

# ISSUES FACING THE FAMILY MEDIATION FIELD

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The family mediation field has struggled for twenty-five years to become a credible option and significant presence in separation and divorce actions. In the past decade, family mediation has emerged as a major dispute resolution process in many states within the U.S., Australia, Canada, and Scotland. With increasing acceptance, family mediation has broadened to include adoption, child protection, guardianship, juvenile, parent-teen, and probate matters, although divorce mediation remains the predominant practice.

Since 1981 when legislation mandating mediation for custody and access disputes was implemented, California has been at the forefront of many of these advances. This early integration of mediation in family law was indirectly responsible for some of the expansive growth of mediation in all dispute sectors in California. Considerable legislative activity implementing pilot projects and large scale mediation programs has followed in the past twenty years.

However, in a number of states, family mediation is still not available in any meaningful way to families seeking a less costly and more cooperative process due to the absence of strong leadership by respected family law practitioners and judicial officers combined with a family law bar hostile to the encroachment of mediation.

As we enter the next decade and millennium, a number of important issues face the family mediation field. Among these are the extent to which divorce and family mediation will remain an interdisciplinary field, how to ensure competence in family mediators, and the question of certification of family mediators.

## *Family Mediation: An Interdisciplinary Field*

Since its inception in the mid-70's, family mediation has been an interdisciplinary endeavor. Divorce mediation arose from widespread, intense dissatisfaction with the negative process and long-term impact of adversarial divorce proceedings on the participants and their children. Among early leaders who conceptualized, published, and offered training in divorce mediation, the disciplines of origin included law, psychology, social work, education, and labor negotiations. These pioneers drew upon diverse theory, research, and practices, to craft a very different process that acknowledged the need to blend the psychological, family systems, and legal aspects of the divorce ex-

perience into an empowering rather than destructive process. This cross-fertilization of frameworks, substantive knowledge, and techniques, from the fields of communication, social psychology (conflict and power research), divorce and child development research, family systems theory, negotiations, and law, created much of the appeal of the family mediation process to practitioners and participants.

The interdisciplinary nature of family mediation also spurred an early and extensive empirical research effort amongst those interested in the field. Indeed, no aspect of family law divorce practice has ever received such research scrutiny. The anticipation was that the divorce mediation process, provided by trained, competent mediators, would result in less conflict during and after the divorce process, more parent communication and cooperation post divorce, and significantly greater client satisfaction with both the process as well as the outcome. Further, it was expected that the negotiated outcomes would not disadvantage either party as compared to the outcomes of couples using the traditional adversarial divorce process. These expectations have generally been supported and replicated by empirical research in five countries assessing divorce and custody mediation processes (see Ellis & Stuckless, 1996; Emery, 1994, Kelly, 1996).

Over the years, legal practitioners, mental health practitioners, and mediation organizations, such as the Academy of Family Mediators, the Society for Professionals in Dispute Resolution, and the California Dispute Resolution Council have worked together to ensure that the mediation field remained interdisciplinary and was not co-opted by lawyers or legal decision-making bodies seeking to exclude from practice all but attorneys. Thus far, this effort has enable family mediation to retain its interdisciplinary nature.

The challenge of this new millennium is to maintain that integrity. As more attorneys embrace the family mediation trend, there will be increasing pressure to regulate divorce mediation practice. In part, this pressure arises from the failure of those who have not taken family mediation training to understand the uniqueness of the family mediation process. Without adequate grounding in a conceptual framework that emphasizes client self-determination and control, mutual collaboration, and mediator impartiality, many attorneys nevertheless view and practice mediation as they practice family law. Consequently, they bring the values, assumptions, language, and practices of adversarial divorce into the mediation process. Further, as mediation is more broadly used by the courts and attorneys for civil and other non-family disputes, mediation methodologies are emerging which more closely emulate the practice of law, such as evaluative mediation models or mediation-arbitration models (Lowry, 2000; Riskin, 1996).

With courts, legal organizations, and practitioners using these more directive, coercive mediation models, it is understandable that mediation in all dispute sectors might be viewed as the practice of law. Attorney and non-attorney practitioners in family mediation have always distinguished between informing clients in a neutral way about the law, (or having clients seek consultation with counsel), giving legal advice, or telling clients how a judge will rule. The renewed interest in lawsuits alleging that non-attorney mediators are engaging in the unauthorized practice of law may stem from the proliferation of these newer forms of mediation which significantly deviate from the original models of divorce mediation (see, for example, Folberg & Taylor, 1984; Friedman, 1993; Haynes, 1994; Moore, 1996).

*Ensuring Competence in Family Mediators*

There are multiple paths to competence as a family mediator. The individual's life skills, knowledge, professional experience working with families, specific training in family mediation, peer consultation, and continuing education all contribute to mediator competence. However, it is the specialized training in family mediation that legal and mental health professionals receive that is pivotal in integrating the talents and experiences of each individual. The fact that divorce mediation has been created from a blend of several disciplines and philosophies presents real challenges to those wishing to achieve competency. Cross-disciplinary training and knowledge is therefore critical for providing effective family mediation. Practitioners need to retain and reshape the skill, experience, and knowledge of their own professional discipline, while simultaneously integrating new theoretical frameworks, information, and practices which are more specific to providing effective mediation.

Thus, for example, family lawyers, more accustomed to giving advice to an individual client and representing only that client's interests, must shift to a different framework which enables two disputing individuals to work together to find their own acceptable solutions without undue influence from the mediator. Further, family lawyers need to develop excellent communication skills starting with the use of neutral language, attentive listening, and the expression of empathy to effective framing of issues. They also need a solid understanding of the psychology of divorce and relevant child development research to be appropriately responsive to client behaviors and discussions. Psychologists, on the other hand, must shift to a more structured, task-oriented, analytical process which does not focus exclusively on feelings and symptom relief but continues to utilize the interpersonal skills of the therapist. They, too, must refrain from advice-giving. These professionals must also

learn substantive family and tax law as well as excellent drafting skills (Foster & Kelly, 1996).

The particular components of family mediation training that are especially important in achieving competence include: communication theories and techniques, conflict theory, research, management, theories of power, empowerment techniques, an exploration of differences in mediation models and their underlying assumptions, and what practices stem from these rationales (Kelly, in press). Each of these training components should include exercises and role-plays to develop competence. The mediator's ability to relate effectively and impartially with the parties, to initiate and maintain a respectful process, and to understand what is happening and how to react in these often highly charged emotional situations emerges from the above components. Other training components such as negotiation theory and technique, contracting for the mediation process, exploring mediator impartiality, and ethical standards of conduct are also important but are more universally included in mediation training.

One of the roadblocks to achieving competence as a family mediator is the belief expressed by many family law attorneys that they already know how to mediate, because they "negotiate all the time," with opposing counsel. Therefore, they do not perceive the need for specialized family mediation training. This failure to understand the vast differences between these two negotiation processes leads some family law attorneys to transport the adversarial process into the family mediation. Evaluative mediation in which the mediator informs the parties about what will happen in court if they don't settle, often as a means of ensuring agreement, is one such example (Riskin, 1996). Such a process lacks the hallmarks of what empirical research has repeatedly demonstrated is important to clients about divorce and custody mediation. These hallmarks are respectful communication, the ability to be heard by the other party and the mediator, not being pressured by the mediator, engaging in constructive conflict, autonomy to craft agreements that both find acceptable, and eliminating a win-lose atmosphere (Emery, 1994; Kelly, 1996).

Even though the Academy of Family Mediators and the Society for Professionals in Dispute Resolution has endorsed mediation training as a central route to competence as a mediator, far too many local and state bar associations have refused to require any mediation training for listings on referral panels. This failure to take the need for specialized training seriously has diminished the quality and stature of family mediation, both through the dismissive attitude toward relevant training, the blurring of boundaries between family mediation and family law adversarial practices, and through coercive and sometimes unethical practices. If the field of family mediation is to maintain

its integrity, the issue of specialized training will need to be addressed more comprehensively by the legal community in this decade.

*Certification or Credentialing of Family Mediators*

The expansion of the mediation field has generated increased discussion about certification of mediators. Also, there has been greater pressure from the mediation community, state bars, and legislatures to create statewide standards in the form of a credential or certificate program. Thus far, there has been little pressure from consumers of mediation, although this is likely to increase as more mediation programs are mandated. It is argued that the public needs protection from incompetent mediators and that certification will address this public interest. Others argue that the mediation field is still quite new and diverse, and thus a certification program is premature, may create inflexibility, and inhibit continuing innovation (see *University of San Francisco Law Review*, Vol. 30 (3) for extensive commentary on the issue of certification). The focus has been on developing a certification program in preference to the expensive bureaucracy entailed in formal licensing of mediators.

Certification provides assurance to the public that the practicing mediator has met specified standards that non-certified mediators may not have met. Because mediation is now commonly used in multiple dispute sectors, it has been difficult to establish consensus on how competence is to be measured. While most mediators agree that a certain number of hours of mediation training and mediation experience are two important criteria for assessing mediator competence, these criteria alone do not ensure competence. Many argue that mediator competence can only be assured if there is a performance-based evaluation of knowledge and skills, and that this is a critical third ingredient of any certification program.

The certification issue for family mediation is linked to the continuing interdisciplinary nature of family mediation. Improperly handled, certification may lead to the exclusion of non-attorneys from the practice of family mediation. Although non-attorney family mediators also mediate adoption, child protection, and juvenile matters, the primary focus has been on comprehensive divorce mediation.

As mediation becomes more widely practiced, the issue of certification will appear before more state legislatures. Since most state legislatures are comprised of attorneys who have limited knowledge of mediation processes and practices, legal influence on any certification program is likely to be broad. Thus far, national organizations supporting mediation (e.g., AFM,

SPIDR) have taken strong positions that competence as a mediator is not related to the acquisition of any particular degree.

In California, the development and dissemination of mediator standards and principles by the California Dispute Resolution Council, an interdisciplinary organization of mediators and arbitrators, has been effective in promoting inclusion rather than exclusion of individuals and groups from mediation practice. The real issue is defining what comprises competence in the family mediation sector, and then developing more specific criteria for determining competence among divorce mediators, dependency mediators, or probate mediators. This is the task that lies ahead if the competency issue is to be effectively addressed rather than what degrees the mediators possess (Foster & Kelly, 1996). This can best be achieved in a manner that reflects the strength of the family mediation field to date: interdisciplinary discussion, collaboration, and consensus.

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