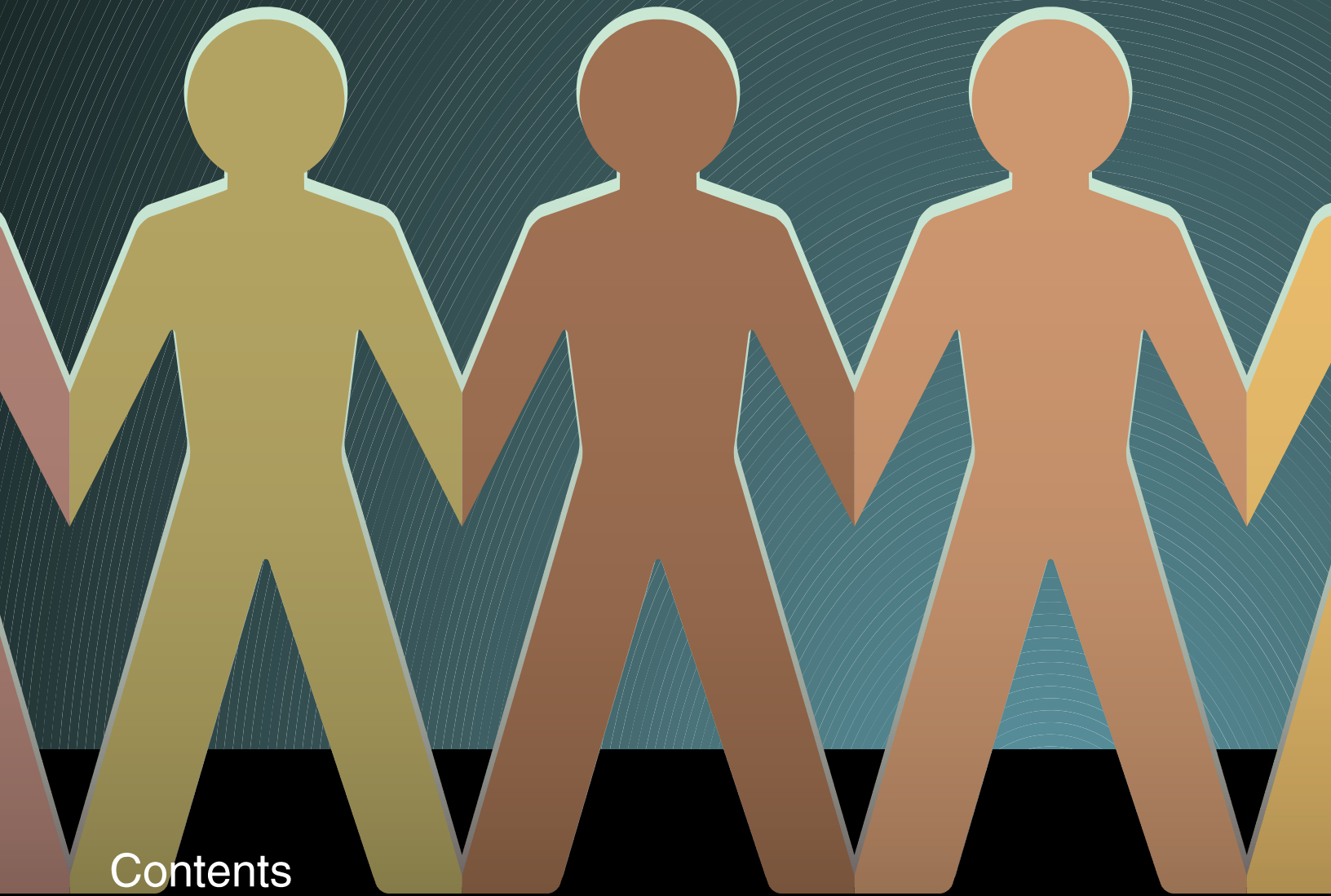




DR Currents

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FROM THE CHAIR

by Taylor Tapley Daly

In the last several years, we have seen many mediators and parties foregoing opening presentations -- opting to move directly to caucus. There has been healthy debate about whether this is a good practice. Most mediators today receive detailed confidential case statements from each party which inform them about the case and/or conduct calls with the participating attorneys in advance of the mediation to determine if there are case issues, relationship issues or personality quirks among the participants that may impact the mediation process. In my view, that decision to make opening presentations lies with the parties. The goals and strategies for opening presentations by the parties are varied. Opening presentations can inform, set the tone, act as a springboard to positive work in early caucuses, but they can have an opposite effect, making the mediator's job more difficult. Because opening presentations or lack thereof can have a significant impact on the mediation, mediators should consider providing some guidance about those presentations and how they may best be used to help in resolution of the case.

In several recent mediations, I have observed opening presentations that, unwittingly, did not further the goals or strategies of the parties. This has led me to add in my discussions with counsel prior to the mediation that they are entitled to present an opening of whatever type they choose (within reason) but that they should consider their audience in the particular case. One size does not fit all. Examples of miscommunicating goals and strategies which I have observed include using a slick PowerPoint with hyper technical terms and statistics in a case involving an unsophisticated party in a personal injury suit. The presenting party came to the mediation genuinely intending to make good offers and the goal, as stated to the mediator, was to inform the individual plaintiff about the product associated with the injury such that a reasonable settlement

could be reached. It backfired. The presentation made the plaintiff feel uncomfortable, out of control and uneducated. It caused him to simply shut down and not participate in a meaningful way in the mediation. The case did not resolve. Another example of a presentation gone wrong involved a medical malpractice case in which the presenting attorney for the doctors made a good presentation, very understandable to the lay plaintiff. However, the attorney making the presentation addressed the mediator only, never looking at the plaintiff. His clients never looked at the plaintiff either. The presentation angered the plaintiff and her counsel who felt that the lack of eye contact was disrespectful, condescending, and suggested the parties had come to the mediation in less than good faith. The case did not resolve.

From the first moment that the parties step into the mediation venue, observations and interpretations of intent are made by attorneys and parties, which are sometimes helpful and sometimes unhelpful to the process. As mediators, while we want to insure that the process belongs to the parties, mediators can assist by exploring with counsel prior to the mediation whether and what type of opening presentation is most helpful in the case.

Please let us know what your experience been with openings and how you have handled these issues.



Taylor Tapley Daly is a partner of Nelson Mullins Riley & Scarborough LLP who practices in the areas of commercial litigation, product liability and dispute resolution. A registered mediator/arbitrator since 1994, Daly is a member of the commercial arbitration and mediation panels for the American Arbitration Association. Daly is a frequent speaker on ADR topics, and is active in pro bono. She serves on the Boards of the Atlanta Legal Aid Society and Georgia Appleeed Center for Law and Justice.

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THE DISAPPEARING OPENING STATEMENT

By Bob Berlin, Editor

What is the purpose, essence, and/or function of mediation? One of the many definitions of mediation is the providing or creating an environment in which parties, who are in conflict, may, if they choose (self-determination) establish a new Relationship so that if they choose to resolve their conflict, they can do so. As Einstein said, “the thinking that takes one to the problem is not the thinking that will take you away.” Or, as may be said another way, “if you keep doing what you’re doing, you’ll keep getting what you get.”

As we are now witnessing in mediations many mediators are going directly to getting the problem solved (or getting settlements). Often times the mediators, in their attempt at problem solving and decision-making, are ill equipped to do one, the other or both. There’s been little or no training in these processes.

Some traditional mediators see this as a disservice to the parties, by not giving them a heads-up as to what’s about to occur. By going to immediate problem solving without the parties getting the mediation blueprint may inhibit their full participation. This, in turn, may deny their self-determination (one of the democratic tenets of our

society) in the process. The more they’re invited in, the more a resolution BECOMES THEIRS. “That to which they give birth, they will support.”

To start your automobile, most need a key in the ignition; to light a room, a switch is engaged; and, so on and so forth. So, too, a good start to mediation is the Opening Statement.

Please humor me by engaging your imagination. Imagine you’ve taken a battery of medical tests and you’re going to see your doctor for the assessment and recommendations:

Doctor #1: Mary, we need to operate. Be at the hospital first thing in the morning and we’ll perform surgery. That’s all!

Doctor #2: Mary, we’ve run the diagnostics taken x-rays and all show us exactly where the problem is and we know just how to fix it. This is what you need to do. Nothing to eat or drink after midnight. Be at the hospital by 6 AM. Be sure to bring your driver’s license or ID. I’ve sent your insurance information over already.

If you park in the Orange Parking Lot, you’ll see the signs to direct you to the Outpatient Surgery Center. Go in through that entrance and you’ll see the reception desk. Check in there; they’ll be expecting you. Get ready; they are the first ones of many who will ask you your name and date of birth! You’ll be directed to the elevators to get to the Third Floor. An assistant will greet you. They will also direct your family to a comfortable waiting area. They’ll get you to a surgery prep room where they’ll give you a gown to put on. They’ll do all the usual things: take your vital signs; start an IV; and, make sure you’re ready once I’m ready for you. While you’re waiting, a couple of your family members can stay with you. The assistant will let them know.

When I’m ready, they’ll administer a mild sedative, just enough to relax you, and will wheel you to the surgery area. I’ll see you there and we’ll get started.

Once the surgery is over; you’ll be taken to the recovery room. You may be a little cold. Not to worry, they’ll put as many warm blankets on you as you need to warm you up. Once your vital sign are stabilized and you’re fully awake, they’ll return you to a room. We’ll monitor your vitals and pain level to keep ahead of that. Once you are fully aware,



I'll be by and we'll talk about the surgery and what will need to happen from that point.

So what's the purpose of the Opening Statement? It can include a mere "Hello" only (I observed this once) or it can include:

- Introductions
- Explanation of the Mediation Process
- Mediator's Roles
- Entitlements/Rights/Assurances
- Other – lots of ...

For those who attend mediations regularly and don't desire to hear an opening statement, they can absent themselves during this time or, if it's a different mediator, or even the same, they may hear something new or hear what is said as reinforcement of what they have previously heard.

The opening statement, among other purposes, sets the stage and may provide comfort for those new to the process allowing them to re-center themselves.

A mediator without an opening statement is like jumping in the driver's seat of a moving auto, capturing the baton in a relay race for the very first time, or grabbing a bullet as the gun fires! (Ouch!)

Knowing what happens often relieves anxiety, potentially sets the stage for the establishment of a NEW ENVIRONMENT and, most importantly, sets the groundwork for the formation of a new relationship, giving rise to NEW THINKING. New thinking can potentially give birth to a do-able and durable resolution.

Many mediators rush to solving the problem or resolving the conflict. May I suggest a good opening statement begins to set the stage for good discussions, competent decision-making and effective problem solving (resolutions)?

Starting from the beginning often invites a good ending.



As president of The New Decision Management Associates, Inc., Robert A. "Bob" Berlin has primary responsibility for Mediation, Negotiation and Arbitration services as well as Lead Trainer. He is a graduate of the Walter F. George School of Law, Mercer University, receiving the LLB (J.D.) and was a senior partner in the law firm of Berlin and Hodges, P.C., and was a municipal court judge and in the Georgia House of Representatives. He is an approved mediator for the U.S. Postal Service, EEOC and the FBI. He presently serves on the Advisory Committee of the Training & Credentialing Committee of the Georgia Commission on Dispute Resolution.

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WHEN THE LAW IS INVOLVED, DO FEELINGS AND NOTIONS OF FAIRNESS MATTER?

by Mark B. Baer

People involved in legal disputes frequently say, “I want to have my day in court.” As lawyers, it is relatively easy for us to accommodate such a request. Before doing so, it is advisable that the attorney determine what the client means when they make such a statement. Should that statement be taken literally or figuratively? Does the individual making the statement know or understand the distinction? Doesn’t the answer to that question depend upon the client’s sophistication when it comes to the actual court process?

According to Merriam-Webster’s Collegiate® Dictionary, 11th Edition, “day in court” is defined as “(1) a day or opportunity for appearance in a lawsuit; or (2) an opportunity to present one’s point of view or argument.”¹ As defined by Cambridge Dictionaries Online², The Free Dictionary³ and many others, “have your day in court” means “to get an opportunity to give your opinion on something or to explain your actions after they have been criticized.” The Cambridge Dictionary of American Idioms defines “have your day in court” to mean “to have the opportunity to make a complaint publicly and to have it judged fairly.”⁴

Do people in dispute literally have the unfettered right to give their opinion or otherwise explain their actions in a court of law? Don’t procedural and evidentiary rules often restrict such rights? If so, how can their ability to do so be unrestricted? Might such limitations prevent someone from feeling as though the matter were judged fairly?

My point is not to criticize litigation or the court process, which serves an essential role in resolving legal disputes. The crucial question is whether or not litigation or the court process is essential or even necessary for any given legal dispute.

In her book titled *The Good Karma Divorce*, Judge Michele Lowrance, a domestic relations judge in the Circuit Court of Illinois, wrote the following:

The couples I see in my courtroom are desperately searching for emotional release; they smuggle their pain into their testimony, even when it is not relevant to the topic. They do so at every opportunity, hoping that somehow the court will know how to lessen their agony. In the end their desperate emotions remain unattended and unsatisfied. The sight of couples who participate exuberantly in a demolition derby always disturbs

me. In an attempt to alleviate pain, even though pain is transitory, they lash out, and irreparable damage is done. The court system was not built to house these emotions, and attorneys are not trained to reduce this kind of suffering. Divorcing people expect relief far beyond what the legal realm can provide from their attorneys and the courts, and they often end up feeling like members of a powerless, unprotected class. They are disappointed in their attorneys, and their attorneys are disappointed that they are not appreciated.

In my personal life, when divorced people discover I am a member of the judicial system, they are exploding to tell me how the system has failed them. People want to believe that life should be fair and bad things should not happen to good people. They expect emotional injustice to be righted by legal justice. The feeling that the rules of fairness have been violated leaves them limited choices on the emotional menu. Either they believe they did something wrong and blame themselves, or they think they were in the right and the administration of justice failed them. The unfortunate fallacy in believing that emotional injustice can be righted by the legal justice system creates anger and feelings of being cheated. This sense of being treated unfairly happens not just in those cases in which there was all-out warfare, but even in those in which disputes were eventually settled. Years after the divorce both groups of people understandably still have enduring bitterness and quiet, brooding grudges.”⁵

In other words, much of the dissatisfaction people have with the litigation process has to do with the fact that it ignores the feelings and emotions that are fueling the locomotive, which is pulling the litigation train. Many of those feelings and emotions involve issues that led one or both parties to decide to end the marriage. However, in a no-fault state, such issues are generally irrelevant, with the exception of domestic violence. As Judge Lowrance says, “If you are going to trial on principal and are seeking to vindicate some moral standard that is crucial to you, you should know that moral standards and principals are not what courts are meant to address. Trials only address the law. For example, in a no-fault state, adultery is not relevant.”⁶

I am by no means advocating for the elimination of no-fault divorce. While divorce rates did rise as a result of no-fault divorce, domestic violence rates fell by approximately 20 to 30 percent and wives’ suicide rate fell by 8 to 13

percent.⁷ Furthermore, fault based divorce does not and never has addressed the underlying feelings and emotions. Rather, it merely requires proof of the existence of such fault before a divorce will be granted.

While litigation and the court process may not address feelings and emotions, such things are dealt with in collaborative law and certain mediation models. In fact, the website for the Maryland Courts contains a document titled “Mediation Framework Descriptions.”⁸ The document begins with the following paragraph: “Mediation is a process for people in conflict which includes two or more participants and one or two mediators. The *trained* impartial mediator(s) helps people in conflict to *communicate with one another, understand each other*, explore options for mutual gain, and if possible, reach agreements that satisfy the participants’ needs. A mediator(s) does not provide legal advice or recommend the terms of any agreements. Instead, the mediator(s) helps people reach their own decisions which may include agreements, may rebuild their relationship, and if possible, find lasting solutions to their disputes. Mediation is a process that lets *people speak for themselves and make their own decisions* [emphasis added].” It is important to note that feelings are a key aspect of each and every model of mediation mentioned in that document.

The Mediation Descriptions by the Maryland Program for Mediator Excellence specifically provides as follows:

Committee Notes:

‘Evaluative Mediation’ is not defined here because we believe it is a misnomer. Evaluation is a technique, not a mediation framework. If a process consists solely of an evaluation and attempts to get participants in line with the evaluation, then that process is not mediation, it is more likely a settlement conference. In a survey asking Maryland mediators how they define their practice, no mediator responded that they define their practice with the term ‘Evaluative.’

A Settlement Conference is not mediation, although the two are often confused. We define settlement conferences here in order to try to clarify the distinction. Settlement conferences are ordered by the courts in a wide range of civil cases and attendance is mandatory. The conferences usually take place 30-days prior to trial.

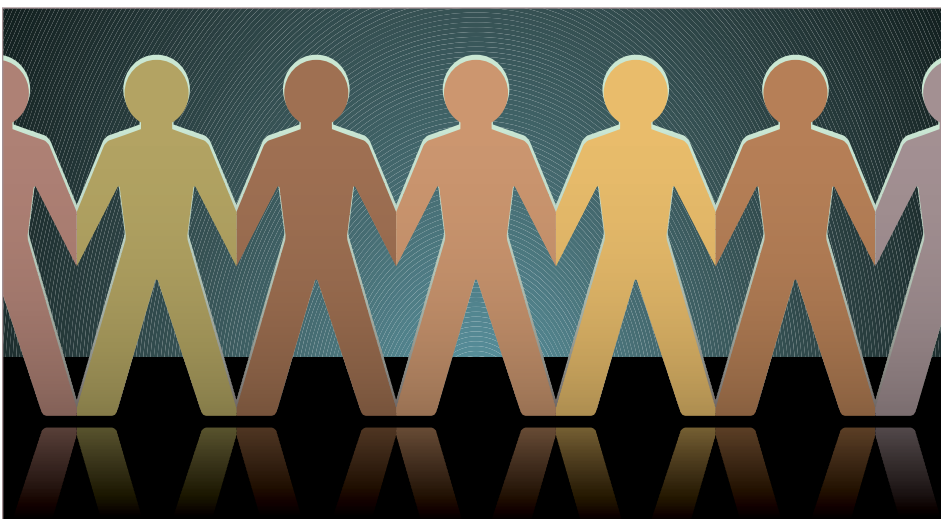
Settlement conference neutrals are judges or lawyers who are familiar with the decisions of the particular court in which the case is filed. The conferences are focused on settling the lawsuit. The neutrals discuss with the participants the value range of their case and attempt to get the participants to reach an agreement, which may be a compromise. The conferences usually operate with attorneys present, and the entire process may consist of the neutral meeting solely with the attorneys. The process may take place in separate meetings with each side, as the neutral uses persuasive arguments, and attempts to encourage the parties to come to an agreement within a range of settlement options.

I raise these issues because of something I read in an article titled “Budget cuts lead to dysfunctional family law departments” by Franklin R. Garfield that was published in the Los Angeles Daily Journal on April 9, 2013. Garfield’s second practice pointer to “family lawyers who participate in the mediation process directly” is to “help the parties put aside their feelings and notions of fairness. Absent an agreement to the contrary, [applicable] law is controlling. The parties’ feelings and notions of fairness are mostly irrelevant. The parties have usually shared their feelings with each other and anyone else who will listen on dozens of occasions; sharing them with the mediator is unlikely to advance the analysis. Along the same lines, everyone wants to be fair – or at least everyone says so. But fairness is a subjective concept. Unless the parties have the same notion of fairness, they are stuck with [applicable] law – whether or not they think it is fair.”

When Garfield refers to “mediation” in his article, he is apparently referring to “evaluative mediation.” I

refer to “evaluative mediation” as an “alternative form of litigation,” and according to the Maryland Program for Mediation Excellence, “evaluative mediation is not mediation.”

I have never meant to indicate that “evaluative mediation” has no value. The fact that I am distinguishing it from what I refer to as “true mediation” does not mean that I don’t believe it serves a purpose. If “evaluative mediation” is able to help parties to resolve their dispute in a more expeditious manner and at a lower overall cost, it certainly has value. My intention is to make a



distinction, so that when people opt to enter into mediation, they enter into the type of mediation they all desire. People should get what they want and if they don't know and understand their choices, they can't make an informed decision. Furthermore, once they make an informed decision on the process, they should be able to determine which professionals are best suited to assist them in that process. If the "mediator" and attorneys only know and understand the "evaluative mediation" model, they are not well-suited to assist clients in other mediation models. This is extremely important to recognize, considering that in Maryland, "evaluative mediation" is not even considered mediation.

I agree with Garfield about one thing – "fairness is a subjective concept." In mediation and other forms of consensual dispute resolution, "fair" is referred to as a "four letter word that starts with an 'F.'" This is precisely because fairness is subjective. What is "fair" to one party involved in the dispute may not be "fair" to the other party. When attorneys, mediators and others are involved in the process, their concepts of fairness may well differ from those of one or both of the parties and from those of the other professionals involved. In fact, in her book, Judge Michele Lowrance says the following is a "detrimental misconception about what really happens in court: Your concept of fairness will approximate that of the judge's. You believe there is a clear-cut non-discriminatory standard of justice that is not dependent upon the judge's personal values."⁹ Regardless of differences in perception, resolutions can be reached that are "fair" to each of the parties. Under such circumstances, does it really matter whether or not their attorneys and/or other professionals involved may disagree? After all, as Lowrance says, "it is a detrimental misconception to believe that your attorney will understand and execute your goals and desires in a way that satisfies your sensitivities and needs."¹⁰

There is a big difference between letting the client know how the proposed agreement might differ from what the law might otherwise provide and advising a client as to the "fairness" of the agreement. If the client is okay with an agreement that differs from what the law might otherwise provide, should the attorney or anyone else be insisting that they instead enter into an agreement that a court would have made? People are allowed to enter into any agreement, as long as it is not illegal or in violation of public policy. Just because the attorney may not have agreed to such terms if they were a party to the agreement, does not mean that their client shouldn't. After all, isn't the ultimate choice up to the client? If lawyers do otherwise, aren't they being paternalistic? A great deal has been written about lawyer paternalism, especially in family law.¹¹ If the attorney believes that an agreement is outside of the "realm of reasonableness," then might it be appropriate to request that the client get a second opinion in writing? If the client still wants to enter into such an agreement,

isn't the attorney in the clear, if they "dotted their i's and crossed the t's," by writing a CYA letter and obtaining a copy of the other lawyer's opinion letter? People should not be prohibited from entering an agreement they want, unless their cognitive reasoning and understanding skills are at issue, the agreement is illegal or in violation of public policy, or it is too outside the realm of reasonableness.

Doesn't "true mediation" provide people with the opportunity to provide their point of view or argument? Doesn't "true mediation" provide people the opportunity to give their opinion on something or explain their actions? Doesn't "true mediation" provide people the opportunity to make a complaint publicly, by doing so in front of at least one neutral person? In other words, doesn't "true mediation" give people their "day in court," so to speak? In fact, doesn't "true mediation" actually address that which most people are seeking, when they say they "want their day in court?"



Mark B. Baer is recognized as a 'thought leader' in many areas of Family Law for his provocative and forward-thinking ideas on improving the way in which family law is handled. As a former litigator who advocates the use of mediation and collaborative law whenever possible, Baer points out the inherent flaws that exist in litigating family law matters, then reveals more creative and less destructive approaches. He also highlights the difference between 'dispute resolution' and 'conflict resolution' to offer simple ways of achieving a better result for all parties involved, including the children.

(Endnotes)

- 1 By permission from *Merriam-WebsterUnabridged*©2013 (<http://unabridged.merriam-webster.com/>) by Merriam-Webster Inc. (www.Merriam-Webster.com).
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MEDIATING SAME-SEX DISSOLUTIONS

by Christie L. Ayotte

In the wake of the U.S. Supreme Court decision of *U.S. v. Windsor* (No. 12-307, June 26, 2013), striking down the Defense of Marriage Act (DOMA), many gay, lesbian, bisexual and transgender (GLBT) Georgians believe that at the federal level at least, all of the benefits of marriage are now available to them if they were lawfully married elsewhere. This is incorrect, and mediators who mistakenly adopt this view risk creating unenforceable settlement agreements for separating same-sex couples.

Federal agencies are still parsing which benefits same-sex spouses will be eligible to receive upon divorce, post-DOMA. In the meantime, however, the better rule to keep in mind is this: *If the state where the couple resides recognizes the couple as married, then they can be treated as married. If the state where the couple resides does not recognize their marriage – as Georgia does not – then most of the benefits of marriage are not available to them.* The primary exceptions to this rule apply to service members and federal employees.

The right to marry is significant because it also carries the right to the protections of divorce: the right to receive alimony, the right to an equitable division of property, including pensions and retirement accounts, and the right to an equitable division of debt.

Although the Supreme Court held that DOMA was unconstitutional, Georgia also has a separate statute and constitutional amendment (commonly called a “mini-DOMA”) which specifies that in Georgia, marriage

between same-sex persons are not recognized, and also that “No marriage between persons of the same sex shall be recognized as entitled to the benefits of marriage.” O.C.G.A. § 19-3-3.1(b) (*emphasis added*); Ga. const. art. I, § 4.

Georgia’s prohibition on recognizing the benefits of marriage is important to keep in mind when mediating same-sex partner dissolutions. Generally, Georgia judges are required to treat same-sex couples as they would treat other non-married couples: property and debt follow title, and are not divided equitably; only the legal parent has any rights to parenting time and decision-making authority; and only legal/biological parents have an obligation to support those children.

Mediation presents an opportunity for same-sex couples to approach the dissolution of their relationship with dignity and respect, by treating their relationship as if it were a legally-recognized marriage, where they reach decisions that are fair and just. This approach poses the first ethical dilemma many mediators face, however: sometimes, one party wants to make an equitable agreement that closely mirrors a divorce settlement, and the other party wants to use the law to his advantage, by striking a deal that is closest to what a judge can award.

For example, if a lesbian couple has jointly raised the plaintiff’s 12 year old for the last eight years, but the defendant never adopted the child and is therefore not a legal parent, then the defendant likely will want scheduled parenting time with that child going forward. The plaintiff may want to cut the defendant off completely. The mediator may have his own opinion about how much parenting time the non-legal parent should have, based on what is best for the child, and must be aware of those opinions to stay neutral.

The tug between equity and contract law presents other issues, too. For example, it is common for gay couples to purchase real estate together, and put all of the assets in the higher-earning party’s name, while keeping the debt in the other person’s name as part of a coordinated estate-planning strategy, to ensure that at least one person in the relationship has good credit. If the parties did not keep receipts and bank records for this property and the subsequent home improvement projects, how should this property and debt be divided?

Finally, if one party quits her job to care for her partner’s aging mother, but the law



says that same-sex partners are not entitled to alimony, then is the caretaking party simply out of luck? And if the parties do agree that some compensation should be paid for the caretaker partner's time, how should this be written so that a judge will approve the agreement?

Here are a few tips when drafting Settlement Agreements for same-sex couples:

1. *Contemplate legal divorce in another jurisdiction.* If the couple is legally married, they will probably need to be legally divorced at some point to avoid prosecution for bigamy. Georgia will not recognize valid same-sex marriages, but other states will. The problem is that with a few exceptions, petitioners can only seek a divorce in the jurisdiction where they reside. Include provisions which state that if either party later relocates to a jurisdiction which will recognize the parties' marriage, that the other party will fully cooperate in seeking an uncontested divorce, by among other things, submitting to personal jurisdiction in the new state. It can be helpful to spell out how attorney's fees will be handled when this happens.
2. *Use contract law language, not family law language.* Avoid words like "alimony" or "equitable," which are rooted in family law. It is usually sufficient to say something vague such as "and other consideration" when describing why a property transfer is included.
3. *Admit inexperience.* Inform the parties that the law is evolving in this area, and that there is always a chance that their mediated agreement, like any other mediated agreement, can be challenged. Encourage the parties to seek competent legal representation to give them advice, and build in a short period of time for pro se parties to seek advice on the agreement from specialists in this field.

Mediation offers an opportunity to end same-sex relationships in a healthy and more just way than the law can provide. It is important to consult a family law attorney who is experienced in this area when novel situations develop. The Stonewall Bar Association (stonewallbar.org) contains a searchable directory of GLBT and allied attorneys who are knowledgeable in this area and usually happy to help.



Christie L. Ayotte is a family and estate planning attorney in Decatur who specializes in LGBT legal issues. She is a registered neutral and currently serves as a guardian ad litem in DeKalb and Fulton counties. She earned her law degree from Emory University School of Law. She frequently speaks to corporate employee groups about legal issues facing same-sex families, from adoption to estate planning.

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THE SATISFIED CLIENT

by Larry Kimel

Too often attorneys overlook a real benefit of trial court mediation-the benefit of client satisfaction. How often do both parties leave the courtroom dissatisfied with a verdict that does not match with the outcome they expected? How many times are they unhappy with the costs or, perhaps angry about the brutal cross-examination they were subjected to? Someone has to be at fault for this travesty of justice. Take your pick - the Judge, the jury, the legal system or, too often, the attorneys. We have all heard the attorney jokes and felt the anger and frustration of the unsatisfied client.

Clients come into their attorney's office with righteous indignation. How dare someone treat them this way or say these things about them. They have a firm belief in the righteousness of their viewpoint and the total unrighteousness of the opponent. It is difficult for them to give any credence to the other story, much less to absorb and understand the many legal and emotional issues that need objective evaluation to determine what a good outcome would be. They are offended when others do not see the world as they do and even more so when their attorney attempts to explain the weakness of their case. Sometimes, they simply tune out when the attorney evaluates the case. Often they remember a different version of the advice given when they point the finger of blame.

John Gray's primary premise in "Men are from Mars, Women are from Venus" is that a wife does not want to be told the answer by her husband when she asks a question - she simply wants her husband to listen to her and to help her work through the problem. However, men have been

conditioned to make decisions and to solve problems. So the husband's immediate response is to give his solution. Rather than being relieved and satisfied, the wife feels unappreciated and becomes angry and frustrated-she needs to find her solution. Attorneys, like husbands, have become conditioned to give solutions rather than helping clients create find their own solutions. They become easy scapegoats when the result does not correspond with the client's expectation.

Many perceive that the greatest benefit that mediation provides is a settlement. However I believe the greatest benefit is the opportunity to sit together at a table in a safe environment. Each party then has the opportunity to discuss the issues and to begin to understand a judge or jury could see the case differently. A judge or jury might rule against them. Decision-making and negotiation becomes a joint effort with all the participants involved. It provides an opportunity to gather the information needed to make a good decision and to make an honest evaluation of the case. It is also a good time to work through the emotions that hinders the clients from evaluating the case objectively.

I believe the more involved the client is the greater the satisfaction. In business cases it is helpful to allow the clients to handle the final negotiations. That way they accept total responsibility for the settlement relieving the attorney of that responsibility.

"Shuttle diplomacy" also takes the client out of the process. It places the responsibility for settlement on the mediator. The mediator, in shuffling from room to room, has control over the flow and interpretation of the information. The parties' only respond to the mediator's spin on the information.

In legal matters, people need counselors that will guide them to good decisions, not someone to make decisions for them, especially if the client does not understand the rationale for the decision. Often they need mediators, not to make decisions, but to build a bridge over the troubled waters to bring greater understanding to the conflict. Ultimately, the greatest satisfaction comes when the client makes the decision.



Kimel became one of the first certified trial court mediators in North Carolina in 1992 and has served as a mediator in over 2500 civil trial cases and 500+ domestic cases. He currently lives on SSI where he enjoys mediating and working with the at-risk community to help them refine their decision-making abilities.



SPECIALIZED MEDIATION PRACTICE:

Finding a Niche

by Roger Mills

The law practice has become progressively more specialized with many lawyers having established fields of concentration. Concomitantly, many certified neutrals/mediators have established niche areas of concentration for their alternative dispute resolution practices. For instance, there are mediators who are particularly adept at resolving disputes in specified substantive areas such as: medical negligence, product liability, employment law, workers' compensation, domestic relations, contract/commercial law, to name a few.

Oftentimes, the mediator's niche practice was simply born of his or her area of concentration as a practicing attorney. That was certainly this author's experience as he was a medical negligence attorney who had first represented doctors and hospitals, and who subsequently switched sides to represent patients' rights. Since the handling of medical cases requires a fairly extensive knowledge of anatomy, physiology and general medicine, alternative dispute resolution of medical cases is quite a boutique practice.

The lawyers and insurance carriers involved in medical negligence mediations expect the mediator to have a fundamental understanding of medicine. When a case, however, involves particularly esoteric medical issues, the plaintiff and defense lawyers generally do a good job of educating the mediator through position papers submitted prior to the mediation.

Obviously then, a first way to establish a niche mediation practice is to follow the substantive area of law in which the mediator practiced. That is not to say, however, that a neutral cannot create a niche practice.

Whenever this author is asked to resolve a case in another state, he tries to research the nuances of that state's tort law and, in particular, its medical negligence

law. It would appear a neutral could similarly conduct extensive research into a practice area such as product liability, then begin offering his or her services in that area and subsequently develop a reputation for expertise in that specialized field of law.

There are excellent sources available to "read into" a particular area of the law. Firstly, authoritative texts or treatises have been authored in almost all major substantive areas. For instance, there will be a definitive treatise on the law of product liability in Georgia. Secondly, the internet provides an excellent research tool on principles of Georgia law in a particular field. Finally, a mediator seeking to establish a niche could attend ICLE seminars which almost always contain a presentation on recent developments in an area such as product liability.

Honestly, the litigants in the matter are oftentimes looking for the appropriate temperament in a mediator who has the patience and determination to lead the parties to an agreeable settlement. Sometimes, they will call upon a mediator whose skills in that regard are recognized even if the mediator has to be educated as to the substantive law involved. Nonetheless, many litigants in a specialized area seek out the mediator who has made that area a niche.

If you are a neutral seeking to find a niche in the increasingly specialized world of alternative dispute resolution, you will need to do your homework to become educated and proficient in a particular area unless you were specialized in that area as an attorney.

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MEDIATION BELOW THE GNAT LINE

by Rusty Gunn

The opening scene of Meredith Wilson’s classic musical, *The Music Man*, depicts a train car full of traveling salesmen, circa early 1912, traveling through the Midwest arguing about sales tactics and particularly about a scam artist calling himself “Professor Harold Hill” who sells the local rubes on buying musical instruments to start a boys’ band which he will organize and direct. All the salesmen agree he is hurting their shared reputations but one in particular harps incessantly that “He doesn’t know the territory!” Whether that criticism of Prof. Hill was relevant to the discussion in the play, it is certainly relevant to the practice of law and also to the effectiveness of mediation in resolving local legal disputes. Lawyers have long acknowledged that knowledge and experience in various legal specialties is important but it is likewise important that lawyers have experience in their local court system and knowledge concerning the local judges, lawyers, court personnel, businesses, and local culture in

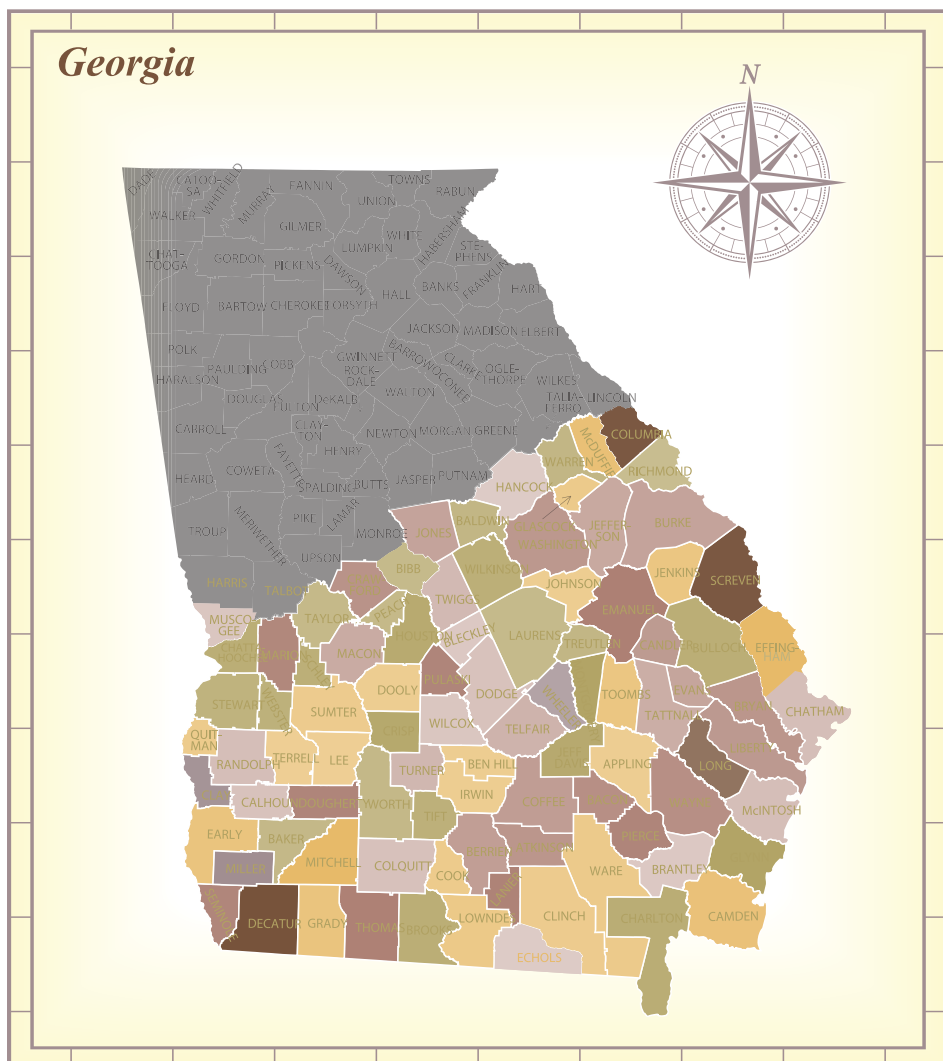
general “Ya gotta know the territory!” There are plenty of first-rate mediation services in our great metropolitan colossus to the North. They provide experienced and effective neutrals as well as comfortable and attractive surroundings. But, it is hereby submitted, the Middle and South regions of the State have litigants whose cases and disputes are just as complex, diverse and important as any that find their way into the metro Atlanta courts.

South Georgia ADR was founded and on the above postulation with the further belief that middle and south Georgia lawyers are of equal caliber to those in Atlanta, and the same goes for neutrals. There was a perceived need to form a full-service mediation company based in “the other Georgia” to provide more convenient access to first-rate neutrals who, in addition to possessing superior mediation skills, also have the local knowledge of the “territory” to make them more effective than their big-city counterparts.

An effort was made to recruit neutrals for the South Georgia ADR panel who were experienced in a wide range of mediation types and who also possessed the important qualities that make for good mediators: patience, ability to listen, creativity and the usual “people skills.”

As currently constituted, the South Georgia ADR panel is made up of lawyers and a few retired Judges from all over middle and South Georgia. The lawyers come from various practice backgrounds: plaintiff’s lawyers, defense lawyers, business/corporate lawyers, etc. We confine the panel to lawyers and judges because of the simple fact that most lawyers will not consider using anyone who is not a lawyer or (former) judge. The neutrals we use are from all over middle and South Georgia. They know the nuances and particular attributes of the various venues and can use that knowledge to help the litigants make intelligent, or at least informed, decisions.

As far as how our service operates, experience shows that most litigants wanting to schedule mediation have a particular neutral in mind and will call



and request that neutral by name. We do our best to honor that request based on the neutral's availability. Sometimes however, we get calls needing mediation "next Thursday" in a certain city, and this is when having a panel of neutrals is a great benefit. We are usually able to accommodate most requests but, as can be expected, the number of mediations assigned to a particular neutral is largely dependent on that neutral's professional "popularity."

In other cases, lawyers will want a mediator with experience in particular fields of law; e.g., medical malpractice. Our current panel has expertise in a very wide range of legal specialties. Where it becomes fun is when we get a request to mediate case involving unusual legal issues. (We were once asked to mediate a case where a prisoner filed a civil rights suit against a local government official for violation of the 13th Amendment [look it up].)

Because Georgia is, geographically, a large state, we try to accommodate lawyers and litigants in remote parts of the state. We let mediators set their own policies for billing travel time. Many will charge half rate for travel time in return for a hotel room and a meal. Mediations can be scheduled in our office in Macon or wherever the parties choose.

Legal billing rates in middle and South Georgia are, sadly, not nearly as impressive as those charged by most metro Atlanta lawyers and firms. The same is true in regards to billing rates for Atlanta-based mediation services. South Georgia ADR, therefore, tries to ensure that its hourly rates for mediators are likewise affordable and in line with those charged by neutrals in middle and South Georgia. In other words, not only are we more geographically convenient, we are also cheaper.

Like other full-service ADR companies, South Georgia ADR also offers arbitrations, early neutral evaluations and special master services but mediation constitutes most of our business by a very long shot. Many courts down here order all civil cases to mediation and others strongly encourage mediation. When mediation first became popular as a method to aid in the settlement of cases there was some feeling down here (and probably state-wide) that it might be a fad and would quickly go the way of shoulder pads in women's jackets and the Pet Rock. It is now apparent that mediation is a permanent feature of the legal landscape and is seen by almost all lawyers and judges as an effective way to bring the contentious process of litigation to an end – and that's a good thing.



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MEDIATION OR COLLABORATION:

How to Reach Our Destination?

by John A. Fiske

This brief article assumes both the mediation and collaborative law processes have value and offers some criteria for us to consider in helping clients answer that question. As usual, my answer always comes back to what the clients want (see www.mediate.com/fiske link to Useful Documents and then “A Basic Separation Agreement Checklist” and read the pesky question at the top: “What Do I Want?”).

The advantage of mediation is that it helps clients to communicate. If you like the simple definition of mediation that I heard at an early Academy of Family Mediators conference you will find it handy in helping clients answer the question. “All mediators do is give people a place to talk.” Never underestimate the important of that gift: there is no other place. Certainly that is not the central focus of collaborative law, which in the Massachusetts protocol begins with the couple hiring a coach and then each spouse has his or her, or his and his, or hers and hers, own lawyer, plus other experts as required. Many clients tell me, “We pay you \$425 an hour because we cannot talk about money without a third person present.” Those couples feel it is a great value to be able to sit together and talk and listen; the less the mediator says the better. There are times I say virtually nothing and at the end the couple says, “Thank you very much, we could not have reached this agreement without you.”

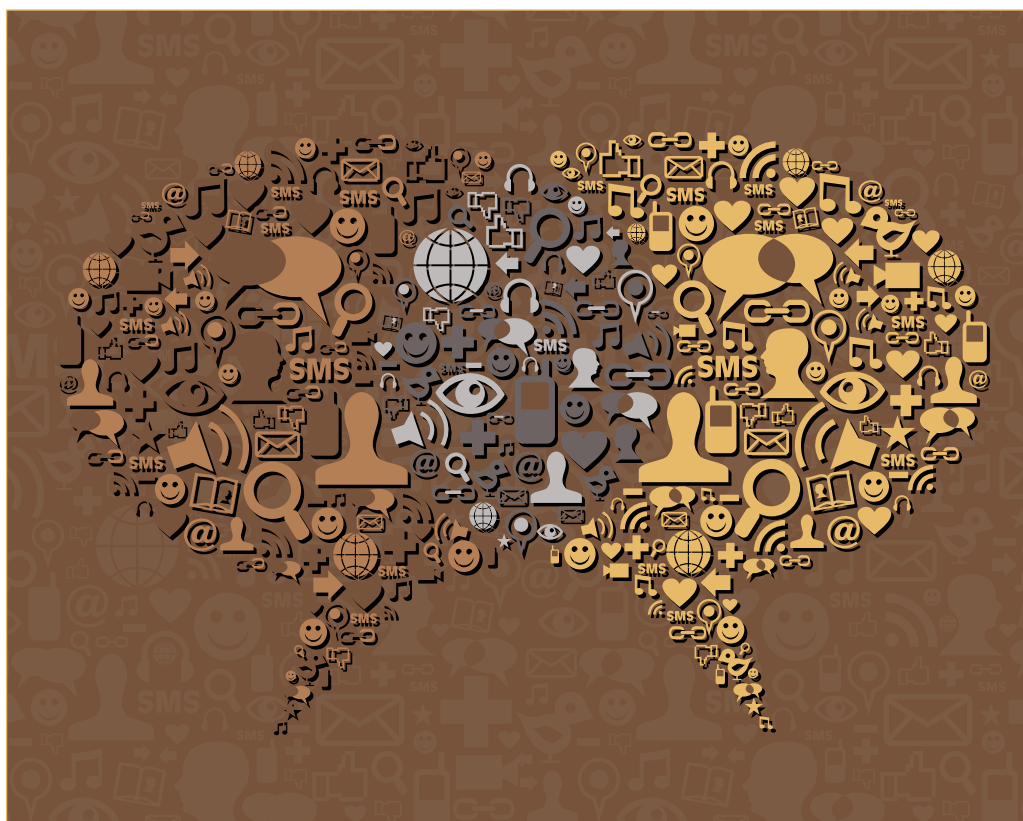
The advantage of collaborative law is that it provides each client legal support and advice throughout the negotiation process, always with a focus on achieving a mutually acceptable agreement without ever going to court. I hope my colleagues who are collaborative lawyers would agree with that.

The disadvantage of mediation is that the clients have to stick up for themselves and rely on the mediator to help them make informed

choices. They can of course consult with their own advisors throughout the process, but in many cases there is no one in their corner with them: they are alone.

The disadvantage of collaborative law is, for me, best expressed by Howard Irving who wrote about mediation decades before collaborative law was born. “A major difficulty of family law is that the problems brought by clients are frequently not primarily legal problems; they are deep human problems in which law is involved.” *Divorce Mediation*, Howard Irving, Personal Library Publishers (1989) p. in 1980. That wise observation extends to many of the complex or simple, beautiful or ugly, things that happen in your family law practice.

Now I turn to what happened yesterday. A young couple met with me for my free half hour to explore mediation. They also asked the question that is the title of this article. They had a couples therapist already. They had a therapist for their six year old daughter already. The presenting question was whether the father should move out of the house to reduce the tension which was upsetting their daughter (the school had taken away her lunch box



the day before because she was swinging it and banging it. I tried briefly to imagine anything more traumatic for a sensitive six year old than having a school official take away her lunch box).

He said, "I want to know the legal implications of my moving out before I do." So in my mediator role of providing legal information I told him the various legal implications and reminded him he could of course consult with his own legal advisor if he wanted one and I could help him find a "mediation friendly" lawyer (a term I am hearing more frequently as mediation becomes more prevalent). But the most important thing that happened was that the wife listened and when it became apparent that his real concern was that he would somehow diminish his role as father if he moved out she quickly and emphatically assured him that would never happen, that she wanted him fully involved and they could readily create a parenting plan in which he had as much or almost as much time with their daughter as she did. I believe he was more grateful to hear what she said than what I said, and that's the whole point right there I realize as I write this sentence.

I told them I had a hard time helping them choose between mediation and collaborative law because I am

a mediator and it seemed to me they already had enough experts in their lives and were using them very skillfully. I believe people can work hard to reach their destination in a very simple manner, and that mediation is uniquely designed for that purpose. Robert Frost wrote that taking a path makes all the difference. (It sure has for me, it created a career.)

My last point is about enforceability of separation agreements. The overloaded courts cannot enforce them for the most part, except as to prompt payment of financial obligations. No one can make either parent show up on time, or not drink, or drive with both hands on the wheel. On this theory, the more they are involved in the voluntary creation of their own agreements the more likely they are to proclaim at the end, "We made this ourselves." Maybe just maybe they will be more likely to comply with them, and the concept of "force" is thankfully irrelevant. After all, Aesop said gentle persuasion is better than force.

John A. Fiske, of counsel, Healy, Fiske, Richmond & Matthew, a Cambridge law firm concentrating in family law and mediation.

FROM THE EDITOR

by Bob Berlin, dma-adr@mindspring.com

To the readers:

I'd very much like to hear from you regarding your thoughts about this newsletter as it is now being published and your comments regarding any and all articles and or subject matter. What would you like to see in the future? Would you be interested in contributing an article?

No comments and or suggestions will be published without your consent. Let me hear from you today!



As president of The New Decision Management Associates, Inc., Robert A. "Bob" Berlin has primary responsibility for Mediation, Negotiation and Arbitration services as well as Lead Trainer. He is a graduate of the Walter F. George School of Law, Mercer University, receiving the LLB (J.D.) and was a senior partner in the law firm of Berlin and Hodges, P.C., and was a municipal court judge and in the Georgia House of Representatives.

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