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# **PART I**

## **Introduction to Divorce and Family Mediation**



## CHAPTER 1

# The Evolution of Divorce and Family Mediation

### *An Overview*

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The field of family and divorce mediation has developed from the juncture of law, counseling, and social work, as the course of family relationships has increasingly become a matter of private decision. In this chapter the editors of the book lay the foundation for subsequent material by providing an overview of the origins, evolution, theory, emerging models of practice, and critical issues facing the field.

Creating a family relationship and ending it have recently evolved from strict statutory requirements and judicial scrutiny to more private choice (Mnookin, 1985). As the state allows individuals more choice in creating and ending domestic relationships, the potential use of mediation increases as a means to facilitate decisions about parenting, financial support, and the division of acquired property.

Making divorce easier legally does not make it easier emotionally. Divorce entwines legal considerations with emotional dynamics; family dissolution is a matter of the heart as well as the law (Gold, 1992). The field of mediation is unique in its recognition of both the emotional and legal dimensions of family dissolution. The practice of mediation has matured into a new profession to meet the needs of individuals ending or restructuring a family (Folberg, 2003). This chapter examines the evolution of family and divorce mediation, defines

and distinguishes the practice from other professional services, provides an overview of several models of practice, and outlines some of the critical issues facing the continued development of the field.

### A BRIEF HISTORY

The increase in, and growing acceptance of, divorce in our society has led to sweeping changes in the substantive law of divorce, the most significant being the adoption of no-fault grounds for divorce. All states now provide some form of no-fault divorce (Ellman, Kurtz, & Scott, 1998), which shifts the responsibility for determining whether or not a divorce is warranted from the court to the parties involved. Other substantive legal changes include legislative provisions for shared parenting and joint custody, as well as the requirement in some states that parents submit parenting plans for how responsibility for children will be allocated. Alimony based on fault and entitlement has given way to financial arrangements based on need and ability to pay. Rigid rules of property division have been replaced in many states by considerations of equity and fairness based on the unique circumstances of the parties.

In addition to these substantive legal reforms are changes in the procedural aspects of divorce. Traditional divorce embodied adversarial norms intended to minimize direct communication and maximize third-party decision making. Divorce actions were initiated by a lawsuit naming a plaintiff and a defendant, and settlement negotiations were conducted under the threat of a trial that only reinforced the competitive underpinnings of the “winner-takes-all” mentality. In the early 1970s a handful of attorneys took to heart the emerging no-fault divorce philosophy and began offering “nonadversarial legal services” (Elson, 1988; Folberg, 1983). These attorneys risked bar association sanctions by meeting with both spouses to help settle financial, property, and child custody issues (Oregon State Bar Ethics Opinion 488, July 1983, *In re* Folberg). The concept of a neutral attorney set the stage for other members of the legal profession to promote the principles of mediation in divorce-related matters.

About this same time, mental health professionals began offering new options for divorcing family members. Historically, divorce was viewed by mental health professionals as lying outside the domain of psychotherapy. The psychodynamic model, with its focus on an individual’s unconscious conflicts and intrapsychic pathology, did not allow couples in conflict to be treated together in a clinical setting. The more traditional schools of therapy (e.g., psychoanalytic, Adlerian, Jungian, Eriksonian) did not direct themselves to the psychological and emotional issues of the divorcing family. These practitioners saw divorce solely as a legal process that begins at the point of separation (Milne, 1986).

As more therapists began to identify themselves as divorce counselors specializing in services directed toward the mental health concerns of the divorcing family, they created therapeutic interventions that combined an insight approach with the action-oriented focus of the behaviorists. Divorcing spouses enlisted the help of clinicians in an attempt to resolve conflicts to effect a satisfactory postdivorce adjustment. Out of these efforts emerged a body of theory that addressed the emotional–psychological aspects of divorce (Federico, 1979; Brown, 1976; Kessler, 1975; Weiss, 1975; Wiseman, 1975; Bohannon, 1970). This divorce theory moved professionals from the one-dimensional view of divorce as a legal process to a more integrated view of divorce as a multidimensional process involving both legal and psychological matters (Kaslow, 1979–1980). Some mental health professionals began offering mediation as a means of helping the divorcing family with both the psychological dissolution of the marriage and with working out a contractual agreement on parenting responsibilities, property division, and finances (Kelly, 1983, 1995).

California first established court-connected conciliation services in 1939. The initial focus of these services was to provide marriage counseling aimed at reconciliation (Folberg & Milne, 1988). Conciliation court personnel were probably the first to offer mediation services, as the focus of conciliation shifted from reconciliation to divorce counseling and custody mediation (Brown, 1982). In 1980 California became the first state to mandate all parents with custody or visitation disputes to participate in family mediation prior to a court hearing. Disputants could choose to use either court-based or private mediators (see Ricci, Chapter 18, this volume). Most states today have statutes and court policies governing family mediation and selected jurisdictions in at least 38 states mandate mediation when there are disputes over custody or visitation (Tondo, Coronel, & Drucker, 2001).

The first private-sector family mediation center was established in 1974 in Atlanta, Georgia, by O. J. Coogler, an attorney and marriage and family counselor. Spurred by his own emotionally and financially costly divorce, Coogler helped popularize the idea of divorce mediation through the publication of his book *Structured Mediation in Divorce Settlement* (1978). To assist couples in contractually resolving issues of finances, property division, support, and child custody, Coogler proposed a structured framework for third-party mediators, using communication and intervention techniques borrowed from labor mediation and the social sciences. In 1975 Coogler established the Family Mediation Association (FMA), an interdisciplinary organization of individuals interested in the development and advancement of divorce mediation. Like many pioneers, Coogler and his “structured mediation model” were harshly criticized. Bar associations declared mediation by nonlawyers to be the unauthorized practice of law and attempted to discourage lawyers from mediating through the threat of ethical sanctions (Silberman, 1988).

Nonetheless, the practice of divorce mediation continued, encouraged by judges who welcomed both the reduction of cases on their dockets and relief from making difficult decisions about the best interests of children. Court administrators supported legislation that compelled family mediation, as evidence mounted that mediation was less expensive than court hearings and resulted in less postdivorce litigation and enforcement problems. The divorcing population, through a number of grassroots organizations, began demanding reform. Legislative changes supporting co-parenting, joint custody, and shared parenting set the stage for the institutionalization of divorce mediation.

Following a dispute within the leadership of FMA over organizational direction, John Haynes, Stephen Erickson, and Samuel Marguiles founded the Academy of Family Mediators (AFM), in 1982. AFM became the professional association for family and divorce mediators. The organization sponsored mediation training programs, addressed public policy issues (including diversity, standards of practice, and supervision qualifications), and published a newsletter and journal for its members. In 2001 AFM merged with the Society of Professionals in Dispute Resolution (SPIDR) and the Conflict Resolution Education Network (CREnet) to form the Association for Conflict Resolution (ACR)—a membership organization dedicated to “enhancing the practice and public understanding of conflict resolution” (Association for Conflict Resolution Mission Statement, 2000).

Other national organizations, including the Association of Family and Conciliation Courts, the American Arbitration Association, and the American Bar Association, began to encourage divorce and child custody mediation and added mediation topics and programs to their conferences, newsletters, and journals.

Today, the largest dispute resolution membership organization, with more than 9,000 members, is the American Bar Association Section of Dispute Resolution. In April 1999, the Section Council called for the inclusion of people from all backgrounds as neutral participants, regardless of whether they are lawyers, and in 2002 passed a resolution stating that mediation is not the practice of law (Hanna, 2003).

The early years of the divorce mediation field focused on attempting to establish a foothold of credibility. Research, limited as it was, established the benefits of mediation over lawyer-assisted negotiation, custody evaluation, and litigation (Kelly, 1991; Pearson & Thoennes, 1984). Funding for court mediation programs—through the use of filing fees dedicated to support these programs—was established in some jurisdictions (McIsaac, 1981).

Since its inception in the early 1970s, the landscape of the mediation field has evolved as more programs and services have been established. Mediation is now used in thousands of divorce-related disputes annually (Cole, Rogers, & McEwen, 2001). The field has matured, as evidenced by current

professional issues and controversies. Topics such as the use of mediation in cases involving allegations of domestic abuse (Milne, Chapter 14, this volume), same-sex partners (Barsky, Chapter 16, this volume), and members from blended families (Jacob, Chapter 15, this volume) as well as unmarried parents (Raisner, Chapter 13, this volume) have moved our professional discourse beyond the benefits of mediation.

Model Standards of Practice for Family and Divorce Mediation were developed through a cooperative effort of the Association of Family and Conciliation Courts, the Family Law Section of the American Bar Association, the Dispute Resolution Section of the American Bar Association, the Academy of Family Mediators, the Conflict Resolution Education Network, the National Association for Community Mediation, the National Conference on Peacemaking and Conflict Resolution, and the Society of Professionals in Dispute Resolution (Schepard, Chapter 22, this volume; Milne & Schepard, 2002; Milne, 1984).

The training and education of mediators have expanded from 1- to 5-day programs with no entrance or exit requirements to academic programs that confer a degree in conflict resolution upon completion of course work and a field practicum (e.g., Marquette University, Antioch University, University of Missouri Law School, George Mason University, Pepperdine University).

New models of mediation that extend beyond the traditional problem-solving, facilitative approach are being touted together with accompanying training curricula. Some blanch at these new approaches and decline to call them *mediation* (Boskey, 1995), whereas others welcome them and point to the benefits of having a diversity of tools in the mediator's tool kit (Linden, 2001; Zumeta, 2000); Chapters 2–6 discuss several of these emerging models of practice and their applications.

A look back at the historical footnotes and a look forward at the more recent developments in the field help us to understand the unique roots and traditions of divorce mediation. As specialized as divorce mediation is within the broad field of dispute resolution, the evolution of its conceptual framework rests upon the early theories of human conflict and conflict resolution.

## EVOLUTION OF THE CONCEPTUAL FRAMEWORK

In 1973, social psychologist Morton Deutsch presented his theories on the nature of human conflict and described the constructive use of a third party in conflict resolution (Deutsch, 1973). Legal scholars, most notably Lon Fuller, Frank Sander, and Roger Fisher, all of Harvard Law School, have helped to shape professional and public thought on the procedures, application, and techniques of mediation (Folberg, 2003).

Rubin and Brown described mediation as a means of

reducing irrationality in the parties by preventing personal recrimination by focusing and refocusing on actual issues; by exploring alternative solutions and making it possible for the parties to retreat or make concessions without losing face or respect; by increasing constructive communication between the parties; by reminding the parties of the costs of conflict and the consequences of unresolved disputes and by providing a mediator model of competence, integrity and fairness. (in Brown, 1982, p. 14)

*Mediation* is not *arbitration*. In arbitration, a designated third person holds the responsibility for making a finding or providing a decision for the parties. The arbitration process is adjudicatory but typically less formal than the traditional court process. In mediation a neutral third party is used, but the parties do not authorize the mediator to make decisions for them (Folberg & Taylor, 1984).

Mediation is also distinguishable from a *negotiation* process, which is typically a sounding-out and bargaining process and does not normally include a neutral third party.

Mediation is not *therapy*. No diagnoses are made, and the parties do not analyze past behaviors but attempt to reach agreements that provide for the future. Unlike traditional forms of therapy, mediation does not focus on obtaining insight into the history of the conflict, nor does it attempt to change personality patterns. Although insights and changes may occur, they are fringe benefits of the mediation process (Kelly, 1983; Milne, 1982).

Mediation provides a personalized approach to dispute resolution in which spouses have an opportunity to learn about each other's needs. Mediation can help the parties solve problems together and recognize that cooperation is mutually advantageous. Mediation is bound neither by rules of procedure and substantive law nor by other assumptions that dominate the adversarial process of the law. The ultimate authority in mediation belongs to the parties. With the help of the mediator, the parties may consider a comprehensive mix of individual needs, interests, and whatever else they deem relevant, irrespective of rules of evidence or legal precedent. Unlike the adjudicatory process, the emphasis is not on who is right and who is wrong but on establishing a workable resolution that best meets the needs of the participants (Folberg, 1985).

Mediation is a private and, in most cases, confidential process, so the most personal of matters may be freely discussed without concern that the information disclosed will become part of a public record. Participants formulate their own agreement and emotionally invest in its success. They are thus more likely to support the agreement than if the terms were negotiated or ordered by others.



Family and divorce mediation has emerged as distinct from commercial and civil claims mediation. Attorneys are not usually present during the mediation session, although they may advise and coach their clients, as well as draft the settlement agreement or, at least, review it prior to the clients formally signing it. *Caucusing*, or separate meetings between the mediator and each party, is less frequently utilized in family and divorce contexts than in commercial and civil case settlement mediations. Unlike commercial and personal injury mediation, family mediation strives to provide a model of interaction and communication for resolution of future disputes, particularly involving children.

### EVOLUTION OF THE PRACTICE

The practice of divorce mediation is largely dependent on who is doing the mediating, where the mediation is offered, and what is being mediated (Folberg, 1982). Mediation in a mandatory court-based setting may differ from a private, voluntary process. Some mediators adhere to a model that focuses on client interaction (see Mayer, Chapter 2, and Bush & Pope, Chapter 3, this volume), whereas others emphasize settlement and outcome (see Lowry, Chapter 4, this volume). Others may integrate therapeutic or arbitrativ components into the mediation process (see Pruett & Johnston, Chapter 5, and Shienvold, Chapter 6, this volume). A number of authors describe mediation as a series of stages (Moore, 1996; Folberg & Taylor, 1984; Haynes, 1981), whereas Bush and Pope eschew the notion of stages altogether (see Chapter 3, this volume). Mayer (Chapter 2, this volume) identifies a set of tasks to be accomplished rather than stages.

#### Who Are the Mediators?

Early research indicated that mental health professionals, including social workers, marriage and family therapists, psychologists, and psychiatrists, accounted for 78% of family mediators in the private sector and 90% in the public sector. Lawyers comprised 15% of private-sector family mediators and only 1% of those in public-sector service (Pearson, Ring, & Milne, 1983). Although more recent data are not available, public-sector court-connected mediation programs report that they continue to employ primarily mental health professionals (Milne & Salem, 2000).

Terms such as “court-connected mediator,” “private mediator,” and “lawyer/nonlawyer mediator” are often used as a means of describing and distinguishing divorce mediation services. These dichotomous labels, although useful for drawing distinctions, add to the territorial competitiveness between the divisions and may stereotype practices. A description of the set-

tings of practice is a more productive way of viewing the range of organizational entities and approaches to divorce mediation.

### **Settings of Practice**

Because family mediation has not developed a distinct academic tradition of its own and most practitioners approach the field from their previous professional orientation, it is difficult to present a singular picture of family mediation. Family mediation services are typically offered in one of four settings: (1) court-connected venues, (2) private practice, (3) agencies and clinics, and (4) community mediation centers.

#### *Court-Connected Mediation*

Court-connected mediation programs have moved beyond the traditionally offered services of reconciliation counseling, divorce counseling, and custody and visitation evaluations to include mediation. Approximately one-tenth of the nation's domestic relations courts have mediation programs, and the vast majority of them authorize the courts to compel parents to attempt to mediate their custody and visitation disputes (Cole et al., 2001). Mediation may be initiated through mandatory or voluntary procedures. Mediators in court-connected settings are, for the most part, mental health practitioners, primarily social workers and psychologists, who are supervised by a director reporting to the chief judge of the family/domestic court (Comeaux, 1983).

It is important to avoid sweeping generalizations about court-connected mediation programs. However, it is equally important to highlight the significant impact of the court setting. The most notable features of court-based mediation services are (1) the limitation of the issues being mediated, (2) the limitations of staff resources, and (3) the mediator's symbiotic relationship with the court system.

Most court-connected mediation services limit themselves, or are limited by statute, to mediating parenting plans. A few court-connected programs use mental health mediators to mediate limited financial matters, such as child support and property division, upon the consent of the parties and their attorneys (Milne & Salem, 2000). Most often, if financial issues are mediated in a court-based program, the mediation is conducted by a court-employed commissioner, referee, or volunteer lawyer.

"Issue-focused mediation" (Johnston & Roseby, 1997), wherein mediators isolate child custody and visitation issues from the other issues in the divorce, has drawn both support and criticism (Pearson & Thoennes, 1984; Saposnek, 1983; Folberg, 1982). Concerns have been expressed by the legal community that mental health professionals lack the expertise to mediate financial and property issues. Isolating these issues helps to alleviate these

concerns and reinforce the bar's support for court mediation programs. Isolating parent-child issues from financial and property issues may also preclude using the children as pawns and leveraging money for children in the mediation process.

Others note that the isolation of parenting from property and financial issues artificially limits the mediation process, in which decisions made in one area may affect decisions in other areas (Milne & Folberg, 1988). Isolating child-related issues places limits on the scope of the parties' decision making, may create an impediment to reaching an agreement, and can cause tentative agreements to unravel later, when parents face the financial implications of custody decisions (e.g., payment and the amount of child support).

Many court-connected mediation programs are challenged by limited resources, including budgets, staff, and office space. Court-connected programs are increasingly underfunded and understaffed due to the number of high-conflict cases being referred and the growing number of unrepresented parties. There is often significant pressure on these mediators to bring parties to an agreement, typically within one or two sessions (Milne & Salem, 2000). This pressure to quickly settle cases may lead to what has been referred to as a "muscle mediation" process in which the mediator substantively shapes the agreement rather than empowering the parties to do so (Milne, 1981; Lande, 1997).

The often symbiotic relationship between a court-connected program and the judiciary can muddy the expectation of mediator neutrality in these settings. In California, the statute allows the mediator to make a recommendation to the court, pursuant to local court rules, if the parties do not reach an agreement (California Family Code, Section 1383); and in Hennepin County, Minnesota, parties that reach an impasse in mediation may opt for their mediator to continue as the custody evaluator (Dennis, 1994).

Some court-connected mediators agree that this combined mediation/evaluation process is not "pure" mediation; however, they argue that it does create an effective process, given the resource limitations of the courts (Chavez-Fallon, 2002). They note that court-based mediators are often working with high-conflict families who otherwise may have little likelihood of reaching an agreement. An aggressive mediation approach, in some cases bordering on arbitration, may provide the structure necessary to allow these parties to reach a settlement and that precludes destructive and costly litigation. Allowing the mediator to make a custody recommendation to the parties or to the court may conserve resources, eliminate duplication of effort, and save time. Some parties prefer this course over an impasse (see Ricci, Chapter 18, this volume).

Critics of this practice contend that it dramatically changes the dynamics of the mediation process when parents know that the mediator may become the evaluator (McIsaac, 1985; Cohen, 1991). Clients will be advised by their attorneys to carefully measure what they discuss in mediation and to

approach the mediator as a potential witness for or against them in a court trial if mediation comes to an impasse.

Restricting the mediation process to those clients who consent to participate may underestimate the coercive pressure this practice can place on a reluctant participant. This symbiotic relationship with the court and the judicial decision-making process is not a factor in other mediation settings and may influence the decision of some consumers to opt out of court-connected mediation. Certainly, the practice will continue to be debated among mediators.

### *Private Practice*

The private practice of family and divorce mediation is not limited to those with legal and mental health backgrounds; however, professionals from these fields comprise the most significant number. Mediators in private practice typically operate on a fee-for-service basis and rely on referrals from the courts and other professionals. Most private mediators offer comprehensive services that encompass financial, property, and parenting issues. In contrast to those mediating in court-connected programs, private mediators may offer parties as many sessions as are needed. The number of sessions generally depends on the number and complexity of issues; typically, private mediators complete a comprehensive mediation in 4 to 8 sessions, with each session lasting between 1 and 2 hours (Milne & Salem, 2000).

Services provided by these individuals vary according to the issues mediated, the mediation model used, and the professional orientation of the mediator. Most common is the mental health mediator working as a sole proprietor or as part of a private mental health clinic. Private mental health mediators may offer divorce mediation in conjunction with counseling, custody evaluation, parent coordination, or other divorce-related services. Many mental health mediators are drawn to the field because of their background in family therapy and their conviction that mediation is a healthy alternative to the adversarial system.

Although mental health mediators have historically outnumbered lawyer mediators, the number of lawyer mediators has grown significantly as the organized bar has become more supportive of mediation and as lawyers look for less adversarial ways to practice law. Many lawyer mediators offer mediation services in addition to their legal practices and may specialize in disputes over property and financial issues. Lawyers who provide mediation services attempt to make it clear that they are not serving as a representational lawyer or providing individual legal advice. Like mental health mediators, lawyer mediators encourage parties to obtain representation by independent legal counsel. Some mediators with a legal background are willing to provide legal information and evaluate possible outcomes (see Lowry, Chapter 4, this volume).

Some mediators hold degrees in both the legal and mental health fields. These cross-trained individuals draw upon their legal expertise to assist couples with the legal and financial issues and use their counseling skills to assist with the communication process and underlying emotional issues.

Although many private mediators have thriving practices, others struggle to make private mediation a full-time practice. Many private practitioners supplement their mediation practice with other professional services, such as counseling, legal services, and mediation training.

#### *Agencies and Clinics*

A third setting for divorce mediation are agencies or clinics that offer a range of services and employ a number of professionals, one or two of whom specialize in divorce mediation. Agencies may specifically market divorce mediation as one of several available services that include individual and family counseling, parent education, financial planning, and other services. Most agencies or clinics view mediation as a logical add-on to their existing community services and as a potential source of income for the agency. Mediators in these settings are usually mental health professionals; services are often offered on a sliding-fee scale and may be limited to parent-child issues.

#### *Community Mediation Centers*

Some community mediation centers also provide limited divorce mediation services. These neighborhood dispute resolution centers were established to provide mediation services as part of their mandate to offer an alternative to the court for a broad range of disputes, including criminal misdemeanor offenses, landlord-tenant, business-consumer, neighborhood, and family conflicts (Shonholtz, 1984). These centers are most often staffed by trained volunteers and administered by an executive director and board of directors. The services are usually free or low cost and tend to be short-term in nature.

## **MODELS OF PRACTICE**

As the divorce mediation field has evolved, so too have various models or styles of practice. These models of practice are not venue specific as described in the earlier discussion, but rather tend to present views about the mission of the mediation process as adhered to by their proponents. These different approaches—including facilitative, transformative, evaluative, therapeutic, narrative, and other hybrids—are all referred to as *mediation*. However, they each have a different focus, different goals, different training programs, and sometimes even different outcomes. It is these differences that

have elicited some concerns for the field and for the consumer. Although the emergence of different mediation models marks the maturing nature of family mediation practice (Folberg, 2003), there are also a number of noted leaders in the field who believe that “it is important that the alternative dispute resolution profession achieve greater clarity regarding the variety of dispute resolution processes and the boundaries that distinguish them” (Peace, 2003, p. 2).

The chapters that follow explain the basis, rationale, and application of the most prominent mediation models by the authors who are closely identified with each process. A summary of several of these approaches highlights the evolution of the field and the development of distinctive practices.

### **Facilitative Mediation**

Facilitative mediation is where the family and divorce mediation field began. The writings of the earliest practitioners and authors would today be described as facilitative mediation (Moore, 1996; Milne, 1986; Lemmon, 1985; Folberg & Taylor, 1984; Haynes, 1981; Coogler, 1978). Many of these early mediation proponents described what we would now call a facilitative model of divorce mediation offered as a multistage process.

Facilitative mediators would agree that this model of practice is first and foremost a *process* that emphasizes the participants’ responsibility for making the decisions that affect their lives. Furthermore, it is intended to be an empowering process. Facilitative mediators would agree that the process consists of systematically isolating points of agreement and disagreement, exploring interests, developing options, and considering accommodations with the help of a neutral third-party mediator, who serves as a facilitator of communications, a guide toward the definition of issues, and a settlement agent who assists the disputants in their own negotiations (Folberg, 1983; Milne, 1982).

In this model of practice the parties typically are seen together, so that the mediator can more effectively facilitate a collaborative communication and problem-solving process. The facilitative mediator does not make recommendations to the parties, give advice, or predict what a court would do (Zumeta, 2000). The mediator is in charge of the process, whereas the parties retain responsibility for the product. Consequently, substantive expertise about money, property, or children is not considered a prerequisite for the facilitative mediator.

Mayer (Chapter 2, this volume) notes that all mediators use some facilitative techniques, and he identifies four key characteristics common to facilitative mediation:

1. *Facilitative mediation is process oriented, not focused on outcomes.* Mediators serve as process guides to assist the parties in their own deliberations.

2. *Facilitative mediation is client centered.* The job of the mediator is to help the clients communicate and problem solve effectively.
3. *Facilitative mediation is communication focused.* The mediator facilitates, or in some instances restricts, communication between the parties.
4. *Facilitative mediation is interest based.* Mediators help parties understand the interests and concerns that they each have and work together to look for solutions that address those areas.

Critics of the facilitative model state that the inability to provide substantive expertise may protract the mediation process, cause additional expense if the parties have to consult other experts, and agreements may be contrary to standards of fairness (Zumeta, 2000).

### **Evaluative Mediation**

In contrast to the facilitative model described above, evaluative mediators offer their substantive knowledge and experience to the disputants. Settlement is a central goal and tends to trump process.

Evaluative mediation is modeled on a settlement conference format (Kovach & Love, 1996; Zumeta, 2000). An evaluative mediator helps the disputants evaluate their positions in light of what would likely happen if they were not to settle. This “reality test” can be very useful for some clients when the issues are of a more legal nature (Linden, 2001). Face saving is often an issue for a client in an evaluative mediation process. Individual sessions, caucuses, and shuttle mediation are more often used in the evaluative model compared to other approaches.

Lowry (Chapter 4, this volume) contends that all mediators use evaluation at some level, given that “a mediator makes a judgment about the dispute at hand and expresses that judgment to the parties” (p. 72). Some mediators directly propose outcomes or ask questions that imply an outcome—for example, “Do you *really* think it is good for the children to go back and forth between homes every other day?”

Lowry notes that an evaluative process (1) may be more effective and efficient in helping parties reach an agreement, (2) provides the opportunity to integrate needed substantive expertise, (3) may empower a weaker party, and (4) may allow parties to save face while reaching an agreement.

Evaluative mediation has been the target of significant criticism. Detractors contend that this model is favored by lawyers and retired judges because they are more comfortable being in the decision-making role than empowering the clients. Of greater concern is probably the worry about the legitimacy of any prediction of a courtroom outcome and the vulnerability of substantive expertise. Proponents of other mediation models point to concerns

about mediator impartiality and neutrality that they believe this model raises.

The Model Standards of Practice for Family and Divorce Mediation (Schepard, 2000) caution the mediator about giving opinions and making recommendations (see also Schepard, Chapter 22, this volume). Florida's Rules of Conduct for Mediators state that a mediator can provide information and advice that he or she is qualified to provide as long as he or she does not violate mediator impartiality or the self-determination of the parties (Zumeta, 2000). In contrast, a Wisconsin statute mandates that disputing parents attempt to mediate their conflict and requires that the mediator certify that the agreement is in the best interests of the child (761.11 [12] [a]).

### **Transformative Mediation**

In the transformative model, first developed by Bush and Folger (1994), mediation is defined as “a process in which a third party works with the parties to help them change the quality of their conflict interaction from negative and destructive to positive and constructive, as they explore and discuss issues and possibilities for resolution” (Bush & Pope, Chapter 3, this volume, p. 59).

The purpose of transformative mediation is to effect a changed and more pacific relationship between the parties. The focus is on the interactions and communications of the parties that will lead them to “moral growth” (Currie, 2001). Settlement of the dispute is a welcome by-product. The focus on the relationship requires that a transformative mediator meet conjointly with the parties.

Bush and Pope (Chapter 3, this volume) contend that conflict propels people into feelings of weakness and self-absorption. As these vulnerable states reinforce one another, conflict escalates. To reverse this escalation, the mediator must foster a shift in the parties from weakness to empowerment and self-absorption to recognition. The cumulative impact of these shifts transforms the interaction between the parties.

Unlike other models of mediation, the transformative mediator is not a process guide but follows the parties by using supportive skills such as reflection, summary, and “checking in.” Directive interventions—such as setting an agenda, normalizing, pointing out common ground, probing for underlying issues, or keeping parties focused on a discussion topic—are avoided. Proponents of transformative mediation believe that this approach creates the opportunity for the parties to reverse the negative conflict spiral and move toward positive interactions, and that this reversal is the greatest value that mediation offers to families in conflict.

Criticism of transformative mediation ranges from those who contend that it is therapy, not mediation, to others who question the appropriateness of assuming that clients are seeking a transformation. Furthermore, this



model of mediation may not lend itself to disputes that involve domestic abuse or power imbalances.

### **Hybrid Models of Mediation**

Hybrid mediation processes combine different models of mediation with other interventions such as therapy and arbitration. Pruett and Johnston (Chapter 5, this volume) present several hybrid mediation models that combine mediation with therapeutic processes. Using multiple sessions, they combine a therapeutic or counseling stage, which prepares parents for negotiation, with a sociopsychological assessment of the child. The mediator plays many roles, including facilitator, educator, child advocate, and counselor to the parents.

Shienvold (Chapter 6, this volume) discusses an evaluative mediation model in which the mediator conducts a child custody evaluation and then uses those findings as the basis for the subsequent mediation process with the parents. The parties are informed that if no agreement is reached, the evaluator/mediator will make a recommendation to the court.

Processes that blend mediation with other techniques have the potential to create confusion as to what “real” mediation is. Furthermore, these models of practice blur some of mediation’s fundamental tenets, such as neutrality, confidentiality, empowerment, and self-determination. One can imagine a conversation between two divorcing couples who are comparing their experiences in mediation and the confusion that may arise as they describe two dramatically different processes—each called *mediation*. However, both couples may conclude that what they experienced as mediation was beneficial and appropriate for their situation.

The development of new models of practice will continue to create controversy in the field and will raise questions regarding training, certification, and standards of practice. A Michigan court rule allows a judge to order parties to participate in a facilitative mediation process but not an evaluative one (Zumeta, 2000). While there may be room in the field for many styles and models of practice, it is argued that when parties are required to participate in a mediation process, they ought to be clearly informed about the different models and allowed to select the one that they prefer (Peace, 2003).

### **CRITICAL ISSUES SHAPING THE FUTURE OF THE FIELD**

As the practice of family and divorce mediation continues to grow, the field faces a number of critical developmental issues. These include confidentiality, domestic abuse, power imbalances, mandatory mediation, and the unauthorized practice of law, in addition to those discussed below. Some of these are addressed in depth in subsequent chapters of this book.

### **Certification and Credentialing**

Certification and credentialing of mediators as a condition to practice is seen by some as the path to public acceptance, enhanced confidence in mediation, and the maturation of a profession. Others see credentialing as an obstacle to the development of new approaches as well as a way to shut the gates behind first-generation mediators (Folberg, 2003). Some note that until a level of consensus can be reached on theory, practice, and proficiency, the basis on which to credential would-be practitioners remains elusive (Milne, 1984).

The absence of certification and licensure provisions also makes it difficult to enforce ethical standards—a prerequisite to the recognition of mediation as a full-fledged profession. Efforts by mediation organizations on both statewide and national levels have resulted in a great deal of interesting discussion but little in the way of certification processes. As of this writing, Florida, Georgia, and Virginia have developed and implemented a comprehensive process for training, certifying, and administering grievances for both court-connected and private mediators who accept court referrals (S. Press, personal communication with A. L. Milne, May 2003).

A system of sanctions may provide some assurance for the public against the practice of mediation by unqualified individuals and may promote more uniformity of service (Milne, 1983a, 1983b). To establish a set of qualifications for practice, however, requires a consensus on definitions, minimum qualifications, and standards. At this stage in the developmental process of divorce mediation, such a consensus may not be realistic.

Then there is the question of who will provide the certification of proficiency. Should the certifying body be a professional organization that provides divorce mediation training, or an independent, interprofessional board that reflects the multidisciplinary practice of divorce mediation, or a government agency, or the courts?

Yet another arena is the legal liability of divorce mediators, which has not been well defined or tested (Folberg, 1988). How best to assure quality without unreasonably restricting choice and needed experimentation is problematic in a field that is still developing.

Canada's experience with voluntary certification of family mediators is proving very valuable (see English & Neilson, Chapter 21, this volume). The development of practice parameters that cross professional boundaries will also assist in the convergence of disciplines and allow divorce mediation to become a profession in its own right (see Shepard, Chapter 22, this volume).

### **Training**

In the absence of required certification, there is great variation and little control over mediation training. Although the number of academic degree

programs has increased, these programs have not yet become the established path to mediation practice. Training programs ranging from 1 to 5 days provide the initial starting point.

Credible mediation training must be supported by credible theoretical underpinnings and supporting research and experience. Academic institutions can help to fill this void by rigorously examining the nature of conflict and the emerging conflict resolution tools and techniques. The William and Flora Hewlett Foundation has provided significant and instrumental financial support to the development of these theory centers (Alfini, Press, Sternlight, & Stulberg, 2001). Changes within the Hewlett Foundation's areas of support will require that other sources of financial support be sought. More is needed.

The thirst for the 1- to 5-day mediation training programs may be abating, as many trainees learn that mediation jobs are not plentiful and apprenticeship opportunities are even scarcer. Mentoring and supervised opportunities for mediators to practice their skills are rare and need to be expanded.

### **Diversity of Practice Models**

John Cooley (2000) eloquently wrote, "Let us develop our own paradigm and not let the paradigms of any other profession, be it law, psychology or any other discipline, determine who we are and how we practice" (cited in Peace, 2003, p. 2). Yet we cannot ignore that the field of divorce mediation drew its first breath from law and the behavioral sciences.

New models of practice will continue to be added to the traditional facilitative school of mediation. Disputes between mediators about the legitimacy of each new model of mediation can be uncomfortable (Bellman, 1998). However, conflict is the mother of invention and the field of mediation must move forward. To do this in a manner that does not confuse the public and the consumer is our greatest challenge.

As mediators we understand the importance of clear communication and the conflicts that result from miscommunications and misperceptions. We need to take great care that the innovative techniques and practices that we are adding to our mediator's tool kit are not misidentified. Mediators need a variety of tools to deal with the diversity of disputes and disputants. On the other hand, "let us not paint it green and call it grass" (H. Bellman, personal communication with A. L. Milne, May 2003).

### **Financial Realities**

The dollars and cents of mediation are often overlooked. Honeyman's *Financing Dispute Resolution* (1995) is one of the few efforts made in the field to examine this critical issue. Although many people have been trained in mediation, comparatively few have the luxury of giving up their "day job." The

growth of fee-for-service mediation appears to have occurred more in civil litigation and commercial cases—the purview of lawyer-trained mediators—than in family and divorce cases. Commercial mediators have had the benefit of well-organized and well-financed groups, such as JAMS (formerly Judicial Arbitration and Mediation Services) and the American Arbitration Association (AAA), actively pursuing and educating the marketplace. Newly trained family mediators find themselves unprepared for the business of setting up and marketing a practice. Forrest Mosten (Chapter 23, this volume) provides helpful advice on how to establish a profitable, full-time mediation practice.

Divorcing spouses are accustomed to having their health insurance pay for individual and marital counseling, and clients resignedly accept that legal fees may put them in debt. Mediation is rarely covered by insurance. Fees for mediation services range from free to \$400+ per hour, depending upon the setting of the service. How can the same service vary so dramatically in cost? Some mediators have lamented that the free or low-cost community mediation services are taking away business and that courts that contract for services unfairly set fees below a market rate (Honeyman, 1995).

A few large self-insured corporations, such as Oscar Mayer, have offered employee benefit plans that cover the costs of divorce mediation services. These companies view mediation as an investment in employee productivity. Time would be well spent encouraging other large entities to support mediation services. Perhaps the mediation field could borrow a strategy from the arts community and encourage business and government to designate 1% of funding to be set aside for dispute resolution programs (Honeyman, 1995).

The other side of this critical issue is the lack of appreciable client demand. While the court-connected mediator is overwhelmed with court-ordered referrals for mediation, many agencies and private practitioners are underutilized. And, unlike McDonald's, there is not a lot of repeat business in divorce mediation.

Funding for court-connected mediation programs has generally come from tax revenue. Oregon initiated the dedication of filing fee increases for court mediation programs, and California as well as a number of other states followed suit (McIsaac, 1981). This “pot of gold” may become less of an annuity for these court programs as governments struggle with budget shortfalls and look to raid these funds. Staff cuts and consolidation and reduction of services have already penetrated court programs throughout the country (Milne & Salem, 2000).

Nearly all of the national organizations that serve family and divorce mediation members have received funding from the William and Flora Hewlett Foundation. The funding has supported these organizations' capacity-building efforts as well as individual projects, such as the design of a certification examination and increasing diversity in the field. As the Hewlett Foundation redirects its funds to areas other than dispute resolution, these

membership organizations and other beneficiaries of these funds face the critical issue of finding new benefactors for the field. While this may seem like a remote concern to the individual practitioner, the work of these organizations is critical for the growth and sustenance of divorce mediation as a professional entity.

### **Public Education**

Many divorcing individuals indicate that they want a dignified, fair, and cooperative divorce but do not connect the mediation process with those goals. The public needs to be educated about mediation—what it is, its benefits, and how it is different from other services. An individual mediator can help to educate the public and potential users of mediation services by appearing on programs, workshops, and media events and discussing the benefits of mediation and how it works. If nearly one out of every two marriages ends in divorce, then it could be said that wherever two people gather there are potential mediation clients.

Public education efforts must also be a priority for the field's national and local membership organizations. Market-building efforts have been lacking. Name-branding concepts, *de rigueur* for most businesses, have been absent in mediation—where the public still confuses mediation with *meditation*. A few organizations have initiated “Mediation Week” or “Mediation Month” projects (e.g., Wisconsin Association of Mediators; Florida Association of Professional Mediators), which could have a much broader application and could lead to a concerted, coordinated public education effort. Billboards, grocery store bags, basketball game marquees, movie theater preview trailers, public access cable TV, airplane banners, rock concerts à la Farm AID—the opportunities are endless. Given the enthusiasm that most divorce mediators have for the process, someone must have hit the MUTE button when it comes to public education. Not addressing this critical issue may well leave the field open to others who wish to claim the turf.

### **Professionalizing the Practice**

Because divorce mediation practice is still relatively new and crosses traditional professional boundaries, there are interdisciplinary turf struggles concerning professional dominance: Debates over who can mediate, who should be certified, and what models of mediation should be practiced abound.

Questions of certification, licensure, and control of mediation training have yet to be answered. Should professional associations engage in training, accreditation, or certification? Will professional organizations of mediators perform a public-interest role or function as a guild to protect existing practitioners? Will the established organizations and leaders “colonize” development of the field by requiring only their approved trainings and ways of prac-

ting (Landau, 2002)? The need to determine professional qualifications for divorce mediators, the establishment of a code of ethics, and the establishment of some form of regulatory control over the practice have been discussed since the early days of family mediation (Coogler, 1978; Crouch, 1982; Elkin, 1982; Folberg, 1982; Harbinson, 1981; Haynes, 1981; Milne, 1983a, 1983b; Silberman, 1981). These concerns center on the need to establish some form of quality control to protect both the consumer and the credibility of a developing profession (Milne, 1983a, 1983b).

Divorce mediators no longer have an association that speaks solely for their interests. The merger of the Academy of Family Mediators with two other more generic dispute resolution organizations has left the field of divorce mediation without an exclusive association identity and with decreased resources to carry out public and professional education efforts. The Association for Conflict Resolution has a broad mission to speak for its constituents under challenging times of decreased foundation support, a lagging economy, and national and international events that have turned away from cooperative dispute resolution practices and philosophy.

Other fields of practice, including collaborative law and traditional legal practices, are looking to establish or reestablish a place on the map. It is unlikely that divorce is going to go away. The question is, will the field of divorce mediation be able to address these and other critical issues in the future?

## LOOKING FORWARD

The following chapters, written by the founders, leaders, and emerging stars of family and divorce mediation, address many of the issues raised here. Collectively they define the practice, provide a comprehensive view of our field, and foreshadow the future.

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