



# DR Currents

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# FROM THE CHAIR

by Taylor Tapley Daly

**2**013 is rapidly coming to a close. The Section has sponsored, and members of the section have participated in, a number of significant CLE's this year and, with Bob Berlin's great work on editing our newsletter and with members generous contributions to those newsletters, the Section has provided not only good information to our members but good practice pointers as well. I hope we can keep up this involvement by Section members next year and expand upon it even further. I look forward to seeing many of you at our year end CLE on Dec. 13 at the State Bar. I think the program will be excellent.

My time as Chair is coming to an end shortly. I encourage members to send me a letter or an email about how the Section can do more in support of its members in 2014. I will both pass that along and help to implement that in my role next year as Past President.

I want to know how the section can help you. Please call me or email me at 404-322-6156 or [taylor.daly@nelsonmullins.com](mailto:taylor.daly@nelsonmullins.com). I look forward to hearing from you.



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# DISPUTE RESOLUTION — THE COLLABORATIVE WAY

by Nora Kalb Bushfield

**C**ollaborative Practice owes its name and method to Stu Webb, a Minnesota family law attorney who, in 1998, became weary of the angst created by litigation. After concluding a hotly contested divorce with one of his best friends, the friend no longer spoke with him. Stu created Collaborative Law as an alternative to the destructive acrimony families had to endure when they allowed the court to make life-changing decisions for them.

The primary goal of Collaborative Practice (sometimes referred to as “Collaborative Law”) is to resolve conflict without going to court. Collaborative Practice is a voluntary dispute resolution process in which parties settle issues without resorting to litigation. In this fashion, the parties and attorneys sign a collaborative participation agreement describing the nature and scope of the matter to be resolved. Among other stipulations, the agreement requires each party to be represented by a lawyer who is required to withdraw from the case if it becomes a contested court proceeding. The participation agreement is the single requirement that distinguishes a true collaborative case from any similar process. There is often confusion about exactly what a collaborative practice is, and if there is no withdrawal provision, then it is not a collaborative case.

Currently there are no licensing, certifications, or other credentials needed to practice collaborative law. Due to the unique characteristics of collaborative practice, however, state and local collaborative organizations are careful to warn parties not to engage in a case with professionals who have not been trained. Training helps professionals make the necessary paradigm shift in the way they practice that supports the dispute resolution goals and benefits for parties. The Participation Agreements usually require the parties to:

- Make complete, voluntary disclosures of all information which is relevant and material to the matter that must be decided. If they refuse the attorneys must then withdraw from the case.
- Agree to use good faith efforts in their negotiations to reach a mutually acceptable settlement.
- Negotiate a mutually acceptable resolution without having courts decide issues.
- Maintain open communication and information sharing.
- Create shared solutions acknowledging the highest priorities for all.

The parties may engage mental health professionals as Divorce Coaches, to support parties with issues related to their divorce, e.g. grief, and Child Specialists to assist parents in developing co-parenting plans. In addition, financial neutrals are available to help parties find equitable financial solutions that are in the best interests of the family as a whole. These professionals are engaged through separate retainers that provide for their withdrawal if the case becomes contested. The parties may jointly engage other experts as needed.

Stu Webb’s called his model “Collaborative Law”, and it was a “lawyer only” model, which did not contemplate the inclusion of other professionals except for referral when needed. Shortly thereafter, a group in California created the concept of “Collaborative Divorce”, which included attorneys, mental health and financial professionals, all working as a team. Some of the practitioners of this model, including some in Georgia, will not work with parties who are unwilling to retain a full team of professionals. Eventually, the label, “collaborative divorce,” became a generic term to describe collaborative practice in family law.



Unfortunately, the labels of “collaborative divorce” and “interdisciplinary team,” created a perception that the term “collaborative practice” meant that the parties could only use the collaborative process if they committed to retaining a full team of professionals. This perception has distorted the concept of the “collaborative process”, which could be employed without the necessity of a “full team” of interdisciplinary professionals. Trainers of collaborative practice, including some trainers in Georgia, only train in the use of the full team model. In addition, some trainers encouraged marketing the full team model as being lower in cost than litigation.

In 2000, the International Academy of Collaborative Professional (IACP - [www.collaborativepractice.com](http://www.collaborativepractice.com)) was created as the worldwide umbrella organization for Collaborative Practice (the name of the organization was changed from “collaborative law” to “collaborative practice”, due to the inclusion of the interdisciplinary professionals.) The IACP reports that Collaborative Practice is used in 17 countries throughout the world, as well as in every province in Canada and in most of the states in the US. Interested parties can use the IACP website to find professionals throughout the world that can provide collaborative services through their members.

IACP’s own statistics demonstrate that the use of a full team is the most expensive model, and parties who use a full team usually fall into the top 2% of family income. Excluding other models as an option for parties can be damaging to the overall perception of collaborative. When professionals and parties think that their only option is to retain a whole team of professionals to get a divorce, they will typically look for other options. This can result in families who could benefit from the collaborative process having to explore other options, e.g. litigation, because they believe that collaborative is beyond their economic reach.

The American Bar Association long ago acknowledged the legitimacy collaborative practice, and created a sub-committee as part of the Dispute Resolution Section. Members of the ABA who are interested in collaborative practice are encouraged to explore the information on the sub-committee web site.

There are a number of other practice groups throughout Georgia, e.g., the Collaborative Law Institute of Georgia (a statewide member organization, [www.collaborativepracticega.com](http://www.collaborativepracticega.com)), as well as practice groups throughout Georgia including, but not limited to the North Georgia Collaborative Law Network, [www.northgeorgiacollaborativelaw.com](http://www.northgeorgiacollaborativelaw.com), and Southern Crescent Collaborative Divorce Professionals, [www.mycollaborativedivorce.net](http://www.mycollaborativedivorce.net). Each group has their own format for collaborative practice in their community.

The Collaborative Law Center of Atlanta, Inc., (CLCA - [www.CollabAtlanta.com](http://www.CollabAtlanta.com)) is a practice group composed of professionals in the metropolitan Atlanta area. Professionals and parties can find and learn about collaborative practice and find collaborative professionals on the CLCA website. This practice group follows the philosophy that a first step in the process should be an assessment of the party’s needs. Based upon that assessment, inclusion of other professionals can be suggested, but these suggestions are tempered with the reality of the party’s financial situation, along with the requirement that the parties themselves make the decision on inclusion of other professionals.

Although collaborative practice was created for and grew as a process to be used in family conflict, there are a growing number of groups that train professionals in other civil practices, e.g., probate, contracts, etc. Conceivably any practice which seeks to use a dispute resolution process that allows parties to resolve conflict without litigation. The growth of civil collaborative practice has been extremely slow. The Global Collaborative Law Council, ([www.collaborativelaw.us](http://www.collaborativelaw.us)), appears to be the only organization dedicated to the training and development of civil practice in the US. Their comprehensive civil collaborative training is offered each year.

The IACP has standards of practice, training and trainers. A roster of those professionals who meet these standards can be found on the IACP website. The Collaborative Law Training Associates (CLTA - [www.CollabTrainer.com](http://www.CollabTrainer.com)), meet or exceed the IACP standards for training and trainers. Since 2004, CLTA has conducted more than 25 trainings around the country, including Georgia. The next CLTA training for attorneys, mental health professionals, financial neutrals and mediators is scheduled for April 18 and 19 in Atlanta, Georgia. This training is approved by the State Bar of Georgia for 13.5 CLE hours, including 1 ethics, 2 professional and 6 trial hours. In addition the Georgia Office on Dispute Resolution has approved this training for 14 continuing education (CE) credits. Detailed information about the CLTA training and trainers, including early bird registration can be found on the website.



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# AMERICAN ARBITRATION ASSOCIATION LAUNCHES NEW COMMERCIAL ARBITRATION RULES

By Linda L. Beyea, Vice President, American Arbitration Association

On Oct. 1, 2013, the American Arbitration Association (AAA®) launched its newly revised Commercial Arbitration Rules. Thousands of organizations across industry sectors look to the AAA and its 87 years of knowledge and experience to resolve a variety of disputes, including large and complex cases. Many of you are familiar with AAA, but for those who are not, a brief history.

AAA was founded in 1926 as a not-for-profit, public service organization committed to the resolution of disputes through the use of arbitration, mediation, conciliation, and other voluntary procedures. In 2012 over 250,000 cases were filed with AAA in a full range of matters including commercial, construction, labor, employment, insurance, international and claims program disputes. Private parties as well as state and federal governments rely on AAA's expertise to handle challenging disputes. For example, AAA is now managing the mediation program for Storm Sandy claims in New York and New Jersey.

The AAA's Commercial Arbitration Rules are a leading benchmark in the arbitration process. The newly revised rules incorporate a number of features which respond to users' stated preferences for a more streamlined, cost-effective and tightly-managed process. The most significant changes follow:

- A mediation step is now included in each case where a claim or counterclaim exceeds \$75,000, with any party having the right to unilaterally opt out. Mediation is done concurrently with arbitration unless the parties agree it will precede arbitration. Mediation is a highly effective way to resolve disputes, and AAA has an experienced panel of mediators around the country.
- The rules contain a new section governing the Preliminary Hearing (P section). Preliminary hearings are highly effective in helping the arbitrators and parties create a roadmap for the proceedings with a focus on maximizing fairness, efficiency and economy. The section includes a checklist of 19 items that depending upon the size, subject matter, and complexity of the dispute may be addressed during the preliminary hearing subject to the discretion of the arbitrator. Topics include discussion of threshold issues, more detailed statement of claims, document exchange, identification of witnesses, date, time,

and place of hearings, pre-hearing and post-hearing submissions, and form of award.

- A new rule has been included for dispositive motions. The rule grants the arbitrator the authority to make rulings on a dispositive motion provided the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case.
- A rule on emergency measures of protection enables the parties to apply for emergency interim relief before an arbitrator that will be appointed within 24 hours of the AAA's receipt of the request. In prior versions of the Commercial rules, the rules for Emergency Measures of Protection were optional and had to be agreed to either post dispute or by specific reference in the parties' arbitration agreement.
- To address issues and increasing concerns where parties refuse to deposit their share of arbitrator compensation or administrative charges, a new rule has been added that authorizes arbitrators to take specific measures related to non-payment.
- Arbitrators may address objectionable and abusive conduct by a party pursuant to a new rule on sanctions.

Parties choose arbitration as a dispute resolution method for many reasons, chief among them the expectation of efficiency and economy. The amended Commercial Arbitration Rules incorporate many features designed to give parties, arbitrators and AAA the tools to deliver a fair, efficient and economical process.

To view the Commercial Arbitration Rules, Summary of Changes, and other resources visit AAA's website at [www.adr.org](http://www.adr.org).



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# ROADBLOCKS TO TRANSFORMATIVE MEDIATION IN CUSTODY DISPUTES

by Susan A. Hurst

I have been a family law litigator and mediator for more than 20 years. Since I frequently serve as a Guardian ad Litem as well, I am often hired to mediate custody disputes and my litigation practice has an emphasis on cases with contested custody or parenting issues.

Many of us who have become mediators have done so to use our skills in an arena where the participants are seeking an amicable resolution. We do so with the belief that an amicable resolution is better for families than a judicial resolution. We believe that alternative dispute resolution reduces conflict and thus is better for the family participants than the battlefield of the courtroom. In mediation sessions we extol the benefits of a result achieved through self-determination, rather than one imposed by a third party.

Most of us have experienced the exuberance following the conclusion of a “perfect mediation.” Conversely, many of us know the confusion and frustration that accompanies the end of a mediation gone sour. Most frequently, though, mediations conclude with a feeling of satisfaction. A settlement or partial settlement of the issues is reached, in the time allotted, and with the financial resources available. Compromises have been reached, litigation has been averted, and the pie has been divided.

If we subscribe to the belief (and I do) that the mere resolution of conflict is usually good for the family system, then the satisfactory mediation is a “good enough” outcome. But for those of us who still harbor the idealistic notion that mediation has the power to transform, and not just resolve, and for those of us who have participated in the transformation experience, the satisfactory mediation isn’t really sufficient. In this article I will address some of the roadblocks that prevent mediation from becoming transformative for the participants.<sup>1</sup> I will discuss four roadblocks that I frequently see in custody cases, although they are applicable to other mediations as well.

## The Litigation Story.

When an event happens, the people involved interpret the experience to give it personal meaning. Facts merge with their interpretation to become the story that each person will tell and retell about the experience, thereby forging their own separate past. This creation becomes that person’s “Truth.”

We lawyers are storytellers. The best and most entertaining trial lawyers weave and spin before a

spellbound jury. By the time of trial, the story we create has a life of its own, far outlasting the trial itself. But the creation of that story begins when the clients walk into our office. They start by telling us their truths and we immediately start helping them fashion and shape those truths into a story. Our storytelling ability is perhaps the most powerful tool we wield.

In *Life of Pi*, by Yann Martel, the author illustrates the great capacity of the human mind to tell and believe the most unbelievable stories, making them a part of reality. That marvelous book tells the tale of a young boy who transforms, through storytelling, the mundane horrors of four shipwreck survivors adrift on the sea into an equally harrowing, but heroic and magical tale of tigers and horses, meerkats and carnivorous islands. In just this way we lawyers help the client transform a tale of ordinary, unhappy people into a tale of nobles and villains, martyrs and miscreants. By the time of final divorce, the client has told the story we have helped create enough times for that story to become the client’s reality.



A mediator has the unenviable task of unraveling the litigation story. The mediator must help one parent tell a story about the other parent that neither focuses on the inflammatory nor exudes the outrageous. The mediator seeking to help parents transform their custody conflict instead helps the parents tell a story that brings resolution, conciliation, and even forgiveness to the process. And when the litigation story is full of bile and recriminations, the mediator's task looms large. The more entrenched the parents are in destructive litigation stories, the more significant the roadblock to transformation.

## Competition in Parenting and Litigation

In the last few years in my mediation and litigation practices, I have often heard one spouse accuse the other of "competitive parenting." This phrase is typically used to describe a parent who engages in parenting tasks in a manner designed to compete for the children's adulation or designed to somehow show the competitive parent in a superior light to the community. For example, one mother, in dismay, told stories of her estranged husband bringing a more popular snack to the soccer game than the one she had packed, or making sure he was the one at the end of the lane at a swim meet, ready to be the first to pull out the child and give congratulations. Sometimes these stories have a basis in reality. Sometimes they are just a fearful projection by a mother clinging, for dear life, to her role as primary custodian.

There is no question, however, that litigation breeds competition. The nature of the beast influences its participants. Litigators are competitive and many clients choose counsel based on myths told of the number of "wins" their lawyer champion has garnered. But those of us who practice in the field of family law know that, particularly in the custody arena, there are few "winners." Resolutions, whether achieved by settlement or imposed by judicial fiat, most often involve compromises from the positions advanced by the litigants.

Still, in order to achieve the best result, parents are told to make sure they are involved in school and activities, that they attend doctor and dentist appointments, that they do homework with their children, know all their children's likes and dislikes, and know the names of

their friends. If the marital roles were more differentiated during the marriage, this abrupt change to shared roles can look and feel competitive. If handled correctly, with good communication and co-parenting, the children may actually benefit from the increased participation of both of their parents. But if the parents are in conflict, the shared roles just add an arena in which to compete and squabble. The ill feelings generated in the latter scenario usually bleed over to the children and make their experience of the divorce even more hurtful.

Mediations that allow parties to stay entrenched in their beliefs about the other parent foster such competition. Custody results based on a competitive style of parenting may involve compromises that are designed merely to insure that one party doesn't win, while ignoring the best interests of the children. For instance, dividing the final decision-making of health, education, extracurricular activities and religion so that each parent receives two areas may make a competitive parent feel satisfied that they have not lost. But if the parents remain in competition and conflict, then they will continually argue over decision-making, perhaps using their respective powers to retaliate against the other parent. The resolution at mediation may be "satisfactory" in that litigation has ended and a parenting plan has been devised, but the conflict has not been transformed and the parents may well be back in litigation at a later date with enforcement or modification issues on the table.

Mediators can begin to discourage competition in parenting by discouraging competition in the resolution at mediation. Discussions should center around the practicalities of the proposed parenting arrangements and whether they can be executed on an ongoing basis in such a way as to promote the children's interest. Negotiations should refrain from focusing on each party getting "equal" time or "equal" decision-making ability. Reframing the discussion so as to focus on each parent's positive contributions and the needs of the children can help overcome the roadblock of competition in parenting and litigation style.

## The "Truth".

Many divorcing parents think it critical to be able to publicly tell the "truth" about their lives so that their experiences and their pain about their marriage, their spouse, their co-parent, will be known to the world. As family law practitioners, we quickly learn that each parent has their own "truth" to tell, and the "truths" often have little in common with each other. In her article, *Creating Empathy in Mediation: Critical Thinking is Not Enough*,<sup>2</sup> Raytheon M. Rawls, Esq. writes that: "Critical thinking or methodological doubt is the systematic, disciplined, and conscious attempt to doubt everything." In this practice, the critical thinker



doubts all hypotheses, inferences, and premises, and actively attempts to find weaknesses and contradictions. This is done regardless of how attractive the hypothesis, inference or premise might be to the critical thinker.

Unfortunately, critical thinking, sometimes called methodological doubt, is a roadblock to transformative mediation; it is a way for each parent to espouse and protect their view of their truth.

Methodological belief, its obverse, can create transformation. The concept of methodological belief just suggests that one spend as just as much time and effort attempting to believe an idea as one spends trying to criticize it. In mediation, we try to accomplish this with “reality checking.” We do this by asking questions intended to get a parent to question their version of their truth and to suggest alternative truths. The goal is to try and get the parents to believe something they do not initially see as true. The purpose is to broaden their version of truth by broadening their way of seeing. And when the separate “truths” become so broad as to encompass each other, all parties become transformed.

Encouraging mediation participants to try to believe rather than criticize propositions is something Rawls calls “the believing game.” What a fine idea; getting parents to “play” the believing game about each other may encourage them to see solutions to the conflicts in the case. It may also help them transform their view of each other as parents and thus transform the mediation.

### Time: The Fourth Roadblock.

Court annexed mediations are often set for about three hours. Many participants expect that they can settle their case in few hours (after all, what’s so hard, right?) and so even when the mediation is conducted by agreement, it may be set for only a half a day. In reality, it usually takes at least an hour with each side just to fully explore the issues and positions that are the starting points of the mediation, making it difficult to settle even a fairly simple case in the time constraints allotted.

Conversely, mediations sometimes end in the dead of the night after a protracted and exhausting day of negotiation. These lengthy mediations often end with dissatisfaction, since fatigue may induce intractability. Even if issues are “settled,” the tired and fatigued client may repudiate the agreement the next day.

Yet, transformation is most likely to occur when issues are fully explored on both sides, and both parties feel that their concerns have been fully addressed. Thus it is difficult to accomplish in a short time frame. Positions that are entrenched take time to yield. Stories take time to unravel and “truths” take time to convert. Sadly, in an effort to accomplish a definitive result, we usually bow to the

constraints of time and finances, and hurriedly check off the list of issues, compromising and settling as we go. At the end of the day we may have resolution, but alas, it is merely satisfactory.

Family lawyers who also value transformative mediation are invaluable to achieving a better process. They understand that multiple sessions may be necessary to accomplish more than just mere resolution. They also recognize that a resolution that leaves the parents fulfilled may prevent future litigation. Parents who are pleased with the result and the process used to achieve the result are invested in making the agreements they created work. They may still be grieving the loss of their marriage, but they may also recognize that they have reached the beginning of a new future. When both parents have this attitude at the end of the mediation, they may seek amicable paths to resolution of the inevitable issues that occur in that future, rather than resorting to litigated modifications.

Mediation is an investment the parties make in the future. It is an investment of money, energy, emotions and time. When that investment pays off in a settlement, the parties avoid litigation. When it goes farther and transforms the parents from adversaries and puts them on a path toward being effective co-parents, the results can serve the family members throughout the children’s minority and beyond. Such a payoff is worth spending the time necessary to accomplish more than mere settlement.

We all know that there are many roadblocks to transformation, not just four, and this article is only meant to briefly address some of the typical ones I see in my practice. More importantly, these thoughts are meant to serve as a reminder that we should not settle for just a “satisfactory” mediation; we should instead try for something better, for transformation, for the sake of the children, the parents, the lawyers and, in the end, for ourselves.



Susan Hurst, is an AV rated family law attorney practicing in the Atlanta area. She has been a registered mediator for more than 20 years and has been listed as a Best Lawyer in America for Family Mediation since 2008. She serves often as a Guardian ad Litem in contested custody cases in Fulton, Cobb, Dekalb and Forsyth counties. She is also certified in Collaborative Practice. She can be contacted at: *Susan A. Hurst P.C., Bogart, Hurst & Ference,, 6400 Powers Ferry Rd. Ste. 220, Atlanta, GA 30339.*

#### (Endnotes)

- 1 The participants being not just the parties, but also the mediator and lawyers if they are present.
- 2 Quoting and adapting Peter Elbow, in a speech delivered at the Reninger Lecture at the University of Northern Iowa in April 1983, reprinted in *Family Dispute Resolution in the New Millennium: Mileposts, Road Signs and Roadapples*, Family Mediation Association of Georgia, October 1998



# THE NEW NEUTRAL – FAMILY CONFLICT RESOLUTION SPECIALIST

by Kristen Jocums

**T**here is a HUGE disconnect for families in contested domestic cases which are resolved through traditional litigation. It is a disconnect at the most basic of levels – the difference between the adversarial legal system and the need for families to form new, productive relationships designed to carry them through their new family structure. The disconnection stems from the diametrically opposed nature of litigation – to prove the other side wrong and yourself right, and the need for children and parents to focus on the positives in their ongoing relationships. There is simply no way, for instance, to balance the advice of a divorce attorney to “document everything she does wrong” with the advice of mental health professionals to “forgive and move on.”

How does a family negotiate this minefield, especially in complex cases that may take years to resolve? One answer is to associate with a competent Family Conflict Resolution Specialist (“FCR”). An FCR is an individual trained in multiple skill sets surrounding one body of knowledge: family conflict. In short, it is someone who can step into any phase of the conflict and help guide the family to the best possible outcome for that family.

The FCR is trained in 3 major areas: mediation, parent coordination and best interest standards of family law (often gained from being a guardian ad litem or custody evaluator). Good FCRs tend to be sensitive attorneys or matter-of-fact mental health professionals. And by that definition alone, you can get the picture that it is not easy to find the right FCR.

The focus of the FCR is to identify possible “dysfunction” in a particular family, recognize the best practices for addressing that “dysfunction,” and to help establish family-specific systems to promote future successful outcomes. Of course, there are cases where there is no dysfunction to work through. These cases are then guided by principles of “good divorce” as the new family structure is designed.

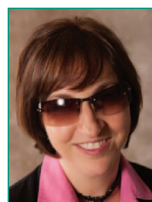
A trained FCR can have an impact in the life of a family at any phase of problem resolution. Whether the FCR’s intervention comes during a pre-decree phase through a custody recommendation, pre- or post-divorce assistance with parenting dynamics through parent coordination, or targeted agreement writing following successful mediation, the FCR pulls on the same body

of knowledge to assist families with conflict. That body includes family systems, dynamics of coercion and control, personality disorders, legal systems, and interventions of all types (i.e., legal, psychological, medical, and systems.).

This is not to say, however, that an FCR assumes dual roles in the provision of services. Because of the differences in role and confidentiality requirements for custody evaluators, GALs, PCs and mediators, an FCR may only assume targeted duties with any one family (although it *may* be possible for a GAL to move into the role of PC). However, there is no doubt that the skills used in mediation are a necessary part of any specific role an FCR assumes. Whether the FCR is acting solely as a neutral or is a recommender to the court for future arrangements, the FCR facilitates a new working arrangement based on individual family dynamics. A large part of successful facilitation is getting the parties to participate in the resolution process and take ownership over the outcomes.

Attorneys sometimes feel threatened by the concept of FCRs. The fear seems to come from a belief that an FCR will take business away from them. This is not the case. FCRs bring a whole new skill set to the process of legally adjusting family structure. When a tricky financial issue comes up in a case, lawyers get a financial expert involved. When property must be evaluated, an appraiser is called. FCRs act in a very similar way – with specialty in the identification and management of difficulties in divorce and custody matters. These skills can often benefit the attorney by streamlining client management, reducing animosity and bringing the parties together for beneficial resolution.

The common thread in whatever particular role the FCR assumes, then is the knowledge of family law, family dynamics and human psychology. When an FCR is grounded in these subject matters, family focused results flow from whichever means of conflict resolution is employed.



*Kristen Jocums is a mediator, parent coordinator and guardian ad litem. Her credentials include 1999 Utah Young Lawyer of the Year and mother of two amazing and talented children. She is the founder of Peaceful Family Solutions, LLC, a firm that specializes in alternatives to litigation for Family Conflict Resolution.*

# WHAT I LEARNED ON THE CAMPAIGN TRAIL ABOUT THE POWER AND PROMISE OF MEDIATION

by Victoria Pynchon

probably looked pretty disheveled and blown out from the heat when, shortly after noon in mid-October, I knocked on apartment 4D's weather beaten door in Las Vegas, Nev.. Along with hundreds of other lawyers, I was there to "get out the vote" in '08.

A gray-haired 60-something woman in a faded housecoat opened the door, an African-American boy of 9 or 10 clinging to her side. She glanced at my campaign button and snapped, "I'm GOP, voting for McCain." But she didn't shut the door.

I was poised to wish her candidate "good luck" when she said "my eldest son keeps trying to talk me into voting for your guy," adding, "this is my foster son." "Your guy scares me," she offered in a whisper as if someone other than me or her kid might be listening.

"Are you worried about national security," I asked, just to keep the door open and the conversation going like any good mediator would. It was a random question but one meant to reveal the interests beneath her position. Her needs, desires, and, values. Her fears.



"No, no," she chuckled, "Who would bomb Vegas? I just think he must hate America." I'm nodding as if in agreement, searching for the right next question, wondering whether she's responding to the Jeremiah Wright controversy, but she seamlessly moves on to health care and education, confiding that she'd grown up in the foster system before adding, "That Michelle seems like a radical to me."

I make a quick calculation not to probe the darker issues – hatred or radicalism. Like the mediator I am, I pick a topic I think we might have in common.

"I'm concerned about health care myself," I say, mentioning a friend whose employer went out of business, stripping him of health care benefits just as he was about to have surgery. "Just what Obama's mother had to worry about when she was dying of cancer," I add.

That's enough for "Sheila" to hold out her hand and introduce herself. "Sheila, Vickie," hands squeezed and released. Physical contact made, stimulating that natural trust building hormone oxytocin. I'm leaning on the doorframe now as Sheila stands on the other side of the entryway, arms akimbo, telling me about the difficulties faced by foster children and the reason she had one of her own, nodding her head back at her foster son.

"Lemar," she said, smiling.

"Barack had it slightly better than you," I acknowledged. "He had a mother."

"And grandparents," she quickly added. "That's a family. He had a family. It makes all the difference in the world."

From there on we just chatted. About Sheila's childhood and her alcoholic parents. About her father's refusal to tell the foster agency how her grandparents might be found. In response, I related my own tales of hardship, how my mom had to work for less than minimum wage selling hosiery and hand bags back when they didn't let women engage in the more lucrative business of selling shoes.

We were talking in the way I'd been taught to build trust with litigants and to help them do the same with one another. Starting small. Revealing just a little, encouraging

a reciprocal confidence, permitting the parties to take baby steps toward trust and eventually resolution.

“I was lucky,” I told Sheila. “My dad came back into my life when I was in high school. He went to law school at 38 and became a lawyer at 42 when I was in the 10th.” My pride was showing so I took a moment to praise America, the country of second chances. The man on my campaign button may “hate America” but the woman at Sheila’s door did not. And then, for no reason I can put my finger on I added my own second chances to the conversation - 15 sober years.

And with that, all wariness toward strangers evaporated. Sheila broke into a toothy grin, saying “I’m a friend of Lois” -- the politely “anonymous” way to say she was Alanon.

“Darn you!” she added, “now I’m going to change my mind again and vote for your guy.”

But by the time Sheila got around to changing her vote, I’d nearly forgotten what had brought me to her door. I’d already taken off my campaign worker hat and put on my apron. We’d become two women talking over the fence after hanging our laundry out to dry. We connected. We had personal history in common with one another and with my candidate, the guy who wasn’t an alcoholic but who had publicly acknowledged he couldn’t stop smoking.

You can’t make these moments up but you can’t make them happen either. I’d had more doors slammed in my face than warm conversations on the campaign trail. I’d even had people – one or two of them big burly men –

literally chase me down suburban streets shouting at me for destroying the fabric of American life.

But conversations like the one I had with Sheila were not uncommon either. Another favorite memory is my brief encounter with the college student who had a McCain sticker on his Ram truck.

“I’m voting for Obama,” he’d confided, “because I don’t like what McCain says about the gays.” Hmm, I remember thinking, this kid does not look gay.

“Why?” I asked “do you care?” to which he replied, “because my mothers are gay.” I was standing in a K-Mart parking lot in Henderson, Nev. in the midst of a massive cultural revolution and it wouldn’t have occurred to me in a million years that this cowboy had two mothers. “Why” being the mediators stock in trade.

These experiences on the campaign trail reminded me why I decided to give up the far more lucrative practice of law to help others find a way to resolve their conflicts without exacerbating it with the additional harm of litigation. They also reminded me that I did my most effective work when I was not trying to change anyone’s mind about anything but rather to to make it safe to make their own minds up themselves.

More deeply, my conversation with Sheila and others like her reminded me of what a few old 12-step geezers said early on as they poked me in the chest with stubby fore-fingers – that I was now required to commit to my goals with all my heart while at the same time giving the result up to the force my father always called “things as they are.”

Things as they are giveth and things as they are taketh away. Blessed be things as they are.

I don’t know if Sheila voted for my candidate or not and frankly I didn’t and don’t care. Whether I’m mediating a commercial dispute or helping a family decide whether to put mom in a nursing home, I will always make it my business to hold open the space for transformation. Because, for me, mediation is a spiritual practice ever reminding me that we all have the potential, lurking just beneath the surface, to permit conflict to change us.



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# THE BARRISTER'S TALE

## (WHERE IS THE LAWYER?)

by Rev. Fred Faubucker

**M**any years ago in a far away land a wise King, concerned about the crowd of peasants wanting his judgments, appointed a young man to help the commoners and represent them when they came before his Court. He wanted the barrister to be knowledgeable of the law and unfailing in his representation of and obligation to the common man and the King. At his commissioning, the King commanded the young man “to help them solve their problems, using the most effective and least expensive methods, and only as a last resort, bring them to Court.” Foremost, he said, “Your success determines the fate of my Court and the future of our kingdom.”

The young barrister, humbled by his task, set out to meet the citizens and tell them about the King’s command. He went into the marketplace and talked to the shopkeepers. He stopped the ox-driven carts and talked to the farmers, telling them the news. He even held classes under the old oak tree at the edge of town. At first, the people were suspicious – they listened and watched, but didn’t say much. Finally, someone in the village had a problem with his neighbor and needed to ask the King for a solution. He summoned the counselor.

The barrister listened carefully and asked many questions about the circumstances. He told the man about the law and explained how it worked. He drew word-pictures of what to expect if he went before the King, and he suggested alternative methods for resolving his difficulty. The peasant followed his advice, told his friends and soon the number of peasants appearing before the King declined. Since the King had told the young man that he could charge a small fee for his services, he explained how it was set, what it covered, and they discussed ways it could be paid.

Like all small towns, word traveled fast. Soon the villagers were coming to see the young man, telling their stories and asking for advice and representation. The peasants learned that many problems could be settled without having to go before the King. Satisfied townspeople brought him more clients and soon he was busy everyday. He was making more money than he had ever dreamed.

The barrister liked his work and he particularly liked the way the people looked up to him and sought his counsel. Whenever he traveled the village roads,

the blacksmiths, basket weavers, chimney sweeps, and scullery maidens waved at him. Children danced and cheered as he passed. His business was blooming like a field in early springtime.

As the years passed, the counselor looked forward to the days spent in the king’s Court, on certain occasions, even the King asked for his advice. The barrister swapped stories with the nobles about hunting game in the forest and fishing along the riverbank. Sometimes, and out of earshot of the King, the nobles kidded the barrister about his clients and told him how lazy and dishonest the peasants were: how they had to be cajoled and forced to work and pay their taxes. “A worthless lot, they are” one Lord said.

The young man reasoned that he must dress like the Lords and act more like a person with an important position. He bought fine satin clothes and hired a coachman for his shiny new carriage drawn by a snow-white stallion. He thought, “Now, I look as important as I am. And, it’s all mine.”

Word of his successes spread to the countryside and the farmers began to come. Everywhere he went there were more people to see, problems to solve, conflicts to settle and tears to wipe. By this time, he was an experienced barrister who had heard all the stories and all the problems. He was convinced that he now had all the answers. The lawyer thought to himself, “I do not need to spend my valuable time with each and every person. The King makes quick decision, why should I spend so much time coaching and representing them?”

He employed an assistant to talk to the clients, get the information, check the written law of the land, and draw up the Court petitions. The peasants were told how much they owed and when to report before the King. Lessons on citizenship and how to save money by solving their own difficulties no longer happened. More and more villagers headed for the King’s Court and less and less time was spent on advice and counsel.

When especially scruffy peasants appeared at this door, the Counselor would think, “Why can’t these people live their lives in such a way that they stay out of trouble? Peasant problems and conflicts are consuming all of my time. Why can’t they solve their own problems and leave me alone?”

Dressed in his elegant clothes, hunting and fishing with noblemen, the aging barrister began to see himself as a member of royalty. Only the King's Court counted, judgments of the King were preferred and solicited. Any other resolution was viewed with suspicion.

Returning to his country estate, exhausted after a particularly long and hard day in Court, he sought refuge in a bottle of wine. Falling asleep, he dreamed that a large, muscle bound, hairy, and sweaty blacksmith, in a panic, knocked on his polished mahogany door. His beautiful daughter had been taken by the landlord, in lieu of unpaid taxes. The man was shouting, "Help me! You must go before the King!"

The barrister became furious that an ignorant, worthless peasant would have the audacity to wake him in the middle of the night. He began shouting. "Get out! Do you really expect me to talk with your landlord or go to the King? You broke the law. What do you expect; someone to hold your hand, show you how to solve your own problem?" The Lawyer awakened from his own shrieking.

After a long while, he dropped into a fitful and restless sleep. This time he dreamed he was standing in the King's Court, crowded with rowdy commoners on one side and fashionably dressed noblemen on the other. Each group was tugging at him, taunting him with demand, accusations, and disparaging remarks. The King was standing in front, scowling, pointing, and shaking his finger.

Frightened, the barrister cried out, "Why? What have I done?" He was caught between two opposing forces; each with its own sense of justice.

Wet with perspiration, he stated to run from the Court, the King, and the shouting crowd. He stopped suddenly when he came face to face with his own image – the image of the young man, once commissioned by the King.

Looking into his own eyes, he cried, "What happened? I am a good lawyer. I served the King. What am I to do now?"

Even with the roar of the shouting commoners and noblemen, the barrister heard his younger image whisper, "What are you to do? Your answers lie in your own questions?"

As he awoke the opened his eyes, he heard the King's charge, perhaps for the first time:

"You are to help them solve their problems using the most effective and least expensive method, and only as a last resort, bring them to my Court. Your success determines the fate of my Court and the future of our kingdom!"

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