, we professional family mediators should always be clear about what we are offering to the public. Our new proposed standards discourage the offering of one thing and the delivering of another. That is, we suggest that one not offer mediation when in fact what is provided is something else, such as settlement conferencing, or early neutral evaluation, or non-binding advisory arbitration, or, for that matter, mediation-therapy.

Over the years, adjudicative processes have seeped into the mediation room in many ways, yet it has not gone the other way—with the courtroom becoming more cooperative. Adjudication has remained an island, almost pure and unchanged, and if anything, ever more adversarial. For example, an attorney engaged in representing a client is duty-bound to advocate for that client only, to advise that client about the law as it applies to his or her case, and generally, to advance the client's wishes. It would be a violation of lawyer ethics to say to a client, "Now, in my representation of you and in my advancing your wishes, I will undertake to also ensure that the other side obtain the best outcome possible, as well, and in representing you in this matter, I will not hesitate to do my best to help the other side in any way that I can. In any state in which one practices law, even if your client asked you to act in such a manner, we don't think you could, as it would be violating several provisions of the lawyer's ethical code of conduct and you would likely be disciplined.

However, the field of mediation has seen more and more colonization and infusion of advocacy by the legal field into the process of mediation, and this is precisely why the Standards, most importantly the Standard on Self-Determination, have drawn a deep line in the sand and concluded, "Enough, enough, enough!" No more co-mingling of roles.

What our APFM Task Force on Recommended Standards has been trying to say (and, what Steve tried to assert in his previous Column) is that mediation must be defined and distinguished with clarity, otherwise mediation will meld into the broad band of alternative adjudicative models, and professional family mediation will become no more than one of a whole spectrum of ADR procedures. Many mediators practicing today still follow the early ideas of complete separation of the fields. Steve's Agreement to Mediate essentially states, "Don't ask me for legal advice, rather go hire an attorney. I am a professional family mediator, not a jack of all trades."

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Carol Berz, LCSW, JD, PhD, is CEO of Private Dispute Resolution Services, LLC, a mediation services and training organization based in Chattanooga, TN. Dr. Berz is a Tenn. Sup. Ct. R. 31 Listed Civil and Family mediator, with advanced training in domestic and workplace violence, and she teaches extensively in both the private and public sectors in the areas of mediation, mediation advocacy and mediation law and ethics. Her specialty is strategic planning relative to costs of corporate conflict. She is on the APFM Board and is co-chair of the Ethics/Standards Committee.

Mojo Marketing and Management

"What Does Your Business Card Say About You?"

By Ada Hasloecher

In the last column, we explored the various reasons why it's a good idea to have your business cards with you at all times, especially when you are walking out the door for a business or social engagement.

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.

Before we talk about business card etiquette, in the next installment, I'd like to start with the appearance of the business card itself. What does it need to look like? What information should be on it? What information should not be on it? How do you feel about having your photo on the card? Is that a good idea? If not, why not? What kind of paper stock is best? What color, font, and logo might you consider?

I can hear you running away already! Too many decisions—too many choices to make—I don't have a picture of myself that I like—Do I have to have one?—I have my cards already and it took me so long to get them done; I'm not happy with them but I don't want to think about going through it all again.

The first thing I would suggest if you do not yet have a business card is to go onto one of any number of printing websites, or visit an office supply store and put something—anything together and don't worry about the look. You can (and will most probably) change the card later on. These companies do make it easy for you to design your own cards.They are cheap enough, and you can always use the less desired cards as a bookmark, once you redesign your card to the one that you really like. The goal is to have something to hand out NOW.

As to what should be on the card, there is the essential information that needs to be included and the nonessential information that you may want to include. I like to keep things simple, clean and readable. To use the vernacular, you don't want it to be *Ongepochket* (Yiddish for "Messed up; excessively decorated; overly baroque").

The <u>essentials</u>:
1. Name
2. Title (Mediator, Esq., etc.)
3. Company name (if applicable)
4. Phone number
5. Business address
6. Email address
7. Website address

The <u>non-essentials</u>:
1. Photograph
2. Logo
3. Tag-line

Now, I would like to address a few of the "essential" items.

Title: At the very least, you want to put the word "mediator" next to your name. If you are also a social worker, psychologist, attorney, etc. and feel that your degrees will enhance your authority, then, by all means add them. I included "Founder" of the Divorce and Family Mediation Center, LLC, as part of my title. Again, anything that demonstrates your strength as an expert in your field is a good thing.

Business address: Clients want to see a business address, and not a P.O. Box. You are conducting your mediations in a physical location and it should be on your card. If I were a potential client and didn't see an address on the card, I would be suspicious.

Email address: You may think that this is a no-brainer. But, I do know some therapists, for example, that do not like to give out their email address to their patients and never include it on their business cards. If you are a therapist who is also a mediator, you may want to consider having two cards – one for your therapy practice and one for your mediation practice. Much of my communication with my clients is done via email, and not having an email address would greatly hinder my ability to communicate with both parties at the same time. You may also want to consider having multiple email addresses for specific purposes (personal, business, etc.)

My thoughts on the "Non-Essentials" are the following:

Photograph: When my business coach first approached this subject with me, I balked big time! I thought it was cheesy (only real estate agents did that), and I resisted it. But, what's the point of having a coach if you don't take the coaching? So, I took the plunge, had my photo taken and added it to my business card and my email signature line and my website and my social media sites and my handouts. What a difference it made! People think they know me even when they have never met me before. It gives me instant recognizability and a familiarity that makes social networking smoother and easier. I do have an inside joke with my family about the photo: I made them promise me that when I no longer look like my picture, they'll be honest with me and tell me when it's time to have a new one taken. Of course, you're always going to select the photo that makes you look like a rock star!

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THE CREATIVE SOLUTION

"Slings and Arrows of Outrageous Fortune"

By Chip Rose

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.

This past year I was reading Hamlet and mentoring my daughter through her senior year of high school. I know that I had not read Shakespeare since I was in high school, and I found the reading again to be just as dense as I remembered it. At the same time, I was struck by the incredible beauty and brilliance of Shakespeare's use of both written and spoken language. It was in that context that I found myself at the end of a particularly taxing day that had ended with a very negative and challenging client interaction. Clients can wear their unhappiness in a variety of different ways and can focus and scan the pointed end of their discontent in a three hundred and sixty degree circle from the center of their being. I am referring to one of those occasions when that laser beam of negativity targets a red dot on the forehead of the mediator and we are being blamed for what ails the client. I was reflecting back on that day's experience when the Bard's words came to mind.

The sources of client complaints are many. For some, it is the fact that their life expectations are being dashed by choices being made by someone else (We will ignore, for the moment, the broader philosophical perspective regarding the choices that the first client made which put him or her in the position of being subject to the choices being made by the second party, since the complaining clients about whom I am talking don't want to hear about this anyway.). For others, it may be their general condition of unhappiness at the state of their personal affairs. Regardless of the source of their discontent, the mediator is challenged to deal with the manifesting behavior of an angry and blaming client. This is the client who goes on the attack, challenging everything, agreeing with nothing, and blaming the one person who has absolutely no responsibility for the circumstances that the clients bring into the process—namely, the mediator.

The complaint can take the form of unhappiness with the facts; for example, the existence of a significant separate property interest that one party has (a common occurrence under California law) which will result in an unequal division of property, or perhaps it is the discovery by the leavee of a significant legal obligation to provide support to the leavor. Not only is the first party being "abandoned," but is also being asked to pay for it. The fact that the instigator of the divorce is the one who committed trust-shattering infidelities which, in No-Fault states, the state considers irrelevant, can be a palpable generator of a client's anger. Whatever the source, the circumstance upon which I am reflecting here is when the client's reaction is aimed at the process in general and the mediator in particular. Swept into the arc of the client's discontent can be anything at hand: the accruing cost of the process, the amount of time that has been spent, the lack of any progress as the client perceives it, the unreasonableness of the law, and the fact that the mediator doesn't seem to be doing anything about it. I would not be surprised to have one throw in the inability of Congress to resolve the debt ceiling. Like the kid with a can of spray paint attacking a brick wall, this client is hell bent on externalizing blame. The question is what we as mediators do about it.

As we are so fond of reminding clients, we have options. When I find myself in this situation, I make a point of remembering some of my earliest experiences in mediation with clients who challenged me directly on some aspect of the process or another. One such vivid recollection involved an over-bearing husband who was challenging me for control of the process. As I felt waves of emotion sweep over me, the internal dialogue that was going on in my head went something like this: "Hey jackass, I am the mediator, you are in my office and this is my process!" I recall finding this to be a very compelling argument that I really wanted to have carry the day. As I gained in experience and increased my capacity for reassessment of every action in my role as mediator, I realized that I fell into a trap when I allowed myself to become defensive. It is probably the most human of reactions in that type of circumstance and something we all experience at some time in conflicted situations. From a professional perspective, it totally subverts any capacity for managing conflict. To react is to be emotional; on the other hand, to respond is to be strategic.

I will always be indebted to our fearless editor, Don Saposnek, for conceptualizing the Aikido metaphor as it applies to our role as mediator. The key element in this concept is the need to engage and dance with the negative energy of the person with whom you are facilitating, rather than trying to confront or overpower that energy. The metaphor coalesced perfectly with my own experiences, which reinforced for me the validity of the concept. The more that one responds rather than reacts to negative energy, the greater the likelihood that the issue will move in a constructive direction. To "dance" with a client's negative energy—especially when that energy is aimed at you—requires an ability to be in a place that is outside one's own emotional self. The ability to hear the complaint or accusation from an intellectual rather than from an emotional place allows the professional to seek the "truth" that the client holds and bring to bear the most appropriate response. That response may take many forms: acknowledgment - making sure the client feels heard; validation - assuring the client that you understand that the emotions expressed are real; empathy - providing compassionate understanding for the circumstance; and curiosity - the willingness to embrace the complaint and dance with it.

Curiosity is the most challenging, and effective, strategic intervention in the face of the expressed negative emotional assault. The ability to demonstrate curiosity contains two critical ingredients:

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The Ethical Edge:
New Winter 2013 Question

"Oops! Does Confidentiality Survive When One of the Clients Dies?"

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.

Where do you land on this ethical edge issue? I'm seeking responses to two questions:

1) What limitations, if any, do you think there should be on a family mediator who discloses otherwise confidential information when one of the clients dies?

2) What, if any, are your state's laws or ethical rules on this subject?

We'd like a robust discussion of this ethical edge issue, so please respond - even a brief paragraph - right away (before you forget about it!). Please write to me right away at billeddy@highconflictinstitute.com, and we will include your responses in the Spring 2013 issue of *The Professional Family Mediator*.

One of the most essential elements of mediation is confidentiality. All Standards mention it and many clients come to mediation because of its strong emphasis on confidentiality. They do not want others knowing their highly personal business.

However, we have seen the limits of confidentiality tested in recent months. A mediator for the parents of Adam Lanza, the shooter at the Sandy Hook Elementary School in Connecticut, allegedly spoke out publically about information that was confidential during a mediation, because one of the clients (the former wife) was shot dead by their son. Is this release of confidential information appropriate? Is it legal? Is it ethical?

I'd like to start off the discussion with my view as a California mediator, therapist and lawyer. Fifteen years ago, a good set of laws [Evidence Code 1115-1128] was adopted in this state about mediation, including: "All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential." If a "participant" wants to disclose a confidential "communication or writing," then he or she has to convince "all persons who conduct or otherwise participate in the mediation [to] expressly agree in writing, or orally [on the record and signed within 72 hours], to disclosure of the communication, document, or writing."

In other words, confidentiality exists for all participants, which includes the mediator, unless all participants agree to release the confidentiality. In other words, any party or the mediator can refuse to disclose confidential information, unless all the parties and the mediator agree to release it. This is a well-reasoned law and has been consistently upheld by the California Supreme Court despite many attempts to weaken it.

Now, what about after one of the participants dies? The mediation laws do not address that, but the Standard in California for therapists and lawyers is that the client "holds the privilege" and that only the client can authorize the release of communications or writings from confidential therapy sessions. When a couple is in therapy, it takes both clients to allow the release of confidential information, otherwise neither one can individually disclose anything. Note that none of this is up to the therapist or lawyer, because, unlike in mediation laws, these professionals are not "participants" in the confidentiality laws for therapists and lawyers.

A famous example of this violation was when Susan Forward, a therapist and author, told the press what Nicole Brown-Simpson said to her in therapy, right after O.J. Simpson allegedly killed Nicole. Ms. Forward was required to write a booklet on therapist confidentiality after a client dies, including the fact that the administrator of the client's estate continues to "hold the privilege." So it is a common professional error, but also a dangerous one.

In each of these professions, without unanimous agreement by all clients involved to release information, the professional's hands are tied. In other words, a husband cannot release a wife's confidentiality, even if the wife is now dead. When a therapy client or law client dies, the administrator of their estate "holds the privilege" and nothing can be released without that entity's permission.

What this says to me is that the result of decades of thinking, experience and discussion is a unanimous conclusion that clients should have a nearly ironclad confidentiality in law, therapy and mediation. I would suggest that we have an ethical standard on this issue like the laws we already have in California. Where Would YOU Land?

Note: Since we only received one response to the Fall 2012 ethical edge questions about mediators writing agreements, I will save that for the Spring 2013 Issue after I receive more responses. Here are those questions reprinted for you to have another chance to respond: Fall, 2012 Ethical Question: "Should Mediators Write Divorce Agreements?"
Within this general question, I have four specific questions for members to consider, and hopefully write in about, for the next Newsletter. These were suggested to me by an attendee at the APFM Founding Conference in Cape Cod and I thought they cut to the essence of the drafting debate:
1. Can a lawyer-mediator ethically draft the divorce agreement to be filed with the court?
2. Should a lawyer-mediator draft the divorce agreement, as a "best practice?"
3. Can a non-lawyer-mediator ethically draft the divorce agreement to be filed with the court?
4. Should a non-lawyer-mediator draft the divorce agreement, as a "best practice?"
I am interested in Yes or No answers from as many mediators as possible, but also include why you say Yes or No. Please write to me directly at billeddy@highconflictinstitute.com, and we will include your responses in the Spring, 2013 issue of The Professional Family Mediator.
Where Would You Land?

The First Standard of Practice:

"The Genius of Self-Determination, Or, It's a Fine Line"

By Steve Erickson

Professional Family Mediation is not about adjudication, evaluation of who has a stronger or weaker case, coercion, or predictions of outcomes if the case goes to court. It focuses on the self-determination of the parties. The answers and the solutions to the conflict are found, not by the mediator, but by the parties themselves who hire the mediator.

This Standard of Practice that expects the mediator to respect the self-determination of the parties is, on the one hand, the genius of family mediation, and, on the other hand, the mystery of family mediation. "How is it possible to move people in conflict to settlement if you aren't supposed to push on them - hard - sometimes? And, what exactly does a mediator DO?" Indeed, it is a mystery. The answer, of course, is that we do not push - we talk with the parties, they talk with each other, and things are discovered.

I once had a husband say to me that I would make a good "guide dog." Since that time, I have often watched this owner-dog relationship and wondered who is the leader, and who is the follower. I rather like the analogy in that if, unfortunately, one needs a guide dog, the owner decides where they want to go, and the guide dog safely gets them there. It is a bit like a partnership.

In a mediation process that respects the self-determination of the parties, it is also a partnership that encourages the parties to decide the destination. Although we are occasionally asked, there is really no need to predict the destination that the court has for them, because nobody can really be certain what the court outcome would be. Sure, we might talk in the mediation room about the court's standards of fairness, as well as the inadequacies of cookie-cutter solutions, like the same child support formula applied to everyone. Yet, parents mostly worry about how they will survive as their partnership is ending. We have found a non-adversarial way of helping them survive and move past the conflict, whether it be past a crushing impasse or past a need for simple help about planning the future. And, we also educate them about what they need to know to reach the end of the journey.

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.

We do this not by pushing or coercing, but by creating an environment where it becomes easier for the couple to find the solution themselves. For example, by not asking the "custody" question, we avoid framing a contest over who is the better or worse parent. Instead, we ask "What are the future parenting arrangements the two of you can agree on so that both of you can be the best parents possible, even though you will be living separately."

Likewise, by not telling them what they can expect to pay or receive as alimony, we avoid evaluating outcomes in court, or predicting what a judge might award. Instead, we ask them to create a budget of expenses, and then, since mediators are good at narrowing the issue, we break down the alimony question into its smallest pieces. To get to a resolution about alimony, we ask three questions: First, "Do you both agree that one of you is currently completely or partially dependent on the marriage relationship for support?" Second, "Do you both agree that a goal of our discussions is to increase the self-sufficiency of the less income spouse?" And third, "What plan can you agree upon that will achieve lessening the dependency or eventually eliminating the dependency altogether?"

Throughout their journey with us, we give clients guidance and help, just as a good guide dog would. In the area of child support, instead of telling them that they are required by law to fit into a set of child support guidelines that are applied to every single case in the state, we give them the freedom to create a child support plan. In my own practice, I tell parents that they may choose – if they wish – to deviate from the guidelines in order to better fit their own particular financial situation. If they wish, they may even use a joint checking account that is shared and used by both parents to manage and pay for the children's costs. This joint checking account may be contributed to equally or on a pro-rata basis according to each of their incomes, or any other ratio agreeable to each.

There are many other examples of how a Professional Family Mediator can offer guidance without pushing or pulling too hard. In the end, it is the clients' decision. They, in the mediation room, will create their own standard of fairness, provided they are given good assistance. More often than not, they decide to equivalently share the burdens of divorce and separation, rather than turning them into a contest.

As a good guide dog also knows, it is the person at the other end of the leash who is really in charge. This is the genius of the Self-Determination Standard.

tpFM

"Self-Determination and Standards of Practice" Cont. from Pg. 1

8. Self-determination often is not static. Every experienced mediator has seen situations where one party exercises her or his self-determination to agree to something that later appears to that same person to have been a serious mistake.

9. The self-determination of the parties as to the final language of the agreement is very important, since that's the only thing that counts legally. Their self-determination in this crucial part of the process may be severely limited if the mediator does not also draft the agreement, or if the mediator who drafts the agreement does not have an effective means to involve the parties in fine-tuning the actual provisions.

10. Mediation is not a "hermetically sealed" process. It takes place in the context of a legal process that will result in a binding agreement or a court order. Often, both parties have attorneys to consult with and to review any draft agreement. It is not unusual for a court case to already have been filed and even for actual hearings to be scheduled within weeks or even days of the mediation meeting. The alternatives to mediation usually involve a far less degree of self-determination (and correspondingly more coercion) than does the mediation process.

11. The mediator also has a right of self-determination as to her or his proper role as mediator. A mediator may refuse to be part of a settlement that she or he considers to be clearly unfair or impractical. The mediator should not undertake to do anything in the mediation process that exceeds her or his training, experience, knowledge, or professional authority. On the other hand, a mediator should have the right to use any of her or his professional background and experience that is appropriate and relevant to the mediation process.

12. The history of mediation is also relevant. There is a long and rich history of mediation prior to its introduction into family law settlements in the mid-to-late-1970's. Often, mediators in commercial, labor and international disputes were (and are) chosen with the expectation that they will take a more active and evaluative role. Nothing in the history of mediation necessarily would make it clear that such a role is improper.

13. There are some alternative dispute resolution modalities (other than mediation, but short of arbitration) that are now being used in domestic relations situations. These include neutral case evaluation and conciliation. In these modes, often the neutral third party is expected to take an evaluative role. Arbitration is also increasingly used in domestic relations cases, and, by its very nature, is a coercive process. Mediation exists as part of the ACR spectrum.

14. Standards of practice that set up artificial rules intended to protect a narrow definition of self-determination, rather than to establish principles designed to find ethical ways to carry out a broader definition of self-determination, may make it more likely that the disputes are instead settled in the more coercive process of attorney negotiations and court rulings. The ethical focus should be on the manner of implementing a broader definition, rather than enforcing a narrower one.

15. A mediator may have an ethical obligation to raise certain issues even if the parties do not, in order to protect a longer-term right of self-determination. For example, if child support is an issue, the parties should be made aware of the state child support guidelines (while informing them that they are free to agree upon a different figure). If a party has a business or professional practice that was developed during the mediation, the mediator should raise the issue as to its status as marital property. A party that might be entitled to spousal support may be reluctant to raise that issue in mediation.

16. One of the reasons that parties exercise their self-determination to use mediation is cost. There are times when getting the mediation done quickly may be relatively easy and substantially reduce the cost to them of the mediation. For example, post-divorce disputes over modification of child support arise relatively frequently. It is not unusual for them to simply want the mediator to run the state child support guidelines, using the new figure(s), and then tell them how to implement the result.

17. A party to mediation who is represented by counsel has the right to have his or her lawyer present at the mediation sessions. If this happens, the mediator may give the other party the right to also have counsel present, or to postpone or cancel the session. When a party is represented by counsel in mediation, he or she retains the right of self-determination (it is the party and not counsel who makes the ultimate decisions), but in practice it can appear at times that it is the lawyer and not the party who is controlling self-determination. Arguably, the mediator may be free to use a more evaluative approach if both parties are represented by competent counsel in the meeting.

18. Finally, there is another good test of how seriously a mediator is committed to self-determination. That is the case where the parties get some ideas from the mediator as to the structure of the settlement, and they then resolve most or all of the remaining points by themselves outside of the mediation session. Or, if the mediator gives them a draft agreement in editable form, they fill in the blanks and otherwise edit the draft into relatively final shape. The mediator may have to do only very little actual mediating to achieve a fair and balanced settlement. I used to worry about these cases, because ostensibly I hadn't done much to make them come out right. Now I consider them to be successes, because I had somehow given them whatever tools they needed to do it right.

The list of situations and considerations set forth above does not cover the full range of problems with any simplistic definition of self-determination. Rather, it makes clear how complex this issue is. And it provides practical examples that can be used to test any proposed standards of practice. This article is best understood as a series of questions, rather than as a collection of answers. Self-determination is a concept of crucial importance to mediators, but it has multiple facets. If we are devising standards of practice designed in part to protect and advance self-determination in the mediation process, then we always need to ask ourselves whether a proposed Standard may, in certain situations, actually have the opposite effect. I welcome your responses to these ideas. *tp*FM

"Slings and Arrows of Outrageous Fortune" Cont. from Pg. 6

1) The complete subordination of one's emotional self, which allows the professional to be free from any defensiveness, and therefore, standing with both psychological feet on the ground, balanced, centered, and ready for whatever comes. This is the Aikido stance. In this stance, the capacity to demonstrate curiosity is genuine, compassionate and authentic. 2) The strategic ability to become the leader in the dance rather than the follower. Curiosity that comes from this stable place can then shape the dance, with questions like: What would you like to see happen? How would you suggest going about that? What would you be willing to do to make that happen? Asking open questions has the added advantage of reinforcing curiosity and eliminating any need to control the direction of the dynamic by attempts to elicit answers that the professional wants to hear. It took years of practice to rid myself of legal culture's addiction to F. Lee Bailey's imperative: Never ask a question that you don't know the answer to! Questions to which I don't know the answer are my favorite and most important interventions with a client.

There is obviously much more to say about these concepts and techniques, but the place to start is for us to become mindful of our emotional equilibrium while facilitating our sessions, and to treat each session as a classroom from which we can learn so much about ourselves. As our good friend Will said:

"…to thine own self be true,
And it must follow, as the night the day,
Thou canst not then be false to any man."

*tp*FM

"So Much Polarization" Cont. from Pg. 3

Chip gets very personal and Shakespearian in this edition of his ever-popular Creative Solution column. In what he calls ""Slings and Arrows of Outrageous Fortune," he discusses why and how disgruntled clients can turn on you, and what to do about it. Insights from his expertise in handling such disorienting confrontations will enhance your own courage in managing your next case from hell.

Bill Eddy presents a very important question in his Ethical Edge Column: Does Confidentiality Survive When One of the Clients Dies? Anchoring on several recent public breaches of mediator confidentiality, he explores the law for mediators, therapists, and lawyers and draws some important conclusions that we all need to heed, in order to be fully ethical. And last, Steve Erickson's regular Column on Standards this time is titled: "The First Standard of Practice: The Genius of Self-Determination, Or, It's a Fine Line", in which he presents an interesting comparison of an effective mediator to the role of a "guide dog," who leads but does not coerce.

Please send your responses to any and all of these articles, as well as your ideas for new features to our newsletter to me at dsaposnek@mediate.com, and be sure to include your name and location. We intend to publish your responses and get a dialogue going on these and other matters of concern to our readership of family mediators.

I leave you with this thought:
"I asked my Mom one time why she and my Dad were still together. She said, 'Because we both didn't want to be divorced at the same time.'"

- Actor Don Cheadle

Enjoy.
Don Saposnek
Editor
The Professional Family Mediator tpFM

"Response to Larry Gaughan's Article" Cont. from Pg. 4

Over the years, we have not gotten into problems because the couple before us did not know the law or follow the law, as seems to be one of Larry's concerns. Sure, we have always followed a model of good mediation practice that asks questions about whether or not some of the property we are discussing came into the marriage through gift, inheritance or was in existence prior to the marriage. And, we will ask couples if they wish to treat differently those items of property that are not the product of the marital partnership sweat or effort. Surely, we could easily define for them the nuances of the Non-Marital Property Law of a particular state, but, we would refrain from telling them the latest rulings or the latest leanings of the court because we know that non-marital property laws are vastly different across state lines. Steve has mediated cases in East Grand Forks Minnesota and in Grand Forks North Dakota and knows for a fact that the non-marital property laws are vastly different on either side of the Red River of the North. Should he help them follow North Dakota community standards or Minnesota community standards? Lenard Marlow has questioned that, if state law is so important, why is it so radically different across state lines?

If we become too concerned about whether or not our clients are following community standards, we will need to then mediate in such a way that requires the mediator to rigidly adhere to such community standards. And, the next questions that would arise are: "Who is then permitted or authorized to advise a client about community standards?" And, "Which community standard do we suggest?" "Is a therapist permitted to state to clients when acting as a mediator, 'I don't particularly like equal time sharing; I think children need a primary psychological parent and a visiting non-custodial parent'?" (which was the community standard of the 1970's, when many of us started practicing family law). So, we propose that we have restrictions on what we do as mediators so that we can encourage unrestricted, creative solutions to emerge in the mediation room.

We can certainly respect all professional fields. But, because we are a different profession, when it comes to rules and standards, we believe we need to emphasize those differences by instituting our own rules of conduct, while at the same time respecting the rules of the Bar for their members—a process that we would hope they would follow with respect to the Academy of Professional Family Mediators. tpFM

"What Does your Business Card Say About You?" Cont. from Pg. 5

Logo and tag-line: If you have a business entity, chances are you had a logo designed. Use it! And, if you have a tag line for your business, use that too! These are the sorts of things that will distinguish you from everyone else who has a plain vanilla business card.

Color/fonts/stock: My suggestion is not to go with something that will impede someone from being able to read the information on your card. Colors that are too dark and fonts that are too light or too small are no good. You don't want people to have to take out a magnifying glass to read your card. Paper stock is important, too. With my first cards, I went with a really nice, shiny stock but eventually found that it was hard to write on it. Remember, when you hand out your business card, people will generally turn it over and make some notes on the back of it. If you use a shiny stock, the writing will smudge. I wish I knew that when I ordered them. Of course, I used them up as I had ordered 1000 of them. But when I ordered new cards, I went with a matte finish. And, one last thing: leave the back of the card blank for purposes of notation.

My next installment will be "Business Card Etiquette." tpFM

ANNOUNCEMENTS

The Public Speaking-Presentation Preparation Sub-Committee of the APFM Public Awareness Committee is working on the development of a PRESENTATION TOOL KIT that APFM members can use to present a clear, strong, consistent, and insightful message about family mediation to the public. This kit initially will include:

1) A well organized, professional, PowerPoint presentation with notes, handouts, etc.

2) Family mediation messaging statements – thirty seconds, 3-minute, 10-minute, etc.

We believe that professionally prepared presentations introducing the benefits of mediation to the public are the best means of promoting business for all APFM members, and the availability of well-organized presentation materials will enhance the quality of all presentations and will encourage members to offer such presentations. The presentation kit will contain a consistent core message while allowing for individuality, in terms of practice specifics, "look and feel", and the targeting of specific audiences.

Rather than re-inventing the wheel, we are gathering presentations and messaging statements already in use by the APFM membership. Our goal is to pull from the strengths of all the presentations already developed and tie them together with a unified message. Members willing to share their materials will be acknowledged in the materials themselves, in the APFM newsletter, and at the APFM annual conference.

We encourage you to help us, by forwarding presentations and messaging statements that you are currently using. Send your materials to: Alan@FalmouthMediation.com.

Thank you in advance for your support, and we encourage all your input of ideas.

Best regards,

Alan Jacobs, on behalf of APFM's
Public Speaking-Presentation Preparation Sub-Committee

Have You Had Success Using Social Media, Radio, or TV?

The Social Media Subcommittee of the Public Awareness Committee would like to gather from APFM members:

1) Information about successful use of social media by APFM members and

2) Information about companies that have done well managing social media or arranging radio or TV interviews for APFM members. If your use of Facebook, LinkedIn, Twitter, Pinterest, or YouTube has brought clients to you, we would like to know how you made it work. If you have a public relations company that has done a good job in getting radio and TV appearances for you, we would like to know about the company.

We plan to share the best of what we learn with everybody in a future newsletter.
Please reply to Virginia Colin at mediatorQ@gmail.com. Thank you.

UP-COMING TRAININGS

SAVE THE DATES

MARCH 5,6,7,14 & 15, 2013

A 40-hour training By Divorce Mediation Training Associates of Boston
Wellesley, MA
Trainers: John Fiske and Diane Neumann
Contact: John Fiske
43 Thorndike Street, Cambridge, MA 02141
jadamsfiske@yahoo.com • Phone: 617.354.7133

MARCH 8-9, 2013

FAMILY LAW MEDIATION: When Time is Not on Your Side
Santa Clara University Law School, Santa Clara, CA
13 hours MCLE credit, including 2 hours of Ethics credit
(Provides 8 hours Children's Counsel Credit per CRC 5.242(c))
Trainers: Don Saposnek and Irwin Joseph
See: www.familymediationtrainings.com
Contact: Family Mediation Trainings
P.O. 3686, Aptos, CA 95001
dsaposnek@mediate.com

APRIL 13-14, 2013

APFM Mid-Year Advanced Training: Power Imbalance in Family Mediation
Atlanta, Georgia
Contact: Details and registration coming soon on the APFM website

The APFM Training Committee has developed this 2-day training. Day One focuses on Power Imbalance – Identifying and Managing Power in Family Mediation, and Day Two focuses on Power Imbalance – Role-play Exercises, Feedback and Discussion. The lead trainers are Hilary Linton and Claudette Reimer, experienced private and court-connected family mediators and trainers based in Toronto, with an expertise in screening processes for power imbalances, including domestic violence. Bill Eddy will present on why personality disorders seek power imbalance and will focus on parenting mediation and role-play exercises. Rod Wells will speak on financial issues and power imbalance.

MAY 2-4, 2013

What do Bill Eddy and Chip Rose have in common?
They are both attorneys and mediators; they both live in California; and, they are both presenting at the 30th Annual Conference of the New York State Council on Divorce Mediation
Gideon Putnam Resort, Saratoga Springs, New York
Contact: website: www.nysmediate.org

Save the Date!

For the Second Annual Conference of the

Academy of Professional Family Mediators

Mediating in the Landscape of the Changing Family

October 3 – 6, 2013

Embassy Suites Hotel

Denver, Colorado