

MCFM

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The Massachusetts Council On Family Mediation is a nonprofit corporation established in 1982 by family mediators interested in sharing knowledge and setting guidelines for mediation. MCFM is the oldest professional organization in Massachusetts devoted exclusively to family mediation.



PRESIDENT'S PAGE: FRAN WHYMAN

Dear Mediators:

I came to the field of alternative dispute resolution by asking the question, "What do I need to feel good about myself?" One of the answers to that question was, to know that the work I do improves the lives of others. I believe that providing a process for our clients' conflict resolution that fosters positive communication and understanding, and the possibility of self determination and joint decision making, is important work that not only improves our clients' lives but those of their children. This perspective guides my daily work with clients. If I think that divorcing clients might be receptive I ask them to think about a similar question: "When you look back at this time in your life, how do you want to feel about the way in which you went about resolving the issues before you?" So much of mediation is about asking the right questions at the right time. When clients are capable of reflecting on this question, the result of this inquiry can have a profound impact on how they treat each other during the course of the mediation.

As I write this page my two-year term as President of the MCFM is coming to an end. It has been an exhilarating two years. I have had the privilege to work with the dedicated, hard working members of the MCFM Board of Directors, who give so much of their time and energy to make the MCFM the extraordinary organization that it is. Their efforts and initiatives are resulting in greater visibility of our members and increased awareness of mediation among the public.

By the time this edition reaches our membership, three members of the MCFM's Board of Directors will have stepped down, and I want to thank them for their extraordinary service. Lynn Cooper served in many different roles over approximately twenty years on the Board, including the Presidency, Chair of the Certification Committee, and most recently as Chair of the MCFM/MCLC Joint Committee. Marion Wasserman also served in many different roles over the years, including organization Vice President, member of the Professional Development, Nominating, and most recently the Certification Committee. Kate Fanger served as organization Vice President and took on the challenging role of Editor of MCFM's Family Mediation Quarterly, which she produced at the highest level. Thank you, Lynn, Marion, and Kate. Your contributions were impressive, and we appreciate all you have done for the organization. You will be sorely missed.

Currently the MCFM has about 250 members. I am proud to be part of this growing community of Family Law mediators. The commitment of our members to providing an alternative way to resolve family law disputes is making a profound difference in the lives of others. Keep up the good work!

My best to all,





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ARE YOU LETTING THIS COMMON HABIT GET IN THE WAY OF EFFECTIVE MEDIATING?

By Dr. Tammy Lenski

It feels natural to take notes while mediating or coaching, and coaching and mediation notes serve a purpose. While jotting down something really important is useful, taking notes throughout the session is often a mistake. Here's how note-taking can be a bad habit and a barrier to effective mediating and coaching.

In a recent conflict coaching workshop for leaders and managers, I was preparing the group for their first coaching activity. Paired up and ready to take turns coaching each other on a real conflict in their lives, I asked the coaches to put down their pens and leave them on the tables in front of them.

"Please don't take notes," I requested.

This request was not met with great enthusiasm. One participant even challenged me back with, "But you took notes during the demo! Why can't we?"

I held up my notepad for everyone to see. It contained just three words, a short list of interests I'd heard from the person I was coaching. The rest of the sheet was blank. For virtually the entire session, my pen had been capped.

While there are times when note-taking is useful and even advisable, I wanted these coaches to give their listening muscles a true workout. I wanted them to listen deeply, in ways it's almost impossible to do with even minor multi-tasking like writing. And I wanted the person being coached to have the experience of someone's full attention, because there's nothing like it.

When I'm teaching mediators, I often make the same request. Pen and paper can be a crutch for new mediators, who fear they'll forget something important. That's understandable when they're just starting out. But then the crutch becomes a habit. And over time, the habit becomes well formed, unquestioned, and mindlessly followed.

Why you need to write less than you think you do

You need to write less than you think for the sake of your clients or employees:

- There's something about the mediator or manager sitting there with a notepad and pen that conveys "interview," or "interrogation," or "record for your HR file." Is that really what you're trying to achieve as the mediator or coach? Now, I do understand that for some of you reading this, there are some professional and even legal standards you're required to meet and notes help you do that. But you'll be hard-pressed

"While jotting down something really important is useful, taking notes throughout the session is often a mistake."



to persuade me that you need your pen in hand all the time to capture the things you're required to.

- The mediation or coaching room is one of the few places in people's lives where they have a chance to be truly listened to. Giving someone your undivided attention is a rare gift (click to tweet this). I am repeatedly reminded of how rare and valuable a gift this is when a mediation or coaching client says to me, "Thank you for really listening to me. No one else has."
- Your clients don't know that you're not really listening when you're writing. They don't know what you missed hearing. They said it and assume you heard it. Conflict is complicated enough without adding a layer of additional confusion to the mix.

And you need to write less than you think for the sake of your own effectiveness as a mediator or coach.

When you're taking notes, you're multi-tasking. There's no way around that — you are trying to do at least two things at once: Write and listen. But when you're trying to do two things at once, your brain is actually switching between each task, back and forth, back and forth. One task is getting attention and the other's not, and then this is reversed as your attention switches back again. Psychologists have a term, "switch costs," which refers to the costs of attention loss and the demands on willpower.

The bottom line? When you're writing, you're not fully listening. And that means you're missing things.

Sometimes what you're missing is a gem you should not have missed. That's a high price to pay for a crutch-habit.

How much do you really need to write down?

Less than you think.

This isn't an exhaustive list by any means, but here's what I take the time to write down. So that I don't get overly absorbed in the writing instead of the listening, I prefer to jot phrases and words instead of entire sentences (with one exception, noted below).

- Interests — The most important underlying needs a client identifies. I don't write these down at all unless the list starts getting long.
- Something important I want to return to — It may be something I heard in passing that I think merits a revisit when the timing is right. In an entire mediation session, I will often have only 2-3 of these; the rest don't need writing down because I can attend to them right away or they're so powerful I will not lose track of them.
- The list of problems and issues I understand they want to resolve

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together. This list often re-shapes itself and the items in it reframed as the session unfolds.

- Tentative proposals and agreements — These I write out in full with their help, to make sure I've got the details right as we go along. I make sure to say out loud that I'm jotting down a *tentative* list and that nothing is final until everyone agrees it is. Since they're working with me on this, I'm not missing conversation.

But how do you prepare summary notes, then?

It's not hard.

Mediators often send summary notes to clients after a session, and managers and HR professionals also have good reason to keep a record of what transpired in the kind of informal mediations they do daily. These are good and useful practices and I use them, too.

Immediately following a session, I take 5-10 minutes to outline the summary notes while the session is still fresh in my mind. The few things I jotted down as mediation notes guide my drafting and the rest is readily present in my memory — *because I paid attention*.

Challenge yourself to get out of the crutch-habit

If you're used to sitting in the mediator's or coach's chair with pen in hand, it'll feel downright unnatural to have an empty hand. You may not even notice your hand reaching for the crutch-pen and scribbling away.

Feeling unnatural for a little while as you change a habit is a small price to pay for being a better mediator or coach. Put down and cap your pen. Close the laptop lid. Hold a cup of coffee in that empty writing hand if you must. Push yourself to use your mediation notes only for their best purpose — to track what must not be lost.

For everything else, practice being fully present with your clients or employees. They'll love you for it and you'll hear the gems you've been missing.



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CAN THERE BE ANY BENEFITS TO CHILDREN OF DIVORCE?

By Vicki L. Shemin, Esq., LICSW, ACSW

I write this article with a great deal of ambivalence as a cautionary tale.

As a child of divorce, a divorced mother of two, and a long-practicing divorce lawyer/therapist, divorce is not exactly something I would advocate for improving a child's mental health. That said, now that I am well on the other side reflecting back, I can point to at least four ways divorce can benefit (which the dictionary defines as "something that promotes or enhances well-being") children. Warning: As a 360-degree thinker, for every upside, I also offer a downside.

1. Independence

It has been my experience that many children of divorce tend to be more independent than their counterparts. Whether it is borne of a need to be self-protective, self-motivated, or self-aware, children of divorce often display an admirable streak of independence as the attention of their parents may have been diverted for relatively long periods of time during key child developmental stages. Query whether this impacts the ability of some of these children to form and trust bonds with peers or when they form their own romantic relationships.

2. Emotionally Intelligent

Perhaps because they have had to navigate bifurcated and often discordant households, children of divorce can tend to have extraordinarily high EQ – emotional intelligence, that is, to be more curious, compassionate, sensitive, and insightful than their counterparts as they strive to intuit and make meaning of the changes in their parents' moods, behaviors, households, and evolving new lives. Query whether this impacts the ability of some of these children to avoid becoming "parentified" and to risk insufficient self-care.

3. High Achiever

Archetypically, I have seen many children of divorce strive beyond measure to be successful by pushing themselves to the far-flung corners of their young limits in various fields of endeavor (academics, sports, hobbies, and talents). I believe the root of this palpable drive is to please one or both parents – to prove to them that just because their marriage failed, does not mean they are failures as parents. It is also a way for children to signal to their parent(s) that their respective or collective divorce guilt can be assuaged because – at least on the surface – "the kids are alright." Moreover, spotlighting a child's success can be a great distractor for warring parents who cannot otherwise agree on the time of day. Query whether the detrimental impact these early high achievers can face may devolve into adult Type A personalities sentenced to chase an unattainable endgame.

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4. Fair-Minded

In my experience, children of divorce are apt to grow up to be unusually gifted in their ability to be egalitarian in their view of the world and in their dealings with others. Perhaps because of their real-life experiences with shuttle diplomacy between their parents, they have a well-developed normative sense of what is, what can be, or what should be “fair.” Query whether that leaves these children ultimately emotionally vulnerable as they put their own needs aside and try to please others at their own expense.

In sum, during my 35 years of practice, I have been amazed and delighted to see so many divorced parents “get it right” if they are able to see beyond their own narrow interests and truly insist – as the touchstone in their years of co-parenting – what is in the best interests of their children. But, what amazes me even more is the resiliency and survival mechanisms of some children of divorce to rise above the circumstances and choices they likely would not have elected for their families. Concluding that nothing in child development is black and white, I have tried to present a bit of a holistic and realistic view of the conscious or unconscious beneficial journey embarked upon by some children of divorce.



Vicki L. Shemin, J. D. LICSW, ACSW, of counsel to Boston Law Collaborative brings 35 years of family law/therapy experience to offering clients ADR options including mediation, collaborative law, consultation/coaching, parenting coordination, GAL evaluations, pre-marital/post-nuptial agreements – and agreements to stay married. Since 2011, listed annually as one of the Top Women Lawyers in the Northeast, Vicki is also an adjunct instructor at Northeastern University and at Boston University School of Social Work. She is currently researching a book, “Letters To Ex-Spouses: And I Just Wanted You To Know,” combining her interests in psychology/law. She can be reached at VShemin@BostonLawCollaborative.com





FROM GLADIATOR TO MEDIATOR: THE CHALLENGES FOR LAWYERS WHO BECOME MEDIATORS

By Gregg Relyea and Roy Cheng

When they represent clients, advocates may be compared to gladiators doing battle with logic instead of a lance, statutes instead of swords, and rhetoric instead of physical force. Successful litigators routinely engage in clashes of confrontation and competition with other parties, advocates and judges. They are bound by rigid rules of professional responsibility, formal rules of advocacy, and highly technical rules of evidence. The procedural framework surrounding litigation is well-defined and the roles of the parties and judge are deeply rooted in tradition. The pageantry and spectacle of combat is replaced by the formality and majesty of the trial process.

Mediators, by contrast, take part in a dance of a different nature. The rules of engagement in mediation differ fundamentally from those of trial. The formalities of trial do not apply. Strict rules of evidence have no place. Long-term personal and business interests may be afforded equal or greater importance than the facts of the dispute or the applicable law. Emotions are considered to be directly relevant to the dispute. The roles, responsibilities and opportunities of the parties, advocates and neutral third party differ significantly. Specialized communication and negotiation skills and techniques are the primary tools of a mediator—instead of forceful rhetoric and penetrating arguments.

"Lawyers who successfully undertake mediation training for the purpose of serving as mediators must be prepared to radically re-define their objectives, their role and their techniques."

Lawyers who successfully undertake mediation training for the purpose of serving as mediators must be prepared to radically re-define their objectives, their role and their techniques. They must approach mediation training with an open mind and a willingness to learn the distinct differences between the processes of trial and mediation. They must be skilled at working within the framework of traditional rights and remedies and also ready to move beyond it. Lawyer-mediators will learn that mediation is more than a legal negotiation in a different package—mediation differs fundamentally in its procedural structure, terminology, objectives and techniques.

Mediation trainers, likewise, must be aware of the educational background and professional mindset of lawyers. Trainers must understand the lawyer's perspective and successfully describe the differences in the role, duties and methods of mediators. For example, while the trial process is highly adversarial, the mediation process strikes a different balance encouraging adversaries to act

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in some ways as collaborators. Instead of looking for one-sided outcomes and opportunities to exploit the opponent's weaknesses, mediators look for and cultivate opportunities for mutual gain by all parties. In trial, the goal is victory, while in mediation, the objective is harmony. In short, mediation trainers must face the challenge of teaching the gladiator to become a mediator.

It is noteworthy that mediation training can be beneficial for lawyers independent of their intent to establish a practice as a mediator. Formal mediation training can serve many purposes: cultivating general awareness of mediation as one alternative process of dispute resolution, preparing a person to serve as a mediator, preparing a person to serve as an advocate in the mediation process, and providing a person with additional skills and methods for dealing with everyday conflict at home, at work, and in the community. The skills and techniques that are part of mediation training can be adapted and transferable to any type of conflict. Lawyers can use them in the transactional arena (drafting contracts, setting salaries and terms of employment, negotiating leases), in litigation (negotiating settlements, resolving discovery disputes, negotiating medical liens, handling client fees and expenses), and law practice management (law firm governance, shareholder disputes, claims, policy-making).

This article will examine the challenges experienced by lawyers who are training to become mediators. Some of these challenges stem from deeply ingrained perspectives associated with legal training and experience. The "legal culture" shapes and informs a lawyer's identity and the ways he or she views conflict. This article will suggest that identifying these perspectives is a crucial step in recognizing, working with, and ultimately broadening the "lawyer's perspective" to include a "mediator's perspective."

1. The duty to represent clients zealously

History and the rules of professional responsibility dictate that a lawyer's duty is toward one side of a dispute or transaction—his or her client. The attorney/client relationship is carefully defined, for once an attorney undertakes representation, he or she must protect and advance their client's interests in a zealous manner.

A lawyer is required to put the client's interests ahead of their own. All the information that is generated during litigation is analyzed in terms of its potential benefit or harm to the client. Strategic goals are set based upon the client's legal rights. Though the purpose of the adversarial system is justice, the system can also result in tension between parties that may lead to deep-seated antagonism between advocates, their counterparts, and the parties.

A lawyer who is training to become a mediator may consciously or unconsciously transfer the concept of the attorney/client relationship and the duty toward clients to the mediation process. This could take the form of taking up the cause of one party or another by speaking on their behalf, losing the appearance of neutrality by advocating vigorously in support of one or more claims/defenses/



positions, and making private decisions about the merits of the dispute and favorable outcomes.

By contrast, a mediator does not represent one party or another in a dispute. The mediator does not have a duty of zealous advocacy on behalf of any one participant in the process. To this day, there is no single word that describes the relationship of the mediator to the participants in mediation. Not unlike a judge or an arbitrator, the mediator generally has no duty of representation toward any person who is involved in the mediation process, including named parties, attorneys, witnesses, expert witnesses and others. These 'parties' participate in mediation and the mediator may have identifiable general ethical duties toward them, but the mediator is not answerable directly to any party to the dispute in the same manner as a lawyer.

For lawyers who are training to become mediators, it may be helpful to shift their perspective concerning the identity of the client. Mediators have duties toward the participants and to the process. They protect the integrity of the mediation process through the careful use of techniques that promote a constructive dialogue and negotiation. In a balanced and neutral manner, a mediator explores facts, law, issues and interests to promote mutual understanding and resolution of the dispute. The mediator is a guardian of the mediation process itself rather than any individual party or their interests. If a party were to ask a mediator, 'Whose side are you on?' the Solomonic response might be, 'I am neither for one party nor the other. My job is to assist everyone in figuring out whether there are favorable terms of agreement that can be reached after thoroughly considering the alternatives.'

2. The nature of mediation

Lawyers' training and experience with dispute resolution generally is based upon their understanding of trial and arbitration, two adjudicative processes where the neutral judge/arbitrator controls both the process and outcome of the hearings. Alternatively, many lawyers frequently engage in the differently structured process of negotiation, with varying degrees of tactical and strategic success. In either case, the framework for traditional advocacy practices often consists of formal rules of court and professional responsibility or, alternatively, conventional negotiating tactics.

Adjudicative processes are, by nature, highly adversarial. They are rigidly structured, with pre-hearing conferences, opening statements, plaintiff's case, defendant's case, closing arguments, post-trial issues and possible appeal. The rules of evidence govern and are strictly applied. Information is introduced in the form of examination of witnesses and documents meeting specific evidentiary requirements. The temporal orientation of adjudicative processes where legal issues (versus equitable) are at stake is historical, e.g. Who did what to whom in the past? The focus is on fact-finding (discovery and rules of exclusion) and fault-finding (examination of conduct, deciding liability). Every manner of human

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conduct is reduced to dollars. Lawyers must advocate for their clients within this formal framework of traditional rights, remedies and procedures.

Alternatively, negotiation is a process used by many lawyers in an unstructured and spontaneous manner. Some lawyers are unaware that there are well-established negotiating principles and techniques that can be applied in a systematic manner, thereby producing relatively consistent and predictable results. Instead, they may 'shoot from the hip', drawing from a narrow frame of reference in terms of effective negotiating tactics.

Lawyers who are training to become mediators may approach the topic of mediation with an expectation that the mediation process is similar to adjudicative processes like arbitration and trial, which are structured, formal and exclusionary. They may actually feel uncomfortable with different procedures, a lower level of formality, and a high degree of procedural and remedial flexibility, all of which are present in mediation. Conversely, lawyers may believe that mediation is a process where there are few or no rules of practice, so mediation is viewed as a casual, disorganized and sporadically successful process.

The reality is that mediation shares some of the structure of formal adjudicative processes and it also provides parties with flexibility and freedom to negotiate in their best interests. Mediation is a voluntary structured negotiation process, with identifiable procedural stages, where a mediator assists the parties by using specialized communication and negotiation techniques. Mediation has both adversarial and collaborative features. In litigated disputes, a mediator carefully examines the factual background and may also have an evaluative role, analyzing liability, costs of litigation, jury appeal of various clients and arguments, risk of losing at trial, potential jury verdict ranges, witness appearance, and alternatives to litigation.

The rules of evidence do not apply during mediation; no examination of witnesses takes place and rules of exclusion do not restrict the information that can be considered. In terms of temporal orientation, the mediation process focuses on the past (historical background of a dispute, actions and conduct of the parties, documents and other related information), present (the parties' immediate circumstances, needs, and concerns), and the future (the parties' long-term personal and business interests, future dealings between the parties, working out terms of agreement that present a stable and durable settlement that is within the ability of the parties to carry out, re-establishing or re-structuring the communication and relationship between parties).

Mediation is neither a fact-finding or fault-finding process; instead, mediation is a problem-solving process, which means that the emphasis is on exploring the possibility of working out a solution rather than only dwelling on the past and who is to blame. The parties in mediation are not restricted to money damages. They have the freedom to create monetary and/or non-monetary terms of agreement that are creative and non-traditional. Finally, the mediation process, itself, can be flexible procedurally, offering pre-mediation communications between the



parties and the mediator, variations in the sequencing of the stages of mediation, sub-caucuses between various participants and interest groups in multi-party cases, location, timing and form.

3. Giving legal advice

A lawyer's stock in trade is rendering sound legal advice and providing good counsel to their clients. The lawyer's specialized formal legal training and experience provides him or her with a frame of reference for analyzing and evaluating disputes. Clients ask for legal advice and they expect lawyers to provide it. The rendering of legal advice is a central and inherent part of a lawyer's work, which suggests that lawyers will tend to move into an advice-giving mode when they are confronted with a legal issue, conflict, or claim. When a client asks, 'What should I do?', it is expected that a lawyer will formulate a well-considered response that consists of some variation of the following, 'Based upon my analysis of the facts and the law, it is my considered opinion that you should do...' It is challenging, to say the least, to refrain from giving advice when that process has been a central part of law practice for a long time.

Mediators do not render legal advice to anyone because they are no one's attorney. Rendering legal advice to any party would be stepping outside the role of a mediator. Rendering legal advice to one party and not another would violate the rule of neutrality and possibly create unfair advantages. Although mediation participants routinely ask for advice concerning legal issues ('Don't you agree that they're at fault?') and transactional issues ('What should my next move be?'), mediators cannot render direct advice and simultaneously stay within their role as mediators. On questions of law, a mediator may be of assistance by independently evaluating an issue and providing their analysis, but they must stop short of advising the parties about future conduct or activities. On questions of negotiation, a mediator can solicit options from the parties and even identify options themselves, so long as they are not couched in terms of what a party 'should do'. For example, in response to a question by a party about their next counter-offer, a mediator may say, 'Based on the history of offers in this case, on the length of time we've been mediating, and on the atmosphere in the other room, I don't think that moving incrementally at this point will generate a counter-offer from the other party. Something more may be necessary to move this negotiation along. If you were going to make another offer that was not a small move, what would you be willing to do?'

4. Thinking inside the box

Typically in adjudicative processes, lawyers confine their analysis to traditional rights and remedies. The framework of traditional rights and remedies is the intellectual 'box' within which lawyers operate. After many years of legal training and experience, lawyers have developed exceptional skill in logical thinking, e.g. analytical, rational, linear, deductive thinking. This skill, however, can be developed to a point where it reduces or virtually eliminates one's ability to think creatively and intuitively.

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Lawyers being trained as mediators will experience difficulty thinking in non-traditional ways about possible solutions. It is easy to fall back on traditional remedies, i.e., money. Experience has demonstrated that the more training and experience a lawyer has, the harder it is to do anything except to think logically.

Creative thinking may seem to be unacceptably unstructured and vague when a lawyer as mediator is confronted with the question of what terms of agreement might be of value to the parties—other than or in addition to money. If a lawyer/mediator imposes the template of traditional rights and remedies on the parties in mediation, it could drastically limit the options for agreement that may be possible.

A mediator is trained to think logically (when analyzing the facts, claims and legal issues) and laterally (when assisting the parties in developing terms of agreement that meet their most important interests). Lateral thinking is a form of thinking that is creative, non-linear, non-traditional and intuitive. Lateral thinking is an intellectual muscle that is used so rarely that it has often atrophied to the point of non-existence in lawyers and other professionals. Lateral thinking is a skill that can be identified and developed, once there is an understanding of what it is and an awareness of its value in the process of generating options for agreement. Mediators are flexible in that they are prepared to work with the parties in creating a traditional money-based agreement or in creating a non-traditional, integrative deal that incorporates a wide range of monetary and/or non-monetary terms.

Out beyond ideas of wrong doing and right doing,

There is a field,

I'll meet you there.

When the soul lies down in that grass,

Ideas, language, even the words "each other,"

Don't make any sense.

—Jalaluddin Rumi

5. Responsibility for decision-making

Essentially, law practice is a service-oriented business. Lawyers assist people in conflict when the demands involve legal issues, claims and defenses. People often self-select to become lawyers because they have an altruistic desire to help others who are in trouble or because they have experienced conflict themselves and they are aware of the stress and turmoil associated with conflict. Whether their motivation is based upon personal experience or the desire to help others, many lawyers are motivated by a desire to protect others and to serve their interests. Being a client's 'white knight' can be professionally and personally rewarding.

Unfortunately, the desire to help may also coincide or morph into a desire to control or to 'fix' problems for others. Lawyers at times may interpret their duties to include



'running interference' for their clients, even where emotional confrontation may lead to understanding or personal healing. Lawyers may want to 'step in' to protect their clients, even at times where exposing vulnerabilities and discussion of deep personal issues may go to the heart of a conflict. Finally, lawyers may define their work in terms of taking responsibility for developing a final outcome, rather than asking their clients to share some of the responsibility for their conduct, making an effort to understand another person's perspective, or taking responsibility for thinking of possible solutions that truly meet their own unique interests.

A mediator does not assume responsibility for fixing a dispute between parties. Conflict is viewed by mediators as a natural and normal outgrowth of human activity, differing interests, and the placement of differing value on certain things.

A mediator does not 'own' the dispute—the parties do. The parties are the people who have to live with the consequences and long-term effects of a mediation process, whether or not the case is settled during mediation. A mediator, accordingly, is mindful of the parties' desire to resolve disputes and 'close the deal', but is also aware of the primary importance of asking and allowing the parties to take responsibility for making their own decisions.

A mediator takes careful steps to ensure that the 'centre' of the process remains the parties by consulting and conferring with them every step along the way. Part of the problem-solving process involves understanding whether the parties are ready to move forward and to let go of the conflict. Another part of the process involves learning about the parties' concerns and interests. Yet another part of the process involves generating options for agreement that meet the individual needs of the particular parties, which necessarily involves reliance on the parties and their own unique understanding of their needs and circumstances. Lawyer-mediators must, themselves, learn to let go of the desire to 'fix' problems for their clients and to allow the clients to find their own solutions through guided dialogues and structured interactions. Mediation presents an entirely different paradigm for resolving disputes that is fluid and flexible, while focusing consistently on the parties as the centre of the process.

*Giving birth and nourishing,
Having without possessing,
Acting with no expectations,
Leading and not trying to control,
This is the supreme virtue.*

—Lao Tzu

6. Feelings are irrelevant

When is a party in civil trial allowed to vent their emotions in their own words and without the artificial and highly structured process of direct or cross-examination?

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When does the judge, jury or arbitrator invite a party to let off steam, to clear the air, or to discuss what is weighing heavily on their minds? Other than testimony that is directly related to general damages, pain and suffering, and emotional distress, when is a party asked how they felt about some past event, how they currently feel about things, and how it might make them feel in the future if they can reach a deal? The Anglo-Saxon system of justice may feature elements that are considered to be 'genius' but it generally does not invite, encourage, or allow the emotional narrative of a case to come out in the form of the parties' own words.

Whether for reasons of efficiency or perceived lack of probative value, a party's emotional state, except insofar as it relates to a specific general damages claim, is generally considered to be legally irrelevant and inadmissible in civil trial. Civil litigators historically have advocated for their clients within the narrow confines of remedies for pain and suffering or emotional distress. Lawyers serving as mediators have to broaden their view of the role of emotions in the mediation process. Emotions often fuel negotiation tactics and objectives. Emotions may serve as barriers to communication and negotiation. Human nature is such that emotions play a central role, independent of who is involved in the dispute or the precise nature of the claims. Everyone is affected by emotions, including top elected officials and diplomatic operatives, high-ranking executives and managers, highly educated professionals of all kinds and everyday people. Understanding the role of emotions in conflict and mediation is key to managing the interaction between the parties in a productive way.

Mediators are trained to understand that emotions play a key role in conflict and negotiation. The importance of being able to 'sit with conflict', i.e. to allow the parties to express themselves emotionally without becoming overly agitated, is stressed in mediation training. The mediation process welcomes the expression of emotional issues and invites parties to talk about what is bothering them and how they feel. Several specific communication techniques are geared toward managing difficult conversations, including active listening, reflecting emotions, re-stating, role reversal, re-framing and acknowledgment. A mediator's ability to calmly manage the parties' expression of intense emotions enables the parties to understand the issues more clearly and to find their own path through conflict.

People do not mirror themselves in running water

Rather, they mirror themselves in still water;

Only that which is still,

Can still the stillness,

In others.

-Lao Tzu



7. The rules are the rules

Lawyers work in a complex web of procedural and substantive rules. They rely upon statutes, regulations and other written rules. They research and cite case law interpreting the common law and written rules. The rules of professional responsibility dictate standards of conduct and practice. In short, lawyers are surrounded by rules and they apply rules on a daily basis in their professional practice. Rules of logic govern legal thinking. The Socratic method of using questions to elicit information is the norm in law schools. With everything that is implied, rules and rule-based behavior circumscribe every aspect of the practice of law.

Rules may bring a degree of certainty but they also restrict possibilities. Rules may produce some defined standards but they also tend to result in generalized outcomes and remedies instead of individualized agreements. Rules, however arbitrary and ill-defined, may engender feelings of comfort, order and predictability. Working within the rules and also outside traditional boundaries of litigation, remedies and legalistic problem-solving may engender feelings of a loss of structure and loss of direction.

Mediation is structured but flexible. Mediation has well-established rules of facilitation but it is fluid in the manner in which they are applied. Mediation is a dynamic, interactive and multi-dimensional process, which requires constant adjustments and sound judgment by the mediator. For example, the stages of the mediation process provide a template for reference, but they may be varied according to the needs of the parties. In some cases, there will be pre-mediation communications between the parties and the mediator, while in other cases, the mediation may begin with a private caucus instead of a joint session. Mediators may choose to meet with some, but not all, of the parties in a sub-caucus where it may be productive. Likewise, there is flexibility in the way in which specialized communication techniques are used by a mediator. Mediators must continually use their discretion, skill and judgment during a mediation process that is unfolding, changing direction and raising unexpected twists and turns.

Mediators are asked to bring to the table their training in the mediation process as 'process experts'. In addition, they bring to the table their communication and negotiation skills and abilities. They also bring to mediation their subject matter knowledge in particular fields and their general life experiences. Mediation asks that mediators refrain from limiting themselves to strictly traditional money agreements as settlements. They are challenged to be open-minded about the range of possible solutions that may exist for any given conflict. They are asked, in essence, to be flexible, to allow the parties to help determine the direction of the mediation process, and to allow litigants to find solutions that, while lawful, are unique to their particular circumstances and interests. As a practical matter, mediation takes place in the 'shadow of the law', which means that traditional rights, remedies and norms provide the initial framework for some mediations.

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However, this does not restrict the mediator from going outside those traditional boundaries if the parties express an interest in doing so.

8. The concept of judging

It has been said that judges are the hardest people to train as mediators, lawyers are the next hardest and the rest of the population is the easiest. The law encourages judges and lawyers to be judgmental about the facts, the law, and the credibility of witnesses and parties. Often, the act of analyzing these factors moves into the realm of sitting in judgment of others as people. This type of focused analysis and global judgment is a difficult habit to break.

A lawyer-mediator faces the challenge of listening with an open mind to parties who have already submitted compelling mediation briefs. A lawyer-mediator has to resist the temptation to make early and unfounded judgments about the merits of a claim or defense. Harder still is the task of suspending judgment while the parties make persuasive arguments during mediation and the mediator observes characteristics in parties that would otherwise lead a person to develop personal feelings that favor or disfavor individual parties.

A mediator is asked to inquire about the factual background of a dispute and to entertain the parties' positions on the issues and applicable law—without making public or private judgments. They are asked to treat the parties with equal respect, courtesy and consideration regardless of any personal feelings that may be generated. To the extent possible, mediators are asked to separate their personal feelings about parties from the facts, the law and other circumstances surrounding their claims.

Lawyer-mediators, by virtue of their training and experience, may tend to form early and rigid professional opinions about a dispute and the parties. In mediation, the challenge is to hold in reserve the process of judgment, while analyzing the case and facilitating communication between the parties. Evaluation of the elements of a case does not necessarily include a global evaluation or rendering of a judgment. Moreover, the manner in which a professional evaluation is conveyed does not necessarily require that a lawyer-mediator come across as if they are rendering a final judgment; instead, an evaluation can be described in terms of possible outcomes and can be the basis for a dialogue with the parties and their attorneys rather than a pronouncement. Mediation is, thus, a process of empowerment, even when the techniques a mediator uses may be invisible to the parties.

*When the Master governs,
The people are hardly aware that he exists.
Next best thing is a leader who is loved.
Next, one who is feared.
The worst is the one who is despised.*



*If you don't trust people,
you make them untrustworthy.
The Master doesn't talk, he acts.*

*When his work is done,
The people say, "Amazing,
We did it, all by ourselves."*

—Chuang Tzu

Conclusion

Lawyers seeking training as mediators face distinct challenges due to their specialized legal training and experience. To make the transition from counselor to conciliator, there must be an awareness of the fundamental differences between the mediation process and adjudicative processes, the roles of an advocate and a mediator and the specialized techniques that are used. The challenge for lawyers is to recognize the difference skill set of a mediator, while simultaneously applying their substantial base of knowledge and experience. Understanding the differences in procedural structure, formality and the rules of evidence can help lawyers to find a degree of comfort in the flexibility, creativity and freedoms of mediation. Accepting these differences and being prepared to let go of a lawyer's traditional role can actually broaden a lawyer's base of skills for resolving disputes in the role of a mediator or in their role as an advocate.

For trainers, it is vital to understand the lawyer's perspective and to treat it as an educational starting point. Early in mediation training, there should be a focus on the distinctive nature and characteristics of the mediation process in comparison to adjudicative processes such as arbitration and trial. Problem-solving should be comparatively analyzed with fact-finding and fault-finding. Additional focus should be placed on the distinctive role of a mediator compared to the role of an advocate or judge. The neutral/party relationship should be examined and contrasted with the attorney/client relationship, especially insofar as it may involve advice-giving. Critical thinking and analysis should be carefully distinguished from sitting in judgment or imposing decisions.

For training of lawyers as mediators to be effective, emphasis must be given to the fact that the transactional centre of the mediation process is the parties. It is the parties, who, with guidance and counsel from their advocates, have the responsibility and the freedom to control the outcome and to make decisions about favorable terms of agreement. It should be stressed that the mediation process, while structured, is flexible and dynamic. Mediators are expected to apply various specialized communication and negotiation techniques with discretion, good judgment, and responsiveness to the particular circumstances of each case. Role-plays, exercises, interactive activities, and case studies should be developed to help lawyers broaden their perspective to include a mediative view of conflict resolution.

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Lawyers bring an added dimension to the mediation of litigated cases, in terms of their experience with the trial process, their knowledge of the substantive law and their practice of working things out with opposing counsel and parties through negotiation. An enhanced understanding of the mediation process coupled with legal training and experience will enable a lawyer to become even more skilled in resolving disputes. Unburdened from the limitations flowing from custom, ceremony and the combative nature of the legal process, lawyers can achieve the transformation from gladiator to mediator.



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Massachusetts Council
on Family Mediation

GOT CERTIFICATION?
GO TO MCFM.ORG



STOP LABELING PEOPLE DIFFICULT PEOPLE AND HCPS

By Janet Rowles

Nowadays it is chic to label people. If we then turn that label into an acronym we sound even smarter, it appears. At the top of the list of most-used labels is narcissistic personality disorder (NPD). While people used to be merely “selfish”, a term that might lend itself to being at least somewhat transitory, we now label people narcissistic which guarantees that from then on every move they make will be proof of the label – a self-fulfilling prophecy, for sure.

In the world of alternative dispute resolution (ADR, as long as we are slinging around acronyms) mediators, evaluators, attorneys and judges love to hate-on difficult people or high-conflict people (HCPs).

According to Bill Eddy, LCSW, Esq., “High-conflict people (HCPs) have a pattern of high-conflict behavior that increases conflict rather than reducing it or resolving it. This pattern usually happens over and over again in many different situations with many different people. The issue that seems in conflict at the time is not what is increasing the conflict. The “issue” is not the issue. With HCPs the high-conflict pattern of behavior is the issue, including a lot of: A. All-or-nothing thinking, B. Unmanaged emotions, C. Extreme behaviors, D. Blaming others.”

(<http://www.highconflictinstitute.com/who-are-high-conflict-people>)

Let's look at this. If you understand conflict, you know that when people are in conflict that they are generally not at their best. They are sadder, angrier, more sensitive, more volatile, more stubborn, and/or more confused compared to their normal selves.

The “All-or-nothing thinking” is an attribute of most mediation participants when they first meet at the table. “Unmanaged emotions” as well. Sometimes people arrive to the mediation table quite calm and then, as the conversation progresses, they might get more upset! Progress in a mediation is not a straight path to an agreement. It is often convoluted and unexpected. It *usually* gets worse before it gets better. Think of cleaning out a room. You pull out all the stuff to go through it and suddenly the room is messier instead of cleaner. Same in a mediation: often the process is a bit messy.

Getting back to the attributes of so-called HCPs, “Extreme behaviors” is next on the list. Yes, extreme behaviors may be a sign of dysfunction, but at the mediation table, more importantly, it is definitely a sign of feelings of powerlessness. Judging people for these behaviors only adds to the difficulty.

The fourth and final attribute is ironic, at best. “Blaming others”. Everyone, and I mean *everyone*, blames the other participant in the mediation. If they aren't blaming each other, they likely don't need mediation. Like the other attributes, blaming is a symptom of powerlessness. People are more self-absorbed than they

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would normally be when they are in conflict so it makes perfect sense that they would not yet be able to accept responsibility for their part.

It appears that labeling people HCPs is a way of blaming them for mediators' inability to deal with very difficult cases. We need to stop blaming the participants and start figuring out ways of improving our own skills to accommodate very difficult situations. These are the cases that are most in need of mediation.

All four of these attributes of so-called HCPs are consistently a part of high-conflict mediation. But labeling a person in the mediation as high-conflict, is a vote of discouragement and judgment. It devalues their opinions and struggles. It affects our neutrality, which is essential to a high-quality process.

These are not HCPs. These are people who are in conflict. Perhaps they have been in conflict for a long time and are steeped in their upsetness. Regardless, we must stop labeling people HCPs because it changes the course of the discussion. It changes the interventions we choose as mediators. It closes down the discussion instead of opening it up. We should be welcoming people who are angry or upset and telling them explicitly and through our actions that we understand why they might be acting that way.

"It appears that labeling people HCPs is a way of blaming them for mediators' inability to deal with very difficult cases. We need to stop blaming the participants and start figuring out ways of improving our own skills to accommodate very difficult situations."

The best mediators know that it is important to understand that when people are upset, they *act* upset. We welcome high-conflict cases because that is exactly what we are supposed to be experts in: conflict. We don't judge people because they are stubborn or sad or angry, even those who appear unmovable. We actually expect this and know how damaging it is to the process to judge them for their behavior.

Mediators (and others) who label people as HCPs and difficult people are preying on potential clients that figure now they are finally going to be understood because their soon-to-be-ex-spouse is certainly an HCP! Can't you just hear someone going through a divorce reading about HCPs in an article or on a website and exclaiming, "Have you read the definition? It fits exactly him, doesn't it?"

It might be true that one reason to label people is to then be able to find empathy for their behaviors, for their condition, for their struggles. Regretfully, this is not what truly happens. When we label people, what we inevitably do is stop listening with an open mind, we stop taking them seriously, we start making assumptions based on their label, which ironically, we just made ourselves.



These are people who are acting angry, interrupting, won't calm down, won't get to the point, and/or won't compromise. Once someone has the HCP label, it means that we walk into the room with our guard up, watching out for the others, keeping arms length physically and emotionally, and we pretty much don't believe them with the same openness that we do if they would just behave themselves. They suddenly have fewer rights than others do because they have been labeled HCPs.

Mediators who complain about HCPs are the same mediators that accept, and likely prefer, cases that have little or no conflict. If there is little or no conflict, ideally people would try to work things out on their own. Then if they get hung up on certain aspects of their agreement, they can find a mediator who truly welcomes and has expertise in dealing with difficult situations.

Come to think of it, there ought to be a label for people who are constantly labeling other people. Just in case there isn't, I'm going to go against my own advice and label them. Let's call it: Excessive Labeling Disorder (ELD).



Janet Rowles is a mediator specializing in high conflict and emotionally-difficult situations. In addition to doing divorce, post-divorce, and all types of family mediations, Janet does small and large group work including circle-keeping in Minneapolis public schools and facilitating large groups such as condo associations and non-profit board decision-making. Janet has a Certificate in Dispute Resolution from Hamline School of Law Alternative Dispute Resolution Institute. Janet is also trained in transformative mediation, eldercare mediation, circle-keeping, and the social inclusion method for bullying in schools. Janet has been a volunteer-mediator for Conflict Resolution Center in Minneapolis since 2003 and was a board member there from 2004-2011. In 2013 Janet received a Peacemaker of the Year Award from the Minneapolis Public Schools.





CONFLICT PREEMPTION

By Charles Hill

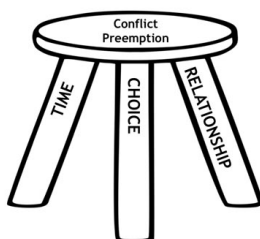
Google Scholar returned “about 2,190,000 results” for articles on “Conflict Resolution.” Indeed, many highly accomplished and respected practicing mediators, as well as a few of my own colleagues regularly write and/or post articles on the topic. I too have posted articles and taught brief workshops on conflict resolution.

Much less often we find articles dealing with conflict preemption. I am guided by the definition of preemption found in the *Encarta North American Dictionary*: “action that makes it pointless or impossible for somebody else to do what he or she intended.”

A decade and a half in the ADR field has led me to ask the question: what about conflict preemption? Mediators strive to help parties de-escalate and resolve conflict that has already occurred. As ADR practitioners, shouldn't we also devote time and effort to helping people learn techniques and tactics that might help them preclude conflict?

I began examining that question from an anecdotal, non-academic perspective without benefit of research, but with potential conflicts in situations involving a variety of individuals including couples divorcing, homeowners moving to newly shared communities, faculty members at a private school, young men confined to a mental health facility, residents of a large inner city public housing project, and inmates at a maximum security institution.

Mediating and conducting workshops in those environments led me to see preemption of conflict as possible when three supporting factors are considered: Time, Choice, and Relationship. These are the critical elements in my “Three Legged Stool for Conflict Preemption.”



TIME

The first leg and what may ultimately be the most difficult to master is time. Viktor Frankl, psychiatrist, Holocaust survivor, and author of *Man's Search for Meaning*, famously said:



“Between stimulus and response there is a space. In that space is our power to choose our response. In our response lies our growth and freedom.”

This strikes me as a fundamental element in our ability to preempt conflict. Time may be the most difficult of the three legs to gain control of simply because conflict stimuli occur so quickly and with such little warning that nature’s protective “fight or flight” reactions tend to trigger before more thoughtful responses can emerge. This almost instinctive response leaves little time for analysis, introspection, choice, or anything else. Nevertheless, if we learn to pause and work with, if not manage, the infinitesimal time that often exists between stimulus and response, we open opportunities for alternatives to fight or flight.

We can step back, pause, collect our wits, and see the situation objectively, as William Ury advocates with his “Going to the Balcony.” Imagine you are on a stage, then imagine yourself climbing onto a balcony overlooking the stage. That detached view may allow one to see the conflict in a more objective light almost as if looking as a third party and even envisioning oneself in the scene as one of the participants. Perhaps, in such a scenario, we can learn to respond rather than react! But first we must learn to pause and give ourselves the opportunity to access the higher level processing center in our brains.

Many other strategies and techniques for managing our response to conflict such as Michele McDonald’s acronym, RAIN: Recognize what is going on; Allow the experience to be there, just as it is; Investigate with kindness; and Natural awareness, which comes from not identifying with the experience; also rely on our ability to harness TIME.

CHOICE

As rationale humans we have options. The second leg of the stool is CHOICE and it encompasses the fact that we can learn to be selective in our response to a given stimulus.

Sharks, Owls, Foxes, Turtles, and Teddy Bears are often used to illustrate the five different styles of conflict response described in the well known Thomas-Kilmann Conflict Mode Instrument (TKI®): competing, collaborating, compromising, avoiding, and accommodating.

But unlike animals, who are controlled almost entirely by their instincts, humans, if we condition ourselves to engage the rational part of our brains, can select from amongst several modes of response behavior. Although clearly not the only set of choices available, the five TKI modes serve as readily-differentiated choices we might employ. Studies in mindfulness and non-violent communications are opening us to an expanded array of choices we might select amongst in responding to signs of impending conflict. Understanding that choices actually do exist is a huge step in preemption!

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RELATIONSHIP

The third leg of my conflict preemption stool, relationship, is perhaps the easiest of the legs to describe. It is simply understanding the nature of the relationship between people or groups. Is it an ongoing relationship as with family, friends, co-workers, bosses, customers, or is it likely that the parties may never encounter each other again?

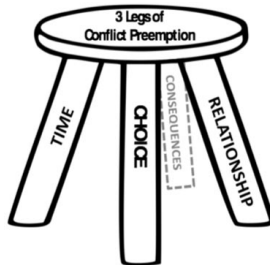
The impact of relationship on our approach to conflict preemption, management, and resolution is fairly obvious and need not be delineated here. Suffice to say that ongoing relationships are likely to carry more relative value and consequently offer more reasons for unearthing tempered responses.

There is another dimension of conflict preemption that although very obvious, warrants deliberation:

CONSEQUENCES

For too many of us, the long term consequences of our response to conflict come into focus only after the fact. Perhaps this is once again where the severe TIME limitation hampers our ability to apply analysis, reasoning, and higher order thinking needed to assess how we might respond. This is particularly prevalent with young people who lack the maturity and life experiences necessary to vet their choices and think of them only in retrospect. Some neuroscientists say the human brain is not fully developed until age 25, and that may contribute to their inability to routinely consider consequences.

As depicted below, it may well be that our proverbial stool has four rather than three legs. For many of us, taking the long term consequences of our response to conflict into account is difficult at best and far too often it occurs only as an afterthought. That is why the graphic below depicts the fourth leg as somewhat of a less visible or greyed out, dotted line leg.



Charles A. Hill is a Tennessee Supreme Court “Rule 31” Listed Mediator. He is a member of the Board of Directors of the Nashville Conflict Resolution Center and is authorized to practice in both Tennessee and California.



BEYOND EMAIL: ONLINE APPOINTMENT SCHEDULING

By Rackham Karlsson, Justin L. Kelsey,
and Jonathan R. Eaton

A version of this article originally appeared at zephyrlaw.com/family-law-blog.

It's no secret that time is a mediator's most valuable asset, especially if you're being paid hourly. If you're not working, you're not making money — and not only that, it has to be paying work. Much of the work that mediators do every day is essential to keeping the business afloat, but isn't paid, including everything from accounting to the subject of this article: appointment scheduling.

If you share office space, you might already have access to an assistant, paralegal, or office manager who does this kind of work — someone who manages your calendar, screens calls, etc. But if you're a solo, chances are you don't have much help, and the costs of bringing someone on, even part-time, are daunting.

Consider the argument that a mediator who charges \$200 an hour shouldn't be doing work that someone else could do for \$25 an hour (plus payroll expenses). If you can replace that time with paid work, that's theoretically \$175 per hour (minus payroll expenses) that you weren't making before. However, you have to build in the overhead of training and management. Perhaps most importantly, managing people is an added complication that conflicts with many solos' love of the freedom of working alone.

One answer is to automate some business functions, which allows you to effectively "delegate" unpaid work to your computer and earn more money without hiring a single person. Some of the work you're losing money on needs to be done by a human, but not all of it. Depending on the tools you use, appointment scheduling might not require a human touch. If your calendar is hosted online, particularly by Google, there are easy-to-use services that allow clients to schedule their own appointments, with little-to-no interaction required by you. That means fewer interruptions and more time available for paid work.

Handing over your calendar to a machine might be a bit unsettling at first, but rest assured — online scheduling services don't offer clients unrestricted access to your schedule. In addition to respecting times that you've already blocked off, you can define useful parameters and restrictions, such as:

- Hours of operation
- Appointment length (which may be different for different appointment types)
- Buffer time before and after appointments

These services can also provide helpful ancillary functions, like:

- Requiring clients to provide contact and other information at the time of scheduling
- Follow-up emails with additional instructions
- Automated reminders to clients

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Again, all of this can happen without any effort on your part, beyond the initial setup.

Online scheduling doesn't have to be an all-or-nothing proposition. If a client calls and is ready to schedule over the phone, by all means do so. But if a client calls and isn't ready to schedule, consider taking their email address and sending them a link to your online scheduling system. Likewise, if a client emails you about setting up an appointment, send them the link. You will make the process incredibly easy for them, while saving yourself the time and hassle of back-and-forth emails to determine everybody's availability.

Online scheduling is only one area where you can delegate without hiring, but it's an important one. Even if you have staff, you may want to consider adding an automated scheduling option, because some clients may prefer it and you can reduce the number of steps between a potential client and a meeting. Many online scheduling services can be embedded right into your website, giving a seamless experience for visitors. (Unfortunately, the specifics of setting up website integration are a bit beyond the scope of this article.)

This very easy process will undoubtedly save you valuable time, avoid costly interruptions, and simultaneously making it easier for clients to get in front of you at a time that works for them. A couple of options to consider are Calendly (calendly.com), Doodle.com, and x.ai. The latter is in beta mode but has been getting rave reviews. If you know of any others that work well for you, please let us know!



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HOW CAN YOU SAY THAT?

By Kate Fanger

*Recently a mediation session went south when one client insisted on her position because it was “right” and “the only fair thing to do” (under the circumstances) and while she listened to me when I explained how the law might (differently) view the point she was making (in other words that she might not win in court based on her logic), she then repeated her view that **fairness** demanded her condition be met. The other client’s response: That he only wanted what the law would provide.*

In a recent case I had the same situation: wife was insisting that a valuation (for buy out) of the marital home should be dated as of her discovery of husband’s extramarital affair, and not now (some two-plus years later). At that time they had talked about trying to work things out and stay married, but wife now felt husband had never been sincere in those intentions, and instead had merely delayed the divorce process in order that joint assets, like the house, would increase in value. Of course husband disagreed – with all of it – and said he was legally entitled to half of the current value of the home so that’s what he wanted.

Many divorce mediation clients are stuck in certain positions when they come to see us, but I find the “stuckness” has different qualities that can make a difference in what tools I’ll use to try to free the conversation up for flexible and creative problem-solving. Often, a spouse is stuck because he or she feels there is a lack of understanding or appreciation of their feelings and concerns. In that case, a well-facilitated sharing or expression on both sides often loosens clients from their sticky positions, as they begin to understand each other’s point of view. Other times, the grip on a position is due to a lack of legal information, and providing that does the loosening.

But sometimes, as in my case above, the impasse is due to one of the parties holding what I call a “flag” position. One spouse feels they have the moral high ground for a particular demand, and it’s as if they have put a flag on their hill, and nothing will budge them. When I discover a flag issue (often revealed by talk of being betrayed or lied to) instead of attempting to nudge that client off their hill, I use a different approach. I’ll caucus and explore the larger map of each client’s settlement, and test the topography. Translation: I’ll encourage flexibility on the part of less-outraged spouse by explaining my experience of these flag issues, and ask whether they can be flexible in a place where their spouse may emotionally be less able to bend, and perhaps seek to win some other point. With the flag client, I’ll confirm if it is *the* most important issue for them to “win”, and encourage them to have no others.

In my recent case, after such a caucus, husband looked at the landscape I’d described, and decided (as long as the rest of the map remained fairly flat) he could live without scaling that particular hill.



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WHAT'S NEWS? NATIONAL & INTERNATIONAL FAMILY NEWS

Chronologically Compiled & Edited by Les Wallerstein

Anti-Abortion Groups Assert “Best Interest of the Embryo” As scientific advances have made frozen embryos common, they have brought new complications to divorces. Most courts have treated embryos as marital property, often favoring the party that plans not to use the embryos, emphasizing a right not to be forced to procreate. Some have applied contract law, decided which half of the couple more deserved the embryos, or required mutual consent. But anti-abortion groups argue that such cases should be decided according to the best interests of the embryos, the same legal standard used in child-custody disputes. They say an embryo’s most fundamental interest is to be born: “No other right is of any avail if a human being is not around to invoke it.” The cases are part of the broader “personhood” debate that has become central to abortion politics. Advocates in many states are seeking laws that would make embryos full legal persons at fertilization — blocking not only abortion but also some forms of contraception and assisted reproduction. (Tamar Lewin, NYTimes, 1/20/2016)

Couple’s Lawsuit Is First Test for Same-Sex Marriage in China Two young men met through an online chat group. On their first anniversary, Sun Wenlin and Hu Mingliang, tried to register to marry at a local civil affairs bureau in Changsha, a southern provincial capital. An employee refused, saying Chinese law did not permit same-sex marriage. The couple then did the unthinkable — they sued the civil affairs bureau. This month a district court accepted their case, the first time a Chinese court had agreed to hear a lawsuit on same-sex marriage. Mr. Sun said the case had cost them about \$1,200 so far, nearly three times what each of them earns in a month. But he said they were determined to see it through to the end. (Edward Wong & Vanessa Piao, NYTimes, 1/28/2016)

Pentagon Offers Plan to Store Eggs and Sperm As part of an initiative to make military service more appealing and family friendly, Defense Secretary Ashton B. Carter has created a pilot program that will pay for troops to have their reproductive cells preserved. The goal is to give those in uniform the peace of mind that if they are hurt on the battlefield — hundreds of veterans suffered injuries to their reproductive organs in Iraq and Afghanistan — they would still be able to have children. But the initiative raises legal and ethical questions that Defense Department officials will have to navigate. “Freezing sperm and eggs is not like freezing chicken for dinner,” said Arthur Caplan, a professor of bioethics at New York University’s Langone Medical Center. “What happens if you die — can your wife use it? And what if your mother wants grandchildren and your wife doesn’t, does that mean the sperm can be used with a surrogate? If you’re cognitively



disabled, can it be used? And what happens if the company housing your sperm or eggs goes bankrupt?" A Pentagon spokesman declined to comment on the legal and ethical questions, saying that details were being worked out. The program applies only to active-duty service members, will be re-evaluated in two years, and could ultimately be made permanent. The Pentagon estimates that the program could cost about \$150 million over five years. (Michael S. Schmidt, NY Times, 2/4/2016)

Disparity in Life Spans of the Rich and the Poor Is Growing Wealthier Americans tend to live longer than poorer Americans. Despite advances in medicine and education, the difference in life span after age 50 between richest and poorest has more than doubled since the 1970s. Looking at the extreme ends of the income spectrum, economists at the Brookings Institution found that for men born in 1920, there was a six-year difference in life expectancy between the top 10 percent of earners and the bottom 10 percent. For men born in 1950, that difference had more than doubled, to 14 years. For women, the gap grew to 13 years, from 4.7 years. (Sabrina Tavernise, NY Times, 2/13/2016)

"Burying Beetle" Moms Send a Chemical Signal: 'Not Tonight, Honey' It's the bane of a new mother's life: She's exhausted, but her male partner wants sex. And besides, she still has to get up for those middle of the night feedings. But female "burying beetles" have solved the problem brilliantly, according to a study published in *Nature Communications*. Not only do they zap fathers with an anti-aphrodisiac, they get them to help out with child care. "They are a very modern family," said Sandra Steiger, an assistant professor of biology at the University of Ulm in Germany, and the lead researcher, who studied 400 pairs of beetles over three years to determine the physiological mechanisms by which this sex-versus-parenting détente is mediated. When the immature, wingless beetle larvae are most dependent, researchers found, the mother stops producing eggs and releases a chemical that functions as an anti-aphrodisiac. The father gets the message through his antennae. Both parents then hunker down for the species-preserving imperative: Kids first. Protect and feed. Three days later, when the larvae are independent enough to toddle off and feed themselves, the parents resume copulating. (Jan Hoffman, NY Times, 3/22/2016)

Fathered by the Mailman? It's Mostly an Urban Legend Until the 20th century, it was difficult to prove that a particular man was the biological father of a particular child. In 1304 a British husband went to court to dispute the paternity of his wife's child, born while he was abroad for three years. Despite the obvious logistical challenges, the court rejected the husband's objection. "The privity between a man and his wife cannot be known," the judge ruled. Modern biology lifted the veil from this mystery, albeit slowly. In the early 1900s, researchers discovered that people have distinct blood types inherited from their parents. In

Continued on next page



a 1943 lawsuit, Charlie Chaplin relied on blood-type testing to prove that he was not the father of the actress Joan Barry's child. (The court refused to accept the evidence and forced Chaplin to pay child support anyway.) It wasn't until DNA sequencing emerged in the 1990s that paternity tests earned the legal system's confidence. Labs were able to compare DNA markers in children to those of their purported fathers to see if they matched. As the lab tests piled up, researchers collated the results and came to a startling conclusion: Ten percent to 30 percent of the tested men were not the biological fathers of their children. Those figures were spread far and wide, ending up in many science books. But the problem with the lab data was that it didn't come from a random sample of people. A 2013 study used Belgium's detailed birth records to reconstruct large family genealogies reaching back four centuries. Then the scientists tracked down living male descendants and asked to sequence their Y chromosomes. Y chromosomes are passed down in almost identical form from fathers to sons. Men who are related to the same male ancestor should also share his Y chromosome, providing that some unknown father didn't introduce his own Y somewhere along the way. Comparing the chromosomes of living related men the study came up with a cuckoldry rate of less than 1 percent. Similar studies have generally produced the same low results in such countries as Spain, Italy and Germany, as well as agricultural villages in Mali. A commentary in *Trends in Ecology and Evolution* argues that it's long past time to toss out frequent cuckoldry as a myth. Studies relying on different methods in different cultures all point to cuckoldry rates of about 1 percent. (Carl Zimmer, NY Times, 4/8/2016)



Les Wallerstein is a family mediator, collaborative lawyer, and the founding editor of the FMQ. He can be contacted at 781-862-1099, or at wallerstein@sociallaw.com



**At every age, people underestimate
how much their personalities will
change in the next decade.**

Dan Gilbert



Nota Bene

All family mediators should be aware of a change made to terminology used in the Probate and Family Court:

PARENTING TIME (instead of “visitation”)

The Massachusetts Probate and Family Court has replaced the term “visitation” with the words “parenting time” in various custody-related court forms and on the self-help portion of the Probate and Family Court website. The following forms reflect this change: (CJD 103) Complaint for Civil/Criminal Contempt; (CJD 106) Complaint to Establish Paternity; and (CJD 109) Complaint for Custody-Support-Parenting Time. The revised forms are available at:

<http://www.mass.gov/courts/forms/pfc/pfc-forms-gen.html>

The change of wording went into effect on July 15, 2015.

The term “parenting time” is already widely used in Massachusetts, reflecting the broader awareness and understanding that words matter to families. This is consistent with the national trend and practice of keeping parents involved in their children’s lives.





MC FM NEWS

MEDIATION PEER GROUP MEETINGS

Peer Group Focused on Financial Issues in Divorce: Open to all divorce professionals, the purpose of the group is to focus awareness on the financial intricacies of divorce in an open forum that promotes discussion of a wide range of issues. Discussions will be led by Chris Chen, CFP®, CDFA™, Thomas E. Seder, CDFA™ and group members.

Morning Meetings are usually from 10:00 am to 12:00 pm at the offices of Insight Financial Strategists, 271 Waverly Oaks Road, Suite 2, Waltham. Seating is limited. **Please contact Chris at 781-489-3014, chris.chen@insightfinancialstrategists.com or Tom at 781-489-3014, to m.seder@insightfinancialstrategists.com for more information.**

Central Massachusetts Mediators Group: We serve mediators in Central Mass and towns along Rt. 2 West of Rt. 128. We meet to discuss topics and/or cases, sometimes with guest speakers, in the offices of Interpeople Inc. in Littleton. Interpeople is located about 1/2 a mile off Rt. 495, at Exit 31. Meetings begin at 8:30 AM on the last Thursday of every month, except December, July and August. If you are a family and divorce mediator — attorney or non-attorney — you are welcome to join us. **New members are asked to please call ahead of time: 978-486-3338, or email Shuneet at drthomson@interpeople-inc.com.**

North Suburban Mediators Group: Join fellow mediators meeting to learn and share and network. Meetings are held at 8:30 a.m. on the second Tuesday of the month from January to June and from September to November at the offices of Lynda Robbins and Susan DeMatteo, 34 Salem Street, Suite 202, Reading. **Please call Lynda at 781-944-0156 for information and directions. All MCFM members are welcome.**

Pioneer-Valley Mediators Group: This Western Mass group will be meeting monthly in December on the first Wednesday of every month at the end of the day, from 4 to 6 pm or 6 to 8 pm (depending on the interest) in Northampton at a location to be announced. **Please email Kathy Townsend for further info at Kathleen@divmedgroup.com.**

Mediators in Search of a Group? As mediators we almost always work alone with our clients. Peer supervision offers mediators an opportunity to share their experiences of that process, and to learn from each other in a relaxed, safe setting. Most MCFM directors are members of peer supervision groups. All it takes to start a new group is the interest of a few, like-minded mediators and a willingness to get together on a semi-regular, informal basis. In the hope of promoting peer supervision groups a board member will volunteer to help facilitate your initial meetings. **Please contact Kathy Townsend at Kathleen@divmedgroup.com, as she will coordinate this outreach, and put mediators in touch with like-minded mediators.**



OFFER MCFM's BROCHURES TO PROSPECTIVE CLIENTS

Copies of MCFM's brochure are available for members only. Brochure costs are: **[10 brochures – \$10, 100 brochures – \$50. Postage included.]**, unless you pre-arrange to pick them up at a professional development meeting or other MCFM event. A blank area on the back is provided for members to personalize their brochures, or to address for mailing. **Remember: when you buy 21 or more brochures the “per copy” price is less than the cost to print!**

TO OBTAIN COPIES MEMBERS MAY

call Ramona Goutiere: 781-449-4430

or email: masscouncil@mcfm.org



AN INVITATION FOR MCFM MEMBERS ONLY

All MCFM members are invited to fill out the Member Profile Questionnaire posted on the MEMBERS ONLY page of mcfm.org and submit it for publication in the FMQ. Please email your questionnaire with a personal photo (head shot) and an optional photo of your primary mediation space (or office) to KF@katefangermediation.com. Since the questionnaire is intended to help others learn about you, feel free to customize it by omitting questions listed, or adding questions you prefer. Only questions answered will be published, and all submissions may be edited for clarity and length. **Please help us get to know you.**



THE FMQ WANTS YOU!

The Family Mediation Quarterly is always open to submissions, especially from new authors. Every mediator has stories to tell and skills to share.

To submit articles or discuss proposed articles
call Kate Fanger 617-599-6412
or email KF@katefangermediation.com

NOW'S THE TIME TO SHARE YOUR STORY!





HELP BUILD AN ARCHIVE!

In the spring of 2006, MCFM entered into an agreement with the Department of Dispute Resolution at the University of Massachusetts to create an archive of Massachusetts family-related mediation materials. The two key goals are to preserve our history and make it available for research purposes.

We're looking for anything and everything related to family mediation in Massachusetts — both originals and copies — including: meeting agendas and minutes, budgets, treasurer's reports, committee reports, correspondence, publications, fliers, posters, photographs, advertisements and announcements.

We need your help to maximize this opportunity to preserve the history of mediation in Massachusetts. **Please rummage through your office files, attics, basements and garages. If you discover materials that you are willing to donate please contact Les Wallerstein at wallerstein@socialaw.com.**



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JOIN US

MEMBERSHIP

MCFM membership is open to all practitioners and friends of family mediation. MCFM invites guest speakers to present topics of interest at four, free, professional development meetings annually. These educational meetings often satisfy certification requirements. Members are encouraged to bring guests. MCFM members also receive the Family Mediation Quarterly and are welcome to serve on any MCFM Committee. Annual membership dues are \$90, or \$50 for fulltime students. Please direct all membership inquiries to **Ramona Goutiere** at masscouncil@mcfm.org.

REFERRAL DIRECTORY

Every MCFM member with an active mediation practice who adheres to the Practice Standards for mediators in Massachusetts is eligible to be listed in MCFM's Referral Directory. Each listing in the Referral Directory allows a member to share detailed information explaining her/his mediation practice and philosophy with prospective clients. The most current directory is always available online at www.mcfm.org. The annual Referral Directory listing fee is \$60. Please direct all referral directory inquiries to **Ramona Goutiere** at masscouncil@mcfm.org.

PRACTICE STANDARDS

MCFM was the first organization to issue Practice Standards for mediators in Massachusetts. To be listed in the MCFM Referral Directory each member must agree to uphold the MCFM Standards of Practice. MCFM's Practice Standards are available online at www.mcfm.org.

CERTIFICATION & RECERTIFICATION

MCFM was the first organization to certify family mediators in Massachusetts. Certification is reserved for mediators with significant mediation experience, advanced training and education. Extensive mediation experience may be substituted for an advanced academic degree.

MCFM's certification & recertification requirements are available online at www.mcfm.org. Every MCFM certified mediator is designated as such in the Referral Directory. Certified mediators must have malpractice insurance, and certification must be renewed every two years. Only certified mediators are eligible to receive referrals from the Massachusetts Probate & Family Court through MCFM.

Certification applications cost \$150 and re-certification applications cost \$50. For more information contact **S. Tracy Fischer** at tracy@tracyfischermediation.com. For certification or re-certification applications contact **Ramona Goutiere** at masscouncil@mcfm.org.



DIRECTORATE

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EDITOR'S NOTICE

MCFM **Family Mediation Quarterly**

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The FMQ is dedicated to family mediators working with traditional and non-traditional families. All family mediators share common interests and concerns. The FMQ will provide a forum to explore that common ground.

The FMQ intends to be a journal of practical use to family mediators. As mediation is designed to resolve conflicts, the FMQ will not shy away from controversy. The FMQ welcomes the broadest spectrum of diverse opinions that affect the practice of family mediation.

The contents of the FMQ are published at the discretion of the editor, in consultation with the MCFM Board of Directors. The FMQ does not necessarily express the views of the MCFM unless specifically stated.

The FMQ is mailed and emailed to all MCFM members. The FMQ is mailed to all Probate & Family Court Judges, all local Dispute Resolution Coordinators, all Family Service Officers and all law school libraries in Massachusetts. An archive of all previous editions of the FMQ are available online in PDF at <www.mcfm.org>, accompanied by a cumulative index of articles to facilitate data retrieval.

MCFM members may submit notices of mediation-related events for free publication. Complimentary publication of notices from mediation-related organizations is available on a reciprocal basis. Commercial advertising is also available.

Please submit all contributions for the FMQ to the editor, either by email or computer disk. Submissions may be edited for clarity and length, and must scrupulously safeguard client confidentiality. The following deadlines for all submissions will be observed:

Summer: July 15th Fall: October 15th
Winter: January 15th Spring: April 15th

All MCFM members and friends of family mediation are encouraged to contribute to the FMQ. Every mediator has stories to tell and skills to teach. Please share yours.



Massachusetts
Council on
Family Mediation



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