

# MEDIATION, ARBITRATION AND THERAPY

We marriage and family therapists, trained in systems thinking and at home in a room with multiple clients, are confronted on a daily basis with conflict between individuals. Yet, unlike our work with individuals (who tell their stories of their out-of-the-office conflicts for our consumption) our conjoint or family work forces us to engage the people in conflict - *during* the conflict. It's Salvador Minuchin's "enactment." This experience positions us uniquely to perform the service of mediation. First, however, we have to understand what mediation is - and how it differs from other forms of conflict resolution.

For starters, we must clearly differentiate between mediation, arbitration and therapy. Mediation is a process by which people or groups in conflict work together, with the assistance of a neutral facilitator to arrive at a settlement of their dispute. The goal is resolution of a discrete disagreement over identified issues. That's the end-point of mediation - and this embodies the fundamental difference between mediation and therapy. At the beginning of couple's therapy, for example, can we clearly describe the endpoint or goal of the process? In that regard mediation is more task-driven than therapy. Arbitration differs from these two processes in that the third party, arbitrator, is expected to make the decision. The resolution of the conflict is imposed upon the parties by the decision-maker. Arbitration is considered a less formal process than court-based litigation, so it is generally much less expensive than the latter. Still, the parties are dis-empowered by the imposition of a decision upon them. Among the fundamental rationales supporting the mediation process is the axiom that a settlement of a dispute reached by agreement is far more likely to be honored by both sides as each has a stake in its creation.

Divorce mediation, while not the only arena for this form of dispute resolution, is certainly the most common. Generally, there are two approaches to divorce mediation and the difference highlights the discomfort which most divorce lawyers experience in the face of conflict. One approach, popular within the bar, is "evaluative mediation," in which the individuals (and their lawyers) are separated into two conference rooms and the mediator shuttles between sides, transmitting offers to each camp which he or she has helped fashion. The process is usually scheduled for a full day, the purpose being to "sweat" the parties to a settlement. I have advised clients that they will feel "beat up" by the end of the experience. The goal is settlement and an apt metaphor is an effort to bring two positive poles of a magnet together. The concern with experienced negotiators is that any break in the process will give either or both parties the opportunity to reconsider, retrench and repel one another. I avoid this approach when I can because I have yet to see people emerge without second thoughts and "buyer's remorse."

The second approach, which is much more congenial to the therapist's mind-set is "facilitative mediation." This takes many forms, but the basic formula involves the parties working together, in the same room, toward a mutually acceptable resolution. This may traverse a number of sessions. While conventional negotiations involve parties establishing positions and then moving off these positions with varying degrees of resistance, the facilitative model assets people in identifying their fundamental interests. Everyone, then, engages in the search for a set

of solutions to a mutual problem. There is no “zero sum” assumption. If this sounds like therapy, to some extent, read what Christopher Moore describes as the eight essential attributes for a mediator in his classic *The Mediation Process - Practical Strategies for Resolving Conflict*.

The successful mediator possesses: Originality of ideas; An appropriate sense of humor; The ability to act unobtrusively in a conflict; Control of his/her feelings; The ability to project empathy; the willingness to be a vigorous salesperson; Persistence and patience; The ability to quickly understand the dynamics of a dispute. These attributes should sound familiar to experienced practicing therapists. You might be saying, “Hey, I *do* that!”

This is my point. Mediation is golden field for exploration by family therapists. So many of the skill sets are already possessed by you. Bear in mind that mediation is still a burgeoning field. In the 1990's the pendulum began to swing away from the growing expense and complexity of litigation and the field of Alternative Dispute Resolution became very much in vogue. Law schools all have clinics and courses now, teaching ADR, the State Bar has an ADR section and just this year a uniform mediation act (“uniform” because it has been passed in substantially identical form in all states) was passed in Washington.

Opportunities to specifically train in mediation abound, from private trainers up and down the West Coast (check out James Melalmed’s web site in Oregon, for example) to local organizations like the Dispute Resolution Centers in King, Snohomish, Spokane and other counties.

Another dynamic which makes the field so rich right now for the therapist is the entrenched (and I believe mistaken) belief held by most lawyers that non-lawyers should not engage in mediation over legal issues other than parenting. In the wonderful phrase of Robert Mnookin, divorce mediation is “bargaining in the shadow of the law.” However, lawyers often assume that the only standard by which a solution may be measured is the law. This is incorrect, as master mediator, teacher and author, John Haynes notes that outcomes are also based on the “norms of the parties, their families and communities, rather than legal precedent.” Any result that does not take into consideration the culture of the couple or family - their understanding of the meaning of fairness for them (assuming, of course an equal bargaining position) - as well as the general legal standards involved, is going to be inadequate.

A relative comfort level in the presence of conflict and facility with teaching communication skills are the gifts which therapists bring to the mediation process. The study of mediation can vastly expand the therapist’s understanding of the structure of conflict and the process of negotiation. Extremely smart, capable people are uncomfortable with negotiation - because it’s just not something they do on a daily, professional basis. Among these negotiation neophytes may be listed therapists, teachers, writers and artists. People who are unfamiliar with negotiation are more likely to personalize the process (“I can’t *believe* he thinks I would accept that offer!”) and are more inclined to decide what would be a “fair” offer and then present it without any inclination make further concessions. Those unfamiliar with negotiation view the high demand/low offer dance to the middle as a “game” which is distasteful. Yet, as master mediator John Alan Lemmon (who trained me) once noted, “Each participant must feel that *both* people are making concessions or a deal will not be reached.” As mentioned, a grasp of the

theory of conflict is useful in therapeutic as well as mediation work. Basic rules like, “Dissuade people from framing their positions as conflicts over ‘principles’ as these are very difficult to resolve,” have universal applicability and value.

So, as Fall is upon us and the kids have returned to school - many of us experience this time as the start of a new cycle. For those who are interested in learning a new skill, mediation is a field just waiting to embrace the family and couples therapist.