

J-700

10/14/83

First Supplement to Memorandum 83-93

Subject: Study J-700 - Mediation

Attached are three articles by Gary J. Freidman relating to mediation. He will be at our meeting to make a presentation and to answer our questions. He provided these articles for background information to read before the meeting.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

Mediation: Reducing Dependence on Lawyers and Courts to Achieve Justice

by Gary Friedman

We have all seen so many judicial dramas on film, it is no wonder that we imagine all courtrooms to be presided over by a facsimile of the late Charles Laughton, with a tortured Henry Fonda in the witness box, and a stocky E.G. Marshall or Raymond Burr pacing back and forth before the jury, formulating his hard-edged questions as he glares over his shoulders at the witness. Indeed, the adversary system of arriving at truth is so deeply ingrained in our consciousness that, until recently, our court system was rarely questioned. Just as we learned as children that "God is on our side" and that democracy is the best of all possible systems, we have accepted that, Sacco and Vanzetti aside, the truth will out in an American courtroom. But can we be so sure? If we ignore the programming we received from our high school civics teachers, is it reasonable to expect that the truth will reveal itself when lawyers assume outrageously extreme positions and then try to prove those positions in verbal courtroom jousts ruled by stylized and often archaic procedures? And is there another way to solve disputes that seems more reasonable? Perhaps so. Please read on.

It's a familiar story to most people who have had to hire a lawyer. A no-win situation. Legal fees are likely to run higher than the fiscal returns you stand to gain from winning your case, and the dispute will probably take so long to resolve that winning won't be worth the effort—especially if you consider the bitterness and anger that typically accompany the fight. Either way, you're going to end up feeling like you've lost,¹ even when your lawyer tells you that you've won.

As a lawyer facing these realities every day, I grew tired of participating in a system that appears to be blatantly insensitive to the people it was designed to serve. And out of that frustration, I thrashed about for another way to practice law. I didn't subscribe to those postures most lawyers assume almost automatically, such as winning at any cost, and I was no

longer ready to assume the worst and plunge into the fray with an arsenal of hostility, aggressiveness, and intimidation directed at the soft underbelly of my opponent. Yet, knowing what I wanted to avoid was easier than conceiving a more constructive way to relate to law. After much mental confusion and anguish, I realized that what I wanted was to use law to bring together people with disputes and help them create an agreement that they could both feel good about. Gradually, and at first only with clients who were friends, I began to mediate disputes rather than counselling people to fight it out in expensive court battles. And soon it became clear that the mediation approach not only made me feel positive about my career, but was also an efficient way to solve disputes. Now I have complete confidence in the mediation process as a preferable way for many, if not most, people to work out their legal disputes. The results of my work have been encouraging, sometimes dramatically so, with a few disappointments and a fair share of mistakes. Here are a couple of examples:

Three years ago a couple decided that they wanted me to mediate their divorce. Within three one and a half hour sessions they reached an agreement on all issues necessary to draw up a written agreement. But at the last moment, the man got cold feet and refused to sign, claiming that he had been advised by another lawyer that he could do much better if he hired him as his advocate. Two years and over \$20,000 in legal fees later, the couple reappeared in my office and signed the agreement I had originally drawn up.

At first I was self-conscious about being a "mediator" and not exclusively a "fighter." But gradually I have become more willing to come out of the closet and express my confidence in mediation. Now I make the mediation option available to every client who walks into my office, whereas in the past I would suggest the possibility of mediation quite tentatively. Fortunately, one early client was willing to

accept my tentative offer to mediate rather than litigate. He was the father of a twenty-one year old woman and originally wanted to hire me to have his daughter declared legally incompetent to manage her life. The idea was to deny the daughter money from a trust fund set up for her by a deceased grandmother, so that it would not be available to buy drugs and liquor. When the father and I carefully examined the negative effect that his "winning" the case might have on his daughter, I suggested to him that it might be preferable for me to act as a mediator between him and his daughter, rather than as his lawyer. I met with the daughter and described the mediation process; she was willing to participate. Five sessions later, she and her father came to an agreement that she would seek therapeutic help, keep track of her finances, and go to school, if he would agree not to interfere with her life. The agreement is still in effect, has been honored by both father and daughter, and has been jointly modified twice over the years. The father is satisfied that the daughter has "straightened out" and the daughter feels that she and her father have enjoyed a positive relationship for the first time in her life.

It is no surprise to me that more and more people decide that hiring a lawyer to represent them as part of the traditional adversary process is simply too expensive, time-consuming, mystifying and alienating. Many people are also unwilling to accept the feeling of powerlessness and helplessness that comes from having set legal wheels in motion and then realizing that these wheels have acquired an impetus of their own—one that is often far removed from the original concerns of the person who started them rolling. All too often small disputes seem to escalate almost automatically into legal wars marked by aggressiveness, righteousness, and hostility whenever lawyers are involved.

Mediation represents a positive way to slow down the process of hostility-escalation and gap-widening that usually accompanies a dispute. Where the parties to the dispute have need of a continuing relationship (i.e. neighbors, parents and children, businessmen, friends, tenants and landlords), it is particularly important to have avenues of resolving differences that don't further separate them. The presence of a neutral third person—the mediator—becomes both a symbolic and real recognition of the larger community—a community that partici-

pates with the disputants on an equal footing, rather than sitting in judgment and holding up one party as being right and the other wrong.

The two most essential elements of a mediation are, first, the presence of a neutral third party who has no power to decide the dispute and does not represent either or both of the individuals, and second, the willingness of the disputants to enter into mediation.

Working together with the mediator, the parties establish mutually agreeable ground rules to govern their discussions. The goal is to reach a solution which is satisfactory to all of the participants. Once an agreement is reached, the role of the mediator (my usual role) is to reduce the agreement to writing, have it reviewed by the parties, and, if desired, by their lawyers, and then to have it signed by the parties. Once signed, with or without a lawyer's review, it represents a valid contract with all of the usual rights and remedies.

Differences Between Mediation and Typical Legal Representation

Mediation can be seen, not as a competing alternative to legal representation, but as a way to solve a dispute before it escalates into a full-scale battle. The simplest most direct way of settling an argument is for the two people who disagree to sit down and work out their differences. When this process is not successful, people typically turn to a lawyer to help them prevail against the other person, who then in turn also hires a lawyer. When this happens, the lawyers typically either negotiate an agreement acceptable to the parties or submit their dispute to a judge or jury to decide. Mediation represents another alternative—an often overlooked opportunity to solve the dispute before it has escalated to the state where people feel that lawyers and courts are required to resolve it.

The parties themselves determine both the mediation method, as well as the specific ends they seek. The advantages to a successful mediation process are numerous. Since the parties have played such a central role in resolving their differences, the chances of their living up to their agreement are much greater than when the decision has been either reached through coercion of "handed down" by a court. Although lip service is often paid to the client's right to make ultimate choices when represented by a

lawyer in a formal adversary proceeding, the legal process is often so foreign to non-lawyers, that undue deference is given to the lawyer's opinion.

The role of law itself is also different in the mediation setting as compared to situations where lawyers are in charge. The parties in a mediation are free to determine how the law shall be used in resolving their differences. In a court setting, the law tends to become the "property" of the judge and to a lesser extent, the "lawyers." Only in a mediation setting can the parties to the dispute make their own rules.

One of the things I like best about mediation is that there are no losers. In adversary representation, the process is structured for one party to win and the other to lose. When the mediation process works, both parties feel like winners for having worked through their difficulties together. All of the effort of the mediation is directed toward bringing the parties together, rather than dividing them further from each other by identifying one as right and the other as wrong.

But it's important to remember that mediations do not take place in a vacuum. They exist in the context of our adversary legal system and our political and economic systems, and the possibility of threat or resort to the courts always lurks behind the process of mediation. And the adversary approach is certainly not limited to the legal system. Indeed, aggressiveness and open competition are deeply ingrained in our culture, from the base of our economic system of capitalism to the way we are raised by our parents. Even when we decide that we want to act in a cooperative, mutually respectful way, it is often difficult to prevent our aggressive conditioning (our need to survive) from getting in the way. Succeeding at doing this is what mediation is all about. Mediation should not be confused with arbitration. In arbitration, the arbitrator acts as a judge; thus the decision-making process is taken out of the hands of the parties just as it is in court.

Disputes That Qualify for Mediation

Any dispute can be mediated provided *all* of the parties are willing to pursue the process. Since the process depends so heavily on the willingness of the parties to freely enter the mediation, coercion of any kind tends to be counterproductive. A basic premise of mediation is that any agreement which is unacceptable to one or more of the parties is considered



as bad, or worse, than no agreement at all. Although it is impossible to screen out all pressures felt by mediation participants in coming to an agreement, it is basic that all parties must be engaging in the mediation because they want to, not because they feel pressured by others to do it.

The question of timing is also important in determining if mediation is appropriate. A dispute can be so charged with intense feelings that the parties are unwilling or simply not ready to deal directly with each other. I remember one couple who came to me to mediate their divorce at a time when they were both so upset and angry that they weren't capable of having the perspective necessary to make a good agreement. Still, they were clear enough to realize that they didn't want to hire lawyers and drag what was left of their relationship through the judicial mire. I suggested that they agree to take a couple of months as an official cooling-off period and then come back and give mediation a try. Two months later they came back and reached an agreement on all issues in one two-hour session.

I have successfully mediated disputes in many different areas of law, including divorcing couples, landlord-tenant, neighbors in dispute, partnership, internal business problems, real-estate, employer-employee and medical malpractice. I believe that, ideally, it is even possible to mediate in the area of

criminal law, although I have serious reservations about how much can be accomplished today, given society's present orientation toward punishment. Let me give you an example of a mediation approach involving a minor dispute that I think could have much wider application. A client came to me after having been arrested for assaulting a young boy by dousing him with water. The boy had been continually annoying the entire neighborhood by riding his motorcycle without a muffler in the middle of the night. I suggested to the prosecutor that, instead of proceeding to court, he and I sit down with the victim, my client, and a group of concerned neighbors without acting as adversaries. He was willing to give it a try. I made it clear to my client that I would not be acting as his representative, and that the prosecutor and I would be there to facilitate the discussion; he was amenable. The case was resolved in one three-hour discussion resulting in an agreement between all of the parties. The boy agreed to restrict his motorcycle riding to an area that did not disturb the neighbors, and the neighbors and my client agreed to pay for his medical bills, in return for the dismissal of all criminal charges against my client.

The mediation was successful in the above example because everyone was willing to mediate in good faith. There can be problems with mediation in criminal cases, however. The pressure of a criminal charge in the event no agreement is reached, operates as an obvious coercive factor that can lead to poor settlements.

Who Should Mediate?

Since the mediation process so heavily depends on a non-hierarchical relationship between the parties and the mediator for its success, the problems of domination and distance which have permeated the professions (especially law) have led some to believe that it is not wise to develop a professional class of mediators. It is certainly true that, as a lawyer, I have found it necessary to "untrain" myself in certain ways. The heavy emphasis in legal training on aggressiveness, automatic escalation of disputes, righteousness, competition, and so on, all get in the way of successful mediation. But I have found that the ability to clarify complex situations, organize and cut to the heart of a matter—which I also learned in law school—are an invaluable aid to

mediation. I do think that a mediator's interpersonal skills and the understanding of human nature emphasized in the social sciences, including psychotherapy, are at least as valuable as skills in legal analysis. It may be that a system which allows for the cooperation of lay and professional mediators will work well, but in the final analysis, the choice of a mediator should be based primarily on the parties' trust in the mediator as a person. Success as a mediator depends heavily upon personal qualities, the ability to create a positive climate where the deeply held personal values of the disputants can be recognized and expressed. The mediator's ability to create such a climate is based on his or her own ability to identify and act on values that support the mediation process.

What Happens in a Mediation?

At the heart of a successful mediation is an understanding between the parties and the mediator. Establishing a good initial agreement avoids many problems which can short-circuit the mediation. The role that I usually agree to take with the participants is to keep the parties to the agenda they set. I ask clarifying questions, give feedback to the parties on their behavior, point out miscommunications, and make suggestions for possible resolution when the parties seem stuck. Some mediations are highly structured, with time-controlled opportunities to speak out and rebut. I favor a more flexible, informal format.

Here are some of the other rules that I have worked out with participants in many different mediations.

Representation: I make it clear from the beginning that my goal is to remain neutral and that I will not act as an advocate for either party. I also make it explicit that, in the event the mediation does not end in agreement, I will not act in any way with, or for, either party in the future.

Presence of Others in the Mediation: Often, one or more parties to a mediation will want to include other persons in the proceeding, perhaps because they have relevant first-hand information to contribute, or because they are somehow affected by the dispute. Sometimes experts in the area around which the dispute is centering are invited. At other

times people are invited to provide emotional support during the mediation process. I have found that the presence of these people is rarely disruptive as long as the parties to the mediation have agreed on that person's presence, and it is clear to the person that he or she is not there to represent either party.

Confidentiality: There are at least two views concerning confidentiality with regard to conversations between the mediator and one of the parties in the absence of the other party. On occasion a situation arises where we all agree that it would be helpful for me to talk with one of the parties privately—either by phone or in person. I naturally hold all conversations between myself and the parties in confidence from the outside world. However, I make it clear to all parties that I will not hold what one tells me in the absence of the other(s) in confidence from the other(s). The reason I do this is that I believe that my possession of a "secret" can change the equal relationship between the three of us, and become a way of manipulating me into losing my impartiality.

Use of Information Disclosed by the Parties: I ask the parties to agree that, in the event the mediation does not end in agreement, they will not use information disclosed by the other in a later court proceeding. In California and some other states, if the parties agree that the mediation is a settlement discussion, information disclosed is inadmissible as evidence in any later adversary proceeding. This minimizes the risks of participating in the mediation, and confirms a spirit of cooperation between the parties.

Disclosure: Since neither party has coercive power to be certain that the other person is disclosing all relevant information, I ask the parties to agree that they will disclose all relevant information voluntarily, and that any agreement they come to is based on their mutual reliance on this agreement. This means that in the event that it is later discovered by one of the parties that he or she has been lied to, or an important fact has been intentionally omitted, the agreement is invalidated.

Cost: The cost of mediation varies widely from free community mediation centers to fees in excess of \$100 per hour for teams of private mediators. A fee

of \$40–\$50 per hour as the top of a sliding scale is about average for individual mediators. In the final analysis, it is almost always cheaper to mediate than to try to solve the problem through conventional litigation.

Time: Sessions usually range from one to two hours, subject to the stamina of the parties, and their schedules. My experience is that, if no agreement is within sight after three or four sessions, the prospects for eventual agreement are dim. My longest mediation took eighteen hours, the shortest, a half-hour.

My highest priority in a mediation is for the disputants to come to an agreement that they believe to be fair. In the overwhelming majority of cases, I do not express my opinion about the fairness of the agreement, even though I am usually satisfied that fairness has been achieved. My understanding with the parties is this: I will accept as wide a range of agreement between them as possible, but where I am convinced that either a court would not accept the agreement, or that the agreement is grossly unfair, I will express my opinion. If I object to a settlement for one of these reasons, and the parties still want to go on with the agreement, I will resign as mediator. In practice, this has never happened, but there have been times when I have expressed my opinion. In one such situation, I was mediating with two business partners who were trying to dissolve their partnership. I had the strong impression that the person who initiated the dissolution felt guilty and in order to assuage this guilt, was willing to pay an exorbitant amount to the other. I indicated my feeling that the agreement they were on the verge of coming to seemed grossly unfair to me. After listening to my explanation, the parties re-evaluated their positions, and the resulting agreement seemed more equitable to all of us.

Objecting to a settlement is extremely sensitive, as it has the potential for my acting as a judge, with the parties deferring to me. However, I believe that as mediators, we cannot pretend that we are value-free, even in situations where it is desirable to keep our beliefs from intruding.

Other Risks and Problems in Mediation

One risk that a party runs in entering a mediation is that he or she might agree to a settlement that would

be less desirable than could be obtained in court. It is also possible to accept a settlement that a lawyer might advise against, or that the party feels is unfair but was coerced into accepting. The most troublesome area for the mediator occurs when one party seems to be taking advantage of the other through pressure, manipulation, or power-tactics, or where a party is so desirous of ending a conflict that he or she is willing to agree to almost anything. Where the mediator observes this dynamic, it is important to find a way to redress the imbalance without having the mediator act as an advocate for one party.

I encountered this sort of problem in the course of mediating a post-divorce dispute concerning property division and the parents' relationship to the children. The ex-husband was obviously being pushed into a corner by his ex-wife. When I verbalized my observation, the ex-husband said that he had felt badgered by his ex-wife all of their married life, and that was why he had left the marriage. The ex-wife did not fully agree with my observation. Nevertheless, it was apparent to me that if this pattern persisted throughout the mediation, there would either be no agreement at all or the ex-husband would feel that he had lost. Finally, the ex-husband said that he did not feel strong enough to deal directly with his ex-wife at this point in his life, and that he wanted to stop the mediation. Again, I saw that not every dispute can be successfully mediated.

Where a mediation "fails," the time and expense of the mediation are not necessarily wasted. The impact of the parties having met with one another directly and having faced a problem together, can often have an important catalyzing effect in helping the parties come to terms with each other in the future. For example, the couple described just above eventually hired lawyers to represent them, but quickly came to an agreement once the ex-husband made it clear that he would not continue to repeat the "put-upon" pattern of the marriage. Acknowledging that he could not deal directly with his ex-wife, helped him to see more clearly what he needed to do.

Enforceability and Modification

As with any agreement between parties, circumstance can arise that call for a change in the understanding they've made. Where the parties agree, this

presents no difficulty; the change can simply modify the existing agreement, with all of the enforceability of any agreement between two people. Where the parties disagree about the change, mediation can be utilized again to resolve the issue. Once people have come to an agreement through mediation, the benefits they have received from using the process initially often encourage them to use it again should the need arise. My experience in mediating agreements for the past several years is that no party has had to resort to court action to change or enforce an agreement reached through mediation. Some parties have felt a need to have an agreement reviewed by lawyers before signing it, feeling that by so doing, the agreement would be more enforceable. My own view is that where the parties have been on equal footing, as in the mediation, any agreement they arrive at should have the same force as an agreement negotiated by lawyers.

The Future of Mediation: Implications for the Society as a Whole

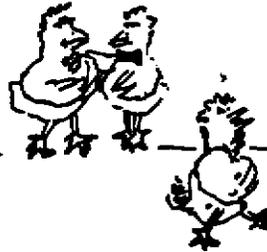
The growth of mediation as a way of settling disputes has enormous implications for our legal system and for society as a whole. In a world where alienation and isolation are increasingly common, and where many of us believe that survival depends on defeating others with whom we share our planet, we tend to orient our lives toward self-preservation and protection from each other. Yet the more isolated and fearful we become, the more apparent it is that our survival depends on the active cooperation of all members of our community, state, nation and planet.

Mediation is one way of making direct and immediate contact with others in a manner that allows us to resolve disputes and, at the same time, experience being part of a larger community. The mediation approach does not divide the world into winners and losers, or better or worse people. It allows individuals to shift away from a parochial approach towards a broader perspective of themselves in relation to others, with less of the hard-edged competitive anger that is almost always present in the adversary legal system. It is no accident that mediation is becoming popular at a time when the world-wide community is becoming increasingly aware of the need for cooperative efforts. Mediation allows us to reorient ourselves so as to recognize that we are part of, rather

than separate from, those around us, and to see our own immediate community as part of a larger community. Mediation is a device that allows people to work together in a world which obviously needs such an approach if there is to be any hope of meeting everyone's needs. Finally, through mediation we can appreciate the points of view of others with whom we disagree, and participate in a healthy process which, if adopted on a wider scale, can be one part of the transformation that must take place if we are to continue to live peacefully and productively on this planet.



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Divorce mediation's strengths. . .

By Gary J. Friedman
and Margaret L. Anderson



Gary J. Friedman



Margaret L. Anderson

Within the last few years, lawyers and clients have turned increasingly to divorce mediation as an alternative to the adversary system. One of the motivations for clients has been the economic cost of adversary representation: Attorneys' fees can often consume a substantial portion of the community's resources. Equally important, couples have found that the adversarial approach distances them from each other when they still want to have a caring, or at least respectful, foundation for their relationship. In addition, the involvement of lawyers has frequently meant that the couple's dispute was taken out of their hands, that the lawyers or the courts decided how the case would be resolved.

Many lawyers have experienced their own frustration with the adversary sys-

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tem, but have felt compelled to respond to aggression from their opponents with counter-attack. And while they might have preferred that their clients assume the primary decision-making responsibility, lawyers have taken on the major control and responsibility for handling the case for reasons of efficiency and the obligation to safeguard their clients' rights.

Some clients do not need or want the kind of protection lawyers are trained to provide.

Lawyers have also recognized that the mandatory application of rigid legal principles ignores the individual needs of clients and may result in serious unfairness to one or both parties. This is often the case, for example, with the Lucas rule (*Lucas v. Lucas* (1980) 27 C3d 808, 166 CR 853), which has been interpreted to mean that in the absence of an agreement or understanding to the contrary, a house

Responsibility for making decisions remains in the hands of those who know best what needs must be met

held in joint tenancy is treated as community property. Many lawyers have experienced the frustration of explaining to a client that his or her inherited funds or premarital savings became community property as a result of the unknowing advice of a realtor to take title as joint tenants.

Finally, the traditional rationale for the adversary model — that we live in a hostile society where lawyers' skill and prowess are all that keep us from devouring each other — has not always been borne out by experience. Some clients do not need or want the kind of protection lawyers have been trained to provide.

In response to these concerns, growing numbers of lawyers and clients are turning to mediation, in which the lawyer acts as a neutral facilitator to assist the couple in resolving their dispute. This process can save money and time and allows the partners to reach agreements without further damaging their relationship. The responsibility for making decisions remains in the hands of those who know best what needs must be met. This is particularly important where parenting issues are involved, as the California Legislature recognized in 1981 when it passed a law encouraging joint custody and requiring mediation in child custody cases. (See "The custody compromise," June 1983.) Mediation allows attorneys to devote their energies to conflict resolution, rather than becoming trapped in the escalation of conflict. As mediator, the lawyer can provide access to legal information while respecting the parties' sense of fair-

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In My View

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ness and encouraging their participation in shaping their own agreement.

However, just as the adversary model is not the best way to resolve all disputes, neither is mediation. This process probably is not appropriate if the clients are motivated solely by fear of the adversary court system or by general mistrust of lawyers. In addition, mediation may not work when one spouse has not shared

'Lawyer-mediators can neither rely exclusively on their old skills nor abandon them.'

more or less equally in the couple's decision-making process and has become largely dependent on the other to handle financial and business decisions. Mediation is for people who want and are able to work together to reach a fair agreement. Both partners must be able to stand up for themselves and be open to finding a solution that addresses their needs.

Some lawyers who jumped on the mediation bandwagon out of frustration with the adversary system are now recognizing that problems exist with this model as well. Too often, these lawyers are tempted to express this realization with the same sweeping rejection of mediation that they earlier applied to the adversary approach. The real challenge, however, is to synthesize the strengths of each model into a broader view of the possibilities for resolving conflict. Lawyers and lawyer-mediators can neither rely exclusively on their old skills nor abandon them. The paternalism of the traditional adversary system must not control; at the same time, the impulse toward fairness and protection from harm cannot be ignored. This means that lawyers and clients must develop an expanded view of the roles each can play. A broad range of possibilities is available for resolution of disputes, not merely two polarities: an all-controlling lawyer or no lawyer at all.

It is our view that mediation, when it is appropriate, provides an opportunity for clients to exercise their own sense of responsibility and justice in resolutions that honor both clients, and that it is the mediator's job to work toward assuring that outcome. The parties often know the best solution to their own problems, even though it will not necessarily mirror our ideas of what a court would do. This may

mean that one spouse will elect to waive spousal support or an interest in a pension; it may mean that the parties choose to recognize a separate property interest in a particular asset inconsistent with record title, or base parts of an agreement on personal rather than financial considerations.

We can use the breadth of our experience with people and our understanding of the law in a way that does not rob our clients of the opportunity to use their own sense of justice as a reference point, yet helps them recognize that the law is a force with which they must come to terms. During the mediation process the mediator must point out dangers and pitfalls without dictating the solution. It can make a difference to clients to know that the resolution is theirs, not ours, and that they made it happen.

As lawyer-mediators, we must be able to distinguish between our own ideas of fairness, the "fairness" embodied in statutory and case law, and our fear of malpractice. We must learn to be sensitive to the way we subtly use the law to protect ourselves rather than the parties directly involved. At the same time, the parties need the mediator to be watchful for one party taking advantage of the other, even if it means the mediator refuses to go along with an agreement that seems grossly unfair, either in its content or in the way it was reached.

The tension between client autonomy and need for legal protection is always present. When our lawyering experience reveals to us that one party is being treated unfairly, or that an unfair or untenable agreement is being made, it is an easy jump to the conclusion that we as lawyer-mediators must control the process and fashion the agreement. The inevitable result is a controlling and manipulative form of mediation, or the all-too-easy abandonment of mediation altogether.

'The tension between client autonomy and need for legal protection is always present.'

Neither result addresses the problems inherent in the two models. More importantly, both results ignore the strengths of each model. Only by integrating traditional lawyering skills with new mediation skills can we understand the place of mediation and the possibilities for lawyering in the resolution of conflict. □

Mandatory "Mediation" misnamed

by Gary Friedman

For years, many people have been appalled by adversary court fights involving the custody and visitation of small children. Finally in 1980 the California legislature, reacting to what has become known as the *Kramer v. Kramer* syndrome, enacted what it considers to be an alternative solution to the bitterness of court fights over child custody.

Under Section 4607 of the California Civil Code, effective January 1, 1981, were Mr. and Mrs. Kramer to live in California, they would be required to participate in what is called "mandatory mediation" before they could proceed to try their case before the court. The purpose of the law, as defined by the legislature, is to "reduce acrimony which may exist" and "develop an agreement between the parties allowing the child close and continuing contact with both parents."

While the idea of reducing hostility between separating parties makes great sense and is long overdue, there are problems with the methods chosen. Mandatory mediation is a contradiction in terms. Those of us who have been acting as mediators know the key element to a successful mediation is the willingness of the disputing parties to work out an agreement with each other.

As we have learned from experience, it is impossible to coerce people to work together. Yet under the new law, the parents of children in custody proceedings will be forced to sit down together in the same room to try to come to an agreement. They will still be entitled to their day in court if they can't agree, but not until they have gone through a mediation process with a court official and have failed to reach an agreement. In addition, their day in court will be colored by an official recommendation by the mediator as to how he or she believes the court should decide the case.

Mediation is not defined by the new law. Indeed, Section 4607 more accurately describes arbitration than mediation. The essential difference between mediation and arbitration is that in a mediation, the parties to the dispute retain control over the process. If either party doesn't like what is going on, he or she can leave with no legal repercussions.

In a true mediation, the mediator has no power over the parties other than his or her persuasive ability. This leaves the parties free to participate in the mediation in any way which makes sense to them. In arbitration, the arbitrator acts as a judge and decides the case. Consequently, in arbitration the parties present themselves and their case to please the arbitrator much as they would in an adversary court proceeding.

Under Section 4607, the mediator is part of the court staff, has the duty "to assess the needs and interests of the child and interview the child if he or she deems it appropriate."

Additionally, the mediator has the power to render a recommendation to the court as to the ultimate disposition of the case, in the event the parties do not reach any agreement. While a court is not bound to accept the mediator's recommendation, the knowledge that the mediator has the power to influence the court puts the mediator in an extremely powerful position in relation to the parties. The law also gives the mediator explicit power to recommend that mutual restraining orders be issued to protect the best interests of the child.

Those of us who have seen mediation grow as part of a grassroots movement where people have begun to reclaim the power to decide their controversies themselves with a little help from their friends can only be disturbed that this law is called a "mediation" law. Mediation, to be effective, must be voluntary. The heart of the mediation process is for people to act like themselves and to address their common problems in as free and full a way as possible.

"The essential difference between mediation and arbitration is that, in a mediation, the parties to the dispute retain control over the process."

Under Section 4607, the step forward is in having reduced the role of lawyers in contested custody proceedings. The mediator can exclude lawyers from the room. The step backward is the legislature having created a new monster, the wolf in sheep's clothing, a friend who can suddenly become your judge.

Another troublesome aspect of Section 4607 is that the mediation is private and confidential. This works to give the mediator's recommendation still further weight since the parties will not be permitted to introduce any evidence of their own as to what happened in the presence of the mediator. Thus, the one up -- one down nature of the relationship between the mediator and the parties only serves to create distrust and wariness of the mediator.

Hopefully, people will come to understand that Section 4607, while certainly well-motivated, is not mediation because it is not a process which truly restores power to people to make decisions about their lives.

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