Divorce Mediation

An Honors Thesis (ID 499)

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INTRODUCTION

Dr. Howard Irving (1980) described the prevalence of divorce in our society in ominous tones:

"If you are simply living and breathing in North America the odds of your being involved with someone who is getting a divorce are better than even (p. 4)."

Considering the frequency of divorce, one would justly assume that our society would have developed an effective means for dissolving marriage. Unfortunately, our culture still labors beneath an archaic, inadequate adversarial procedure. Only recently have alternatives begun to develop. One such alternative is divorce mediation, which proposes the use of amiable negotiations in the dissolution of a marriage. The development of alternatives such as divorce mediation ensures people the opportunity to choose the method most effective for them.

The purpose of this paper is to explore divorce mediation as an alternative to the traditional adversarial procedure. In order to provide an understanding of this new alternative, this paper will focus on the development of divorce mediation, on the mechanics of the process, on the advantages and disadvantages, and on attorneys as mediators.
THE DEVELOPMENT OF DIVORCE MEDIATION

The development of divorce mediation has been both deliberate and sporadic. In 1968, the Ford Foundation gave the American Arbitration Association (AAA) a grant to begin extensive research into family and divorce mediation, with the hope that family mediation would be brought to national prominence (Vroom, Fassett, and Wakefield, 1981). Not until several years later was the AAA instrumental in bringing together the pioneers of family mediation. However, one of those pioneers—O.J. Coogler—did blaze a new trail with the establishment of the Family Mediation Association (FMA) in January of 1975. The purposes of FMA were to provide an alternative to adversarial divorce proceedings, to provide training for mediators, to research and develop the field, and to establish an information clearinghouse. Originally, the FMA operated with volunteers. Fortunately, in the fall of 1976, the Robert Sterling Clark Foundation of New York approached the FMA with an offer for assistance in research and development. From that research, structured mediation bloomed and grew (Coogler, 1978).

Although no one unifying model or theory exists, many practitioners are expanding the body of knowledge and are laying the groundwork for models. Dr. John M. Haynes of New York has a practice in divorce mediation and has written a book describing his experience, as has
Dr. Howard Irving. Perhaps as a result of this divergent development, clashes of opinion have occurred. A split in the FMA occurred at the November 23, 1981 meeting. According to the National Council on Family Relations, Winter 1981, newsletter, the split resulted in a new organization called the Academy of Family Mediators, chaired by Dr. John M. Haynes.

Despite such conflict, which is no doubt inevitable in the development of any new field, the research and development of mediation has continued. For example, Vroom, Fassett, and Wakefield (1981) described a consortium of foundations and corporations led by the Ford Foundation and the William Flora Hewlett Foundation which established the National Institute for Dispute Resolution. The Institute, which was endowed with ten million dollars for its first five years, is a major center for research and development.

Harris (1980) noted the states' involvement. More than a dozen states have family courts which have established mediation services. The federal government has also become involved in the effort. Congress passed the Dispute Resolution Act in 1980. The Act was to establish alternative resolution mechanisms nationwide through the Justice Department. Unfortunately, the appropriations bill has yet to pass Congress. However, this general awareness of the problem was further heightened by the federal government when the U.S. Department of Health
and Human Services funded a three year project to evaluate the "effectiveness and efficiency of mediation nationwide (Vroom, Fassett and Wakefield, 1981, p. 12)."

The field is in a state of development. While no one can agree on the final product of the development, everyone can agree on the goal--to find a good alternative to the adversarial divorce approach. Mediation appears to be the best alternative. As Meyer Elkin, former director of the L.A. conciliation court, described it, "Mediation is a way to close the books gently (Harris, 1980, p. 85)." This paper examines this gentler approach to the legal end to a marriage.

THE MECHANICS OF DIVORCE MEDIATION

Divorce mediation can best be described by examining the roles and characteristics of the participants, the principles of the process of mediation and a mediation model.

Currently, mediation has three principal participants--the divorcing couple, the mediator, and the advising attorney. Mediation primarily attracts the middle-class. Coogler (1978) characterized the typical couple who seeks mediation as aged between twenty-eight and forty-five with one to three children and a family income between eighteen and thirty thousand dollars. The couple usually has equity in a residence, two cars, and an average amount of debts.
The mediator is the "neutral third party." He provides the non-threatening atmosphere in which the couple works to resolve conflicts. Irving (1980) professed that the role of the mediator is:

"to direct discussion into productive channels, to encourage compromise, to take the attitude of problem solving and to prevent the type of name-calling and tawdry recrimination so prevalent in the courtroom (p. 77-78)."

Haynes (1981) emphasized, though, that the mediator should be careful not to waver between mediator and counselor. If a counselor is needed, one should be sought elsewhere or time-out periods in which the mediator acts as temporary counselor should be designated. No agreement should be struck while counseling is taking place. Furthermore, the mediator must remind the couple that he is not an arbiter. He will not impose an agreement upon them, nor solve any of their problems for them. He can only help them seek answers.

Coogler (1978) suggests that the mediator should have a masters degree in social work, psychology, psychological counseling, pastoral or marriage counseling, or a work equivalent. In addition, he should have three years of full time counseling experience, at least two of which were in marriage and family counseling.

Since many mediators are not attorneys, clinics retain advisory attorneys to provide legal advice and review the final agreement. In many states the bar association and the law require that each spouse retain separate attorneys.
The attorney's role will be discussed in more detail later.

If the participants support the basic principles of mediation, the process is much more effective. Gold (1981) developed seven principles common to all variations of mediation. First, a commitment to the preservation of the family relationship must exist. As Irving (1980) stressed, divorce affects the entire family, not just the couple. While the union of a couple might not last forever, the relationship between the parents and children and grandparents and grandchildren does.

Secondly, a commitment to the best interest of the child is vital. Continued parental conflict can be the most damaging part of divorce for children. Unfortunately, children are often used as pawns in adversarial divorce settlement. Haynes (1981) and Coogler (1978) require that all property and financial issues be settled before child custody is discussed if a conflict exists.

The third principle evolves from the first two. The family is seen as the client. This principle allows the mediator to emphasize the maximization of benefits for the entire family rather than those of one individual or just the couple.

Fourth, the couple is required to reach their own agreement. While the mediator may provide direction and expertise, he cannot impose a decision upon them. Fifth, the mediator must be an advocate for each party's well-being, yet must remain neutral as to the settlement. This
principle provides a friendly atmosphere for even the most frightened participant, yet assures the couple that the mediator will not be biased toward one participant or the other as the courts sometimes are.

Sixth, mediation requires full disclosure by the participants. If full disclosure is not made, a court could set aside the agreement in later litigation. Finally, an understanding that neither spouse will call the mediator as a witness in later litigation must be made. Without this understanding full disclosure would be difficult to attain.

These seven principles provide the foundation for most models of mediation. O.J. Coogler's (1978) model describes the basic components of the process. Since Coogler pioneered the field, most models thus far do not vary widely from his.

Coogler (1978) contends that a fair settlement must consist of four parts (if applicable):

1) Division of marital property
2) Spousal maintenance
3) Child support
4) Child custody

Each of these issues is attacked within the contracted ten hour framework established for mediation.

Typically, the sessions are two hours long. Within the first hour of the first session, the mediator sets the general agenda so that the conflict issues are known. Financial forms which each spouse completed before this session are discussed. Finally, a Temporary Settlement Agreement which stabilizes the relationship during the mediation is
written.

During the second hour of the first session, custody is discussed. If no conflict exists, visitation is agreed upon. If there are no children involved, the mediator moves directly to a discussion of marital property. At the end of this first session, the mediator asks the couple to seriously consider the division of the marital property, the custody of the children, and their financial situation. If the income of the family is not sufficient to provide for two households, both must consider ways they can increase their contribution or reduce their consumption.

During the second and third sessions, the couple finalizes the agreement concerning marital property, support and custody arrangements. If too much conflict exists, the mediator calls an impasse and the couple has the option to contract for four more hours of mediation.

In the fourth session, if an agreement has been reached, the couple meets with the advisory attorney to review the agreement. The attorney presents the final agreement within the second hour of the fourth session if no conflict exists and no legal problems surface.

The fifth session is reserved for couples with custody disputes. The children are asked to this session and the problem is discussed in a family atmosphere if at all possible. An important reminder in this session is that no custody settlement is ever final. Typically, the couple agrees to a custody arrangement for a specific period of time,
after which a review is mandated.

Basically, this model (and most variations thereof) allows the participants of the process to terminate dependency—both physical and emotional—upon the relationship, yet allows them to continue the "ongoing business", such as children, initiated by the partnership. O.J. Coogler (1978) considers this final outcome the ultimate goal of divorce mediation for it improves the quality of family life even when that family has been "broken."

While divorce mediation does have many advantages over adversarial proceedings, mediation is not a universal remedy of divorce problems. The next section examines the advantages and disadvantages of divorce mediation.

ADVANTAGES AND DISADVANTAGES OF DIVORCE MEDIATION

The advantages of divorce mediation are best understood by examining some inherent disadvantages of the adversarial approach. Seven basic disadvantages of the adversarial procedure have been outlined (Coogler, 1978; Gold, 1981; Haynes, 1981; Irving, 1980; Jenkins, 1981).

First, adversarial divorce proceedings are inherently costly. Two sets of attorney's fees, expert witness fees, and court costs often result in very high expenses. Art Parker, director of the Divorce Mediation Center in Charlotte, South Carolina, estimated that the average adversarial bill was $2,951. Mediation, on the other hand, has an average cost of $763. Hugh McIssac, director of the family counseling
service of the L.A. County Conciliation Court, confirmed those figures when he estimated that mediation cost only one quarter as much as traditional proceedings (Jenkins, 1981).

Secondly, mediation is also advantageous to those who are not directly affected by it. In L.A. County, the taxpayer provides approximately $5000 per divorce case which monopolizes, on the average, 9.8 hours of the court's time (Jenkins, 1981). In a court system in which the dockets are already overcrowded with cases that need guilt determination, divorce cases could easily be removed.

Thirdly, the adversarial approach pits two people, who have already had trouble with conflict resolution, against each other in a public arena. Bernstein (1974) effectively described the trauma when he referred to the parade of witnesses who destroy whatever "minute particle of good will (p. 41)" that might have existed prior to the divorce. Perhaps most damaging of all, however, is that the proceedings are open to the public--neighbors, family, and friends. Once the accusing words have been spoken, they can never be retracted. Although advocates of no fault divorce had hoped that such grounds for divorce would diminish the incidence of these damaging proceedings, they found that the same procedures were used for custody trials.

Mediation differs in that the entire process is private. This privacy encourages the openness which is vital to constructive conflict resolution. Complete disclosure is
possible because of the basic principle that a mediator will never be called to testify in court.

Fourth, the adversarial process fosters acquiescence by the contestants toward the final decree. Each participant, more than likely, went to his own attorney and delegated the responsibility of the negotiations to him. When an individual surrenders much of his direct participation in the formation of an agreement, he feels little obligation toward it. As Harris (1980) recognized, many court orders are not followed because of this low commitment. More litigation and blame placing results.

Mediation, on the other hand, requires direct participation and cooperation. No decision will be placed in the final agreement unless it is fully understood and agreed to by both participants. Gold (1981) emphasized that:

"fears, concerns, and future needs are handled in a positive way so that these issues do not then become the basis for undermining the agreement. Better compliance is possible because all of the options have been explored (p. 13)."

Fifth, adversarial proceedings encourage the use of children as pawns. Three-quarters of divorces involve children.(Irving, 1980). Often the children have little understanding of the cause of the divorce or the nature of their future. Mediation denies the use of children as pawns by requiring that all agreements be made concerning other issues before custody decisions are made. Furthermore, mediation involves the children in the sessions. The mediator makes certain that the children understand the reason
for the divorce and the neutrality of their role in their parent's decision to divorce (Haynes, 1981).

Sixth, no one can deny that adversarial divorce is a game of chance. Each contestant depends upon the skill of his attorney who may or may not be evenly matched with the opposing attorney. When the final decree is presented to the court, the judge has final determination. Nowhere else in the legal arena does the judge have more personal discretion than in adversarial divorce proceedings (Coogler, 1978). A mediation agreement, however, is determined completely by the couple themselves. No element of chance exists in the final agreement.

Finally, and perhaps most importantly, adversarial divorce deals with divorce as an event—a one time occurrence in the lives of family members. Unfortunately, that event—the courtroom debut—is only a part of the continuing process of adjustment. Mediation, as Haynes (1981) described, helps the clients face the future more easily by dealing with the emotional issues as well as the material issues. Specific provisions, such as funds for the wife to obtain an education, hence independence, are included to ensure that the pain involved in the process is as minimal as possible.

Divorce mediation does have many advantages over traditional adversarial proceedings. However, the potential for two major disadvantages of divorce mediation also exists. First, there is the danger that unscrupulous, untrained
people will advertise as divorce mediators. As founder and co-director of the National Center for Collaborative Planning and Community Services, William Lincoln expressed, "We need standards and competency (Vroom, Fassett, and Wakefield, 1981, p. 13)." FMA and a few other organizations have established training centers and certification processes. Lists of qualified mediators can also be obtained from FMA and other groups. Quackery could easily abound if precautions are not taken.

Secondly, divorce mediation simply is not for everyone. Gold (1981) reminded us that there are those who need the protection of the court for whatever reason. Mnookin and Kornhauser (1979) outlined five reasons why some cases will be litigated.

First, spite may motivate a spouse to punish and to blame the other spouse. No better arena than the courtroom exists for such a purpose. Secondly, due to distrust or distaste the parties may simply not be able to negotiate face to face voluntarily.

Third, instances where continuation of the negotiations is impossible will occur. As Mnookin and Kornhauser (1979) described:

"If parties get heavily engaged in strategic behavior and get carried away with making threats, a courtroom battle may result, despite both parties preference for a settlement (p. 975)."

Fourth, if each of the spouses believes that he can "win" more in the game of chance of the courtroom, he is more likely to choose the adversarial approach, especially
if he has little concern for the welfare of his spouse.

Finally, in some cases, the spouses will feel that no middle ground exists. "Optimal bargaining exists when, in economic terminology, nothing is indivisible (Mnookin and Kornhauser, 1979, p. 975)." Mediation will not be considered an option if no room for bargaining exists in the minds of the spouses.

Divorce mediation may not be for everyone, but for those who choose that path and who locate a qualified mediator, the process could be very rewarding and advantageous.

ATTORNEYS AS MEDIATORS

The task of finding a qualified mediator raises the question of who should be the divorce mediators. We discussed above Coogler's preference for a well-trained counselor with work experience. While the advantages of mediators trained in the behavioral sciences cannot be denied, the possibility of just the attorney as a mediator should not be overlooked. Currently attorney mediators comprise only fifteen percent of the national total of divorce mediators (Harbinson, 1981). This section of the paper will examine the current role of the attorney in mediation, why some people think he cannot expand his participation, and why others think his role could and should be expanded.

Currently attorneys participating in divorce mediation are divided into two categories--those who facilitate the work of mediators and those who actually mediate. The
first category is comprised of the majority of attorneys now involved in divorce mediation. "Advisory attorneys", as they are called, review the final agreement and draft the settlement into a judicially acceptable form. Unless legal questions arise during the negotiations, the review is the attorney's first and only contact with the clients.

The second category is a minority. These attorneys actually mediate, although much controversy surrounds the propriety of such services. Bruce W. Callner (1977) summarized three basic arguments against attorney mediators. First, Callner (1977) expressed concern about the attorney's inadequate training in psychology. He asserted, "the role of a lawyer should not be diluted with excessive non-legal responsibilities (p. 393)." Coogler (1978) supported this contention when he commented:

"It is generally easier for one trained in behavioral sciences to acquire legal and other knowledge required for mediation than for the legally trained person to gain knowledge and a feel for behavioral science and counseling skills (p. 75)."

Secondly, Callner (1977) argued that the ABA Code of Professional Responsibility (the Code) contains three barriers to attorney mediators. Canon 5 prohibits representing conflicting interests, Canon 9 dictates that the attorney avoid even the appearance of professional impropriety, and Canon 7 limits the attorney's ability to communicate with someone of adverse interest to his client. All of these barriers combine to prevent the attorney from
mediating a divorce, in Callner's interpretation. Callner (1977) described counseling of both spouses as a "high risk activity (p. 395)" for an attorney.

Finally, Callner (1977) cited what he felt would be an inherent weakness in any attorney who attempted to mediate--the inability to switch from advocate of one side to mediator of both sides. Shaffer (1975) compared seven dimensions between attorneys and counselors and drew some typical conclusions. For example, he stated that attorneys were "conscious of relevance (only the key facts, please) (p. 855)," while counselors were "empathic (feel what the client feels) and congruent (aware of their own feelings) (p. 855)."

The training received in law school, Shaffer (1975) asserted does not provide the same skills as training received in a masters program in marriage counseling.

However, Mussehl (1977) demonstrated that statistics prove that around one third of the average attorney's time is spent counseling and that some attorneys spend up to eighty percent of their time counseling. As no fault procedures for divorce gain in popularity, the vacuum created by the decreased desire for attorneys' adversarial divorce skills will have to be filled. If those attorneys have already incorporated counseling within their skills, they, too, should actively participate in divorce mediation. Harbinson (1981) asserted that the "increasing demand for mediation services in general has surpassed the availability of non-attorney mediation services (p. 175)." Furthermore, legal
advice is a necessary component of mediation—a component attorneys can most expertly provide. Winks (1981) described the skills necessary for effective mediation as, "skills...in every lawyer's arsenal: definition, clarification, negotiation (p. 646)."

As noted before, however, opposition to attorney mediation exists. The strongest opposing factor relates to ethical considerations. Canon 5, which prohibits representing conflicting interests, in effect, prohibits the representation of both husband and wife by one attorney. However, a different provision of the Code (D.R. 5-105(c)) does allow the attorney to represent multiple clients if three conditions are met:

"First, it must be obvious that he can adequately represent the interests of each client. Second, each client must consent to the joint representation. Third, the consent of each client must be given after full disclosure of the possible effect of multiple representation on the exercise of the lawyer's independent professional judgment (Harbinson, 1981, p. 176)."

Basically, then the attorney cannot later represent either client in divorce litigation.

The conflict of interest controversy has evoked a somewhat semantic question of whether the attorney is representing both sides or representing only the situation. The position that the attorney represents only the situation has gathered support from those who prefer the idea of a "disinterested advisor (Winks, 1981, p. 634)." While this position has been supported by a few state bar associations, the new ABA Model Rules of Professional Conduct specifically
indicate that the attorney represents both parties (Silberman, 1981). The mere existence of this question suggests that the attorney's role in divorce mediation is seriously being considered and debated within the legal profession.

The new ABA Model Rules of Professional Conduct does have a section pertaining to intermediaries. The stipulations which must be met before performing this role are similar to those found in the Code. The section specifically refers to mediation: "a lawyer may act as an intermediary between spouses in arranging the terms of an uncontested separation or divorce settlement (Harbinson, 1981, p. 180)." This provision, when all stipulations are met, deals with the barriers of Canons 9 and 7 which, respectively, mandate that the attorney avoid even the appearance of professional impropriety and limit the attorney's communication with someone of adverse interest to his client.

Attorney mediation is but one option in a wide spectrum of possibilities in divorce mediation. Considering the attorney's experienced past involvement in divorce resolution, he should not now be denied the opportunity to use that experience in a new field filled with complex legal questions. Just as not all divorce clients are meant for participation in divorce mediation, neither are all attorneys. However, under the careful guidance of the ABA and state bar associations, as well as those groups such as the FMA, attorneys could significantly contribute to divorce mediation.
CONCLUSION

The astounding 1.2 million divorces a year in the United States today challenge our society to develop a humane means for the dissolution of marriage (Heymann, 1981). No longer can we burden our courts with the destructive adversarial divorce in which the family is the biggest loser. One alternative which has developed is divorce mediation.

The continuing evolution of this alternative has resulted in structured models which encompass the basic principles of mediation. When those who choose to use mediation adhere to these basic principles, the advantages of this alternative are obvious. As the field is fully explored, options for variation, such as attorney mediators, will be developed and tested.

The time has come to take the emotionally and psychologically subjective experience of divorce out of the fault-finding objective court system. By allowing the couple to put to rest the emotions and conflicts surrounding the divorce through the use of cooperative negotiations instead of building the tension with adversarial accusations in the courtroom, mediation paves the road for the healthy continuation of the lives of everyone involved.
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