

# Therapeutic Mediation: A Saner Way of Disputing

by  
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Recent evidence shows that the same dysfunction that generates a couple's inability to communicate is the primary reason that mediation fails. These very processes that damaged the marriage are precisely the points at which the mediation gets stuck. It is believed that "[m]ost forms of divorce mediation have their roots in the therapeutic tradition."<sup>1</sup> However, therapeutic mediation finds both that mediation failures can be traced to relationship dysfunction and can be prevented by well-placed attention to these stalemates. In this way, therapeutic mediators attempt to ensure that the relational impasses that generated the marital rupture do not jeopardize the mediation and carry over to become impasses of divorce.

In fact, the findings of Joan Kelly, longtime leading researcher in the area of divorce and its sequellae, point to the need for mediations in general to include attention to relational, as well as legal, issues. She writes, "[t]here are some indications that mediations that incorporate more hours and sessions, with trained and experienced mediators, and focus as well on communication and relational issues, are more successful in achieving settlement and behavioral change."<sup>2</sup>

And because the behavior of most couples beginning divorce mediation reflects their behavior during the marriage, couples naturally come to mediation with these dysfunctional communication patterns in place. Yet, if these communication

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<sup>1</sup> SUSAN BROWN, *Models of Mediation*, in *DIVORCE AND FAMILY MEDIATION*, 48, 49 (James C. Hansen & Sarah Childs Grebe eds., 1985).

<sup>2</sup> Joan Kelly, *A Decade of Divorce Mediation Research: Some Answers and Questions*, 34 *FAM. AND CONCILIATION CTS REVIEW* 3, 373-385 (July 1996).

patterns were ineffective during the marriage, they become increasingly more ineffective during the course of divorce, in light of the additional layers of defenses that the marital rupture naturally creates. Therefore, in addition to resolving the relevant legal disputes, therapeutic mediators believe that, like therapists, they must: 1) remain cognizant of couples' learned dysfunctional communication patterns; 2) know when and how to intervene to stop couples' harmful and recursive interactions; and 3) be able to teach more effective communication tools.

## I. Central Premise

The primary assumption of this article is that these personal and relational issues that blocked communication in the marriage must be attended to in the mediation, at least to the extent that they can be removed as impediments to the negotiations. Otherwise, these issues likely will become road blocks that will jeopardize the settlement of the multiple legal issues essential to divorce. Worse yet, these issues will overshadow the couple's post-divorce adjustment. While this may be less a concern for couples who divorce with no children because they truly never have to see each other again if they choose, this is not so for divorces where children are involved. For them, it is absolutely essential that the couple adopt different and more effective ways of working together, in theirs and their children's best interests. As Judith Wallerstein



and Sandra Blakeslee write, “[d]ivorce is deceptive. Legally it is a single event, but psychologically it is a chain - sometimes a never-ending chain - of events, relocations, and radically shifting relationships strung through time, a process that forever changes the lives of the people involved.”<sup>1</sup> A useful way to think about therapeutic mediation, then, is that it aims to prevent any additional damage that is not already inherent in the divorcing process, while it attempts to ensure the parents’ restabilization and adjustment so that their children’s development is not jeopardized by ongoing rancor between parents.

## II. Article Overview

To elucidate an approach to divorce mediation that capitalizes on, rather than ignores or sidesteps, these often highly charged emotional issues, this article will attempt to consider the following questions. Are there any constructive uses of conflict? What is therapeutic mediation? What constitutes a systemic perspective, and how is that relevant to mediation? What are the goals of therapeutic mediation? Are there special skills or attributes that are important for therapeutic mediators? Is therapeutic mediation therapy? Why is interdisciplinary co-mediation important in this style of mediation? How does therapeutic mediation compare with other forms of dispute resolution? For what kinds of cases is therapeutic mediation appropriate? What are some pitfalls in this type of mediation, and how do mediators counteract them? Are there any special ethical considerations inherent in this type of mediation?

## III. Are There Any Constructive Uses of Conflict?

How one views conflict will have a great deal to do with what one does with it.<sup>2</sup> Rather than seeing conflict as something to be denied, eliminated at all costs, or fanned into flames, conflict instead could be viewed as “. . . the manifestation of a problem in need of satisfaction.”<sup>3</sup> Conflict can be seen as natural because when people live side by side in their most intimate contexts, it is inevitable for irritants to develop between them. In order for those vexations that swirl like gnats around them not to develop into major problems, people need to have strategies for resolving them before those aggravations become like killer bees.

Divorce lawyers and psychotherapists alike know all too well the multiple ways that anger runs amuck and ravages human beings, destroying their most precious relationships. So it may seem paradoxical to say that anger and the resulting conflict it usually engenders can be among the purest, most intimacy-generating experiences human beings ever have. When couples do not avoid the inevitable differences that occur in any intimate relationship but instead strive to reach a mutual understanding and accommodation, the result is a level of safety, intimacy, and trust that can become steadily more deeply satisfying. Alas, all too often, anger is the most easily prostituted human emotion. This happens when people use conflict to manipulate, to struggle for power, to control, and, in general, to maintain distance between each other. Anger then becomes dangerous to the relationship instead of life- and intimacy-enhancing.

Family psychologist and researcher John Gottman at the University of Washington explored the issue of communication styles that promote long-term, satisfying marriages in order to isolate the variables that jeopardize them. His findings, after years of research, centered on the management of anger as the key.<sup>4</sup> It is common sense to say that exploding in endless tantrums all too often results in verbal if not physical violence and damages people and relationships. But it is less commonly understood that withdrawal into what Gottman calls “stonewalling” can be just as deleterious.<sup>7</sup> Gottman found that the best single predictor of divorce in couples is whether the husband withdraws during conflict. Because this action precludes

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<sup>1</sup> JUDITH S. WALLERSTEIN, AND SANDRA BLAKESLEE, *SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE* xii (1989).

<sup>2</sup> JOSEPH FOLGER AND ROBERT BUSH, *Ideology, Orientations to Conflict, and Mediation Discourse*, in *NEW DIRECTIONS IN MEDIATION: COMMUNICATION RESEARCH AND PERSPECTIVES 3* (Joseph Folger and Tricia Jones eds., 1994).

<sup>3</sup> *Id.* at 4.

<sup>4</sup> John M. Gottman, *Predicting the Longitudinal Course of Marriages*, 17 *J. MARITAL & FAM. THERAPY* 3, 4 (1991). <sup>7</sup> *Id.* at 6.

mutual expression and understanding of emotions and the development of options that will solve the problem, the emotional or literal disappearance of either one is precarious for the ongoing health of the marriage.

Why would men withdraw, just when they need to remain present and have it out with their wives? It is widely accepted that the primary emotion that men in our culture are socialized to believe is acceptable for them is anger.<sup>5</sup> And yet, many are fearful of expressing their anger lest they become rageful. In fact, one of the primary factors in men's well-documented emotional constriction may be that very fear.<sup>9</sup> Thus, when a husband withdraws, this may look to his wife like disinterest, when in fact it usually is quite the opposite. He retreats because he is feeling strongly, and it frightens him. So he stonewalls, emotionally withdrawing from even the chance of a fight.

Yet, understandably "[t]he husband's stonewalling is very aversive for the wife and leads to her physiological arousal. She responds by trying to re-engage the husband."<sup>6</sup> So, ironically, he unwittingly ignites the very fight he is trying to stave off. As one might predict, this can become an ever-deepening cycle of distance between them; the husband either withdraws progressively farther, leaving them both lonely, or erupts as he feared, leaving them both bruised, literally or figuratively. When this happens, instead of generating deepening intimacy, the couple is trapped in deepening distance. Therefore, conflict and how it is handled become major predictors and regulators of the degree and the quality of intimacy for a couple.

However, a major constructive function of anger, if it is not allowed to rain down unchecked, is that it serves as a differentiator between people. Individuals act out the need to be psychologically separate and autonomous using conflict. Relationships that are characterized by a sense of vibrant closeness possess a sense of what Judith Wallerstein and Sandra Blakeslee call a sense of "we-ness."<sup>7</sup> This helps the marriage survive because both members of the couple believe that the marriage is worth nurturing and protecting. However, paradoxically and simultaneously, the most satisfying marriages are composed of two strong and healthy individuals.<sup>8</sup> That is, the deepest levels of intimacy are found with couples who also establish and cherish their own and the other's individual differences. Often, these divergences are the most clearly articulated and come to be best understood in the course of conflict. This is why the "terrible twos" and adolescence (its developmental echo), are as stormy as they frequently are. Individuals in each of these instances are attempting legitimately to assert their separate, independent selves. It is as if people say to each other, "Now, do you still love me?" after they have fought. Provided conflict does not become their only vehicle for closeness, these turf-setting or kiss-and-make-up resolution functions of conflict make it not only mutually rewarding but also a leavening agent both for individuals and for couples.

Nathan Ackerman, considered by most family therapists to be the grandfather of family therapy, stated that the only true autonomy is in togetherness.<sup>9</sup> By that, it can be hypothesized that he meant the best way to learn about ourselves is by interacting with others, for only then can we learn in real and experiential ways who we are. However, the author prefers to extend his axiom to include a corollary: the only true togetherness is in autonomy. A significant source of tension and sometimes conflict for couples is the effort to find that happy medium between autonomy and togetherness. One female psychotherapy client of the author summed up how beginning to strike this balance generated positive effects both in self-esteem and in her marriage. Speaking to her husband of six years, she said, "I'm feeling more aligned with myself as a result of therapy than I have in my whole life! And as a result, I'm feeling better and better in this relationship. It makes me love you all the more and see you even better." This statement is an outstanding example of Ackerman's elegantly simple paradox.

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<sup>5</sup> BETH M. ERICKSON, *HELPING MEN CHANGE: THE ROLE OF THE FEMALE THERAPIST* 387 (1993). <sup>9</sup> *Id.* at 387.

<sup>6</sup> John M. Gottman, *Predicting the Longitudinal Course of Marriages*, 17 *J. MARITAL & FAM. THERAPY* 3, 5 (1991).

<sup>7</sup> JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, *THE GOOD MARRIAGE: HOW AND WHY LOVE LASTS* 62 (1995).

<sup>8</sup> Beth M. Erickson, *The Erosion of Love and the Persistence of Attachment* (1996)(unpublished)(on file with author).

<sup>9</sup> NATHAN W. ACKERMAN, M.D., *THE PSYCHODYNAMICS OF FAMILY LIFE: DIAGNOSIS AND TREATMENT OF FAMILY RELATIONSHIPS* 75 (1958).



Every couple relationship falls somewhere on a continuum between emotional fusion and autonomy. Further, the degree of fusion and autonomy in any couple can vary, depending on life stressors such as relocation, illness, job loss, birth or death of a child, and other episodes that impinge on the couple from the outside. The greater the fusion between two people, the more one person's attitudes, beliefs, and behavior are influenced by the other. The degree to which a person is emotionally influenced by the other, without regard at the same time for self, reflects the degree to which that person loses self-direction in life. People whose emotional fusion is extreme suffer from such a diffuse sense of self that they, for example, either surrender themselves completely and allow themselves to be physically or emotionally abused, become chronically emotionally or psychosomatically ill, become over-involved and even symbiotic with a child to the detriment of both child and marriage, or they fight to protect what they secretly believe are shards of their shattered self-esteem they feel they must hide. Still other people become frozen into extremes of what they fancy is emotional autonomy, eventually develop problems, and appear in our office as "control freaks."

The central points here are twofold. One is that all couples oscillate between distance and closeness, depending on outside events, their needs for support at any given point, and their developmental stage and that of the relationship. And the other is that couples who get stuck at one extreme or the other of distance or closeness, autonomy or togetherness, can be expected to manifest problems of some kind in their relationship networks. If these are not corrected - and sooner rather than later - they eventually likely will need to seek the help of legal, medical, or mental health professionals.

To summarize, as we have seen, conflict either can serve the relationship or be its eventual undoing. However, most people, especially lawyers and judges who see the results of conflict run amuck, tend not to think of conflict as constructive. Because of this, the author offers the following list of further constructive uses of conflict that are self-explanatory: 1) It clarifies both people's interests and establishes mutuality; 2) It delineates and highlights problems so they can be solved; 3) It allows people to explore and to resolve their differences; 4) It deepens understanding because of the empathy that is built when a problem is resolved successfully; 5) It facilitates the establishment of agreements that form the basis of a family's cohesion and directionality; 6) It allows people to synthesize their divergent directions into a single, unified approach not only to a given problem, but ideally, to a shared life; 7) It helps both partners clarify their needs for themselves and for the other; 8) It establishes and reaffirms a sense of fairness in the relationship that further invests people in its preservation; 9) And it empowers people and helps them feel in charge of their lives. Mediators could add to this list and would be advised to do so, in preparation for doing mediations of whatever stripe.

It is important to conceptualize conflict from a ". . . transformational orientation . . . not as a problem to be gotten rid of, but as a rich opportunity for growth, to be exploited to its full advantage."<sup>10</sup> Obviously, conflict also has the potential to spark wars. So its transformative power is actualized only if it is handled appropriately, such as in ways outlined above. And it is both the mandate and the obligation of mediators to teach the skills that can make conflict empowering rather than disabling.

Perhaps more than anything what enables people to manage conflict effectively hinges on their ability to transact emotions appropriately. This is because emotions are the primary currency in intimate relationships. Relationships in which people are unable to do this satisfactorily become emotionally bankrupt and end up as divorce statistics. And while emotions are the metaphoric legal tender in marriages, these same needs mutate in divorce to actual currency in the form of financial disputes. But at base, the disputes during marriage, divorce, and mediation all concern unmet needs. In the alchemy of divorce, what masquerades underneath the struggle for the couple's gold is the ongoing struggle to get one's needs met. However, in leaving the marriage, the unmet need is slightly different from what it was during the marriage. It is to have one's contributions to the marriage acknowledged and valued by the spouse, or the converse,

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<sup>10</sup> Folger & Bush, *supra* note 4, at 16.

to continue to be taken care of by the spouse out of a sense of entitlement or from fear of being unable to take care of oneself.

#### IV. What is Therapeutic Mediation?

Therapeutic mediators know and readily acknowledge that “[w]hile the marital dyad dissolves after divorce, the parental dyad persists.”<sup>11</sup> Although this statement may seem obvious, all too many mediators, lawyers, and even therapists appear to pay lip service to this factor or to ignore it entirely. However, in working with couples with children, this fact remains in the foreground, not just in the background, for therapeutic mediators. The attempt is to ameliorate the damage that Barbara Whitehead warns of when she writes, “[i]n short, family disruption creates a deep division between parents’ interests and the interests of children. One of the worst consequences of these divided interests is a withdrawal of parental investment in children’s well-being.”<sup>12</sup> As a result, Rutgers University sociologist David Popenoe warns us that “[C]hildren from non-intact families have a risk factor [for multiple kinds of dysfunction] in multiple arenas [of their lives] of two to three times that of children in intact families . . . . This is equivalent to smoking two to three packs of cigarettes per day.”<sup>13</sup>

In contrast to structural mediation, which is goal-directed and driven by the legal issues involved in divorcing, therapeutic mediation can be defined by borrowing from Howard Irving and Michael Benjamin. They write:

Proponents of structural models of mediation recognize that a crucial client task is the negotiation of issues in dispute, without which there can be no agreement. Proponents of therapeutic models of mediation . . . recognize that there are relational prerequisites without which fair negotiation, and thus agreement, is impossible. Accordingly, they focus as much on relational processes as on negotiation outcomes. They also realize that in the absence of these prerequisites, negotiation is a waste of time, with referral for therapy or to the court better options than mediation.<sup>14</sup>

The author and her co-mediator, an interdisciplinary team composed of a licensed marriage and family therapist and a certified family law specialist, offer the following specific strategies they employ to implement this relational focus. They write that therapeutic mediation, as they practice it:

- is aimed at identifying and resolving the communication impasse that compromised the marriage so that those same patterns do not create impasses cases of divorce;
- teaches people to relate to each other qualitatively different *while* they reach the legally binding agreements that will get them divorced;
- coaches both parties to learn to relate to each other differently post-divorce, which particularly is stressed when there are children involved;
- sees relationships from a systemic perspective, and therefore, identifies the major systemic dynamics that either could compromise or facilitate a parties’ ability to reach agreements;
- helps parties empower themselves by taking responsibility for themselves and for the resolution of their problem(s);
- teaches a sufficient degree of mutual understanding that the couple can collaborate on resolving their concerns;
- targets helping both parties arrive at their own agreements after they have explored issues, developed options, and considered alternatives.<sup>15</sup>

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<sup>11</sup> EDWARD W. BEAL, *A Systems View of Divorce Intervention Strategies*, in *DIVORCE AND FAMILY MEDIATION* 16, 24 (James C. Hansen & Sarah Childs Grebe eds., 1985).

<sup>12</sup> Barbara Whitehead, *Dan Quayle Was Right*, *ATLANTIC MONTHLY*, April 1995, at 47, 58.

<sup>13</sup> Interview by The Newshour with Jim Lehrer with David Popenoe, Sociologist at Rutgers University (May 3, 1996).

<sup>14</sup> HOWARD H. IRVING & MICHAEL BENJAMIN, *FAMILY MEDIATION: CONTEMPORARY ISSUES* 145 (1995).

<sup>15</sup> Beth M. Erickson & Roberta Beyer, *Therapeutic Mediation: A Saner Way of Disputing* (1995)(unpublished)(on file with author).

The reader also is encouraged to expand on this list.

## V. What Constitutes a Systemic Perspective?

The reader legitimately may be asking what constitutes a systemic perspective, and what has it to do with mediation? According to Charles H. Kramer, a psychiatrist and founder of The Family Institute of Chicago, the answer to that question lies in the differences between therapists who take an “individual” approach to human behavior and those who take a “family” approach. He writes:

The differences. . . may seem at first glance to be only a matter of semantics or at most a subtle shift of emphasis. The traditional approach sees a person as an individual who secondarily has a complex set of relationships with his various family members. The family [systems] approach sees the total family as a system of interlocking mutual relationships of which each person is only a part.<sup>16</sup>

Systems thinkers know that relationships are *composed* of three entities and take on a life of their own. See Figure 1. They develop a synergy (either positive or negative) that is larger than any single member of the system. Once this synergy develops as a function of the interactions between the members, the system regulates itself by covert rules that govern feelings and behaviors, referred to as homeostasis. Once this homeostasis develops, *both* individuals operate, however unconsciously, in ways that perpetuate the status quo.

### RELATIONSHIPS ARE COMPOSED OF THREE ENTITIES:

- Person A
- Person B
- The Relationship

FIGURE 1  
THE ELEMENTS OF INTIMATE RELATIONSHIPS

It is being able to conceptualize relationship systems in these ways that allow mediators and therapists alike not to blame one person or the other for all the woes in a relationship, regardless of how blatantly at fault one or the other appears. Thus, systems thinkers know that, regardless of who appears to be most culpable, both members of the couple whose divorce they are mediating have a part in the demise of the marriage. This belief is a keystone of developing balance and maintaining neutrality, widely recognized to be an essential skill for mediators of any orientation.

Further, this concept of relationship systems also extends to children of the couples we are helping to divorce. Irving and Benjamin speak to this when they write, “. . . from an ecosystemic perspective. . . , treating spouses and children as separate and apart is epistemologically problematic, because parents and children are necessarily linked; what affects one will almost certainly affect the others.”<sup>17</sup>

Yet, all too many divorces are conducted by parents, lawyers, judges, mediators and therapists alike as if there were no link between parents and children and no connection between the behavior of parents during and after divorce and their and their children’s post-divorce adjustment. Although one may sympathize with the plight of divorcing parents, at least they enter the process voluntarily, or if not

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<sup>16</sup> CHARLES H. KRAMER, M.D., *BECOMING A FAMILY THERAPIST: DEVELOPING AN INTEGRATED APPROACH TO WORKING WITH FAMILIES* 10 (1980).

<sup>17</sup> IRVING & BENJAMIN, *supra* note 18, at 49.

voluntarily, at least with some ability to influence their situation. This is not the case for children. They are swept up in their parents' maelstrom involuntarily and are held hostage by unrelenting conflict. In fact, study after study shows the cancelling out of any positive effect gained by children whose parents divorce purportedly to end the conflict when the strife continues post-divorce. Further, because children are necessarily emotionally and intellectually immature, it is reasonable to assume that they are especially vulnerable to psychological harm. Even if mediators never meet the couple's child(ren), therapeutic mediators believe that we have a responsibility to those children and to future generations. At the very least, therapeutic mediators generally keep them in mind, sometimes take a psychoeducational role with the parents in their children's behalf, and sometimes even include them in parts of the mediation.

## VI. What are the Goals of Therapeutic Mediation?

No divorce mediator would be in business for long who did not help divorcing couples reach agreements on the basic legal issues involved such as asset and debt division, child support, parenting plan, and spousal support. Therapeutic mediation is no exception. However, therapeutic mediators in general have the additional implicit goal to facilitate as much healing as possible during the divorce process. Although it is considered by most to be axiomatic that grief and recovery from a divorce can be expected to take from two to four years, unfortunately, in some cases, it appears to take a lifetime. These usually are cases where the divorce process itself has become iatrogenic. So therapeutic mediators generally believe it is a worthy goal during the divorce process to create the optimal conditions that will set the stage for ongoing post-divorce recovery for all involved. This is especially true in cases in which children are involved.

Volumes of psychosocial research indicates that divorce and ongoing parental conflict have a "snowballing effect" for children.<sup>18</sup> Divorce is associated with deteriorating parent-child relationships,<sup>23</sup> negative affects on the behavioral and emotional development of children,<sup>24</sup> intrapsychic chaos that results in interference with the establishment of enduring ties and the formation of impoverished, immature, and ungratifying relationships,<sup>25</sup> early sexual involvement,<sup>26</sup> considerably more sexual partners,<sup>27</sup> susceptibility to the high-risk circumstances of early and limited education marriages,<sup>28</sup> an expectation that they themselves will divorce,<sup>29</sup> greater apprehension about entering marriage and greater willingness to consider leaving a faltering marriage,<sup>30</sup> and generally unfavorable attitudes toward marriage.<sup>31</sup> In general, the consensus of most researchers is that there is an intergenerational transmission of marital instability and divorce. In light of the damage that professionals from any discipline involved either can foster or prevent by the way they conduct themselves,<sup>32</sup> it is urgently important that they consider carefully their role with couples in the midst of divorce.

The goal of setting the stage for continued post-divorce recovery is ambitious and laudable; but there are two other goals

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<sup>23</sup> Fiona L. Tasker & Martin P. M. Richards, *Adolescents' Attitudes Toward Marriage and Marital Prospects After Parental Divorce: A Review*, 9 J. ADOLESCENT RES. 340 (1994).

<sup>24</sup> David K. Carson & Kelly M. Pauly, *Perceptions of Marriage and Family Life of Young Adults With and Without Histories of Parental Divorce*, PSYCHOL. REP. 33 (1990).

<sup>25</sup> Joan Kelly, *Observations on Adolescent Relationships Five Years After Divorce*, 9 ADOLESCENT PSYCHIATRY 133 (1981).

<sup>26</sup> Lisa Garbini & Lee A. Rosen, *Intimate Relationships: College Students from Divorced and Intact Families*, 18 J. DIVORCE & REMARRIAGE 25 (1992).

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<sup>18</sup> Popenoe, *supra* note 17, at 14.

<sup>27</sup> Lisa Garbini & Lee A. Rosen, *Differences Between College Students from Divorced and Intact Families*, 15 J. DIVORCE & REMARRIAGE 175 (1991). <sup>28</sup> Charles W. Mueller & Hallowell Pope, *Marital Instability: A Study of Its Transmission Between the Generations*, 39 J. MARRIAGE AND FAM. 83, 91 (1977).

<sup>29</sup> Elizabeth Mazur, *Developmental Differences in Children's Understanding of Marriage, Divorce, and Remarriage*, 14 J. APPLIED DEVELOPMENTAL PSYCHOL. 191, 200 (1993).

<sup>30</sup> Andrew Carson et al., *Relationships Between Possible Selves and Self-Reported Problems of Divorced and Intact Family Adolescents*, 7 J. EARLY AD-OLESCENCE 191 (1987).

<sup>31</sup> A. Marlene Jennings et al., *Attitude Toward Marriage: Effects of Parental Conflict, Family Structure, and Gender*, 17 J. DIVORCE AND REMARRIAGE 67 (1991).

<sup>32</sup> Erickson, *supra* note 12, at 28.

for many therapeutic mediators. They aim to help divorcing couples shift their dysfunctional ways of relating. This can help to ensure that their and their children's post-divorce adjustment are not hampered and that these dysfunctional, relationship-killing patterns are not hauled into their next relationship. The other goal is more ambitious still, and therefore, not attainable for all couples. They seek to help couples forgive themselves and each other for their part in the demise of the marriage. These truly are Cadillac divorces.

A word about the goal of facilitating forgiveness is in order. For some couples, it is a sufficiently successful mediation if they merely can sit in the same room and hammer out their legal agreements with civility. This is all the farther they can get. But for those who are more receptive, the mediators can help them shift their destructive ways of dealing with each other. Those who are the most receptive leave the mediation with the best outcome of all: cleansing and forgiveness. Sometimes, forgiveness comes indirectly, in small steps, and is given by inference, and sometimes couples can be helped to broach the subject directly. Such forgiveness nearly always comes after, and as the result of, a huge catharsis. However it comes, it can be extremely freeing for couples and indirectly for their children and even for their extended families. It nearly always allows the mediation to progress, usually very quickly, from there. The following is an example of what is possible when mediators do not shy away from the wounds that need to be forgiven, but facilitate a sharing of them instead.

Dave and Amy had been married for 18 years when Dave decided he had had enough of their marriage and its never-ending conflict.<sup>19</sup> They had developed a business together centering around Dave's blue-collar trade and had three sons, all of middle school age. They requested our help in negotiating a parenting plan while they waited for the very complicated accounting work of having their jointly-owned business valued.

During the marriage, there had been frequent episodes of loud arguments, some of which resulted in physical and verbal abuse. So both parents, understandably, were frightened that this highly charged issue of sharing their children would careen out of control and end up the same way. After all, since they had had unrelenting power struggles in the business, they could not imagine discussing something so important as their children without it ending up the same way. And, in fact, prior to mediation, they had squared off, fighting over the children like chattel. Indeed, the children had become both weapon and prize in their ongoing marital squabbles.

In the midst of one particularly difficult session, where Amy was being quietly controlling and Dave was using his anger to control, Dave started into a loud tantrum. Only this time, the mediator's judgment was that, if Dave were allowed to dump his rage in a controlled setting, and if he were helped to work with the frustration, sadness, and powerlessness that lay just beneath his rage and if she were helped to hear it, that this explosion held the promise of yielding some very different and positive results. So we took the calculated risk of allowing him to continue for a few minutes in a tirade that ended with his flinging "I hate you!" at her.

Dave opened the next session with the following statement. He said, "I'm sorry I flew off the handle last week. I had to get rid of a lot of bitterness. It took me all week to recover from it. I'm doing the best I

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<sup>19</sup> Case example. Because this is an actual case, all identifying information has been changed to protect client confidentiality.



can. . . I want the kids to see their mother whenever they want to. In fact, I'd even get up in the middle of the night to bring them to their mother's, if they needed that." This confirmed our hunch that his outpouring could be a positive, deck-clearing experience for them.

After that, both were extremely conciliatory, and the couple completed their parenting plan that session. Although at no time were the words forgive or forgiveness used, they did not need to be. In fact, with some people using such a word would be contraindicated, because it would engage their resistance. Regardless, either way, the net effect usually is the same.

Erickson and McKnight conceptualize relationships as a circle (see Figure 2) and offer a helpful way to think of both what happens when relationships deteriorate and of the goals of mediation.<sup>20</sup> The relationship of most couples begin as a business-

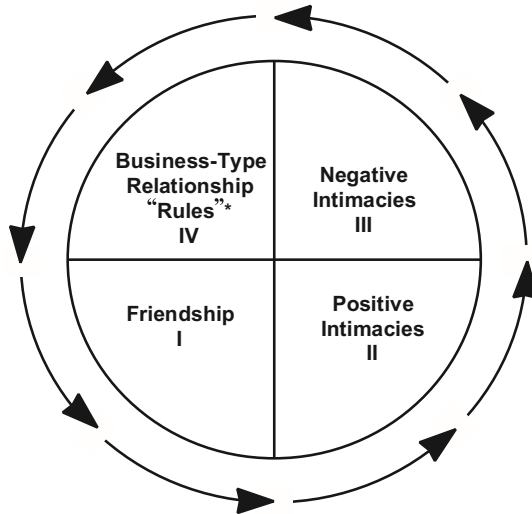


FIGURE 2  
RELATIONSHIP CIRCLE

\*Rules are the Agreements Created by Parties in Mediation.  
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type relationship, where both people are strangers to each other. The next logical step - though one that is bypassed by all too many people - is friendship. When they begin courting, it is because a sense of positive intimacy has developed. For those who divorce, a negative intimacy has taken its place. That is, the couple is still connected, but their association ranges from unsatisfying to destructive. Couples who remain mired in post-decree litigation are those who feed off the ability to remain attached and still safe (because vulnerability is not longer required or even requested), but they do not have to experience the grief of letting the former spouse go. For these couples, there truly is no such thing as divorce. So they and their hapless children languish in the purgatory of the parents' making, all too often inadvertently fueled and even justified by the legal system. When the legal system sees and advocates only for parents' rights and does not stress their and parents' fiduciary responsibility to children, families, children, and our society as a whole are harmed.<sup>21</sup>

How can couples be helped to get to the place where they can let go and where forgiveness is even possible? Further, how do we know which couples could possibly reach this ultimate completion of both the mediation and the marriage? Assessing for which couples this would be possible and for which it would

<sup>20</sup> STEPHEN ERICKSON & MARILYN MCKNIGHT, *DIVORCE MEDIATION TRAINING MANUAL* (1996).

<sup>21</sup> Beth M. Erickson, *Advanced Family Law Ethics: What Family Systems Can Contribute to the Dialogue*, 10, 3 AM. J. OF FAM. LAW 117, 118-119 (Fall 1996).

be an unattainably high goal is an important part of the assessment process. Knowing what couples need to be able to do in order to move to this step will be a significant help in that assessment.

*A. What Couples Need to Learn to Do in Order to Reach Forgiveness.*

It is probably safe to assume, in most cases, that if couples knew how to seek and to grant forgiveness, they would do so spontaneously. Further, those couples probably would not be on the threshold of divorce since happy marriages are made up of people who are good at both adapting to each others' needs and forgiving. Therefore, it is important to lay the requisite groundwork throughout the mediation that may make this possible. And even if teaching these elements does not set the stage for forgiveness, it will, at the very least, make the mediation work better and the couple's interactions healthier.

The elements of the therapeutic mediation as practiced by Erickson and Beyer that allow for this are:

- teaching people to observe and to manage both the content (what they say) and the process (how they say it) of their interactions;
- teaching both parties to take responsibility for themselves, both in the concrete negotiations and for the direction of the sessions;
- teaching clients empathy by helping them see each other's perspective;
- teaching clients to understand that seeing and acknowledging the other person's perspective does not negate their own;
- helping clients to stop blaming each other and to start taking responsibility for problems, choices, decisions, and feelings;
- helping clients learn to articulate clearly what they are saying by using "I messages;"
- helping clients learn how to listen and really hear what the other person is saying - and sometimes not saying;
- helping clients show and share their emotions appropriately, rather than acting them out or withdrawing;
- helping clients realize that if one of them has to win, they both lose;
- helping clients learn that cooperating is in everyone's best interests.<sup>22</sup>

The savvy reader will recognize that these are basic conflict-reducing strategies that are implemented in any effective, satisfying, relationship-enhancing negotiation.

Clients who are on a productive track will manifest multiple indicators that they are capable of attaining these higher levels of functioning with each other. Common evidences of this are the following:

1. Both have begun at least to accept the reality of the inevitability of divorce.
2. Blaming has been greatly diminished if not eliminated.
3. Both are beginning verbally to accept responsibility for their contribution to the demise of the marriage.
4. Both can speak with emotional expressions in the appropriate range.
5. Their anger and bitterness are greatly reduced, even if they are still hurting.
6. They can begin to think in terms of future without each other but that still includes cooperating, if there are children involved.
7. They can bring concerns to each other as concerns without either blaming or feeling blamed.
8. A sufficient amount of trust has been restored that they can see themselves as collaborators in the mediation and post-divorce.
9. They resist the temptation to think of and to use their children as spoils of their war.
10. Perhaps most importantly, they can think and act with the best interests of their children genuinely in mind, rather than disguising their needs behind their interpretation of the children's.

While meeting these goals seems unattainably high for many couples, it perhaps is possible a more than some clients, lawyers and even mediators might expect. For those who are capable of it, genuine healing can take place, rather than the continued wounding that is characteristic of too many divorces.

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<sup>22</sup> Erickson & Beyer, *supra* note 19, at 1.

## VII. Are There Special Skills or Attributes that are Important for Therapeutic Mediators?

What can mediators do to move couples toward these ends? As perhaps is apparent by now, the role of the therapeutic mediator calls for certain highly refined skills in addition to at least cursory knowledge of several disciplines. Of course, to be an effective mediator, one must have a basic knowledge of the laws in the jurisdiction in which the divorce will be filed, of child development, and of communications skills. But in addition, the following is a list of essential skills or behaviors required of mediators who wish to be therapeutic mediators:

1. tolerance for the expression of strong affect;
2. being able to establish a “holding environment” that acts as a container for strong emotions so that they safely can be expressed and released;
3. being able, rather quickly, to establish a working alliance with each party while maintaining neutrality and balance;
4. being able to maintain self-control when directly challenged or resisted by one or both parties;
5. being able to remain in control of the process of the session without being controlling or taking charge of the content;
6. recognizing and withstanding couples’ seductions to shift the responsibility to the mediators for themselves or for the mediation’s outcomes;
7. recognizing and withstanding couples’ pleadings, explicit or implicit, that you side with one and blame the other;
8. being consistent, even-handed, and fair with both parties;
9. being able to drop the advocate role in exchange for the facilitator role;
10. refusing to take responsibility for the decisions clients must make to complete the mediation while remaining in charge of the mediation process.

If the reader is interested in acquiring these skills and does not currently possess them, teaming with or being supervised by a therapeutic mediator or a family systems therapist are excellent ways to acquire them.

## VIII. Is Therapeutic Mediation Therapy?

Therapeutic mediation is not psychotherapy, although there is certainly some notable similarities; but neither is it the practice of law. What distinguishes therapeutic mediation from psychotherapy?

As Howard Irving and Michael Benjamin write, “[t]here is ongoing debate in the literature about the extent to which family mediation should and does involve a frankly therapeutic component. Furthermore, even among those advocating for a therapeutic model, there is disagreement about what constitutes “therapeutic” and “therapy.”<sup>23</sup>

In an effort to clarify, the author offers the following definitions. “Therapy” involves a “. . . change in individual behavior based on insight.”<sup>24</sup> Depth exploration of both past and present events is possible and often necessary to prompt a “cure.” “Therapeutic” involves approaches to working with people that enhance the chances of people opting to change.<sup>25</sup> It is present and future-focused, does not include depth exploration, and is anything that people experience as helpful. For example, winning a tennis match or getting a massage can qualify. Therapeutic mediation, then, combines just enough of the elements of psychotherapy to change a couple’s communication patterns while assisting them in making the requisite legal decisions.

In contrast to therapists whose mandate it is to probe depth emotions and even the unconscious, a mediator’s role is threefold, according to Irving and Benjamin: 1) establish a structure for the mediation; 2) be an advisor; and 3) monitor the affective states and patterned behavior of both spouses.<sup>26</sup> Anne Milne, a

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<sup>23</sup> IRVING & BENJAMIN, *supra* note 18, at 170.

<sup>24</sup> *Id.* at 170.

<sup>25</sup> *Id.* at 170.

<sup>26</sup> IRVING & BENJAMIN, *supra* note 18 at 171.

psychotherapist and therapeutic mediator, discusses the difference between the two modalities when she writes:

The overall objective of psychotherapy is to establish internal harmony and effective intrapersonal and interpersonal functioning. . . . The focus of divorce mediation is on the dissolution of the marital corporation, including the allocation of the marital resources (e.g., property and finances) and the custody of children. . . . Mediation is not treatment. The parties do not analyze past behaviors, but instead reach agreements that provide for the future. During mediation, there is no attempt to obtain insight into the history of the conflict or to change personality patterns. Although these may both occur, they are fringe benefits of the mediation process.<sup>27</sup>

To summarize, because the boundaries between the two conflict-resolving modalities is so easily blurred, in the final analysis, perhaps the key deciding factor is the mind set of the professional. If the focus of one's work is behavioral, emotional, and attitudinal change, one is attempting to operate as a therapist. But if one keeps focused on the topical and contractual nature and on removing the impediments to resolving these as one's mandate, it likely would be easier to keep the boundary between both roles from becoming muddled and from rendering ourselves ineffectual. Further, determining the depth and the scope of the changes that mediators can hope to accomplish is another important distinction, so that the mediator neither under nor overestimates the changes that are possible in any given individual or couple.

## **IX. Why is Interdisciplinary Co-Mediation Important in this Style of Mediation?**

As undoubtedly is readily apparent by now, this form of divorce mediation is highly complex. Too complex for either lawyer or therapist to manage well alone. Also, Howard Folberg wisely realized a subtlety of this type of co-mediation “. . . “when a co-mediation team consists of a lawyer and a therapist, the team not only can separate emotional and legal issues, but also can deal with them simultaneously.”<sup>28</sup>

What the lawyer can provide the therapist is highly specialized knowledge of legal procedures and options. What the therapist can provide the lawyer is knowledge of and experience in how to deal with communication impasses and the psychological underpinnings that undergird them, their reaction to the mediation, and their resistances to it and to each other. Also, comediators from two disciplines provide each other a very important opportunity for checks and balances. Working alone and without observation, it is easy either to miss valuable elements (both legal and psychological) of the mediation, or to get swept up into the couple's maelstrom and be rendered ineffectual.

In general, there are more advantages than disadvantages to co-mediation. Working in an interdisciplinary co-mediation team of lawyer and therapist enables both to have many more arrows in their quivers. These additional techniques, strategies and therefore advantages simply are not available to single mediators. Some of the most obvious advantages are these:

1. Together, they possess more knowledge and a wider range of resources available both to each other and to the clients.
2. They offer more resources available to set boundaries for aggressive or out of control clients.
3. Co-mediators make it more difficult for one overbearing spouse to dominate.
4. The combination of mediators offers each client someone with whom to identify.
5. Co-mediation allows the ability to pass the baton to each other that invites positive synergy and a different quality to the leadership provided to clients.
6. Two heads are better than one for strategizing between sessions and brainstorming in sessions.
7. Two mediators afford the opportunity to employ the “good cop/ bad cop” technique, where one confronts and the other nurtures clients simultaneously.

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<sup>27</sup> ANNE L. MILNE, *Mediation or Therapy - Which Is It?* in DIVORCE AND FAMILY MEDIATION: THE FAMILY THERAPY COLLECTIONS, 1, 5-7 (James C. Hansen & Sarah Child Grebe eds., 1985).

<sup>28</sup> Howard Folberg, *Divorce Mediation: A Workable Alternative Means of dispute Resolution* 14 (1996).



8. Clients can witness and experience, some for the first time, the model of a workable relationship.
9. One mediator can help a client learn to modify a strong position in the face of new, incoming information, while the other mediator helps each spouse save face.
10. Two mediators provide a role model for clients to see and to experience first hand shared leadership, collaboration, and a certain degree of appropriate affection that often develops when people work together.
11. The couple can experience their emotional, legal, and economic needs being met at the same time.
12. One mediator can work with the couple while the other observes for non-verbal cues, interaction patterns, and the like.
13. Both together more palpably can provide immediate and presumably objective feedback and constructive criticism.
14. Working together provides training for new mediators who can learn in a hands-on way.
15. Non-lawyer mediators are less likely to be accused of practicing law without a license with a lawyer mediator present.
16. Working with another professional provides a quality control device that is not available when we work alone and behind closed doors, for the protection of both clients and professionals.

Despite these multiple and substantial advantages, there are some disadvantages that deserve mention:

1. Co-mediation doubles the cost to clients.
2. Co-mediation poses scheduling difficulties by having to coordinate the calendars of two busy professionals and two parties, many of whom already live separately.
3. Individual mediators will have less control because, optimally, both will want and need to agree on the direction taken in each session and with the case as a whole.
4. The situation is ripe for power struggles between the two mediators, particularly those who easily get hooked by and reflect clients' unresolved and unrelenting power struggles.
5. The transferences that clients have to the mediators may induce the mediators into replicating and playing out left-over conflict with the parties' parents from childhood.
6. With co-mediation, the exposure in front of a peer can be intimidating, at least at first.

Most of these disadvantages, even the financial one, can be worked with when mediators are committed to the process. And those that are of a more psychological nature can be compensated for, with willing and committed co-mediators who invest some time in doing their own work on their relationship.

Before we leave this subject, there are three special issues that need to be elaborated on briefly: 1) modeling; 2) complementary roles; and 3) co-mediation with spouse teams. Each will be considered briefly below.

#### A. *Modeling*

What does everything we have said so far about the constructive uses of conflict mean about constructive modeling? It is probably safe to say that many people who divorce have never seen close up or experienced a model of a relationship that works. That is perhaps the most important aspect of co-mediation that simply comes with the territory. But does this mean, however, that the mediators must never disagree and should have everything in their relationship worked out before they begin to mediate together? Absolutely not. Based on the belief that conflict and how it is worked out can provide the yeast necessary for a relationship to grow, it is only important that the comediators be committed to working out their differences or misunderstandings. These arise in the natural course of working in close proximity or as a result of being infected by client couples' dysfunction. Sometimes, working on these differences needs to be done immediately and in the presence of the couple. When this is the case, the mediators provide powerful and direct modeling of mediation and constructive conflict resolution. Other times, these bones of contention are worked out behind the scenes. It only matters that they are worked out. Otherwise, both the clients, who usually are highly attuned both to what is being said and what is not being said, the success of the mediation, and the quality of the co-mediators' relationship will be affected adversely. In sum, as Anna Beth Benningfield writes, "[t]he personal examples of interdependent yet individual. . . cotherapists,

who obviously care for and value each other, may be one of the most valuable experiences marriage or family therapy [or co-mediation] has to offer.”<sup>29</sup>

## B. *Complementary Roles*

When there are two mediators, the primary advantage for both the couple and the mediators is the ability to pass the baton between them. Sometimes, this amounts to being appropriately rescued by the other mediator. As Martin Kranitz writes:

It is not unusual in mediation. . .for one spouse to focus frustrations and anger on a mediator rather than turning these feelings inward or sideways to the other spouse. When this happens in co-mediation, the anger can be diffused either by letting the mediator who is not the focus of that anger take over. . .or by asking why the client is focusing on just one mediator.<sup>30</sup>

When a therapist is part of a co-mediation team, she is usually the mediator monitoring the couple’s intrapsychic and interfactional dynamics the most closely. Therefore, she is usually the one delivering the feedback that is really important but difficult for people to hear. The support and perspective of the other mediator usually is invaluable, not only to that mediator but also to the couple who need to learn about their destructive patterns. This in turn enhances the success of the mediation as a whole, in that the co-mediator is there either to intercept the volleys or to act as interpreter of the difficult news. The lawyer mediator does this by restating the message in other ways, helping clients interpret the feedback, or in general, softening the blow so they can hear and use the feedback. In sum, the therapist mediator generally speaks unpleasant truths, while the lawyer mediator helps clients listen and hear. This puts the focus back where it belongs - on their problematic interactions - rather than allowing the escape hatch of focusing on and scapegoating the mediator(s).

## C. *Co-Mediation With a Spouse*

With relatively little written about married co-mediators, one is left to extrapolate about married co-mediators from the literature on co-therapy. The author’s central premise is that, while the skills needed to do co-mediation are the same (the ability to develop trusting relationships, to share leadership, to create positive synergy by developing ways to complement the other person’s expertise, to bring up and solve conflict, to be honest with oneself, to deliver and to hear constructive criticism, to handle each other’s feelings, to creatively problem solve, to name a few) when one does co-mediation with a spouse, there are some extra layers of complexity to take into account.

The first and perhaps the most subtle aspect of co-mediation with a spouse relates to the fact that clients will see - and will scrutinize, however consciously - the marriage of the mediators. John Briggs and Muriel Briggs,<sup>31</sup> writing about married therapists working as co-therapists, coined the term “the marriage personality.” That is, just as the couples whose divorces we mediate have a third entity - the relationship that they bring into the room - so do the mediators. The Briggses write, “[b]riefly, the idea is that as soon as you bring a marriage into a room, you bring a third entity or personality which strongly affects other personalities, *most particularly the personalities of the marriage partners themselves*”<sup>32</sup> [emphasis added].

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<sup>29</sup> Anna Beth Benningfield, *The Pros and Cons About Spouse Cotherapy*, in QUESTIONS AND ANSWERS IN THE PRACTICE OF FAMILY THERAPY 477, 478 (Alan Gurman ed., 1987).

<sup>30</sup> MARTIN A. KRANITZ, *Co-Mediation: Pros and Cons*, in DIVORCE AND FAMILY MEDIATION: THE FAMILY THERAPY COLLECTIONS, 71, 78 (James C. Hansen & Sarah Child Grebe eds., 1985).

<sup>31</sup> John Briggs & Muriel Briggs, *Married Therapists Working as Co-Therapists*, in DIVORCE AND FAMILY MEDIATION: THE FAMILY THERAPY COLLECTION 474 (Alan Gurman ed., 1987).

<sup>32</sup> *Id.* at 474.

This premise has two dimensions. One is that married partners act differently when they are together than when they are not together. It should be noted that this will be true for the mediators' marriage as well as the clients'. Therefore, married co-mediators would be well advised to attend to their own marriage and its personality. This personality can be experienced in the sessions as either a major tool or a stubborn impediment. The other dimension is that clients will see married co-mediators not just as two separate mediators, but as a marriage. This will promote transferences that the mediators may not intend or that may not necessarily represent reality. For example, divorcing couples may either idealize the co-mediators' marriage into perfection or denigrate it as the first sign of problems in order to ameliorate their disappointment with their own.

As married co-mediators work with couples, their own relationship will be constantly under scrutiny and in plain view. Instead of clients wondering, as they usually do, what kind of marriage their lawyer, therapist, or mediator may have, they will be able to experience first hand how the mediators conduct themselves and their relationship, not just how they say they do. Thus, ". . . crisis in your own marriage will be exposed, examined and consciously and unconsciously 'modeled' by the [mediating] couple."<sup>33</sup> In the process, by inference, the couple with whom married co-mediators are mediating will keep the mediators alert as to how their marriage is doing. Further, clients will size up quickly whether co-mediators are truly co-mediators. Therefore, before attempting to co-mediate with a spouse, it is wise to be honest about one's willingness to engage in self-monitoring of one's own relationship and in having one's marriage scrutinized by clients. As Anna Beth Benningfield reminds us, "[t]he freedom and ability of the . . . [co-mediators] to aid clients with specific problems is dependent in large measure on the degree to which such problems are resolved in their marital relationship."<sup>34</sup>

A final caveat inheres anytime couples work together, but it is intensified in the emotional cauldron of people divorcing. The risk is that the professional relationship will encroach on and even dominate the personal relationship. Co-mediating couples may find themselves discussing cases at home in the bedroom or in the midst of a social evening, thereby inviting their work to dominate their own marriages and their lives. It is crucial to the success of each venture that spouse co-mediators find effective ways of demarcating the boundary between their personal and professional relationships. All couples who work together in whatever capacity must find satisfactory ways to ensure that their own marriage does not get reduced to the lowest common denominator of merely a business partnership. But it is especially important that spouse co-mediators find the calm of the eye in the storm of the clients' divorce.

## **X. How Does Therapeutic Mediation Compare with Other Forms of Dispute Resolution?**

On the assumption that the reader has at least a cursory familiarity with all forms of alternative dispute resolution and is intimately familiar with litigation, and in light of space constraints, the author will attempt no in-depth discussion of each modality. However, a word must be said, in order to put therapeutic mediation in context with these methods of dispute resolution. (See Figure 3.) From the outset, the author wishes to emphasize that there is a place for each of these conflict resolution options.

A useful way to think about dispute resolution choices is to place each on a continuum of the degree of self-determination and freedom of choice that each modality allows the disputants. On the one extreme is litigation that can de-emphasize shared goals, feelings, and values, reinforce spouses' desire to inflict hurt on each other, and intensify negative feelings by encouraging opposition and confrontation. On the other extreme is psychotherapy, which attempts to do the opposite. Most therapists, especially those trained to view a problem from a relational perspective and to work with the relationship system to stop conflict, aim to intervene when these dynamics

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<sup>33</sup> *Id.* at 475.

<sup>34</sup> Benningfield, *supra* note 43, at 478.

occur, and to reshape clients' interaction patterns so that they do not persist. Near the middle is mediation, which “. . . stands apart from the adversarial system by returning control over an agreement back to the

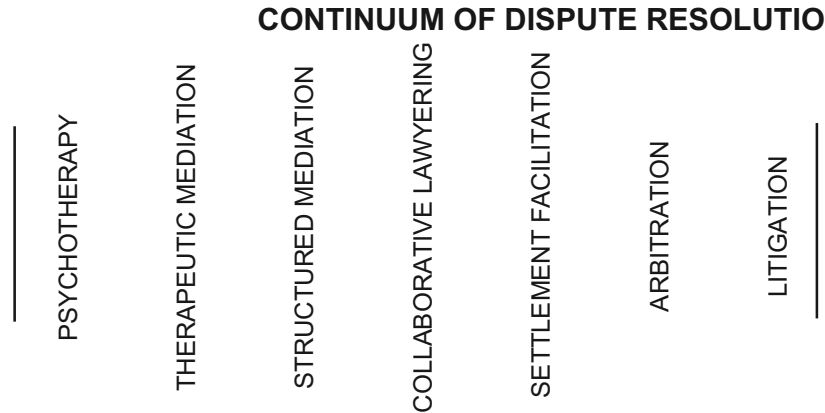


FIGURE 3  
DEGREE OF CONTROL EXERCISED  
BY OUTSIDE INFLUENCES

spouses. In doing so, mediators characterize themselves as neutral, their role solely that of facilitator.”<sup>35</sup> Beth Erickson and Roberta Beyer believe that whenever the lawyers for the parties attend the mediation sessions, the process becomes more like a court-annexed mediation or settlement facilitation because here the mediators need to become more directive.<sup>50</sup>

## **XI. For What Kinds of Cases is Therapeutic Mediation Appropriate?**

The efficacy of therapeutic mediation reaches beyond that of structural mediation, used for any type of divorce, because of attention to individual dynamics and to the relational processes that are embedded in ongoing conflict. Therapeutic mediation has numerous implications for helping couples revisit and finish lingering post-divorce issues. It also has implications for negotiating non-marital issues. For example, the author and her comediator received a recent request from a lawyer who was arranging an adoption. He asked our help to negotiate an agreement between the birth mother and the adoptive parents regarding whether or not there would be post-adoption visitation. In addition, therapeutic mediation is useful for a host of general family disputes. For example, the author and her co-mediator recently received a request from a real estate lawyer to mediate squabbles among family members who were disputing inherited property. Perhaps a specific example will provide a flavor for the rich possibilities inherent in this type of mediation.

A few years ago, the author and her mediation partner re-ceived a request from a woman for help to renegotiate child support.<sup>36</sup> She had already met with a lawyer who wisely discerned that this situation went far beyond a difference of opinion regarding an amount due the mother for child support, so she called us.

Carmen and Stew had been divorced 13 years previously when out of the blue, at least from Stew's perspective, he came home from work one day and was served with divorce papers. While her decision to divorce surely was painful for Stew, the way he learned that his life was about to be inexorably altered was shocking and stultifying to him. They had three children who at that time were 9, 7, and 3 years old.

<sup>35</sup> IRVING & BENJAMIN, *supra* note 18, at 101. <sup>50</sup> Erickson & Beyer, *supra* note 19, at 2.

<sup>36</sup> Case example. Because this is an actual case, all identifying information has been changed to protect client confidentiality.



In the intervening years, Stew slowly pulled himself together and eventually remarried and had another son in that marriage. However, the children did not fare so well. The children lived primarily with their dad who, up to the time of the divorce, had been a typical uninvolved traditional father. Now, the children visited their mother only infrequently. Left to fend for themselves much of the time, the oldest child's mischief became increasingly more dangerous to himself and his sister. He began molesting her as he approached adolescence, and then turned to drugs, finally ending up in a drug treatment center for two extended stays. During this time, dad and stepmom, newly married, were left to ride herd on these three highly distressed, disturbed children, which distressed, disturbed and almost destroyed their new marriage. Meanwhile, mom stayed in the background, not interfering, but not helping these beleaguered people much either. In the midst of this chaos and trauma, she herself remarried.

When her older brother and sister left home, the youngest, who was a toddler at the time of the marital rupture, decided she wanted to live with her mother. This triggered the request for child support from the mother who, from the father's perspective, had contributed little in the way of money, relief, or help when the children had lived with him. So he was loathe to reciprocate now.

Because it was clear in the intake call that this was an ongoing dispute that involved not only the parents but also their new spouses, we requested that all four attend the sessions, a suggestion that was accepted reluctantly. What resulted, after four, 2hour sessions, was not only an agreement on the amount of child support that would be paid, but also a very firm and clear coparental coalition. For instance, when their daughter began smoking pot and skipping school, for the first time, all four parents met, confronted her, and meted out appropriate consequences. When she became confident that all four parents were a functional united front working in her behalf, she stopped her defiant conduct. As evidence of the resolution of the old hurts and to cement their new relationships, spontaneously at the end of the last mediation session, all four parents hugged each other and us.

Unfortunately, not all of our mediation end with this dramatic and mutually affirming conclusion. But for those that do, it is a remarkable shift indeed. And when one considers the price that all members of this post-divorce family had paid from the ongoing conflict and lack of cooperation between parents and for how long, the prognosis for a much different and better future now is not nearly so guarded.

## **XII. What are Some Pitfalls with This Type of Mediation, and How Do Mediators Counteract Them?**

Therapeutic mediators must learn to assess their couples carefully. Not all couples can tolerate therapeutic mediation, even though they may need it. And some couples, on some level, make a covert and unconscious agreement to continue their fight, regardless of any help there may be to learn to stop it. Some others are so fragile that they may require psychotherapy in conjunction with the mediation. They will need careful monitoring and periodic consultation with their therapist between sessions, if they continue the mediation. However, in such instances, the client's ability to mediate a divorce using any style of mediation should be assessed carefully, because mediation relies on informed consent and the ability to advocate for oneself. Still others do not need therapeutic mediation. These are the couples for whom divorce is a genuine move toward health and who are healthy enough to understand their reasons for the divorce and their own contribution to the need for it. For these couples, a structural mediation is all they need to facilitate a relatively uneventful divorce. And still others had little or no affective connection during the marriage, and so their divorce matches it in style and is completed in a short and almost perfunctory way.

Our experience is that approximately one-half to two-thirds of our mediated divorces fall into the therapeutic mediation category.

### *A. Pitfalls*



Even when we have assessed the couple's situation as one where therapeutic mediation is indicated, sometimes clients disagree with us. This disagreement comes in many forms. Sometimes couples simply drop out. Other times, clients who disagree with our approach complain to their lawyers and succeed in getting the lawyer to side with them to undermine the mediators covertly. This is particularly common with people who have a history of blaming others for their problems and of seducing people to take sides, too, and thereby blame someone, anyone. This is a special risk with lawyers whose training emphasizes protecting their clients' individual interests, as perceived by the client. Some people are chronically and vituperatively conflictual. They are functioning at such psychologically immature levels that are likely to only be able to see the world as split into black and white, good guys and bad guys. They are very likely to attempt to generate good guy/bad guy splits between the mediators if there are two, or with the mediator against the spouse, or between the lawyer(s) and the mediators.

It should be noted that these same tendencies are apparent in many of the couples whose divorces any mediator is asked to mediate. However, when therapeutic mediator(s) invite and allow expressions of affect, and when they attempt to work with dysfunctional patterns to try to modify them, there is an inherent risk of explosiveness in the mediation that mirrors their marital style of interaction. Mediators must be prepared to contain and to manage this so that the mediation does not careen out of control as the marriage has.

#### *A. Countering These Pitfalls*

Of course, no successful mediation of any stripe is a onsize-fits-all proposition. To be artistic and not just skilled means learning to prune and fit one's approach to couples on a case by case basis. However, there are some rules of thumb that the reader may want to consider adopting as guidelines:

- 1) Learn to recognize client resistance. This is important for several reasons. One, obviously, is that if you do not, you may get fired. But a less obvious reason is that resistance is a marker of pain. This may be the very pain that needs to be surfaced so that clients can deal constructively with it in order to heal.
- 2) Learn when to push and when to back off and work more indirectly. When you have first located the source of the pain, it is unlikely that the client(s) will allow you to work directly with it immediately. So learn to work up to it as well as to work with it. 3) Learn how to lay tracks to get to the pattern you see the need to change. We do that by making statements like, "Maybe someday you'll want to work on X," or "I know this isn't going to seem related to your current situation, but . . ."
- 4) Learn to appreciate the function of symptoms for the clients as individuals and for the client couple. No matter how obnoxious or painful the problem, there is some psychic economy that this symptom is filling. Therefore, people are loathe to give it up, despite their complaint to the contrary. So attempt to remove it slowly. 5) Keep track of mediation-friendly lawyers with whom you can collaborate. They are worth their weight in gold as enhancers of individual mediation and of your mediation practice. Refer to them as consulting attorneys and work with them to settle their cases. They will not only become some of your best referral sources, but also they will be strong allies in settling cases.
- 6) Consult with the parties' lawyer along the way. Fight fire with fire by contacting them if there has been a particularly difficult session that the client would report to the lawyer in a garbled - if not a directly undermining - way. Have both parties sign a release of information so that you can collaborate with their lawyers whenever the need arises on either end.
- 7) Learn when to bring the parties' lawyers into the session and when to do the mediation without them. Even though it quadruples the cost when the lawyers are present, sometimes it is the most economical approach. Lawyers' presence is especially helpful when you cannot stop the clients' or the lawyers' tendency to undermine the mediation. Lawyers participating in the mediation are also helpful when the clients need legal information and advice on the spot in order to resolve their conflict.

### **XIII. Are There Special Ethical Considerations Inherent in This Type of Mediation?**

There are some special ethical considerations involved in this kind of mediation both for lawyers and for mental health professionals. These can be summarized succinctly in three words: know your limitations.



Because you will be there in the capacity of a lawyer and your co-mediator will be there as a therapist, clients will tend to turn to you for legal advice and emotional counsel. It is important to remember and to remind your clients that you are not there representing your discipline; you are there as a mediator. It would be inappropriate, for example, for lawyers to give legal advice. However, just as therapist mediators can and should operate in a psychoeducational role, lawyer mediators can and should offer legal information that might help the mediation progress.

But by the same token, a mediator cannot ignore the professional responsibilities inherent in his/her discipline while acting as a mediator. For example, when therapists mediate with clients who have a history of suicidal ideation or activity, they cannot ignore their professional responsibility to see to the client's safety. To illustrate, the author and her co-mediator once mediated a divorce with a couple where the wife had been psychiatrically hospitalized for severe depression. Released a few months earlier, she presented for the mediation still barely functional. After trying a couple of sessions with them, we suggested that we put the mediation on hold until she could work more on self-esteem and ego strengthening with her therapist. Then, approximately three months later when she was more able, we continued and completed the mediation of their highly complicated divorce. In another instance with a client who spoke of feeling despondent and suicidal but manifested no immediate danger, the author sought and got a no-suicide contract from the client and strongly recommended therapy; taking these precautions to ensure his safety allowed the mediation to continue.

To summarize, mediators are mediators; they are not representing their disciplines. However, they are not immune from carrying out the ethical responsibilities inherent in their respective professions.

#### XIV. Conclusion

We have seen how important the constructive resolution of conflict is to post-divorce adjustment for couples and for any children they have, either in the marriage that is ending or in any subsequent relationships. Intervention that occurs at the time of divorce can set the tone, for better or for worse, that will affect the couple's interactions and, as a result, their families for generations to come.

Lawyers, therapists, and mediators can exert enormous influence on multiple family members and eventually on the quality of life in our society as a whole by the ways we guide people at this crucial time. It is important not to downplay the significance in people's lives, potentially for generations to come, of the kind of help they receive at the time of the marital rupture. One client of the author said it best when he resisted the notion advanced by the mediators that cooperative co-parenting was in everyone's best interest. He quipped defensively, "But I don't want to be her friend!" The author's immediate response was, "You don't have to be. Just don't be her enemy."

