MCFM

Family Mediation Quarterly

Vol. 3 No. 4 Fall 2004

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

NONPROFIT ORG.
U.S. POSTAGE
PAID
NEEDHAM, MA
PERMIT NO. 53289

Family Mediation Quarterly

MASSACHUSETTS COUNCIL ON FAMILY MEDIATION
23 Parker Road
Needham Heights, MA 02494-2001

TOLL FREE: 1-877-777-4430
ON LINE: www.mcfm.org

MCFM

INSPIRING SETTLEMENTS SINCE 1982

MCFM

From The President: Laurie S. Udell

The MCFM year is off to a roaring start.

In October, MCFM sponsored our (almost) annual Fall Institute in Wellesley where many of our members and some non-members were treated to a day of learning and camaraderie. The new "parenting plan guidelines" created by a committee headed by Judge Arline Rotman, Ret. were highlighted at the beginning of the day. The next presentation concerned how to identify parties with addictions in the divorce process, and then how to address them. The afternoon sessions included: the issue of alimony at the age of retirement, estate planning issues for family law practitioners, dealing with difficult mediation cases, mediator role play for a multi-party family dispute, how to tell if children are in distress, and recent developments in family law.

All of the speakers were terrific and gave us food for thought — speaking of which, the lunch was a great time to indulge in tasty food and conversation.

A month earlier, we had an informative presentation at our September Members' Meeting by Monique Kornfeld, a knowledgeable immigration attorney. She discussed the ways in which aliens can be legally admitted to the US and then gain their permanent residence status and ultimately their US citizenship. From that jumping off point followed pitfalls for which the divorce practitioner or mediator should be alert.

When you have a moment, check out our new and improved web site at www.mcfm.org The site has been redesigned to make it easier for people to find the Mass Council, the oldest professional organization in Massachusetts dedicated exclusively to family mediation. You'll notice that the site is constantly updated with upcoming events as well as having old issues of the Family Mediation Quarterly and the older MCFM newsletters. They are even indexed so you can more easily locate what you're looking for.

If you've only been a "paper member" please come and join us for our next members' meeting or other event. We'd love to see you there!

Contents

A WELL-FOUNDED FEAR OF PROSECUTION:
Mediation and the Unauthorized Practice of Law

By David A. Hoffman and Natasha A. Affolder

To many mediators, "UPL" is an acronym with an increasingly ominous ring. This growing concern about the unauthorized practice of law (UPL) arises from reports around the country of charges filed against mediators who are not lawyers. These prosecutions — or in some cases warnings — are primarily directed at divorce mediators as a result of their drafting of detailed marital settlement agreements. However, all mediators have reason to be concerned, because of uncertainties about what constitutes UPL in the context of mediation.

The legal standards governing UPL enforcement are highly indefinite, and vary by state.[1] The patterns of enforcement are also unpredictable, and disclaimers in mediation agreements may not be legally effective.[2] Yet the stakes are high, as the potential consequences for a mediator of being found to engage in the unauthorized practice of law range from civil and criminal liability to ethics charges. This article surveys today's terrain, and argues that it's time for new, clear and uniform standards for distinguishing between mediation and the practice of law.

Statutes, interpretations There are two main reasons for UPL statutes. One is consumer protection — i.e., to ensure the competence and integrity of people who practice law, and to make sure that people who are seeking out legal services have the protection of the attorney-client privilege. The other reason, which attorneys may be more reluctant to admit, is that UPL statutes enable lawyers to maintain a monopoly over certain services. This means that prices can be maintained and competition limited.

UPL prohibitions are enforced by state and local agencies, such as the state Attorney General's office, the district attorney's office, and state bar UPL committees. UPL prosecutions tend to target law-related activities such as the work of accountants, real estate brokers,[3] workers' compensation specialists,[4] eviction service professionals,[5] title companies[6] and the makers of "do-it-yourself" divorce kits.[7] In several states, mediators have also become targets.[8]

The courts have developed five tests to distinguish the practice of law from other activities, a fact that itself underscores the difficulty in defining UPL. As applied to mediation, these tests are:

1. The 'Commonly Understood' Test. This broad test poses the question of whether mediation is commonly understood to be a part of the practice of law in the community. Factors that would inform this determination might include, for example, the extent to which lawyers in a given community, as opposed to non-lawyers, routinely provide mediation services.

2. The 'Client Reliance' Test. This test asks whether the parties who use a mediator believe they are receiving legal services. Evidence of what services the parties think they may be getting can sometimes be found in the advertising materials of the mediator, or in a written agreement to participate in mediation. Under this test, whether the mediator is engaging in legal practice could be different in every case, depending on the perspectives of the individual parties.

3. The 'Relating Law to Specific Facts' Test. This test asks whether the mediator is engaged in activities "relating the law to specific facts" — in essence, whether the mediation is an evaluative process. Prof. Carrie Menkel-Meadow, for example, argues that when a mediator evaluates the strengths and weaknesses of the parties' case by applying legal principles to a specific fact situation, he or she is engaged in the practice of law.[9]

4. The 'Affecting Legal Rights' Test. This test defines the practice of law as those activities affecting a person's legal rights — an extremely broad test. Mediations involving litigation matters by definition involve the parties' legal rights. Even in non-litigation matters (such as neighborhood, family, or organizational disputes), however, a mediation can affect the parties' legal rights if the mediation results in a legally enforceable settlement agreement.

5. The 'Attorney-Client Relationship' Test. This test asks whether the relationship between the mediator and the parties is tantamount to an attorney-client relationship. One factor affecting this determination in the context of mediation might be whether the parties in the mediation were represented by counsel — either at the negotiating table with the mediator and the parties, or in close consultation with the parties during the mediation but not actually attending mediation sessions. If not, there is greater risk in some situations that the parties could view the mediator as performing the role of attorney.

How useful are these tests? At a minimum, they underscore the point that there is no fixed definition of the practice of law in the context of mediation or otherwise. Moreover, courts are often also interested in matters that are significant but not mentioned in these tests — particularly the question of money. Some courts and advisory bodies have thus found that the issue of whether an individual is paid is important in defining an activity as the practice of law.[10]

Two states set standards At least two states — Virginia and North Carolina — have developed UPL standards specifically applicable to mediation. Rather than rely on any of the five tests described above, drafters in those two states identified the most common categories of mediator activities that could be considered the practice of law: providing legal advice to the parties, and drafting settlement agreements in a manner that goes beyond

There is no fixed definition of the practice of law in the context of mediation or otherwise.

Continued on next page

serving as a scrivener for the parties.

Legal advice. The Virginia Guidelines on Mediation and the Unauthorized Practice of Law, drafted by the Department of Dispute Resolution Services of the Supreme Court of Virginia, attempt to draw a line between providing legal information (which is not legal practice) and giving legal advice (which is).

Legal advice is defined in the Virginia Guidelines as applying legal principles to facts in such a way as to (1) predict a specific outcome of a legal issue or (2) direct, urge, or recommend a course of action by a disputant. Under these Guidelines, mediators can provide disputants with copies of relevant statutes or court cases, and they may state what they believe the law to be on a given legal topic, without being deemed to be practicing law.

There is an unavoidable measure of uncertainty in the various definitions of UPL.

However, the Virginia Guidelines prohibit a mediator from describing the application of the law to the parties' situation. They offer the following two statements as examples; the former would be permissible while the latter would not: "Generally speaking, a contract for the lease of goods that exceeds $1,000 must be in writing to be enforceable. Since your agreement was in writing, you would have no problem getting a court to enforce it."

The North Carolina *Guidelines for the Ethical Practice of Mediation and to Prevent the Unauthorized Practice of Law,* adopted by the North Carolina Bar in 1999, likewise permit mediators to provide "legal information," but prohibit mediators from advising or giving an "opinion upon the legal rights of any person, firm or corporation." Legal information may include printed material, such as brochures prepared by the bar association; presumably, providing copies of statutes, cases, or rules would fall within this category. But, in the words of the North Carolina Guidelines, "there are no bright lines." "The North Carolina Guidelines for the Ethical Practice of Mediation and to Prevent the Unauthorized Practice of Law, adopted by the North Carolina Bar in 1999, likewise permit mediators to provide "legal information," but prohibit mediators from advising or giving an "opinion upon the legal rights of any person, firm or corporation." Legal information may include printed material, such as brochures prepared by the bar association; presumably, providing copies of statutes, cases, or rules would fall within this category. But, in the words of the North Carolina Guidelines, "there are no bright lines."

Settlement agreements. With respect to the drafting of settlement agreements for the parties, the Virginia Guidelines recommend that mediators serve simply as scriveners, using only those terms that the parties specifically request and avoiding legal "boilerplate."

The North Carolina Guidelines include, primarily for the benefit of non-attorney mediators, samples of recommended language for an agreement to mediate and a memorandum of understanding. The North Carolina Guidelines state that mediators "should not sign or initial" a memorandum of understanding, and if they do, they "shall advise the parties in writing that the signature does not constitute an opinion regarding the content or legal effect of any such document."

Uniformity from state to state would advance the process of drawing clear lines between mediation and the practice of law.

From the Guidelines formulated in Virginia and North Carolina, and the five tests discussed above, one can see that the biggest risk areas for mediators who are not lawyers, are activities that involve (a) applying legal norms to specific sets of facts, and (b) drafting documents that may be legally binding.

A good start, but... The Virginia and North Carolina Guidelines are among the first attempts to articulate a UPL standard applicable specifically to mediators. The Virginia Guidelines offer a particularly thoughtful and detailed analysis of UPL issues, and advance the discussion of these issues by including examples of permissible and impermissible actions by mediators.

The distinction drawn in both sets of Guidelines between "legal information" and "legal advice" is a familiar dividing line between permissible and impermissible practice from the standpoint of mediator ethics.[11] One should not underestimate, however, the difficulty of enforcing a standard based on this distinction. Consider, for example, whether the following hypothetical statements made by a mediator constitute legal advice by "predicting a specific outcome of a legal issue."

(a) "I think the plaintiff has a better liability case than you [the defendant] do."
(b) "The plaintiff seems to have a better liability case than you do."
(c) "The plaintiff may have a better liability case than you do."
(d) "I can see how a jury might think the plaintiff has a better liability case than you do."
(e) "Do you really think you have a better liability case than the plaintiff?"
Statements (a) and (b) seem to cross the line; many would say the (d) and (e) do not. Is (c) UPL?

Enforcing a standard based on a prohibition against "directing, urging, or recommending a course of action by a disputant" is equally difficult. Consider the following hypothetical statements by a mediator to a party in a private session:

(a) "I think your interests would be well served by this proposal."
(b) "I think you should strongly consider this proposal."
(c) "This proposal could turn out to be a good thing for you."
(d) "I can see how this proposal might be better than going to trial."

Continued on next page

(e) "Do you really think you will do better than this at trial?"

Again, statements (a) and (b) seem to cross the line, and many would say (d) and (e) do not. Is (c) UPL?

It is difficult to view the drafting of settlement agreements by mediators — particularly detailed marital settlement agreements that go far beyond the words of the parties themselves — as something other than the practice of law.

With respect to settlement agreements, both the Virginia and North Carolina Guidelines set boundaries for mediators that may be difficult, in practice, to enforce. In the subtle and complex interactions of parties and mediator while they are creating a memorandum of agreement, it will often be difficult to discern whether the mediator's involvement has altered or enhanced the parties' own language.

In short, there is an unavoidable measure of uncertainty in the various definitions of UPL, and for regulators an irreducible measure of discretion that must be employed when applying these definitions.

New approach needed Uniformity from state to state would advance the process of drawing clear lines between mediation and the practice of law. The efforts currently under way to draft a Uniform Mediation Act could provide an opportunity for greater uniformity if the statute addresses this issue.[12]

However, there is widespread disagreement about how mediation should be defined, and this disagreement stands in the way of consensus on the boundary between mediation and UPL. For example, for those mediators who believe that providing the parties with "reality testing" and other kinds of evaluative feedback is not only permissible but often an essential part of the mediation process,[13] the Virginia and North Carolina Guidelines are anathema. These mediators, many of whom mediate disputes in which lawyers (and litigation) are involved, believe they are not practicing law and that there is no risk of role confusion — and therefore no reason to describe their work as UPL — because the parties and their lawyers are sophisticated participants in the process.

For other mediators, however, any form of evaluation is anathema, because mediation (in their view) should be solely facilitative. These mediators, many (but not all) of whom practice in a community setting, believe that any definition of the line between mediation and UPL which permits evaluation and agreement-drafting by mediators fundamentally misconstrues the mediation process and debases it.

Yet another group of mediators believes that mediation can be practiced in many ways — including evaluative forms of mediation — but are nervous about non-lawyers providing case evaluation and agreement-drafting services. For these mediators, a primary concern is protection of the public from people who are unqualified to provide such services.

So long as the mediator's so-called "advice" arises in the context of his or her serving as an intermediary, assisting in the negotiation of a dispute, and providing feedback to the parties about their case solely as a function of that intermediary role, these activities should not be considered UPL.

Integrating competing viewpoints Integrating these points of view is no mean feat. One way to begin seeking such an integration is to focus separately, as the Virginia and North Carolina Guidelines do, on (a) the drafting of settlement agreements, and (b) providing legal advice, because these are the two primary areas of concern with respect to UPL.

In our view it makes sense to treat agreement-drafting quite differently from other kinds of mediator behavior for purposes of UPL enforcement. It is difficult to view the drafting of settlement agreements by mediators — particularly detailed marital settlement agreements that go far beyond the words of the parties themselves — as something other than the practice of law. Restricting such activities to lawyers does not impair the ability of mediators to assist the parties in reaching agreement, because the parties can either hire counsel to draft the agreement, or rely on the mediator to help them develop a simpler memorandum of understanding using their own language, or, in a litigated matter, ask the court to enter the terms of a memorandum of understanding as a court order. This approach is consistent with that of several ethical opinions from bar associations, which define the drafting of settlement agreements by mediators as the practice of law and provide guidance for the drafting of such agreements by lawyer-mediators.[14]

UPL enforcement: a disturbingly blunt instrument With respect to providing legal "advice," however, it seems appropriate to create a broad zone of protection from UPL enforcement for mediators. The reason for this is two-fold. First, it is virtually impossible to draw a sensible — i.e., defensible — line on the spectrum described above between reality testing and evaluating the parties' claims and contentions. Second, unlike the words of a settlement agreement, which define the rights and obligations of the parties, a mediator's evaluative feedback about a claim or contention — or even a mediator's recommendation — leaves the parties in control of the decision whether to create enforceable rights or obligations.

To be sure, mediators can go overboard.

Continued on next page

Providing evaluative feedback or recommending that the parties consider a particular proposal or course or action can become so directive as to impair that party's self-determination — an essential element in the mediation process. However, given the subtlety of such a determination, and the many principles of mediation ethics that intersect in such a determination (e.g., informed consent, voluntariness, and confidentiality), UPL enforcement is a disturbingly blunt instrument with which to enforce the practice standards of the mediation field.

In other words, so long as the mediator's so-called "advice" arises in the context of his or her serving as an intermediary, assisting in the negotiation of a dispute, and providing feedback to the parties about their case solely as a function of that intermediary role, these activities should not be considered UPL. Accordingly, it may be appropriate for UPL enforcers to cede entirely to those responsible for promulgating and enforcing mediation ethics the job of deciding when, if ever, mediators should be sanctioned for crossing the line from facilitative to evaluative forms of mediation. Such a division of labor would leave the wide range of activities engaged in by mediators — whether they are facilitative, evaluative, or transformative in their orientation — entirely outside the scope of UPL enforcement.

Clear standards and uniform laws, while desirable, are not a cure-all.

Relying on mediation ethics Currently, many if not most codes of mediation ethics prohibit mediators from providing professional advice or services (such as law or psychotherapy) in the context of mediation.[15] However, the very definition of "professional advice" or "professional services" arises from a relationship far different from the relationship between the mediator and the parties. Existing codes of ethics for mediators also emphasize the role of "competence," and therefore one might reasonably expect the enforcement of these codes, with respect to a mediator's evaluative interventions, to take into account whether the mediator is qualified by training or experience to provide such interventions. The principle of "self-determination" might also be interpreted in such a way as to bar the use of evaluative feedback except in those instances where the parties request it.

In any event, the job of making these difficult determinations, which implicate passionately debated principles of mediation ethics and practice,[16] should be in the hands of mediators not prosecutors. Of course it may be politically naive to think that UPL regulators and those responsible for bar discipline will permit non-lawyer mediators to provide case evaluations simply because they call it mediation. However, the alternative — continuing to permit these issues to be resolved by governmental agencies with little experience or understanding of mediation — is an unappealing prospect.

A "hands off" approach to mediation by UPL and bar regulators might be more acceptable to them if there were some form of regulation of mediation. Certification and other types of formal regulation of mediation is a topic that lies outside the scope of this article. Suffice it to say, however, that there is a wide range of views among mediators about the desirability of such regulation. One factor to consider as regulation is debated is whether it might enable mediators to prevent regulation by those outside the field of mediation, such as those who enforce UPL statutes.

Any regulation of the practice of mediation — a confidential process — poses the same risks that exist in the regulation of law, medicine, psychotherapy and other occupations where confidentiality is closely guarded.

Conclusion: Need for greater clarity about UPL Clear standards and uniform laws, while desirable, are not a cure-all. Applying those standards in a manner that is sensitive to the nuances of mediation practice will be difficult. And any regulation of the practice of mediation — a confidential process — poses the same risks that exist in the regulation of law, medicine, psychotherapy and other occupations where confidentiality is closely guarded. Yet however difficult the job of setting and enforcing standards may be, the field of mediation needs greater clarity with respect to this issue, so that mediators — regardless of whether they are lawyers or not[17] — can perform their useful work without having to wonder, at each step of the way, whether they should be looking over their shoulders.

Natasha A. Affolder, Ph.D., is an assistant professor at the University of British Columbia Faculty of Law where she teaches and conducts research in the areas of Canadian and international environmental law, natural resources law, and dispute resolution. She can be reached at affolder@law.ubc.ca.

David A. Hoffman is an attorney, mediator, and arbitrator at Boston Law Collaborative, LLC. He is chair-elect of the ABA Section of Dispute Resolution and can be reached at DHoffman@BostonLawCollaborative.com . This article is reprinted with permission from the ABA Dispute Resolution Magazine (2000).

Endnotes

1. There has been considerable scholarly discussion of whether mediation per se, or certain aspects of mediation practice, amount to the practice of law. See generally, N. Rogers and C. McEwen, Mediation: Law, Policy, Practice ch. 10 (1994). Compare C. Menkel-Meadow, "Is Mediation the Practice of Law?" 14

Continued on next page

Alternatives 57 (1996) (contending the certain aspects of mediation, such as agreement writing, amount to the practice of law) with B. Meyerson, "Lawyers Who Mediate Are Not Practicing Law," 14 Alternatives 74 (1996) (arguing that mediation is not the practice of law because there is no attorney-client relationship).

2. It is common for mediators to ask the parties to sign an agreement to mediate, in which the parties acknowledge that the mediator is not providing legal advice in connection with the mediation, and that the mediator is not representing either or both parties as an attorney at any time in connection with the dispute. However, where the parties are not represented by counsel, there may be a question as to whether they understand the import of such a disclaimer.

However difficult the job of setting and enforcing standards may be, the field of mediation needs greater clarity..., so that mediators can perform their useful work without having to wonder, at each step of the way, whether they should be looking over their shoulders.

3. Sharon Village Ltd. v. Licking County Board of Revision, 78 Ohio St. 3d 479 (Ohio 1997) (agent, a non-lawyer, who prepared legal documents and gave advice to his clients on their real estate property taxes, was held to have engaged in the unauthorized practice of law).

4. Turner v. Kentucky Bar Association, 980 S.W.2d 560 (Ky. 1998) (holding that workers' claims specialists could process claims as long as their work is supervised by an attorney. They could not represent parties before adjudicative tribunals as this would involve the unauthorized practice of law).

5. People v. Merchants Protective Corporation, 215 Cal. App. 3d 1599 (Ct. App. Cal. 1989) (finding that eviction service professionals engaged in UPL).

6. State Bar v. Guardian Abstract & Title Co., 575 P.2d 943 (N.M. 1978) (practice of title insurance company employees filling in blanks on attorney-drafted real estate legal instruments did not constitute UPL; however, exercising judgment about which standardized form to use did constitute UPL).

7. Oregon State Bar v. Gilchrist, 272 Ore. 552 (Ore. 1975) (merely selling divorce kits does not constitute the practice of law but personal contact with customers including "consultation, explanation, recommendation, or advice or other assistance in selecting particular forms" would cross the line).

8. See e.g. Werle v. Rhode Island Bar Ass'n, 755 F2d 195, 199-200 (CA1 1985) (finding no constitutional violation in a bar association letter to a psychologist-mediator requesting cessation of divorce mediation business).

9. Carrie Menkel-Meadow, Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities, 38 S. Tex. L. Rev. 407, 428 (1997).

10. In Tennessee, two advisory opinions from the Board of Professional Responsibility of the state's Supreme Court have been issued on the subject of whether mediation services constitute the unauthorized practice of law. The Committee decided that the mediation program which charged a fee was engaging in the practice of law (Opinion 83-F-39). And yet another program which was providing mediation services for free was not engaged in the practice of law (Opinion 85-F-98). This distinction seems both unprincipled and unhelpful for defining the practice of law.

11. See, e.g., Rule 9(c)(iv) of the ethical rules in the Massachusetts Uniform Rules on Dispute Resolution: "A neutral may use his or her knowledge to inform the parties' deliberations, but shall not provide legal advice, counseling, or other professional services in connection with the dispute resolution process."

12. See Richard C. Reuben and Nancy H.. Rogers, Choppy Waters: Movement Toward a Uniform Confidentiality Privilege Faces Cross-Currents, 5 Disp. Resol. Mag. 4 (1998).

13. See L. Love & K. Kovach, "'Evaluative' Mediation is an Oxymoron," Alternatives (March 1996).

14. See, e.g., Massachusetts Bar Association Ethics Opinion 85-3 (1985); Boston Bar Association Ethics Opinion 78-1 (1978).

15. See, e.g., AAA/ABA/SPIDR Standards of Practice for Mediators ("A mediator should . . . refrain from providing professional advice. Where appropriate, a mediator should recommend that parties seek outside professional advice, or consider resolving their dispute through arbitration, counseling, neutral evaluation, or other processes. A mediator who undertakes, at the request of the parties, an additional dispute resolution role in the same matter assumes increased responsibilities and obligations that may be governed by the standards of other professions.").

16. See, e.g., J. Folger & R. Baruch Bush, The Promise of Mediation (1994).

17. In April 1999, the ABA Section of Dispute Resolution adopted a resolution recognizing the importance of permitting nonlawyers to serve as mediators. The Resolution states in part: "The Section of Dispute Resolution . . . believes that the eligibility criteria for dispute resolution programs should permit all individuals who have the appropriate training and qualifications to serve as neutrals, regardless of whether they are lawyers."

ABA SECTION OF DISPUTE RESOLUTION
Resolution on Mediation and the Unauthorized Practice of Law

Adopted by the Section on February 2, 2002

The ABA Section of Dispute Resolution has noted the wide range of views expressed by scholars, mediators, and regulators concerning the question of whether mediation constitutes the practice of law. The Section believes that both the public interest and the practice of mediation would benefit from greater clarity with respect to this issue in the statutes and regulations governing the unauthorized practice of law ("UPL"). The Section believes that such statutes and regulations should be interpreted and applied in such a manner as to permit all individuals, regardless of whether they are lawyers, to serve as mediators. The enforcement of such statutes and regulations should be informed by the following principles:

Mediation is not the practice of law Mediation is a process in which an impartial individual assists the parties in reaching a voluntary settlement. Such assistance does not constitute the practice of law. The parties to the mediation are not represented by the mediator.

Mediators' discussion of legal issues In disputes where the parties' legal rights or obligations are at issue, the mediator's discussions with the parties may involve legal issues. Such discussions do not create an attorney-client relationship, and do not constitute legal advice, whether or not the mediator is an attorney.

Drafting settlement agreements When an agreement is reached in a mediation, the parties often request assistance from the mediator in memorializing their agreement. The preparation of a memorandum of understanding or settlement agreement by a mediator, incorporating the terms of settlement specified by the parties, does not constitute the practice of law. If the mediator drafts an agreement that goes beyond the terms specified by the parties, he or she may be engaged in the practice of law. However, in such a case, a mediator shall not be engaged in the practice of law if (a) all parties are represented by counsel and (b) the mediator discloses that any proposal that he or she makes with respect to the terms of settlement is informational as opposed to the practice of law, and that the parties should not view or rely upon such proposals as advice of counsel, but merely consider them in consultation with their own attorneys.

Mediators' responsibilities Mediators have a responsibility to inform the parties in a mediation about the nature of the mediator's role in the process and the limits of that role. Mediators should inform the parties: (a) that the mediator's role is not to provide them with legal representation, but rather to assist them in reaching a voluntary agreement; (b) that a settlement agreement may affect the parties' legal rights; and (c) that each of the parties has the right to seek the advice of independent legal counsel throughout the mediation process and should seek such counsel before signing a settlement agreement.

Comments

1. Mediation and the practice of law There is a growing consensus in the ethical opinions addressing this issue that mediation is not the practice of law. See, e.g., Maine Bar Rule 3.4(h)(4) ("The role of mediator does not create a lawyer-client relationship with any of the parties and does not constitute representation of them."); Kentucky Bar Association Ethics Opinion 377 (1995) ("Mediation is not the practice of law."); Indiana Ethics Opinion 5 (1992) (same); Washington State Bar Association, Committee to Define the Practice of Law, Final Report (July 1999), adopted by Washington State Bar Association Board of Governors, September 1999 (same). But see New Jersey Supreme Court Advisory Committee on Professional Ethics, Opinion No. 676 (1994) (holding that when a lawyer serves as a third party neutral, he or she "is acting as a lawyer"). Essential to most of the common definitions of the practice of law is the existence of an attorney-client relationship. Because mediators do not establish an attorney-client relationship, they are not engaged in the practice of law when they provide mediation services. The Section recognizes that in some very extraordinary situations it might be possible for a mediator to inadvertently create an attorney-client relationship with a party in mediation. For example, if the parties were unrepresented, and the mediator did not clarify his/her role, it is possible that a party in mediation could mistakenly assume that the mediator's role was to advise and protect solely that party's interests. In mediations where the parties are represented by counsel or where the mediator properly explains (and preferably documents) his/her role, it would appear unlikely that either party in mediation could ever reasonably assume that the mediator was that person's attorney.

2. Ethical rules governing mediators There is a growing body of ethical principles and standards governing the practice of mediation. Accordingly, even if a mediator's conduct is not inconsistent with state UPL statutes or regulations, there may be other sources of authority governing the mediator's conduct. See, e.g., Mass. Uniform Rules on Dispute Resolution 9(c)(iv) ("A neutral may use his or her knowledge to inform the parties' deliberations, but shall not provide legal advice, counseling, or other professional services in connection with the dispute resolution process.").

3. Ethical rules governing lawyers An important, but still partly unresolved question concerning the ethical rules applicable to lawyers is whether, and to what extent, the rules governing the conduct of lawyers apply to lawyers when they are serving as mediators and not engaged in the practice of law. If such rules were applied, in whole or in part, they would raise a host of imponderable issues for lawyer-mediators, including who is the client and how to discharge many of the traditional duties lawyers owe to clients. Recent amendments to the ABA Model Rules of Professional Conduct, when enacted in various jurisdictions, would address this issue. The new rule states:

Continued on next page

Lawyer Serving as Third-Party Neutral
(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of disputes that have arisen between them. Service as a third-party neutral may include service as an arbitrator, mediator, or in such other capacity as will enable the lawyer to assist the parties to resolve their dispute.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and the lawyer's role as one who represents a client.

Further, the ABA has modified the Preamble to the Model Rules as follows: "[3] In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., Rules 1.12 and 2.4."

4. UPL and multi-jurisdictional practice of lawyer-mediators Lawyer-mediators should be aware that, unless they are admitted to the bar in every state, they too are potentially affected by the issue of UPL and mediation. Many lawyer-mediators provide mediation services in more than one jurisdiction. If mediation is considered the practice of law, lawyer-mediators could be accused of violating UPL statutes when they serve in a jurisdiction in which they are not admitted to the bar. Although a lawyer may petition for temporary admission, requiring such admission substantially and unnecessarily burdens the practice of mediation outside of the mediator's local area.

This problem is compounded for lawyer-mediators who have ceased practicing law, serve only as a neutral, and later relocate to different states. These lawyer-mediators may face difficult bar admission issues, as a state may require a certain minimum years of active engagement in the practice of law to qualify for admission to the bar without examination. This problem arises because bar regulators' definitions of the active practice of law may not include the activities typical of mediation, whereas the regulators who enforce UPL statutes (typically the state Attorney General, local district attorneys, or a bar committee) may include such activities as the practice of law in their interpretation of UPL statutes. It would seem to be a perverse result if transplanted lawyers clearly engaged in the practice of law could do so without proving their command of their new jurisdiction's laws, while a mediator who has no intention of practicing law would be required to take the new jurisdiction's bar exam.

The ABA's Commission on Multijurisdictional Practice is currently considering proposals for modification of the Model Rules of Professional Conduct that would, if adopted by the ABA and enacted by the states, eliminate, or at least reduce, concerns about lawyer-mediators engaging in a multi-jurisdictional practice.

5. Guidelines on legal advice The Virginia Guidelines on Mediation and the Unauthorized Practice of Law, drafted by the Department of Dispute Resolution Services of the Supreme Court of Virginia, and the North Carolina Guidelines for the Ethical Practice of Mediation and to Prevent the Unauthorized Practice of Law, adopted by the North Carolina Bar in 1999, articulate a UPL standard for mediators that differs from the standard articulated in this Resolution. According to those Guidelines, a mediator may provide the parties with legal information but may not give legal advice. The Guidelines define legal advice as applying the law to the facts of the case in such a way as to (a) predict the outcome of the case or an issue in the case, or (b) recommend a course of action based on the mediator's analysis. The Section believes that adoption of the Virginia and North Carolina standards in other jurisdictions would be harmful to the growth and development of mediation.

It is important that mediators who are competent to engage in discussion about the strengths and weaknesses of a party's case be free to do so without running afoul of UPL statutes. Indeed, many parties, and their counsel, hire mediators precisely to obtain feedback about their case. Even though mediators who engage in these discussions do sometimes aid the parties by discussing possible outcomes of the dispute if a settlement is not reached and providing evaluative feedback about the parties' positions, this conduct is not the practice of law because the parties have no reasonable basis for believing that the mediator will provide advice solely on behalf of any individual party. This is the important distinction between the mediator's role and the role of an attorney. Parties expect their attorney to represent solely their interests and to provide advice and counsel only for them. On the other hand, a mediator is a neutral, with no duty of loyalty to the individual parties. (Thus, for example, when a judge conducts a settlement conference, acting in a manner analogous to that of a mediator and providing evaluation to the parties about their case, no one suggests that the judge is practicing law.)

6. Discussion of legal issues This Resolution seeks to avoid the problem of a mediator determining, in the midst of a discussion of relevant legal issues, which particular phrasings would constitute legal advice and which would not. For example, during mediation of a medical malpractice case, if a mediator comments that "the video of the newborn (deceased shortly after birth) has considerable emotional impact and makes the newborn more real," is this legal advice or prediction or simply stating the obvious? In context, the mediator is implicitly or explicitly suggesting that it may affect a jury's damage award, and thus settlement value. S/he is raising, from the neutral's perspective, a point the parties (presumably the defendants) may have missed, which may distinguish this case from others (e.g., cases in which a baby died in utero or where there was no video of the newborn) in which lower settlement amounts were offered and accepted. Is the mediator absolved if s/he phrases the point as a

Continued on next page

"probing question"?

In their article, "A Well-Founded Fear of Prosecution: Mediation and the Unauthorized Practice of Law" (6 Dispute Resolution Magazine 20 (Winter 2000)), authors David A. Hoffman and Natasha A. Affolder illustrate this problem across a broader mediation context, setting out numerous alternative ways a mediator might phrase a point. They note that there would likely be very little professional consensus about which phrasings would constitute the practice of law and which would not. Even if mediators could agree as to where the line would be drawn among suggested phrasings, the intended meaning and impact of any particular statement might vary with the context and how the statement was delivered. Because mediation is almost always an informal and confidential process, it is virtually impossible ñ without an audio or video recording of a mediation ñ for regulators to police the nuances of the mediator's communications with the parties. Such recording would clearly be anathema to the mediation process.

7. Settlement agreements The Virginia and North Carolina Guidelines' approach to the drafting of settlement agreements by a mediator is similar to the approach outlined in this Resolution. See "Guidelines on Mediation and the Unauthorized Practice of Law," Department of Dispute Resolution Services of the Supreme Court of Virginia, at 27-28 ("Mediators who prepare written agreements for disputing parties should strive to use the parties' own words whenever possible and in all cases should write agreements in a manner that comports with the wishes of the disputants. . . . Unless required by law, a mediator should not add provisions to an agreement beyond those specified by the disputants.") Ethics opinions in some states have approved the drafting of formal settlement agreements by mediators who are lawyers, even where the mediator incorporates language that goes beyond the words specified by the parties, provided that the mediator has encouraged the parties to seek independent legal advice. See, e.g., Massachusetts Bar Association Opinion 85-3 (attorney acting as mediator may draft a marital settlement agreement "but must advise the parties of the advantages of having independent legal counsel review any such agreement, and must obtain the informed consent of the parties to such joint representation").

8. Resources A number of articles addressing the question of whether mediation is the practice of law have been published in recent years. In addition to the articles cited above, see generally, Symposium, "Is Mediation the Practice of Law?" Forum, Number 33 (NIDR, June 1997); Carrie Menkel-Meadow, "Is Mediation the Practice of Law?" Alternatives, May 1996, at 60; Bruce E. Meyerson, "Mediation Should Not Be Considered the Practice of Law," 18 Alternatives 122-123 (CPR Institute for Dispute Resolution, June 1996); Andrew S. Morrison, "Is Divorce Mediation the Practice of Law? A Matter of Perspective," 75 California Law Review 1093 (1987).

THE SOCIAL SOURCES OF INTERPERSONAL CONFLICT

By Kenneth Cloke

Author's Note: *Excerpted from Into the Heart of Conflict: A Guide to Resolution, Transformation and Transcendence, to be published in 2004.*

Even in our most personal conflicts, social relationships are the hidden source, covert contributor, and "strange attractor" for much of what we experience. How many spousal conflicts, for example, are aggravated by socio-economic conditions that cause young couples to increase their debts, or permit them to be fired without cause? How many conflicts between managers and employees result from hierarchical performance assessments that require managers to evaluate subordinates, but do not allow employees to evaluate their managers? How many conflicts between citizens and government employees result from bureaucratic political systems in which abstract rules and regulations are designed to meet political ends rather than citizen needs? How many conflicts in neighborhoods, workplaces, and schools result from socially induced stresses, racial tensions, poverty, pollution, toxic chemicals, malnutrition, and autocratic decision making?

As an illustration, consider a simplistic example of a couple arguing over money, in which Fred, who works, accuses Mary, who doesn't, of being a spendthrift, while Mary, who cares for the home, accuses Fred of being a tightwad. While Fred and Mary certainly experience their issues subjectively and personally, when we examine them more closely, we discover that they are impacted by objective social conditions.

It is clear, for example, that Fred and Mary are not wealthy enough to escape the kind of monetary rows described below, or poor enough to require Mary to work, or both of them to take several jobs. It is clear that their happiness and survival are dependent on income that is socially produced and politically regulated, and that their financial survival depends on the overall economic health of the society in which they live. Their relationship may also be influenced by differentials in the earning capacity of men and women. Fred may be compelled to work while Mary stays home with the children because society offers higher salaries to men than women, or because they live in a country that prevents or discourages women from working. Or a different Fred may have been denied employment for discriminatory reasons, or fired because his company decided to

Their happiness and survival are dependent on income that is socially produced and politically regulated, and their financial survival depends on the overall economic health of the society in which they live.

Continued on next page

reduce wages by moving overseas, or laid off because the economy is in recession.

If Fred and Mary ignore the social conditions that influence their conflict, they will be more likely to feel unacknowledged, experience their problems as personal failures, blame each other, and terminate their relationship. Fred, who works and earns the money, may complain that Mary stays home all day doing nothing except spend it, and does not appreciate how much work it takes to earn it. Mary, on the other hand, may think Fred spends too much time at work, does not appreciate Mary's non-monetary contributions to their relationship, and does not understand that she wants to use the money to enjoy the little time they have together and bring some fun into their relationship.

Money has become a complex metaphor, revealing not only significant differences in their attitudes, fears, and forms of emotional satisfaction, but in their social position and economic power as well.

Clearly, their relationship is threatened – not only by their divergent attitudes toward money, but by their inability to recognize and talk about what money means to them, what society has chosen for them, and what they might do to improve the cultural, social, economic, and political conditions that are aggravating their conflict. Money has become a complex metaphor, revealing not only significant differences in their attitudes, fears, and forms of emotional satisfaction, but in their social position and economic power as well.

If they could view their conflicts as invitations to deepen their empathy for each other, learn how to manage their money better, and work together to alter the social environment in which they are living, they might identify a number of ways out of their conflict. Fred might express a desire to spend more time with Mary, clarify the efforts that went into earning his wages, and acknowledge Mary's non-monetary contributions to their life together. They might jointly create a budget in which they agree to spend some of their money on things they both enjoy. Mary might thank Fred for working hard to earn the money they both need to live, and clarify what she does during the day to contribute to their relationship. She might offer to work, agree to put more into savings, and collaboratively negotiate how much they can afford to spend.

Imagine what might happen if they went further, and decided to take a class to understand the economic, social, and political conditions that are affecting their conflict; consult experts on ways of increasing their income and reducing their expenses; and work together to alter their economic conditions. Imagine them meeting other couples with similar problems to discuss common issues and lobby for legislation to resolve them. Imagine them realizing that they have allowed social conditions to drive them apart, and deciding instead to face them together.

Imagine what might happen if they spoke from their hearts, said how much they loved each other, and agreed that their relationship is more important to them than any of these issues, and whatever they decide, they will face it together. Imagine them appreciating each other's special talents, empathizing with their emotional turmoil, and recognizing that they chose each other precisely to learn what the other one was capable of teaching them.

Imagine Fred telling Mary what it felt like to grow up as a man always feeling responsible for earning money and frightened of spending it for pleasure; or that the most important thing to him is to learn how to enjoy just being with her, or sincerely asking her for help. Imagine Mary being equally compassionate in return and telling Fred how much she feels trapped in stereotypical women's roles, or wants a career outside the home but is afraid to work because she feels so unqualified and insecure.

On the other hand, imagine Fred and Mary honestly communicating that their arguments over money reflect an inability to resolve deeper issues between them, that it is now time for them to separate and move on to more satisfying relationships. They might then express their grief over the loss of the most important relationship in their lives and design a ritual of closure and completion. In this way, their separation might become a source of transcendence, freeing them from a relationship that is making them miserable, and allowing them to meet people who will make them happier. Whichever solution they chose, their personal decision will have been influenced by social conditions, revealing that their capacity for personal and social evolution are inextricably linked.

Ken Cloke is the director of the Center for Dispute Resolution in Santa Monica, CA. He has been a mediator, arbitrator, university professor, and judge, and the author of several books, including Mediating Dangerously. Ken can be contacted at Kcloke@aol.com.

"Irrationally held truths may be more harmful than reasoned errors."

Thomas Henry Huxley

THE MIXED BLESSING OF A SAME-SEX TAX ADVANTAGE

By James McCusker

Massachusetts as tax haven, now there's a pairing not often conjured up when thinking of the good old Bay State, especially come April 15th. It may not rival some of the more complicated offshore schemes, but for same-sex couples married and living in Massachusetts, a divergence in Federal and State tax laws has fostered an inadvertent tax shelter. And it's legal! The Federal government's refusal to acknowledge same-sex marriages has created a situation where the rules for filing a Federal tax return are different than those for filing a Massachusetts tax return. Herein resides the tax savings and the confusion. What follows is an attempt to highlight the former by addressing the latter (doesn't that sound like something right out of an IRS publication? — I'm just warming you up).

First the savings. As presently constructed Federal tax laws impose a "marriage penalty." In other words, the tax burden on a married couple is higher than the tax bill for that same couple filing as individuals, all other tax attributes being equal. Of course filing as individuals is not an option for married couples. Their filing status choices include married filing joint (MFJ) or married filing separate (MFS), and in some divorce cases a head of household (HoH) status will be an option. The economic discrepancy arises because of an anomaly in the tax brackets.

The Federal tax brackets, which range from 10% to 35% depending upon income level, are less than double the size for married filers vis-a-vis single filers. Due to the progressive nature of the Federal tax code, if your brackets are smaller you will pay more taxes on your income. And accordingly, if the combined tax brackets for two single filers are greater than the tax bracket for one joint filer, there is a built in tax penalty imposed for being married — the "marriage penalty." The variance in tax burdens has been reduced in recent years, but can still amount to thousands of dollars.

Now the confusion. Since Massachusetts has recognized same-sex marriages, the option for those couples to file as individuals, as they do Federally, is no longer available. In Massachusetts they will have to choose between married filing joint and married filing separate as a filing status. In almost all cases married filing joint will be the better option. Massachusetts adopts the Federal tax code as a starting point for its own tax code. Differences between the two codes form the basis for Massachusetts tax regulations. So here's where the fun begins for same-sex couples that now need to file jointly in Massachusetts. That same couple was required to file individually for Federal purposes. However, when they now go to file jointly with the Commonwealth, the state tax regulations will look to Federally computed amounts for guidance in computing medical deductions, rental deductions, dependent care expenses, student loan interest, etc. The problem is the state regulations will be looking for a joint return that doesn't exist. So if tax preparation was not complicated enough, the State is now asking that in those situations where deductions/income on a Massachusetts tax return look to the Federal tax code for guidance with respect to amount or availability, a pro-forma Federal joint return should be completed.

Perhaps an example would help. Let's assume we have a couple Jim and Tom, whose adjusted gross incomes (AGI) are $80,000 and $50,000 respectively. Jim has medical deductions of $10,000 and Tom has medical deductions of $2,000. Medical deductions are limited for Federal and Massachusetts tax returns to that amount which exceeds 7.5% of AGI. Therefore as individual filers Jim would get a $4,000 medical deduction ($10,000 minus 7.5% of $80,000) and Tom would get no deduction because his deductions failed to reach the threshold of $3,750 (7.5% of $50,000). For Federal purposes their total deduction would be limited to Jim's $4,000 deduction. If they could also file individually on their Massachusetts tax return, they would get the same $4,000 deduction. However, if they now choose to file jointly for Massachusetts purposes, they will be required to combine their incomes to determine their joint threshold amount. In our example their joint AGI equals $130,000 and their calculated joint threshold equals $9,750 ($130,000 times 7.5%). The resultant medical deduction is reduced to $2,250 (total medical deductions of $12,000 minus the threshold of $9,750). As joint filers they just lost $1,750 of tax deductions. The mechanics of this example would have to be repeated in most instances where the Massachusetts tax code looks to the Federal tax code for guidance in limiting tax deductions and tax credits for joint filers. So in many cases a pro-forma Federal tax return will have to be completed for same-sex filers in Massachusetts. That's great for tax accountants, not so great for already confused taxpayers.

For the time being same-sex couples do enjoy a Federal tax advantage, somewhat offset by their increased tax prep fees here in Massachusetts.

There are other instances within the Federal tax code that favor two individual filers over one joint filer. Until the budget deficit is brought under control, I'm sure this marriage penalty, and its associated tax revenues, will continue to exist. So for the time being same-sex couples do enjoy a Federal tax advantage, somewhat offset by their increased tax prep fees here in Massachusetts. How long can morality issues prevail over monetary issues — probably not long in this country. So enjoy the savings while it lasts. But if long-term tax avoidance is your plan, I would be checking out those offshore shelters now.

James McCusker is a CPA and a certified financial planner who welcomes your comments, questions or suggestions. Jim can be contacted at (978) 256-1323, or by email at James@McCuskerAssociates.com.

BROOKS v. PIELA
Guidance for Child Support with High Income Couples

By Linda S. Fidnick

When low or moderate income parents divorce, the Child Support Guidelines provide a roadmap for deciding the amount of child support a non-custodial parent should pay, whether at the time of divorce, or after a post-divorce income increase. However, when the parents' incomes exceed the amounts described in the Guidelines, the process, although guided by the same principles, can be more challenging. One of the explicit purposes of the Child Support Guidelines is "... to the extent that either parent enjoys a higher standard of living, to entitle the child to enjoy that higher standard." Thus the Guidelines align the child's support rights to the standard of living enjoyed by the highest income parent. When high-income parents' incomes increase to an even higher level after divorce, what rights do the children have to an increased standard of living? Should there be a ceiling on the children's expectations?

The Massachusetts Appeals Court recently addressed this dilemma in Brooks v. Piela, 61 Mass. App. Ct. 731 (2004). The parents in that case were both physicians who had five children, all of whom resided with the Wife. Their 1996 Judgment of Divorce provided that the Husband would pay $650 per week child support to the Wife. As the children grew older, their needs increased, and the Wife sought a modification of the child support order. Since the original divorce, the Husband's income (originally $130,000) had increased to $278,900 per year and the Wife's income (originally $145,000) had increased to $192,000 per year.

The Husband felt that the $650 per week he was already paying, given the Wife's income, was sufficient to support the children adequately. The Wife, on the other hand, was carrying the increased expenses associated with growing children: lessons, camps and activities in addition to her share of private school tuition. The Probate Court awarded the Wife an increase in child support to $800 per week. The Husband appealed.

In reviewing the Probate Court's decision, the Appeals Court found that the Wife's standard of living had decreased since the divorce while that of the Husband had increased, and that the children's expenses therefore fell disproportionately on her. Citing the principle that the children should be able to enjoy, to the extent possible, the standard of living they would have enjoyed if the family had remained intact, the Appeals Court upheld the $150 per week increase. The Court found that the increased expenses for the children represented "life-enhancing activities" which "are reasonable and appropriate to the standard of living enjoyed by (the Husband)." Brooks v. Piela, 61 Mass. App. Ct. 731 (2004) at note 4.

Attorneys and mediators can help couples understand that the children are entitled to enjoy the benefits of the increased income of either of their parents.

Attorneys and mediators can help couples understand that the children are entitled to enjoy the benefits of the increased income of either of their parents. Parents need to ask themselves what their children's lives would be like if the parents were still together: would they be able to attend private school, take riding lessons or go to camp? If so, the level of support should reflect that lifestyle. While the parties' incomes may be disparate, and absolute parity of lifestyle is not required, the Appeals Court has clarified that the children are entitled to enjoy the enhanced lifestyle of the highest earning parent, and that child support should be determined accordingly.

Linda S. Fidnick is a partner in the Amherst law firm of Burres, Fidnick & Booth, LLP, where she concentrates her practice in all areas of family law, including mediation and collaborative law. She represented the wife in Brooks v. Piela. Linda can be reached at (413) 253-3900, or by email at LFidnick@bfbk.com.

"Never ask of money spent
Where the spender thinks it went.
Nobody was ever meant
To remember or invent
What he did with every cent."

Robert Frost

UNIFORM CHILD CUSTODY JURISDICTION ENFORCEMENT ACT: A Better Child Custody Jurisdiction Law for Massachusetts

By Fern L. Frolin

The history: MCCJA and its problems

Prior to 1968, state courts throughout the United States could exercise subject matter jurisdiction in a child custody case[1] based on the physical in-state presence of the child. Because the United States Supreme Court had never ruled that states must grant full faith and credit to the custody determinations of sister states, many states freely modified other states' custody determinations. This legal climate advantaged the parent in actual possession of the child. It encouraged forum shopping and child abduction. To remedy these problems, the National Conference on Uniform State Laws ("the Uniform Laws Conference")[2] in 1968 promulgated the Uniform Child Custody Jurisdiction Act ("UCCJA").[3] The general purpose of the UCCJA was to "avoid jurisdictional competition and conflict with courts of other states in matters of child custody...."[4]

The UCCJA established four jurisdictional grounds:

• Home state, defined as the state in which a child has lawfully resided for at least six months preceding commencement of the action;

• Significant connection, which occurs when the child's connections with the state provide substantial evidence about the child;

• Emergency, which is a condition that requires immediate action, such as abandonment or abuse; and

• Vacuum, which applies when no other state has a basis for jurisdiction.

The UCCJA did not eliminate the possibility of two or more states having concurrent jurisdiction, for example through home state and significant connection jurisdiction. States passed different versions of the UCCJA and some states permitted emergency jurisdiction as a basis for entering permanent orders.[5]

Massachusetts passed its version of the UCCJA, the Massachusetts Child Custody Jurisdiction Act (MCCJA),[6] in 1983. The MCCJA is a pure version of the UCCJA. It provides a child's home state with exclusive jurisdiction to initiate or modify a child custody order.[7] There were excellent reasons for exclusive home state jurisdiction, particularly connections of the custodial parent and access to information concerning the child's welfare.[8]

Exclusive home state jurisdiction to modify a child custody order required that a state that had issued a custodial order or parenting plan relinquish jurisdiction to modify its own order six months after a child moved. But home state jurisdiction simply did not work as envisioned. Except for Massachusetts, all states that enacted the UCCJA either modified exclusive "home state" jurisdiction in order to permit their courts continuing jurisdiction to modify their own orders after the child moved or adopted continuing jurisdiction from other state statutes.[9] The differing state-to-state versions of the UCCJA frustrated the purpose of avoiding jurisdictional conflict because of the lack of exclusivity.

Home state jurisdiction simply did not work as envisioned.

Other jurisdiction conflicts arose.

Congress enacted the Parental Kidnapping Prevention Act (PKPA),[10] to close some of the remaining gaps in child custody jurisdiction. The PKPA preempts some applications of the MCCJA. In particular, the PKPA rules allow only one state to assert jurisdiction at a time.[11] Thus, for example, Florida's adjudication that it had continuing jurisdiction in a Massachusetts/Florida child custody dispute vested the Florida court with exclusive jurisdiction under the PKPA, even though Massachusetts was the child's home state.[12]

In 1994, the federal government enacted the Full Faith and Credit for Child Support Orders Act.[13] Section (a)(2) of that statute requires each state to adopt the provisions of the act without modification. Section (d) requires that states maintain continuing exclusive jurisdiction over their own child support orders, provided that one contestant or the child remains in the state. In compliance with the Congress' mandate of full faith and credit for child support orders, Massachusetts duly adopted the Uniform Interstate Family Support Act (UIFSA) the following year.[14] As congress required, UIFSA grants continuing exclusive jurisdiction to the state that issued the original support order, provided that one party to the order remains in the issuing state.[15] With MCCJA governing interstate child custody jurisdiction and UIFSA controlling interstate child support jurisdiction, Massachusetts has an inconsistent statutory scheme for parent and child jurisdiction after one of the parents relocates with the child. MCCJA cedes jurisdiction for custody matters, but UIFSA retains continuing jurisdiction for support issues. Parents who leave the state after obtaining custody and support orders in Massachusetts can easily find themselves litigating in two states at the same time.

Aside from the interstate conflicts issue, the MCCJA has created problems of fairness and efficiency in cases of requests to relocate children. Under MCCJA, when the custodial parent asks to move out of state with a minor child,[16] the remaining in-state parent faces loss of access to the Massachusetts courts as an inescapable consequence of the move. This causes noncustodial parents to protest relocation requests where the noncustodial parent might otherwise consent. The result is increased litigation. MCCJA also precludes choice of forum by agreement.[17] Consequently courts and counsel cannot use retained jurisdiction to facilitate settlements. Instead, many cases are now settled by allowing the custodial parent and child to move on a temporary basis only. A relocation case may remain open for years for the sole purpose of retaining jurisdiction.

Continued on next page

The UCCJEA: A vast improvement The Uniform Laws Conference recognized that the UCCJA was not working. In a Juvenile Justice Bulletin of the U.S. Department of Justice Bulletin, Patricia M. Hoff[18] of the ABA Center on Children and the Law observed:

[Under UCCJA] [c]ustody contestants have sometimes exploited jurisdictional ambiguities to draw out litigation, secure conflicting custody orders, and delay (or deny) enforcement of valid custody and visitation orders. In these instances, resources that could have been used to help children were instead spent on multistate litigation.[19]

The central feature of the UCCJEA's jurisdictional rules is exclusive continuing jurisdiction in relocation cases, provided that the child, a parent or person acting as a parent remains in the original state.

To remedy the flaws in the UCCJA, the Uniform laws Conference in 1997 approved the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), a complete replacement of the UCCJA. UCCJEA contains jurisdictional rules that essentially bring the UCCJA into conformity with the PKPA and UIFSA. The central feature of the UCCJEA's jurisdictional rules, like UIFSA, is exclusive continuing jurisdiction in relocation cases, provided that the child, a parent or person acting as a parent remains in the original state.[20] Additionally, the UCCJEA authorizes courts to exercise emergency jurisdiction in cases involving family abuse.[21] This provision expands emergency jurisdiction under the MCCJA, which is limited to abuse or abandonment of the child.[22] The UCCJEA adds enforcement provisions authorizing law enforcement agencies to implement custodial orders.[23] It includes new inconvenient forum provisions with express criteria to promote flexibility in the best interest of the child.[24] UCCJEA specifically directs courts to decline jurisdiction created by unjustifiable conduct.[25]

The result is a vastly improved statute, the main feature of which is continuing exclusive jurisdiction for an issuing state's custody and child access orders. As of April 22, 2004, 34 states and the District of Columbia have passed the UCCJEA. Four additional state legislatures have sent the statute to governors for signature.[26]

Massachusetts UCCJEA: Protections and safeguards In 2001, the Massachusetts Bar Association's Family Law Legislation Practice Group began debating the UCCJEA. The committee included an array of members of the MBA Family Law Section, including several legal services counsel and lawyers who frequently represent victims of domestic violence. The area of most concern to the committee was the advisability of replacing home state jurisdiction with continuing issuing state jurisdiction. Advocates for domestic violence victims raised real apprehension that victims who have been forced to flee the state for safety reasons should not be brought back to defend against repeated child custody litigation. The committee needed to draft a statute that would provide uniformity with other states and PKPA, align the principles child support and child custody jurisdiction, protect victims from litigation harassment and permit flexibility to accept or decline continuing jurisdiction based on a fact sensitive analysis.

After nearly a year of debate, the committee reached several compromises. It ultimately revised the UCCJEA by incorporating multiple provisions for protection of domestic violence victims. This version was supported by the MBA House of Delegates and has since been endorsed by the Massachusetts Council on Family Mediation and the Massachusetts Chapter of the American Academy of Matrimonial Lawyers.

The proposed Massachusetts version provides that Massachusetts has continuing exclusive jurisdiction over its orders until:

- The child no longer has a significant connection with the state and substantial evidence is no longer available in the state; or
- Neither the child nor a parent, nor any person acting as a parent resides in the state; or
- The court finds that a parent or person acting as a parent has engaged in a serious incident or pattern of abuse against the other parent or person acting as a parent or the child.[27]

A finding of a serious incident or a pattern of abuse requires the court to decline continuing jurisdiction unless otherwise agreed in writing by the victim.[28] The standard of "serious incident of abuse or pattern of abuse" parallels the existing Massachusetts child custody statute for cases involving abuse of a parent or child.[29] Thus, the proposed Massachusetts version of the UCCJEA would be part of a consistent statutory scheme that protects children and victims from domestic abusive parents. It will be more protective of victims of domestic violence than any other enacted version of UCCJEA.

The proposed Massachusetts version of the UCCJEA also vests the court with discretion to decline jurisdiction for a myriad of reasons. It instructs the court to consider litigants' disparate resources, any history of domestic violence in the family and other factors for the protection of the child and the parties in determining whether to exercise or decline

The result is a vastly improved statute, the main feature of which is continuing exclusive jurisdiction for an issuing state's custody and child access orders.

Continued on next page

jurisdiction.[30] To ease the burdens of interstate litigation, the UCCJEA permits courts to order an out-of-state custody evaluation[31] and to assess travel and other necessary and reasonable expenses against a party.[32] These protections are not currently available under the MCCJA. As drafted by the committee, adopted by the MBA and filed on behalf of the association, the proposed Massachusetts version of the UCCJEA will protect all classes of litigants, including domestic violence victims and financially disadvantaged parents.

The UCCJEA was filed on behalf of the MBA by Joint Judiciary Committee co-chairs Sen. Robert Creedon and Rep. Eugene O'Flaherty. Early this spring the bill received a favorable report of the Judiciary Committee.

Fern L. Frolin is an attorney, mediator and partner of Grindle, Robinson, Goodhue & Frolin in Wellesley, and a fellow of the American Academy of Matrimonial Lawyers. Fern is a frequent lecturer for MCLE, the MBA, and the MCFM, who can be contacted at ffrolin@grgattys.com. This article originally appeared in the vol. 6 no. 3 issue of the Massachusetts Bar Association Section Review.

Endnotes

1. As used in this article and in the relevant statutes referenced, a "child custody" case includes judgments, orders, decrees for custody, visitation and allocation of parenting time.

2. Founded in 1892, The Uniform Laws Conference is a confederation of state commissioners on uniform laws. It is comprised of more than 300 attorneys, judges and law professors, who are appointed by each of the 50 states, the District of Columbia, Puerto Rico and the Virgin Islands. Its members draft uniform and model state statutes and work toward their enactment.

3. Hoff, P.M. 2001. The Uniform Child-Custody Jurisdiction and Enforcement Act. Office of Juvenile Justice and Delinquency Prevention Bulletin. U.S. Department of Justice.

4. Massachusetts Child Custody Jurisdiction Act, 1983 Mass. Acts ch. 680 §2 (a) (1).

5. Hoff, supra note 3.

6. Mass .Gen. Laws ch. 209B

7. Mass. Gen. Laws ch. 209B, §§1, 2.

8. Massachusetts Child Custody Jurisdiction Act, 1983 Mass. Acts. Ch. 680, §3.

9. See e.g., Delk v. Gonzalez, 421 Mass. 525, 534 (1995). Delk was a child custody jurisdiction dispute between the trial courts of Massachusetts and Virginia. Virginia, like Massachusetts, had a pure version of UCCJA that provided jurisdiction to modify only to the child's home state. After the mother and child moved to Massachusetts, the mother, a victim of abuse by the father, sought modification of a Virginia custody decree. Lacking jurisdiction under its UCCJA, the Virginia trial court ruled that it had continuing jurisdiction under a 1919 statute, Va. Code §20-108. The Supreme Judicial Court required the Massachusetts courts to cede jurisdiction to Virginia, even though Massachusetts had jurisdiction and the Virginia court may have erred.

10. 28 U.S.C.A. § 1738, et seq.

11. Delk, 421 Mass. at 531, n.5.

12. Fortier v. Rogers, 44 Mass. App. Ct. 732 (1998).

13. 28 U.S.C. § 1738B.

14. Mass. Gen. Laws ch. 209D.

15. Mass. Gen. Laws ch. 209D, §2-205.

16. In most circumstances, a moving custodial parent needs permission of the other parent or the court in order to relocate the child. Mass. Gen. Laws ch. 208, §30.

17. MacDougall v. Acres, 427 Mass. 363, 371 (1998).

18. Hoff works as the legal director of a project of the ABA Center on Children and the Law. She served as an advisor to the UCCJEA drafting committee.

19. Hoff, supra note 3.

20. UCCJEA, § 202 (Exclusive Continuing Jurisdiction).

21. UCCJEA, § 204.

22. Mass. Gen. Laws ch. 209B, § 2(a)(3).

23. UCCJEA, § 311 (warrant to take physical custody of children); §§ 315-317 (roles of law enforcement personnel).

24. UCCJEA, § 207 (inconvenient forum).

25. UCCJEA, § 208.

26. UCCJEA has been endorsed by the American Bar Association, the National Center for Missing and Exploited Children, the Polly Klass Foundation and the American Academy of Matrimonial Lawyers.

27. Senate 969, § 202.

28. Senate 969, § 202.

29. Mass. Gen. Laws ch. 208, §31A. Section 31A defines a serious incident of abuse as one involving bodily injury or actions causing another to fear imminent bodily injury or causing another to engage in involuntary sexual relations by force, threat or duress. Neither the proposed Massachusetts version of UCCJEA nor Section 31A defines a pattern of abuse.

30. Senate 969, § 207.

31. Senate 959, § 112 (a) (3).

32. UCCJEA, § 208(c). Recoverable costs include counsel fees, communication expenses, investigative fees, and travel and child care expenses.

COUNTERPOINT: COLLABORATIVE LAW AND MEDIATION CAN CO-EXIST

By Karen J. Levitt

John W. Heister, Ph.D., wrote an article in the spring 2004, (FMQ Vol. 3, No. 2), reprinted from Family Mediation News, winter 2004, entitled "Good Mediation Needs Diverse Skills: A Response to Collaborative Law." The article does not accurately describe the collaborative process, the attorneys who practice collaborative law, or the parties who chose to participate in collaborative law. Mediation can co-exist with collaborative law, just as both can co-exist with litigation. They are merely different models for approaching divorce, and the choice of model depends on the parties and the issues that need to be addressed.

The attack on collaborative practice by mediators and non-collaborative lawyers is reminiscent of the attack on mediation by lawyers and others when mediation began being used in divorce. Mediation sought and has gained acceptance as a form of alternative dispute resolution; collaborative practice is merely seeking that same acceptance.

Clients come to attorneys with a myriad of problems and concerns. Offering clients a variety of options to address their problems, and ensuring that those who provide those services are qualified and competent, only makes for better service providers among divorce professionals. Lawyers as well as mediators, after discussion with clients, should be able to recognize when a case is appropriate for which process, and either take the case or refer the case accordingly. Depending on the case, either litigation, collaborative law, mediation, or sometimes a combination of one or the other, may be appropriate. All should be discussed with the client, along with sufficient information about each to allow the client to make an educated decision about which will work best for them.

Mediation can co-exist with collaborative law, just as both can co-exist with litigation.

Parties who choose collaborative law often do so because they are not comfortable with litigation, and are also not comfortable with mediation where they usually have no representation at the meetings. Parties may also be leery of using what Dr. Heister calls the "neutral attorney" at mediation, or they may fear a spouse's anger or controlling behavior, or they may just not be not comfortable speaking for themselves and putting forth their own needs and interests. Without collaborative law, where do such clients go? In the past there was a void in the legal system for such clients; collaborative law has filled that void. When the mediation process has broken down, or litigation is taking its toll on parties, they have often asked if there is some other process available for them to try to bring their case to resolution peacefully. If collaborative law appeals to them as the best way to address their problems, why should we not encourage them to pursue that process, just as we encourage many clients to use mediation if that if more appropriate?

To provide a "counterpoint" to Dr. Heister's arguments, each one of the goals and essential skills he identifies as being important for divorce professionals are addressed. Dr. Heister lists eight goals of divorce professionals in helping families going through divorce. He also lists four essential skills needed to assist the divorcing family to achieve those goals.

Lawyers as well as mediators, after discussion with clients, should be able to recognize when a case is appropriate for which process, and either take the case or refer the case accordingly.

Goals

1. Dr. Heister identifies the parties' sustaining a positive relationship after divorce so they can continue parenting their children and relate to other extended family, as a goal of most divorce professionals. Although this is a laudable and lofty goal, and attorneys, collaborative lawyers, and mediators would like to see parties sustain a positive relationship in all cases, in reality it is not always possible. Sometimes parties do not and will never have a particularly positive relationship, and in cases where there are no children a sustained relationship might not be the parties' desire. Both collaborative law and mediation by their very nature, try to provide a positive environment for divorce professionals to try to achieve the goal of sustained relationships if that meets with the parties' needs and interests. However, we should not always assume that a positive relationship is the point or desired outcome of either process.

2. The next goal identified by Dr. Heister is that the couple learn life skills about communication, parenting, support, asset management, and that each is better able to manage all these areas separately after the divorce. Again, although this is a noble goal for divorce professionals, neither mediation (which is not therapy) nor the collaborative law processes are going to give these skills to people. All we can do is give them the tools to develop or improve such skills, and both processes provide a forum that allows the parties such educational growth if they so choose. Use of the collaborative professional team puts these resources at the clients' fingertips.

3. Dr. Heister describes another goal as minimizing the length and time of the divorce process. Clearly both mediation and collaborative law have this in common. Both processes allow for a much quicker resolution than litigation. There are times when mediation may take longer than collaborative law, and vice versa, but both are faster than litigation. There may be greater momentum to bringing a case to conclusion in collaborative law which is brought to bear by the attorneys, whereas in

Continued on next page

mediation where the mediator is a neutral, he or she may not be able to have the same leverage or be able to move the process along as quickly.

4. Dr. Heister mentions avoiding the deleterious effects of the adversarial legal process as a goal of most divorce professionals, and this is clearly true of both mediation and collaborative law.

We should not always assume that a positive relationship is the point or desired outcome of either process.

5. Dr. Heister states that the process should help the family to benefit from all the economic and tax benefits of "collaborative tax planning". This is true of both mediation and collaborative law, if participants take advantage of all the tools that are available to maximize such benefits. It is noteworthy that Dr. Heister uses the word "collaborative" when describing this goal.

6. Dr. Heister mentions that the outcome should provide some economic parity between the parties after divorce. First, collaborative law does this even more than mediation, because the parties have representation. In mediation, clients are often unrepresented or resist having representation, and do not understand either what their assets are or how the law may apply to the division of assets or support. This sometimes results in an imbalance between the parties resulting in agreements that may not be fair and reasonable as the law requires. A "neutral" lawyer is little different from a mediator. Parties need legal resources committed to their individual best interests. The collaborative lawyer so advises the client while also considering broader family needs and giving the client the full picture. A neutral "interpretation of the law," while providing legal information, often does not provide necessary legal advice. Divorce agreements have to be approved by the court, and if there is insufficient economic parity the agreement may not be approved. However, a good mediator should be able to overcome such obstacles, and if he or she can't they should discontinue mediation until such issues are addressed and refer the parties to the appropriate professional to help resolve such issues. This is significantly less of an issue in collaborative practice.

7. The cost effectiveness of the process is also identified by Dr. Heister as a goal of divorce professionals. Both mediation and collaborative law are far more cost effective than litigation. Although collaborative law may have a higher cost than mediation, that is not a reason to discount the collaborative process. Cost is not the only factor parties' use in choosing a dispute resolution model that works best for them. This is clearly illustrated by the fact that people who litigate at great financial costs do not seem to be deterred from litigation by that cost, even when they do not have the income or assets to support litigation but continue with litigation regardless resulting in debt.

8. Finally, Dr. Heister talks about both parties being satisfied with and understanding the outcome. Both collaborative law and mediation are alternative dispute resolution models that give parties control over process and outcome.

Skills

1. The first goal is conflict resolution/transformation. Most states require some amount of training for one to call themselves a "mediator". Although collaborative law itself is not regulated except by the professionals themselves, lawyers had to go through rigorous training and testing to become lawyers. Both collaborative lawyers and mediators need conflict resolution skills to assist parties in either process, and having the minimal amount of training is not usually enough. It is incumbent upon the divorce professional in either process to learn negotiation and conflict resolution skills sufficient to be proficient in conflict resolution/transformation, and to assist parties in learning better conflict resolution/transformation skills.

2. The second goal is understanding in the implementation of the applicable law. This goal is true for all dispute resolution processes, whether it be litigation, collaborative law, or mediation. It can be argued that lawyers in the collaborative law process are more likely to understand the implementation of the applicable law because of their education and training. Non-lawyer mediators in particular need to educate themselves about the law and legal issues, which many do successfully.

Both collaborative lawyers and mediators need conflict resolution skills to assist parties in either process, and having the minimal amount of training is not usually enough.

3. The third goal is understanding financial and tax issues to the economic benefit of the family. The same comments made with respect to understanding in the implementation of the applicable law, apply here as well.

4. The fourth goal is communication and human relations to help with children and family issues. Both collaborative law and mediation require these skills. Non-attorney mediators may have more training in these areas, but attorneys can attain these skills through education and experience.

It is true that whether you use the collaborative law process or mediation, you need to try to have all of the above goals and skills to help people with respect to their needs and interests. You also have to know when to bring in third party professional to help the parties' problem-solve. Dr. Heister's comment that a background in law does not necessarily provide superior qualifications than the background of a mediator to meet the need and interests of parties is true; however, Dr. Heister does not recognize that depending upon the case and the parties, the skill of a collaboratively trained attorney may give

Continued on next page

the client the best possible chance of meeting his or her goals, just as in some cases the skill of a mediator, whether an attorney or not, may give a party that best possible outcome. Being able to recognize and advise the client regarding their options and alternatives, whether it be litigation, collaborative law, or mediation, and giving them the power to make the choice, makes for good mediators and good collaborative professionals and benefits clients. Mediators should be recommending collaborative law in certain circumstances, and collaborative lawyers should be recommending mediation in certain circumstances; in fact, they are not even mutually exclusive. Some collaborative law interdisciplinary training programs include mediation not only an alternative, but as a possible adjunct to the collaborative process for some cases.

Do mediators recognize when to refer parties to a different alternative dispute resolution process such as collaborative law? Do collaborative lawyers know when to refer parties to mediation? Only when both mediation and collaborative law practitioners are willing and able to do this for the benefit of the clients, can we co-exist as we should.

Dr. Heister says most of the attorneys starting up in collaborative law have not had the training and experience to give them the "edge" over an experienced mediator. He even questions whether collaborative attorneys best dispense legal advice (it is not clear what the basis of this remark is which seems to imply attorneys in the collaborative process do not advise or advocate for their clients appropriately). He also overlooks the fact that many collaborative attorneys are experienced mediators. Although he gives one example, he fails to mention that cost does not necessarily mean quality. In addition, many collaborative attorneys must have a minimum amount of training to practice collaboratively, with such standards set by their own professional organizations. Some collaborative law groups require mediation and interest based negotiation training as a prerequisite for belonging to their professional association. The International Association of Collaborative Professionals ("IACP") is in the process of setting standards for collaborative practitioners from all disciplines.

We all need to work together in support of alternative dispute resolution processes as a way to avoid the emotional and financial cost of litigation, and to empower parties to be able to meet their needs and interest in a more peaceful and less conflicted manner.

It is not a matter of reconsidering the collaborative model as Dr. Heister suggests; rather, all practitioners whether collaborative or mediation based, need to be educated about the various alternative dispute resolution processes, and understand why and when one might be better or worse for a client. Divorce professionals even need to understand when litigation, rather than an alternative dispute resolution model, is best which it is in some cases.

We all need to work together in support of alternative dispute resolution processes as a way to avoid the emotional and financial cost of litigation, and to empower parties to be able to meet their needs and interest in a more peaceful and less conflicted manner. Even though some cases will need to be litigated, we can continue to offer clients both collaborative law and mediation, and to try to be the best practitioners we can be. We should not demean either process, but embrace them.

Karen J. Levitt is a Director of the Massachusetts Council on Family Mediation and Vice-President for Education & Training of the Massachusetts Collaborative Law Council. She is a solo practitioner with an office in Lowell, MA, and a principal with Centerline Mediation & Arbitration. Karen can be contacted at (978) 458-5529, or klevitt@karenlevitt.com

"Collaborative law stands on the shoulders of three decades of developed concepts and skills that make up the field of mediation....

Their common history is to be recognized, honored and celebrated."

Chip Rose

COLLABORATIVE LAW AND MEDIATION: SOME ADDITIONAL COMMENTS

By John W. Heister

This essay is in response to Karen J. Levitt's article, "Counterpoint: Collaborative Law and Mediation Can Co-exist."

First let me thank Ms. Levitt for her insightful response to my article. Although I said collaborative law was a "welcome and positive change" I did not make clear enough that collaborative law along with mediation and litigation each have a valid place on the problem solving continuum. My article was responding to two articles written earlier by mediator-attorneys who were diminishing the mediation alternative. Let me respond briefly to her concerns about my points.

Goals of Mediation

Sustaining a positive relationship after the divorce: It has generally been my experience over 20 years that the couple has a significantly more positive relationship after the mediation.

Clients gain positive life skills: It has generally been my experience that parties do gain useful life skills. Without surrogates present and with the support of the mediator, people grow.

The time to complete the process is shorter in mediation. I can show clear proof that the time in a mediator's office to complete the process is 6-12 hours on average. I would like to see proof of that with collaborative law.

Mediation avoids the deleterious effects of the adversarial process. I agree that collaborative law does the same.

Collaborative tax planning in mediation benefits both parties. I know my mediation does this. I would hope that collaborative lawyers would develop this skill.

Mediation enables outcomes with economic parity. Both processes should be able to do this. The concept of an experienced neutral attorney helping when needed on a point of law is very effective. Ms. Levitt says, "Parties need legal resources committed to their individual best interests." This doesn't sound very collaborative to me. I thought the collaborative concept was for the two attorneys to be working for a result best suited to the entire family's best interests. In any case, in mediation, each party will have advice from separate counsel before signing an agreement. If the attorneys suggest a modification, the parties return to mediation and settle it. They keep control of their lives.

Mediation costs less than collaborative law.

Mediation costs less than collaborative law. Ms. Levitt concedes this point.

Skills

On the four essential skills needed to help couples come to agreement, Ms. Levitt and I agree. Good mediators and good collaborative attorneys have additional learning to do beyond their skills of origin. Attorneys have legal skills and must acquire the other three to do good work. Depending on the mediator's background, the mediator must acquire the necessary skills.

It is good to have these conversations so that we mediators and collaborative attorneys can "practice what we preach" and be able to cooperate to help people in pain.

John W. (Jack) Heister, Ph.D., is Director of the Mediation Center of Rochester, NY, and was the founding President of the New York State Council on Divorce Mediation. He can be contacted at heister@mediationctr.com.

"Not chaos-like together
crush'd and bruis'd,
But, as the world, harmoniously confus'd:
Where order in variety we see,
And where, though all things differ,
all agree."

Alexander Pope

ADR COURT NEWS

By Christine W. Yurgelun

The Probate and Family Court judges gathered on Friday, October 1st in Marlborough for the Fall 2004 Judicial Conference. The theme of the conference was "Case Management", which included the advent of time standards and the expansion of individual calendars. An update of the work of the Probate and Family Court Steering Committee on Performance and Accountability was given by Judge David Sacks (Chair of the Steering Committee), and Judge Paula Carey (Chair of the Steering Committee's Time Standards Task Force) spoke about the Time Standards which became effective on October 4, 2004. The judges gathered in small groups to identify and discuss "best practices" which are being utilized as case management techniques in courtrooms.

A demonstration of a case management conference, presided over by Judge James Menno, was part of the morning's agenda. In the afternoon, there was a mediation "role play" to show that ADR is part of an integrated case management system. The mediation demonstration was designed so that judges could observe a realistic (albeit more entertaining than an actual) session with divorce issues raised during the role play. Readers of the Family Mediation Quarterly may be interested in knowing that Judge Gail Perlman and Judge Geoffrey Wilson took on the roles of divorcing spouses; David Hoffman served as mediator while Attorneys Phyllis Federico and Lisa Cukier were the lawyers. The script included common issues which arise frequently in family courts but which may benefit from more time-consuming exploration and deliberation of resolution options during mediation. The scenario was also intended to illustrate that skilled mediators have the ability to deal with a full range of issues, including visitation schedules and parenting plans as well as financial issues (distribution of assets).

Readers of the FMQ may be interested in knowing that Judge Gail Perlman and Judge Geoffrey Wilson took on the roles of divorcing spouses; David Hoffman served as mediator while Phyllis Federico and Lisa Cukier were the "acting" attorneys.

The conference programs helped raise awareness of the availability of ADR services, promoted discussion among judges, and helped clarify distinctions between process options (e.g. conciliation; mediation; and dispute intervention). Following the mediation demonstration, judges inquired about the relationship between mediation and Collaborative Law. It has been noted that the adoption of time standards and the use of ADR may be seen as part of a more general "change of culture" within the Trial Court. (All seven trial court departments have recently implemented versions of time standards in Standing Orders as approved by Chief Justice for Administration and Management Robert Mulligan.) During the coming months, we will be following up to see what additional insights may be drawn from the discussions and conference evaluations.

Christine W. Yurgelun is an attorney who coordinates court-connected dispute resolution services for the Massachusetts Probate and Family Court. She can be contacted at (617) 788-6600.

"One would be in less danger
From the wiles of a stranger
If one's own kin and kith
Were more fun to be with."

Ogden Nash

WHAT'S NEWS?

SAME-SEX MARRIAGE IN CANADA

On October 9, 2004, opponents and proponents of same-sex marriage argued before the Supreme Court of Canada, which is expected to issue its decision early next year. At least 80 percent of Canada's population now lives in provinces that have legalized same-sex marriage. (Clifford Krauss, NY Times 10/10/2004)

EDITORIAL: The Answer Is Obvious, The Solution Isn't

Judge Perlman's article "Breathing New Life Into Court-Connected Mediation" (FMQ Vol. 3, No. 3) and John Fiske's email reply (p. 43) are synchronous in two key respects. Both assert not having an answer as to why mediation has not succeeded as a court-offered alternative to litigation, and both are optimistic that it could and should.

MCFM has always been in the forefront of offering mediation in family court. Frank Benson, who recently retired from MCFM's board of directors, was the tireless, unsung hero of the Middlesex Multi-Door Courthouse Program. He organized countless mediators to donate hundreds of hours to "screen" parties to family disputes in Cambridge. His program was well respected, highly functional, and died. Why?

It certainly did not lack for creative ideas, nor the commitment of willing mediators to spread the word and ply their craft. It failed for the same reason that no program before or since has yet to succeed in a Massachusetts court. In a word: money. In this respect Judge Perlman clearly distinguished Massachusetts from other states.

> "With an enormous commitment of its legislature, California instituted mediation in family courts nearly twenty years ago and funded it generously even with a research component, so that California has been able to track its success and its challenges in repeated reports and updates. Numerous other states have made extensive financial commitment to the establishment of mediation in the Courts. Florida, New Hampshire, Maine, Illinois, Minnesota, Wisconsin, and Ohio are just a few."

Like all the courts in Massachusetts, our family courts are abysmally under-funded. Until adequate funds are allocated, no amount of inspired creativity or dedicated commitment will make mediation a meaningful alternative to litigation.

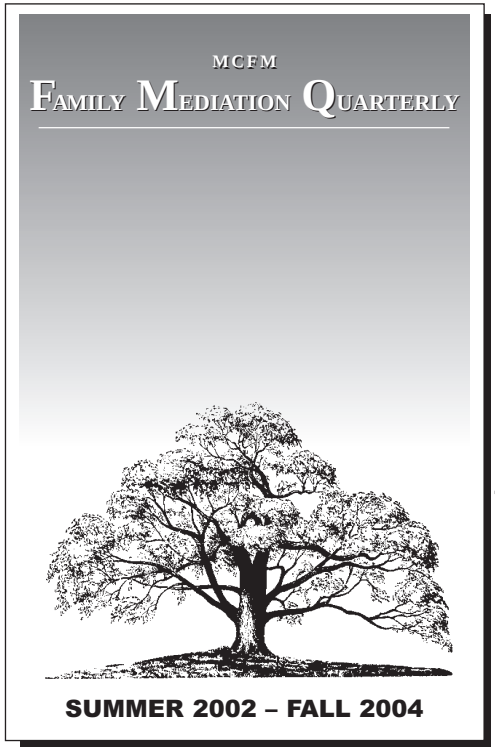
Mediation can save precious judicial dollars by diverting people who could benefit by avoiding litigation away from its adversarial arena. Mediators and thousands of their satisfied customers can attest to its incalculable contributions to the emotional well-being of children and their parents in divorce.

Mediation will never prove its cost-effective worth until is it properly funded. Until then, under-funded mediation programs will flounder into irrelevance. The long-term outlook will be optimistic when the state appreciates its own self-interest in mediation and invests accordingly.

The opinions expressed in this editorial are those of Les Wallerstein. He can be contacted at (781) 862-1099, or at wallerstein@socialaw.com.

JOIN YOUR COLLEAGUES

☆ Natasha Affolder ☆ Salvatore Ambrosino ☆ Jane Appell ☆ Ed Berger ☆ Lisa Blout ☆ William Blout ☆ Kenneth Cloke ☆ Lynn Cooper ☆ Peter Coulombe ☆ Cynthia Crossen ☆ Susan Dickie ☆ Lisa Ehrmann ☆ Elissa Ely ☆ Dawn Evans ☆ Linda Fidnick ☆ John Fiske ☆ Fern Frolin ☆ Edward Ginsburg ☆ Howard Goldstein ☆ David Hall ☆ John Heister ☆ David Hoffman ☆ June Adams ☆ Johnson ☆ Mary Johnston ☆ Oran Kaufman ☆ Joyce Kauffman ☆ Robert Langlois ☆ Karen Levitt ☆ Marilyn Levitt ☆ Robert Loss ☆ Margaret Marshall ☆ James McCusker ☆ Clare McGorrian ☆ Pat Pappernow ☆ Gail Perlman ☆ Frank Peters ☆ Lynda Robbins ☆ Chip Rose ☆ Arline Rotman ☆ David Sacks ☆ Barry Shelton ☆ Debra Smith ☆ Kathleen Townsend ☆ Laurie Udell ☆ Jay Uhler ☆ Les Wallerstein ☆ Marion Lee Wasserman ☆ Janet Weinberger ☆ Bette Winik ☆ Janet Miller Wiseman ☆ Christine Yurgelun ☆ Mark Zarrow ☆



WRITE FOR THE FMQ

MCFM NEWS

MCFM NEWSLETTERS & NEWS NOW ON LINE!

The Family Mediation Quarterly is only the most recent publication of the MCFM. Eight years after its founding, MCFM began to publish a Newsletter that soon evloved into the MFCM News. This spring the board of directors voted to fund the electronic retrieval and preservation of all known copies of the MCFM Newsletters and News (1990-2002).

As of now, 51 prior editions are available at www.mcfm.org. Each edition is in PDF (Portable Document Format), which can be downloaded and reprinted with Adobe Acrobat Reader— free software linked through the MCFM web site.

For archival and research purposes, there is a chronological, Cumulative Table of Contents. **Credit for the creation of this index belongs to board member Robert V. Deiana and some of his firms's staff: Elaine Apostola, Law Librarian; Cheryl Cronin, Database Analyst; and Amy Thornton, Legal Administrative Assistant.**

Examine the roots of mediation. Introduce yourself to our predessors, whose vision helped establish the profession of mediation in Massachusetts.

INCREASING CIRCULATION

Judge Gail Perlman's article "Breathing New Life Into Court-Connected Mediation" (FMQ Vol. 3, No. 3) was reprinted and circulated among the 50 Massachusetts Probate & Family Court judges at their Fall Conference in October.

NEXT EXECUTIVE COMMITTEE & BOARD OF DIRECTORS MEETINGS

Monday, November 15th
5:00 PM: Executive Committee
6:00 PM: Board of Directors
In the Office of Debra L. Smith
134 Main Street
Watertown, MA 02472
(617) 924-6728
lawdeb@aol.com
Directions to Deb's office are available online at www.mcfm.org
PLEASE EMAIL ANY AGENDA ITEMS FOR CONSIDERATION TO:
President Laurie Udell at lsudellesq@aol.com, or to any officer,
all of whom are listed in the DIRECTORATE on page 47

MEDIATION PEER GROUP MEETINGS

Merrimack Valley Area
We are a group of family law mediators who have been meeting (almost) monthly for about three years. The criterion for membership is a desire to learn and share. Meetings are held at 8:15 AM on the last Tuesday of the month (April 27th, May 25th & June 29th) at the office of Lynda Robbins, 11 Summer Street, Chelmsford. Please call Lynda at (978) 256-8178 or Karen Levitt at (978) 458-5550 for information and directions.

Metro-West Area
The Metro-West group (usually) meets on the second Friday of the month at the home of S. Tracy Fischer, located at 120 Cynthia Road, in Newton. Monthly meetings begin at 9:15 AM and are open to all MCFM members. Please call (617) 964-4742 or email <tracyfischer@rcn.com> for dates and directions.

FMQs

The cost of additional, printed FMQs is $5.00 per issue for members, and $7.50 for non-members. Supplies are limited. Please mail requests for additional copies to DeLaurice Fraylick, 23 Parker Road, Needham Heights MA 02494-2001, and enclose a check made payable to MCFM.

An archive of all but the most recent edition of the FMQ is free online in PDF on the MCFM web site at www.mcfm.org. This resource offers an expanding trove of meditation materials which is supplemented by a cumulative index of articles to facilitate data retrieval

PDF editions of the FMQ can be downloaded and printed on any computer with "Acrobat Reader" software, which is available for free on the internet at www.adobe.com

NEW BROCHURES!

MCFM has completely redesigned a brand new brochure! Free copies have already been distributed to members. **Members may obtain additional brochures from Dee Fraylick.** Call (781) 449-4430, or email: masscouncil@mcfm.org

Email

Date: Tue, 31 Aug 2004
From: john fiske
Subject: Breathing New Life
To: yurgelun_c@jud.state.ma.us
Cc: perlman_g@jud.state.ma.us, wallerstein@socialaw.com

Dear Christine:

Judge Perlman's article in the Family Mediation Quarterly addresses a lot of questions I have been pondering for years. She has no more answers than I do, but it was exciting for me to have such a concise summary of her thoughts from her unique judicial perspective. Why aren't the judges doing more to use mediation? I wonder, and no one is more qualified than she to speak and write about why.

I am at a loss why we cannot connect litigants floundering through the court system with mediators eager for clients, including new mediators looking for any experience with real live couples. I am personally familiar with two experiments that had promise: Judge Ginsburg in 1980 pressing couples in the motion session to "voluntarily" try three mediation sessions and promising them a court date for a divorce if they could come to an agreement, using two mediators in the beginning and then expanding to about 15; and Frank Benson running the Middlesex Court Mediation program for about two years as a volunteer. There have been many others no doubt, and some of them I have heard about.

The problem is it takes so much effort to create and operate these programs and it is so easy not to try. We cannot clone Peter Contuzzi, alas.

I continually mediate separation agreements for couples who have been litigating for years. They are usually referred by their lawyers. Given the chance to sit in a room and talk and listen, with a realistic hope of resolution, they are able to reach an agreement, often to their surprise and the gratitude of their tired and probably no longer paid lawyers.

"The readiness is all," says Hamlet in Act IV. When people are ready to agree, mediation can perform the same useful function of a 4 way meeting before a pre-trial conference, or the conference itself, in helping them to reach a sound agreement efficiently. When they are not ready, you know the unending court appearances.

The implications of the individual calendar, as she writes in her article, could be significant. For one, it's a major change in the courts, and major change in the courts doesn't happen often. A breath of new life indeed. What if each judge were allowed to develop a cadre of his or her own mediators, perhaps up to 10, to whom he or she could refer cases at the right time? We would have to amend or address the requirement of Rule 6(a) about referring only to allowed to foster his or her own approved program, if he or she wanted. I could picture Judge Perlman having 10 respected mediators available to her so she could suggest to parties and or their counsel, at the right time, one or two mediation sessions with an appropriate mediator.

Speaking only of Middlesex County since the courthouse is across the street as I write, it would be exciting to organize 10 excellent family mediators and then write each of the Middlesex judges and offer to work with any of them who are as committed to mediation as Judge Perlman, such as Judges Kaplan and McSweeney, to develop some referral program and system that would be useful for the court. Some of the judges would not be interested, and some would, I think. I for one would be glad to discuss the idea with the Mass Council on Family Mediation.

The other reason I write to you is because Judge Perlman suggested it at the end of her article and by copy of this letter I wanted to thank her for giving all Quarterly devotees her insights, which always become timely and important. I also thank by copy Les Wallerstein for continuing to brighten our lives with the Quarterly. Every issue has a pearl, no pun intended.

Keep up your important work.

Sincerely, John

Date: Tue, 31 Aug 2004
To: john fiske
jadamsfiske@yahoo.com
From: Les Wallerstein
wallerstein@socialaw.com

May I publish your letter in the Fall edition?

Date: Tue, 31 Aug 2004
From: john fiske
jadamsfiske@yahoo.com
To: Les Wallerstein
wallerstein@socialaw.com

Dear Les:

Anything I write you can publish
Unless it's rublish.

Cheers, John

WRITE ON!

PUT YOUR THOUGHTS INTO PRINT

FMQ

email the editor:
wallerstein@socialaw.com

ANNOUNCEMENTS

Oran Kaufman, a past president and long standing member of MCFM, is pleased to announce the opening of

THE LAW OFFICE OF ORAN KAUFMAN
190 University Drive
Amherst, MA 01002
(413) 256-1575
oran@orankaufman.com
www.orankaufman.com

Oran's new law office will continue to provide mediation services through Amherst Mediation Services, which will also be available at his Northampton and Greenfield locations. In addition to continuing his practice of general family law and guardianships, general civil litigation and business law, Oran now offers collaborative law alternatives.

ONE-DAY INTRODUCTION TO MEDIATION SKILLS
December 2, 2004
9:00 AM - 5:00 PM
Boston Law Collaborative, LLC
99 Summer Street – Suite 1600
Boston, MA 02110

This 8-hour, introductory course will provide you with an overview of mediation and hands-on experience to help you decide whether to pursue further mediation training. This program will also be useful for people who do not wish to become mediators but would like to incorporate mediation skills into their life and work. **Space is limited to 20 participants.** Registration received 30 days or more prior to the program date: $200, thereafter: $250**.** For more information, please contact Israela Brill-Cass at 617-439-4700 or IBC@BostonLawCollaborative.com

MASSACHUSETTS COLLABORATIVE LAW COUNCIL, INC.
The MCLC offers legal representation to people in conflicts who share a commitment to resolving disputes without litigation. To find out more, or to locate a collaborative lawyer near you, visit MCLC on-line at www.massclc.org.

Join Us

MCFM membership is open to all practitioners and friends of family mediation. MCFM invites guest speakers to present topics of interest at four, free, member education meetings annually. Educational meetings often satisfy certification requirements. Members are encouraged to bring guests at no cost. MCFM members also receive the Family Mediation Quarterly and are welcome to participate on any MCFM Committee.

All members are listed on-line at MCFM's web site, and all listings may be "linked" to a member's email and web site. Annual membership dues are $90. Please direct all membership inquiries to **DeLaurice Fraylick at masscouncil@mcfm.org**.

REFFERAL DIRECTORY: Every MCFM member is eligible to be listed in the MCFM Referral Directory. Each listing in the Referral Directory allows a member to share detailed information explaining her/his mediation practice and philosophy with prospective clients. The Referral Directory is printed and mailed to all Massachusetts judges, and to each listed member. The referral directory is also available on-line at the MCFM web site.

MCFM was the first organization to issue Practice Standards for mediators in Massachusetts. To be listed in the MCFM Referral Directory each member must agree to uphold the MCFM Standards of Practice. Copies of the MCFM Standards of Practice are available on-line at the MCFM web site.

The annual Referral Directory fee is $60. Please direct all referral directory inquiries to **Jerry Weinstein at JWeinsteinDivorce@comcast.net**.

CERTIFICATION: MCFM was the first organization to certify family mediators in Massachusetts. Certification is reserved for mediators with significant mediation experience, advanced training and education. Extensive mediation experience may be substituted for an advanced academic degree. A copy of the MCFM certification requirements is available on-line at the MCFM web site.

Every MCFM certified mediator is designated as such in both the electronic and the printed Referral Directory. Only certified mediators are eligible to provide mediation services to the Massachusetts Probate & Family Court through MCFM. Certification must be renewed every two years.

Certification applications cost $100, and re-certification applications cost $50. Certification and re-certification applications are available on request from **Lynn Cooper at lynnkcooper@aol.com**.

MCFM's web site: www.mcfm.org

Directorate

Editor's Notice

MCFM
Family Mediation Quarterly

Les Wallerstein, Editor
1620 Massachusetts Avenue
Lexington, MA 02420-3802
(781) 862-1099
wallerstein@socialaw.com

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

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

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

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

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

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

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

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