NEW YORK STATE COUNCIL ON DIVORCE MEDIATION

THE REPORT

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THE REPORT is NYSCDM's quarterly journal for members and other interested readers. It is distributed by email. The current and recent issues are available on the web at http://nyscdm.org/resources/the-report/. The NYSCDM permits printing of THE REPORT for personal use, and re-distribution of the entire issue.

The information, opinions, references or other materials herein should not be considered legal advice on specific subjects, but rather should alert readers to issues which may be raised during mediation. Actual application of any of the matters discussed depends on the facts in each case. Readers and their clients should obtain specific advice from the most appropriate professional. The views expressed by the authors or submitters in THE REPORT are their own and do not necessarily reflect those of the NYS Council on Divorce Mediation or of the editors.

The editors of THE REPORT, Eli Uncyk, Chuck Newman, and Justine Borer, would like the journal to be a two-way conversation. We encourage healthy debate. In addition to classic "Letters to the Editor," we welcome your comments, feedback, criticisms, compliments and other thoughts about anything that appears in these pages. We also seek your suggestions for improvement and areas of coverage. If you would like to publish an article or any other kind of paper in THE REPORT, please send us a one-paragraph proposal. The best way to reach us is by email to nyscdmpubs@yahoogroups.com. We look forward to hearing from you.

THE REPORT is published quarterly by the New York State Council on Divorce Mediation.

Eli Uncyk, Esq., Charles (Chuck) M. Newman, Esq., and Justine Borer, Esq., Editors

Melissa Burns, Production Manager

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EDITORS' PAGE

By Eli Uncyk

It's my turn to write the Editors' Page of THE REPORT for this issue. First, I want to introduce Justine Borer, who is now one of three co-editors of THE REPORT, published by the New York State Council on Divorce Mediation.

Justine is a Manhattan-based family and divorce mediator and a lawyer, who has other concentrations as well. She graduated from Harvard College and UCLA School of Law, and is a native New Yorker. Justine has published several articles about mediation and family and matrimonial law. Those were after her stint on the *Harvard Lampoon*. Her recent article, "Would Atticus Finch Have Been a Good Mediator," appeared in the 2013-2 issue of THE REPORT. (Mike Stokamer responds to that review on page 7 of this issue.) Justine is developing a focus on Israeli family and matrimonial issues, and on ethics law. Among her many activities, Justine serves on the New York City Bar Association Professional Responsibility Committee. You can learn more about her at www.justineborer.com.

Charles Newman has been a co-editor of THE REPORT for about the last two years. Chuck is a divorce and commercial mediator and lawyer practicing in New York City. He graduated from New York University School of Law, where he was an Arthur Garfield Hays Civil Liberties Fellow. He earned his B.A., *magna cum laude*, at Lehigh University. He serves on many law and mediation organizations, including as a member of the Boards of Directors of NYSCDM and of the Association for Conflict Resolution — Greater New York Chapter. Chuck volunteers as a community mediator and mediates for the U.S. District Court and New York State Supreme Court in Manhattan. The parties in 100% of his Storm Sandy Insurance Mediations resolved their differences.

I had been the Editor-in-Chief of *The Monthly Mailer* (the predecessor of THE REPORT) for nearly ten years. However, it was Chuck who took THE REPORT to a different level of production, organization and scholarship. His steady hand and clear vision have made THE REPORT more than it was in the past, including in its previous incarnation. I can't adequately express my gratitude for Chuck's invaluable help.

I also want to express my appreciation to Carol Butler, Ph.D., who, as an editor, helped edit and publish THE REPORT and *The Monthly Mailer*. Carol is an individual and couples psychotherapist, divorce mediator, and divorce coach in Manhattan. She is a valuable contributor to THE REPORT in many ways. One of her articles, "Seven Tips for Mediators from a Therapist/Mediator" is published on page 14 of this edition. A prolific writer in several areas within and outside psychology and mediation, she is a docent in the Butterfly Conservatory at the American Museum of Natural History. You can read more about her at www.seetheotherside.com and www.members.authorsguild.net/cabutler.

Debra Vey Voda-Hamilton and Cari Rincker have given us an insight into an area of human emotional interaction with non-humans. People in distress, including couples in mediation, often have animals involved in their lives. The complex relationships among the people and the non-humans in their lives have a dimension we often entirely overlook. New York State has a large population involved with animals, including as companions and in farming and ranching. The article, on p. 21, offers insights into the conflicts and disputes involving these animals, and how to help resolve them.

EDITORS' PAGE, continued

Nadia Shahram reports, page 25, on the NYSCDM's Fall Upstate Mini-Conference, held on September 7th in Buffalo.

We are excited about presenting Chris Sorensen's interview, page 9, of Alton Abramowitz, who is the current national president of the American Academy of Matrimonial Lawyers. The Academy's invitation-only membership includes the cream of the most active and successful matrimonial lawyers across the country. Alton brings a wealth of information and experience to the table when he talks with Chris, and he and Chris discuss how divorce litigators and mediators can work and play well with each other. Chris is an experienced mediator and therapist, and has long been an active member of both the NYSCDM and FDMCGNY.

In our recurring "Ask the Ethicist" column, Abby Rosmarin, an attorney and mediator, provides, page 30, an interesting and unique perspective on questions of confidentiality, neutrality and the obligations of a mediator under professional and personal circumstances.

We didn't have the time or resources to cover, in sufficient depth, some new developments affecting families in mediation. Among these is the New York implementation of the Affordable Care Act (commonly known as "ObamaCare"). Health insurance is an important aspect of marital settlement agreements and many mediators are beginning to learn the details of the ACA through seminars, articles and programs. A good overview can be found in two web sites: www.healthcare.gov/ and www.treasury.gov/press-center/press-releases/Pages/jl2153.aspx.

The U.S. Supreme Court resolved important issues by striking down several provisions of the Defense of Marriage Act, reinstating the right of same-sex marriage in California, and sustaining the Affordable Health Care Act. The federal government issued proclamations and a series of regulations to resolve many inconsistencies and overcome several hurdles which resulted from many states not recognizing same-gender marriages. As a result, legally married same-gender couples will be treated as married under federal laws and regulations, regardless of where the couple lives, so long as the marriage was solemnized in a state which recognizes same-gender marriages. However, there will certainly be interesting issues to address. An Associated Press story described a proceeding in Mississippi, to terminate a same-gender marriage entered into in a state which recognizes such marriages. However, Mississippi does not recognize same-gender marriages, and there is not yet (as of this writing) any indication of how the Mississippi court will deal with this "divorce" case.

We hope you will interact with us. Write, call, suggest, compliment, or criticize. THE REPORT is your forum.

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LETTERS TO THE EDITORS

To The Editors:

I read with interest Eli's article in THE REPORT on what should be made part of an MOU. I was wondering why you haven't included health insurance — both for the parties and for the children. The Courts are insistent that this be included in the Agreements, under DRL 255.

The parties must state that they are aware that they may no longer be covered under a spouse's health insurance policy. This can be put in their affidavits, but it is better to include it in the Agreement.

If there are children, the Agreement must state the specific health insurance coverage for the children and in most cases you must include a Qualified Medical Child Support Order with the Judgment submission.

I am a renewed member of the Council, having been away for a while, and look forward to being part of the Council and a part of all the members who so graciously give of their time. Eli's article was great.

Jeanne Fitzgerald, Belle Harbor

To the Editors:

I have just finished reading Eli's wonderful gifts of clarity and importance in his articles in THE REPORT on the DRL statutory changes and the Law Revision Commission's May 15th "Final Report," including the commission's fascinating recommendations; and about Memoranda of Understanding. Thank you so much for your succinct and very pleasurable, easy-to read summaries.

As to the historical developments related to the MOU ... yes, we have seen a melange of interesting changes. I remember that within John's [Haynes] earliest basic trainings and given the political climate, he often instructed the mostly mental health trainees to describe a more general and good-enough description of a couple's agreement in the MOU; and to leave to the attorney, or attorneys, the addition of any legal language, with a view to those who would accuse us of practicing law without a license; but always, however, to explain in layman's language the purity of what were the intentions and agreements of the parties.

The territorial landscape changes, and we see the impact of mediation ... with its many positives.

With best wishes and appreciation,

Morna Barsky, LCSW, Great Neck

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PRESIDENT'S PAGE

By Clare A. Piro

The Fall has always been one of my favorite seasons. I enjoy the change in weather to cool but not cold, the colors of the leaves, and the opportunity to change my wardrobe. What I love most of all is one of my favorite holidays, Halloween.

This year, though, Halloween brings some trepidation, since we downstaters have had two years of bad storms just before Halloween. In 2011, we had a freak snowstorm and in 2012, of course, we had Superstorm Sandy.

After Sandy, I was without power for ten days. That's nowhere near the loss of life and home and business that many people suffered, but being without electricity is real and present and unpleasant. It's enough to make one think. Many in my professional suite lost power at home, but after a few days, all but three of us were "back online," in the twentieth century meaning of the term. Before the storm, we chatted briefly in the kitchen, but didn't know each other well. But we bonded quickly over our lack of power. We had a misery to share and a common set of problems and complaints and frustrations to talk about. Until day seven, when I became the only one without power. My relationship with the other two returned to our pre-storm hello's, and I felt very alone.

The more my experience became singular, the less connected I felt. There was sympathy, surely, but no one really understood.

I felt the experience so strongly that I thought my pulpit of the President's Page might be a good place to share a realization with my colleagues. I need to keep in mind, when I'm working with a difficult client, what it might be like to experience losing your spouse, your best friend, the person who really knows you. I had bonded with my colleagues for only a few days over a temporary lack of electricity. Even something so small made me feel a loss and isolated when that relationship ended.

How easy it is for us to focus in mediation on the nuts and bolts details that the parties need for a workable agreement. We can lose sight of the pain and loss that one or both parties might feel. In many ways, it is much easier for me to deal with clients who are angry than clients who are sad, hurt or feeling alone and who require much more in the way of patience and understanding

I hope that the Council can continue to be a place where mediators can remind themselves of what's important.

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RESPONSE TO PREVIOUS ARTICLE

TO KILL A MOCKINGBIRD: ANOTHER LOOK

By Michael Stokamer

Last month, just after I read Harper Lee's *To Kill A Mockingbird* for the first time (my high school library did not stock the Classic Comic), I received THE REPORT and read Justine Borer's interesting review titled, "Would Atticus Finch Have Been A Good Mediator?"

I believe that Atticus's daughter, Jean Louise ("Scout"), who was eight years old at the time of the story, would have been an excellent mediator. She showed brilliant technique in a central and dramatic episode recounted in the book. Scout is the narrator.

Atticus was a lawyer in a small, rural, Southern town and was appointed in the 1930's to defend a black man accused of the rape of a white woman. The night before the trial was to begin, Atticus stationed himself in front of the jailhouse where his client was being held. A crowd began to gather, obviously planning to break into the jail and mete out their own justice. Scout and her brother, who had come looking for their father, refused his orders to go home.

As the situation developed, the tension rose:

"He in there Mr. Finch?," a man said.

"He is… and he's asleep. Don't wake him up...."

"You know what we want," another man said. "Get aside from the door, Mr. Finch."

Scout continues:

"I looked around the crowd. It was a summer's night, but the men were dressed, most of them in overalls and denim shirts buttoned up to the collars. I thought they must be cold natured, as their sleeves were unrolled and buttoned to the cuffs….

I sought once more for a familiar face, and at the center of the semi-circle I found one.

Scout engages someone in the crowd:

"Hey, Mr. Cunningham."

The man did not hear me, it seemed.

"Hey Mr. Cunningham"….

He seemed uncomfortable, he cleared his throat, he looked away.

"Don't you remember me, Mr. Cunningham? I'm Jean Louise Finch…. I go to school with Walter," I began. "He's your boy, ain't he? Ain't he, sir?"

RESPONSE TO PREVIOUS ARTICLE, CONTINUED

Mr. Cunningham was moved to a faint nod. He did know me after all.

"He's in my grade," I said, "and he does right well. He's a good boy," I added, "a real nice boy. We brought him home for dinner one time. Maybe he told you about me…"

"Tell him hey for me, won't you?"

As narrator of the story, Scout continues:

I began to feel sweat gathering at the edges of my hair, I could stand anything but a bunch of people looking at me. They were quite still. Atticus said nothing. I looked around and up at Mr. Cunningham, whose face was equally impassive.

Then he did a peculiar thing. He squatted down and took me by both shoulders, "I'll tell him you said hey, little lady," he said. Then he straightened up and waved a big paw.

"Let's clear out," he called. "Let's get going, boys."

As they had come…. The men shuffled back to their ramshackle cars.

In the next chapter, as the family was rehashing the events of the previous evening, Atticus said:

"[Y]ou children last night made Walter Cunningham stand in my shoes for a minute. That was enough."

That is what Atticus taught his children to do. That is what we all try to do, isn't it — just to help one person stand in another person's shoes?

QUESTION: Was it a mediation, or some other kind of intervention? Why?

Mike Stokamer is an attorney and Family and Divorce Mediator in Manhattan and Hackensack, New Jersey. Mike can be reached at emes52@aol.com, or (212)925-7881 in New York or (201)488-2228 in New Jersey. His website is www.MikeStokamer.com

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THE INTERVIEW: ALTON ABRAMOWITZ

By Chris Sorensen

Alton Abramowitz *is one of the most highly regarded divorce lawyers in the country. He is just finishing his term as national President of the American Academy of Matrimonial Lawyers, a premier, invitation-only association of divorce litigators. Alton is a partner of Mayerson Abramowitz & Kahn, LLP in Manhattan, and a Diplomate of American College of Family Trial Lawyers. He is listed in both Best Lawyers in America and Super Lawyers. Alton seeks to find well-reasoned and comprehensive solutions to serious problems that have a long term impact on the lives of the people who have chosen him as their advocate. He employs all of the tools that are at the fingertips of matrimonial lawyers — from negotiation to litigation to appeals. His name appears as counsel of record on a far-ranging group of reported court decisions. Alton is also a distinguished member of Bar and specialty organizations too numerous to mention, having held leadership positions in many of them. He teaches and lectures frequently on a variety of divorce and family law topics.* ***Chris Sorensen*** *is equally highly regarded in divorce mediation and Collaborative Law circles, with an equally impressive resume of organization and committee service and leadership. THE REPORT's editors thought it would be interesting to eavesdrop on a conversation between Alton and Chris. We weren't disappointed, and we hope you won't be, either. Here's the interview.*

CS: Alton, thanks so much for taking the time in what must be such a hectic schedule between your practice and serving as AAML President.

AA: It is hectic, but it's my pleasure.

CS: Family and divorce mediators would be very interested to hear of any trends in your nationwide travels as President of the AAML.

AA: One of the hottest topics right now is the "so-called" alimony reform movement — a massive lobbying effort of state legislatures by groups who believe that men in particular have been treated unfairly by the courts. Their goal is to limit the amount and duration of maintenance. They have successfully legislated in Massachusetts, and they are continuing efforts in Connecticut. The Florida governor recently vetoed such a bill.

In New York, the reform movement has taken another viewpoint, that women and non-moneyed spouses are being treated unfairly; there's a bill in the New York State Legislature on proposed formulas for awarding spousal maintenance. It uses a $500,000 cap for application of the formula, which is different from the child support guidelines. [Editors' note: Eli Uncyk reported on this pending legislation in Vol. 2013, No. 2 of THE REPORT.]

Various state and local bar associations, including the New York State Bar Association Family Law Section, where I serve as vice-chair, and the New York Chapter of the AAML believe that

THE INTERVIEW, continued

the cap should be $136,000, the same as child support, to allow for judicial discretion in high income cases, which are often also high net worth cases. The $500,000 cap would create much more work for the judges, who would have to explain any deviations from the formula. With judges handling 300-350 cases at a time, the system starts to come to a halt. In some counties people must wait six to nine months for an award of temporary support because the judges have to justify deviations in written opinions. In the meantime, people become impoverished, and the ability to control the finances can create unfair leverage for the monied spouse.

CS: So New York, too, may be moving towards a post-divorce maintenance statute, but the reform movement is driven by different interests …

AA: Yes, and basically the groups who are supporting the formulaic approach to maintenance in New York are the same groups that tried to hold up the no-fault divorce legislation in order to get formulaic maintenance. They got that in part, in the form of the temporary alimony statute adopted at the time of no-fault.

> *"In the AAML, we are instead seeing a resurgent interest in mediation, as well as arbitration."*

Another big topic floating around, interestingly, is that Collaborative Law seems to be on the wane. Clients seem to be less inclined to pursue Collaborative Law, lawyers seem less happy with it — even in states that first jumped on the Collaborative bandwagon. A lot of the early advocates have segued back to mediation. I was never a big fan of Collaborative Law — not just because I don't play well in the sandbox (smiles) — but because it actually creates a greater layer of expense if the collaboration fails.

CS: If a mediation is not going to result in a resolution, the mediator or the clients usually know it pretty early on, when people have invested only a limited amount of time, money and energy, whereas it's possible in a Collaborative case that people have spent significant sums and time and then they have to start over with new lawyers, new experts, etc.

AA: Right. So in the AAML, we are instead seeing a resurgent interest in mediation, as well as arbitration. We just had a very successful arbitration training, the first in eight years, and are planning a 40-hour mediation training.

The other huge issue across the country today is same-sex marriage, how same-sex couples are treated from state to state. In negotiating a pre-nuptial agreement, you have to bear in mind that at the time they divorce or one of them dies, a couple may not live in a jurisdiction that recognizes their marriage, which creates huge issues. Recently, I was one of three lawyers who vetted a post-nuptial agreement for a same-sex couple who had homes in three different states.

There is also a growing need by couples, gay or straight, who don't wish to marry but want to enter into agreements regarding their finances. The AAML is about to issue a Model Cohabitation Agreement, and we will have a CLE program in November.

CS: That's a lot of ground we just covered — when do you have time for your practice?! Speaking of which, can you say a little bit about how you chose family law as a career?

AA: Putting aside that I have continued because it's really interesting and people are really interesting — I was a Legal Services lawyer for five years after graduating from law

The Interview, continued

school, doing a lot of Family Court work. I then went to work for Irving Erdheim's firm; he was known for having represented Judy Garland. Very early on people started referring high-profile cases to me, members of prominent families, and it's continued to grow. What's so fascinating is that the law has constantly evolved, become more sophisticated. I've been a member of the AAML for 30 years, and when I tested for the Academy there was one reported equitable distribution decision in New York State. Now there are easily 10,000 or more.

CS: What kind of case was it?

AA: A case in which equitable distribution was decided on the basis of the parties' relative economic contributions, which was the trend early on in the division of marital property.

CS: Does your firm specialize in any particular types of matrimonial cases?

AA: Primarily our firm is litigation-oriented, but I would say 80% of our cases settle before or at trial. Litigation takes a lot of time, costs a lot of money. You try to encourage clients to do the right thing. We try to ask clients to do a cost-benefit analysis to determine whether it's worth it to be paying legal fees that could be paid to their spouse to settle a case.

"Litigation takes a lot of time, costs a lot of money. You try to encourage clients to do the right thing."

CS: Do you like to settle cases, or do you prefer to try cases, or …

AA: I like both. I was trained as a trial lawyer, I've been trying cases since I had hair, and the courtroom is a lot of fun. Settling cases is in some ways more difficult than trying cases …

CS: Can you say more about that?

AA: Trying a case, you prepare your client and your case for trial, and you present your evidence to the judge, and you're off the hook — the judge makes the decision. When you're settling a case, you really have to consider many alternatives and possible results. You do have greater freedom to structure a settlement, more creativity from an income tax perspective, you can trade assets that a judge might not be willing to trade. In trying a case, you are presenting your best case scenario, which isn't necessarily your settlement scenario.

CS: It seems that a lot of mediation skills are needed in trying to resolve a case … you need to have some awareness of the interests and needs of the other person as well as your client.

AA: You have to be conscious of what the other party's ultimate goals are, and what their feelings are … this is an emotional area of the law, it isn't strictly dollars and cents. There is a psychology that goes into getting to the right place.

CS: How important is the relationship between the two lawyers, when you are settling?

AA: It's always good to know your adversary, because if you have experience with them you know what buttons not to push if you are trying to settle a case, you know how to strategize dealing with them. If you're working with friends, sometimes that relationship will remove some of the barriers to being forthright when negotiating — it might be easier to acknowledge certain things about one's case.

CS: It's similar to mediation, in that the level of trust impacts how willing each participant is to be transparent and creative.

THE INTERVIEW, continued

What factors indicate whether a case should have a judge involved, or whether it should be mediated? What are mediation's limits, and where is litigation problematic?

AA: I'm firmly of the view that where there's an incidence of serious domestic violence or verbal abuse, those cases belong in the courthouse, not in mediation. Any veiled threat of violence will impact the outcome of the mediation to the detriment of the victim spouse. Really in any case with a dominant spouse, unless you have a really strong mediator, the spouse who dominated the marriage is going to dominate the mediation. In New York there tends to be very little lawyer involvement in mediations. I think more lawyer involvement, which I find more often outside New York, would help in these cases.

CS: The issue of power imbalance is certainly a topic of great interest to mediators — how to remain neutral while also ensuring that both people are full participants, and are equally empowered to participate. Our membership organizations want to ensure that mediators are well-trained in addressing power imbalances.

"Litigating custody interferes with the harmony that should exist once the divorce is over."

AA: But just as certain lawyers are less effective than others as litigators, some mediators are less effective than others as mediators. I think lawyer involvement in mediation can help to make it less likely that the dominant spouse is going to control.

CS: Often because of finances or personal viewpoints, people may not want to consult with a lawyer during the mediation process; more often people will choose to have an independent legal review of their agreement before signing it.

AA: Yes, but waiting until the end can create whole new areas of tension and sometimes trust can be affected if one spouse feels that, after going to the lawyer, the other spouse reneged on what presumably was a deal. If you have lawyers involved in the process throughout, that's less apt to happen.

CS: I would add how well the mediator explains and prepares the clients for the attorneys' review, and how careful the attorneys are in expressing their legal opinions to their clients.

We've talked about a potential risk of mediation, that it could perpetuate a power imbalance. What about the risks of litigation, in particular, harm to the children?

AA: It goes beyond that, it's a harm to the family. Litigating custody interferes with the harmony that should exist once the divorce is over. It hardens people in their positions and it makes it very hard for them to continue to co-parent, which they really have to do for the rest of their lives, not just while their children are growing up. There are life events — weddings, birth celebrations, christenings, confirmations, bar and bat mitzvahs, anniversaries, birthdays — when parents need to put aside their differences and get along for the sake of the children, in the presence of the children. We certainly should say to our clients that the best custody agreement is the one that you put in a drawer and never look at; that you and your ex-spouse find a way to compromise and accommodate one another; and most importantly, that you accommodate the child's needs. Divorce does not end your relationship.

CS: Spoken like a true mediator. But do you think there are situations where it is in the best interests of the children that there be a judge involved?

THE INTERVIEW, continued

AA: Yes — where one spouse lacks sufficient insight to be able to use good judgment … particularly where there is alcohol or drug abuse, or domestic violence, or extreme psychological pathology. I think those cases have to be tried in court. After two or three days of trial you may finally be able to settle it because the judge will really weigh in and indicate how he or she is going to rule, or really push settlement. Good judges will offer how the case might be settled in a way that they may feel powerless to do themselves, because of the confines of the law.

CS: How can mediators and litigators learn from each other, how can we overcome some of the reservations and wariness that each discipline may have of the other?

AA: Well, certainly joint continuing education programs, publications, and participation in other public forums. But I think also by presenting to our clients, whether as lawyers or mediators, that there is a menu of dispute resolution alternatives available, and that the client needs to decide which one is going to be best for his or her situation.

CS: Thank you, Alton!

Chris Sorensen, JD, MSW, is President of Chris Sorensen P.C., providing mediation, consulting attorney and collaborative law services in Manhattan. Chris is Past President of the Family and Divorce Mediation Council of Greater New York (FDMC) and a former Board member of the NYSCDM. He received his JD from Harvard Law School, his MSW from New York University and his certificate in psychoanalysis from the National Institute for the Psychotherapies. He can be reached at (212) 262-5348 or cs@sorensenpc.com. His website is www.sorensenpc.com.

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SEVEN TIPS FOR MEDIATORS FROM A THERAPIST/MEDIATOR

By Carol A. Butler

You can listen to clients in a cognitive manner without being drawn into their emotional life, hearing the facts and details and mentally preparing your response as you listen. At the other, more therapeutic, end of the spectrum, listening can be an emotional immersion in the client's life in which you allow their subjective experience, viewed through the lens of your own subjectivity, to have an impact on you. Neither approach alone is appropriate for mediation, but it is useful to have the flexibility to negotiate somewhere between the extremes, and I hope this article will suggest some new options.

I am a divorce, family, and business mediator, co-author of *The Divorce Mediation Answer Book*, and a New York State licensed psychoanalyst. In my private practice, I provide mediation as well as psychotherapy for individuals and couples, and I am a clinical supervisor in the Department of Applied Psychology at NYU. I completed psychoanalytic training many years ago with both an ego psychologist and a traditional Freudian, and I have been involved in study groups and trainings over the years, trying to evolve along with the mental health field.

The traditional therapist/patient model was similar to the conventional attorney/client and medical models. It set up the expectation that clients would explain their problems and the professionals would use their expertise to provide help. If you are an attorney, you understand the need to establish a relationship of trust and confidence with the client without getting emotionally involved. The detached, professional stance is intended to enable you to communicate more effectively than the client on his or her behalf, and to keep you focused on objectively using your legal knowledge to try to settle their dispute.

Some of you might be surprised to learn the degree to which traditional therapists, influenced by Freud and the early psychoanalytic writers, were also taught not to get emotionally involved with clients. Feelings experienced by the analyst were labeled "countertransference" and were by definition problematic, assumed to be inappropriate reflections of the analyst's neuroses and needing to be eliminated in the analyst's personal analysis. Early analysts were taught to view themselves as neutral, passive recipients, blank screens receiving the patient's communications with free-floating attention, and dealing only with the patient's drives and defenses. There was little or no explicit consideration given to any contribution the analyst might make to the client's reactions, although anyone who reads Freud and the early analysts can infer that they had a profound personal impact on their patients. Indeed, we have learned that they often got quite emotionally involved with some patients.

Modern therapists recognize the importance of our own conscious and unconscious contributions to the relationship with the client, and I will try to outline how this aspect of our work is helpful for mediators to consider. Following are some specific tips and techniques that I have learned, used, and taught to supervisees who are training to do counseling and psychotherapy. These are psychological tools rather than negotiating techniques, and having them available as a mediator can help facilitate a smoother, less volatile mediation process. The goal is for clients to feel understood and to be able to relax their defenses so they can work together constructively with you and the other party or parties.

SEVEN TIPS FOR MEDIATORS, continued

1. Forget about being neutral.

There is nothing sacred about neutrality. Writing about psychoanalysis, Freud posited that neutrality means you don't take sides in the clients' conflicts and you don't express feelings about them or talk about your own life. This attitude, derived from the medical model, was intended to create a non-judgmental setting in which the client can stay focused on his or her own issues rather than becoming concerned with your reactions.

But we are *not* dispassionate listeners, and we cannot be completely neutral. Each client's appearance, education, beliefs, past experiences — their total identity as well as their environment, what we call their "subjectivity" — influences how you respond to them and how they react to you. Your background and everything you say or do — your physical appearance, your office decor, how you handle interruptions, your community (the law, the courts) — these are facets of your subjectivity and play an active part in the atmosphere of mediation. Together with the clients, you co-construct an experience out of your shared reality and mutual influences. We call this intersubjectivity or the intersubjective field, and this is where mediation occurs. It is not a neutral space.

> *"Your background and everything you say or do … are facets of your subjectivity and play an active part in the atmosphere of mediation."*

2. Dealing with two clients at once.

All attorneys and most mental health professionals are trained to work with one person at a time. That can be difficult enough, so trying to establish rapport and make progress with a couple can be really daunting. The stakes are always high; you're dealing with potential volatility, and there may be elements that underlie the couple's dynamic that they haven't revealed to you. You may feel confused or at odds with one or both of the clients.

When you work with individuals, you can usually stall for time while you try to figure out what to do next. The traditional therapist's passive "Mmmmmm" or "Can you tell me more about that?" is risky when working with a couple because of the increased emotional intensity. Leaving too long a pause may tempt one of the spouses to have an outburst because they feel frustrated. It is important when you work with a couple to concentrate on how each is feeling and to try to empathize with both of them, giving them plenty of opportunities to express themselves without getting out of control.

There are some things you can do to make working with a couple go more smoothly. Welcome each person warmly; look them in the eye as if, for the moment, you are the only two in the room. It is essential to try to immediately establish rapport with each person as they enter your office. Shake their hand, smile, and try to make them comfortable. You really need to make that initial investment, so they can withstand your focus on their spouse when it becomes necessary, as it surely will. Make sure you give both people attention fairly evenly, and check in with one *before* you focus on the other. Try to consistently be aware of all the subjectivities in the room, including your own.

There is always the risk of making a brilliant remark and winning one client's allegiance but alienating the other spouse. Timing is crucial. If you let a couple interrupt each other too frequently you may next have them screaming at each other.

SEVEN TIPS FOR MEDIATORS, continued

Allowing people to express feelings is important, but I intercede immediately if voices are raised, and I prefer to keep my couples sessions short- no more than one hour except in unusual circumstances. Having a time limit keeps people focused on accomplishing something. When I have tried longer sessions, I found that couples became worn down and cranky and began to re-argue issues they had already discussed, resulting in an increased risk of the session becoming unproductive. I find it is better to end the session leaving the clients feeling it was useful and looking forward to the next visit when they can continue the discussion.

3. Reflection or mirroring.

Carl Rogers's client-centered or person-centered approach to counseling takes the point of view that each person's sense of self has developed and exists in a continually changing world of experiences and perceptions in which they are at the center and to which they react. Personal values evolve as a result of "evaluational" (judgmental) interactions with others, and the perceived expectations of other people sometimes stimulate posturing or false or defensive behavior in order to meet with others' approval. Experiences that are inconsistent with how a person sees himself or that do not reflect how he or she wants to be seen may be perceived as threatening. Protecting one's self-image can result in argumentative and irrational behavior. This is frequently what we experience in high conflict mediations.

"Real reflection is not just parroting what the person has said. It is carefully acknowledging and building on how you understand the meaning and implication of the other person's words."

Rogers's work relies on his belief that everyone has a drive to self-actualize — to realize their full potential, to be good, to be fully alive, and to find meaning in life. He is known for using the technique of reflection, relying on the emergence of the person's natural desire to self-actualize once they feel heard and understood. Real reflection, in a Rogerian sense, is a powerful tool. It is *not* just parroting what the person has said, but rather, carefully acknowledging and building on how you understand the meaning and implication of the client's words. Rather than judging them, you (the environment) are trying to accept them and understand their point of view. Later writers have expanded and clarified this process in terms of mirroring, validating, and empathy.

In a highly charged, conflictual exchange, try to reflect what is said to you by paraphrasing it and then asking for confirmation that you are accurately mirroring it; *e.g.*, "If I understand you correctly, what you said is…. Am I correct? Am I getting it?"

4. Validation.

Validation is trying to see the situation or statement from someone else's point of view *without making a judgment and without necessarily accepting his or her point of view*. Instead of simply mirroring or paraphrasing clients' words, try to follow their logic — how you understand what they are trying to convey. You can do this yourself, or you can ask the speaker's partner to give it a try, making it clear that by doing this, they are not accepting the spouse's position. For example, you might say, "So you feel you should have more than half of the assets because you don't have a way to earn enough money to save in the future. Is that what you mean?"

5. Empathy (not sympathy).

Sympathy means sharing the feelings of someone else, having "sympathy pangs," and it is not particularly constructive in mediation.

SEVEN TIPS FOR MEDIATORS, continued

Empathy is quite different because it does not involve your feelings. The word "empathy" comes from the German *Einfühlung*, or literally "feeling in," also variously defined as instinctively mirroring another's experience, trying to comprehend the psychological life of another person, taking an observational stance or temporarily immersing yourself in the other person's subjective universe to try to grasp their meaning and emotions. Some degree of empathy (or the lack of it) has played a role in human communication throughout history.

Consider this, from Heinz Kohut (1959):

> We see a person who is unusually tall.… Without introspection and empathy, however, his size remains simply a physical attribute. Only when we think ourselves into his place, only when we by vicarious introspection begin to feel his unusual size as if it were our own and thus revive inner experiences in which we had been unusual or conspicuous, only then begins there for us an appreciation of the meaning that the unusual size may have for this person and only then have we observed a psychological fact.

"It is a challenge to be sensitive to another person while being true to your own feelings."

Kohut transformed psychoanalytic theory from a one-person model, in which the focus was completely on the client's drives and defenses, to a two-person model, in which the relationship between client and therapist is recognized as playing an important role in the work.

There are situations when an empathic response occurs naturally — as when a loved one is in pain. Empathy, when it doesn't come naturally, requires you to put your own concerns temporarily on the back burner in order to get closer to understanding another person's experience. Doing this does not need to compromise your own perspective, your "authenticity," but it is a challenge to be sensitive to another person while being true to your own feelings. The goal is "optimal responsiveness" — finding a balance from moment to moment between empathy and authenticity.

Making progress in mediation, while staying in an empathic frame of mind with two clients at the same time, is no easy task. You are trying to think about how it must feel to be in each client's situation, and putting that into your own words when it seems useful. For example you might say, "I get the feeling that you are frightened about your future… am I right?" Using empathy thoughtfully can sometimes help one spouse understand the other spouse's position, and may even encourage them to modify their behavior in response to what you are modeling. Of course, sometimes when you have engaged one client and created enough safety for them to drop their anger and express more painful feelings, the partner will be unable to bear the shift and will have an outburst. Even at that point, if you can model competence, confidence, self-awareness, and the ability to tolerate the feelings being expressed, you may be able to avoid an impasse. First, though, you will probably have to empathize with the spouse who has lost control.

6. How to handle a client who you know is lying.

You are aware that total honesty is hardly the norm for every client. Lying is not necessarily a deliberate cover-up or a fabrication of some event or fact, but rather it can be a conscious or

SEVEN TIPS FOR MEDIATORS, continued

unconscious departure from telling the whole story. The underlying reason for the lie may be self-preservation, intentional manipulation, or simply omission.

Dealing with a lie is even more difficult when you are working with a couple, because the spouse may recognize the lie, making the liar even more adamant about not admitting the truth. You risk chaos if you join with the spouse in challenging the lie.

These are some reasons that people lie in mediation:

(a) They are self-conscious, ashamed, or embarrassed about certain behaviors or thoughts. If a client is shocked at their own behavior, they may lie in an attempt to preserve their idealized self-image.

(b) They don't trust their spouse … or you. Trusting you may take time, especially if they already feel betrayed by their spouse.

(c) They fear being judged by their spouse or by you, or they project their own self-criticism onto you.

(d) They may not see it as a lie if they don't feel the information is important or relevant to the mediation. People may omit information in this manner due to a lack of insight, as part of the dynamic between the spouses, or because of delusions or cognitive distortions (inaccurate thoughts) — *e.g.*, jumping to conclusions, discounting the positive, exaggerating, or minimizing.

(e) Denial (the longest river in Egypt). A party may be unconsciously lying to himself, buying into some irrational belief that what he is denying didn't actually happen. Pathological liars are the extreme here — they actually feel quite convinced that what they say is true, although it is not.

(f) They may omit information to spare the spouse's feelings or because they are afraid of retaliation or catastrophic consequences.

(g) Lying may be a learned coping mechanism, adopted earlier to avoid trauma or abuse.

(h) Fear of being reported for something they may reveal. Therapists in most states are mandated reporters; if a client seems to be in danger of harming herself or a specific other person, the therapist must compromise confidentiality and report the possible illegal behavior. For all professional groups, mandatory reporting requirements vary from state-to-state, but clients may assume they exist.

(i) Fear of being seen as crazy, or at fault in the divorce. They may fear that telling the truth will jeopardize their negotiating position — and of course, that might be true.

When you feel a client is lying but it doesn't seem appropriate to challenge them and the other spouse is silent, try thinking of the lie as symbolic communication: what are they trying to convey? What might they be hiding or denying? Why are they doing it? If you can figure that out, you may be able to proceed delicately without ever having to address the lie. The client may or may not recognize or appreciate what you are doing, but it will help things move along more smoothly than having a confrontation.

7. Dealing with the peanut gallery/ Greek chorus.

Clients frequently discuss their crumbling marriage with friends and family, and although this broadens the dialog, it can be confusing, sometimes even to the point of threatening to undermine the mediation. Clients who quote their friends or relatives or people in the barber shop or hairdresser need to keep the advice of those other people in perspective. Instead of debating bad advice, ask your client about the person who gave it. Is that person divorced? In my experience, it usually doesn't take much probing to get a client (or their spouse) to admit or realize that their

SEVEN TIPS FOR MEDIATORS, continued

If you argue for one point of view, an ambivalent person is likely to defend the opposite position. On the other hand, we know that causing someone to verbalize one side of an issue tends to move the person's balance of opinion in that direction. It is therefore useful to encourage the client to voice the reasons for the opposing point of view.

"advisor" is projecting lessons learned from their own painful divorce onto your client's situation, which may be very different. Recognizing that reality, without criticizing it, can be enough to put the advice in perspective.

Consulting with an attorney who is not mediation-friendly can also induce confusion and may sabotage the mediation. You can only advocate for the mediation process and give the clients information about how the adversarial process works. I support their option to go the adversarial route if they seem to be leaning that way; I remind them of the expense, time, and emotional strain that litigation is likely to entail and I encourage them to see what they can accomplish in mediation before they give up.

Some Concluding Thoughts

People who are getting divorced are often ambivalent; even reasonable people can disagree; and more than one point of view can have validity. Your role is to accept the client in the moment, try to stay engaged with each point of view, *and* also move toward change — a tall order.

Repeated impasses are typical of high conflict couples because recurrent cycles of resentment and conflict have become characteristic of their relationship. That pattern may be a major reason they are divorcing. One or both parties may come to the mediation emotionally enfeebled, depressed, or in a chronic rage. Their distress is likely to emerge no matter what you do, so I have tried to suggest some tools that may help you respond more flexibly and without feeling frustrated or getting into a power struggle with the clients. Ideally you will find workable combinations of problem-solving, validation, empathy, reason, and acceptance that will increase the odds of your mediations moving along constructively.

Carol A. Butler, Ph.D., is a mediator and a psychotherapist who works with individuals and couples in her private practice in Greenwich Village. She is co-author of The Divorce Mediation Answer Book*, Kodansha America 1999, and is an Adjunct Assistant Professor/Clinical Supervisor in the Department of Applied Psychology at New York University. She is also a docent at the American Museum of Natural History in their butterfly vivarium, and has co-authored seven books on the natural world. Website: www.seetheotherside.com.*

SEVEN TIPS FOR MEDIATORS, continued

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FIDO, FLUFFY, ELMER & ELSIE: NEW YORK DIVORCE MEDIATION WITH COMPANION AND FARM ANIMALS

By Debra Vey Voda-Hamilton, Esq. & Cari B. Rincker, Esq.

Divorce is an emotional time for all parties involved. One household becomes two. What lies ahead in life's next chapter is new and undefined.

This article discusses the unique challenge surrounding the personal worth of animals — both companion and farm — at divorce, and offers pointers to divorce mediators who face these issues, which can complicate even the finest settlement agreements. Many divorce mediators have war stories involving the settlement that almost got away because of an animal, be it a family pet, pleasure horse, or livestock in a multi-generation farm family.

Litigation about "who gets the animal" often creates a permanent wedge between the parties. Mediation, on the other hand, encourages creative problem solving about animals that is not typically available in court.

VALUING PETS AS PROPERTY DOES NOT PROPERLY ADDRESS THE EMOTIONS DRIVING CONFLICT IN DIVORCE

In New York State, farm and companion animals are both seen as personal property. (In some states, the law in this area is changing.) Yet both farm and companion animals often have emotional, historic and aesthetic value that is difficult to quantify. Most animal owners don't see their animals as property or tangible assets. According to the National Resource Center in a paper entitled *The Link Between Animal Abuse and Human Violence*, approximately 48% of U.S. pet owners define their pets as companions and 49% go so far as to define their pets as family members. Not surprisingly, only 2% of U.S. pet owners identify their pets as property. *See* Phil Arkow & Anna Melbin, "Practical Strategies for Serving with Pets," NC ADV Conference (July 24, 2012). Although similar statistics for farm animals are unavailable, most livestock producers have emotional attachments to the animals they raise. These attachments can give livestock owners a sense of identity. And we find that, like children, animals may be casualties of a divorce when they are used by one spouse as an emotional bargaining chip or to gain power over the other spouse.

It is easier for most of us to relate to emotional attachment to companion animals — such as dogs, cats and horses — than to emotional attachment to farm animals. Yet the latter are just as common. For example, a sixth generation dairy farm in Upstate New York may put increased value on cattle born with a certain pedigree, or derived from certain lines of animals (*e.g.*, descendants from Grandpa's cows or a winning 4-H heifer at the State Fair). Alternatively, a couple may have purchased pigs or sheep together, though one spouse did most of the manual labor, while the other handled bookkeeping. The spouse who did the manual labor may feel that the pigs or sheep are his/hers because he/she was the person who fed them each day, gave them vaccinations, made sure they had water, and stayed up late for health emergencies or calls to veterinarians

Of course, unlike many other types of assets subject to division at divorce, individual companion animals and breeding livestock cannot be physically divided. Several issues revolving around companion or farm animals may arise during divorce mediation. The following are a few common examples:.

1. The animal(s) might be a reason for the conflict between the parties. ("She never did clean out the kitty litter!" "That dang dog kept us up barking at the coyotes all night — we could never

ANIMALS IN DIVORCE MEDIATION, continued

get any sleep!" Or, "She was always riding that horse when she should have been taking care of the home!")

2. The animal(s) might be the last good thing that the couple shared. ("I got her that puppy for our last anniversary, before she broke my heart." "I used to love going out to check cows with him each night; it's how I fell in love with him.") One party may wish to keep the animal as a keepsake of when life was good. If that is the case, the mediator may decide to highlight these shared emotions so the couple can focus on the positive aspects of their past relationship.

3. Farm animal(s) may have symbolic significance for a party who comes from a multi-generational farm business. ("I own a fourth generation dairy farm with my brothers, their wives, and my parents. She knew nothing about the dairy business before we got married. Just because we own cows together doesn't make them hers. I was the one milking them twice a day. I want to keep the herd in my own family and pass it to my children and my children's children.")

4. The animal may have a history with one spouse. ("She is the progeny of the Grand Champion Heifer that I showed at the All East Livestock Exposition." "I trained that dog to win at agility contests." "That is a twelve time 'Best in Show' dog." "I rescued that stray cat and cared for her.")

5. The companion animal(s) might be working members on a farm operation. ("That's my cow dog. She helps me herd cattle. I spent years training her; she knows my commands. She is my right hand around the livestock and is invaluable to me." "I need that horse to check the livestock when they're grazing on the hilly terrain.")

As divorce mediators, our ability to address our clients' emotional attachment to both companion and farm animals is our stock in trade. This is often the cornerstone of why mediation works in divorces in which companion or farm animals are at play.

UNIQUE ECONOMIC FACTORS CONCERNING FARM ANIMALS

Not only should divorce mediators consider and weigh the emotional value of animals, but also the livestock business and the special economic value of farm animals. Divorce mediators should not forget that livestock and horse operations are businesses. The animals are likely assets of that business entity, whether it is in the form of a sole proprietorship; general partnership between spouses or among family members; a corporate entity; or a trust. Businesses have brand recognition, and issues such as goodwill, intellectual property, accounts receivable/payable, debts/loans, and salaried employees. All of these may come into play when a business is involved in a divorce action. Moreover, many farm operations are family businesses that are passed down from generation to generation and among siblings and cousins. In this light, animals can be complex business assets that cannot be overlooked. Some mediation parties may wish to focus on the impact of business valuation and succession planning on heirs.

Furthermore, the value of a particular head of livestock depends on myriad factors, including whether the animal is to be used for breeding or meat; its age; and its progeny and pedigree. There are even more considerations, such as disposition, color markings, and genetic characteristics (DNA markers predict marbling or meat tenderness). For example, a herd bull could have a fair market value between $1,000 and $20,000, depending on his phenotype and genotype. Divorce mediators unfamiliar with livestock or horses may believe that a cow is a cow is a cow, but that is not the case from either an economic or emotional standpoint. To illustrate, a thoroughbred racehorse or a horse used for team penning competitions will have a higher economic value than aged pleasure

ANIMALS IN DIVORCE MEDIATION, continued

Quarter horses used for weekend horse rides with the family. That said, parties may put more emphasis on the emotional value of the livestock. Divorce mediators should listen to their agriculture clients so they will understand whether the clients value their farm animals primarily for economic reasons or for emotional ones.

SOME PRACTICAL POINTERS FOR DIVORCE MEDIATORS

If you are mediating a divorce with companion and/or farm animals, keep the following pointers in mind:

1. Depending on the situation, facilitate the discussion about animals early in the process. This will help prevent an impasse in later settlement negotiations. In some cases, animals can be almost as important an issue in divorce mediation as is child custody. For example, animals can be used as retaliatory weapons in divorces. If an amicable agreement about animals is reached early in the mediation process, the mediator can help the parties reflect on why they made that decision if a disagreement later arises.

2. Help the parties select the proper caregiver. Mediators should reality test to make sure the caregiver understands the responsibility of animal husbandry and ownership. This is especially crucial when livestock and horses are involved. One spouse may have watched the other spouse do most of the work during the marriage, and may not clearly understand the day-to-day responsibilities associated with animal care, such as deciding the proper feeding regime, administering necessary shots/vaccinations, or helping with calving. Likewise, in the case of domestic animals, one pet parent may not understand the impact of the responsibility of daily walks with the dog on his or her lifestyle.

3. Don't forget that the other spouse may seek visitation. Even though courts see pets as property, couples going through divorce mediation may not. Mediators can help the parties decide on a creative visitation schedule. For example, a dog could stay with the other pet parent when the primary caregiver is on vacation, and on a set schedule of weekends throughout the year. If a pet or horse visitation schedule is agreed upon, it should be incorporated into any MOU (or separation agreement, if a lawyer-mediator is drafting).

4. Discuss what happens if one party is no longer able to care for the animal(s). To illustrate, in a recent divorce, the husband found his dog listed on Petfinders seven years after it was awarded to the wife in a divorce settlement. She had put the dog up for adoption six months after the divorce was finalized. Mediators can discuss whether the parties desire that one pet parent notify the other if he/she decides to put the animal up for adoption. Mediators can also discuss with the parties what would happen if an ex-spouse was no longer physically or mentally capable of caring for the animals, and the parties can agree who the contingent caretaker would be.

CONCLUSION

In divorces involving animals, courts often treat animals as personal property subject to equitable distribution. Parties often view their animals as children or with other emotional or personal attachment, but New York law does not. Divorces involving companion or farm animals can be more complicated than first meets the eye. Mediation offers a unique opportunity to address animal-related emotional and financial concerns. Armed with the information and strategies presented in this article, mediators can avoid falling into cautionary tales about the settlement that got away due to the animal(s).

ANIMALS IN DIVORCE MEDIATION, continued

Debra Vey Voda-Hamilton is the principal of Hamilton Law and Mediation. Debra's practice focuses on providing an alternative means of resolving conflicts between people involving animals, thereby avoiding protracted litigation. You can reach Debra at (914) 273-1085 or on her website at www.hamiltonlawandmediation.com.

*Cari Rincker is the owner of Rincker Law, PLLC, a national general practice law firm concentrating in food/agriculture and family/divorce law. She is currently the Chair of the American Bar Association's General Practice, Solo & Small Firm Division's Agriculture Law Committee; and a member of the Association of the Bar in the City of New York's Matrimonial Law Committee. Cari was recently appointed as an adjunct professor teaching food law at New York University, Steinhardt School of Education. She recently co-authored a book, with Pat Dillon, "*Field Manual: Legal Guide for New York Farmers & Food Entrepreneurs*." You can follow her "Food, Farm & Family" Law Blog at www.rinckerlaw.com/blog.*

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UPSTATE MINI-CONFERENCE

NYSCDM members had the opportunity to meet members of Buffalo's local ADR community.

Diane E. Elze, Ph.D., one of several excellent presenters at the NYSCDM 2013 Upstate Mini-Conference.

Lewis Bigler, Ronald Heilmann, Adrienne Grace and Suzanne Brunsting discussed collaborative law and mediation.

By Nadia Shahram

This year's upstate New York Mini-Conference was held on September 7th at the Buffalo Yacht Club in Buffalo, New York, preceded by a mixer on Friday evening at the home of Nadia Shahram in Williamsville. Bridget M. O'Connell, Esq., and Nadia Shahram, Esq., were the Co-Chairs of the weekend. The mixer had forty guests from the local ADR community, Board members and other NYSCDM members. Clare Piro, the current President, addressed the group. Past presidents Bobbie Dillon (2011-2013), Tim Mordaunt (2003-2005) and Jack Heister (the founding President) highlighted some of the history of the NYSCDM. The evening was filled with great conversation, food, drinks and live Irish and belly dancing. For those who missed this gathering, it might be offered again in the future! You don't want to miss it!

Saturday morning's presentation started with attorney-mediator Steve Sugarman presenting opening remarks. He was followed by J. Michael Fox from the International Center for Studies in Creativity at SUNY Buffalo State. The 90-minute talk was a combination of a series of small group problem-solving exercises and a presentation of "conceptualization of novelty," a creative tool to support, investigate, and polish ideas, which mediators may use in dealing with clients. Shari Jo Reich, Esq., (Managing Partner at Kenney Shelton Liptak Nowak, LLP, which has several offices around the state) and Diane E. Elze, Ph.D. (Associate Professor and Director of the M.S.W. Program at SUNY Buffalo School of Social Work) presented, respectively, on same-sex marriage and cultural competency in the wake of court decisions redefining marriage. Mediators in the room had several questions about the law and the culture surrounding same-sex marital relationships.

Lunch was Buffalo's famous beef on weck buffet style, served in the upper deck space overlooking great Lake Ontario with Canada on the far shore. (For those who have so far been deprived of this delicacy, *see* http://en.wikipedia.org/wiki/Beef_on_weck_sandwich.) The lunch presentation by Gail Ferraioli from Clarity Mediations, Rochester, on the topic of "Attention and Intention, Aspiration and Engagement: the Brain and our Being," was about mediating our inner and outer conversations and connections. Gail was inspirational. With her gentle, soft approach to daily challenges, she provided the audience with short exercises to expand our understanding of inner self.

MINI-CONFERENCE, continued

Conference attendees mingle and enjoy the view from the Buffalo Yacht Club.

Around lunchtime, NYSCDM V.P. Bill Hoefer was the maxi-auctioneer at our mini-auction. Jack Heister generously donated one of his paintings; our current President, Clare trumped all bids. Co-Chairs Nadia and Bridget each donated items to the auction.

The afternoon session started with an ethics talk by Suzanne L. Brunsting, Esq. of Rochester. It was followed by a panel discussion by Holly Baum, Esq., Adrienne R. Grace, CFP, CDFA, Helen Ferraro-Zaffram, Esq., and Lou Cercone, CPA, all experts on various aspects of financial planning. The discussion focused on parties' ability to understand different assets, from pensions and retirement assets to inheritances. The audience was then divided into smaller groups to ask questions of the individual experts.

The Mini-Conference ended with a happy hour, where participants who share the common goal of enhancing divorce mediation socialized on the lower deck of the Yacht Club.

Nadia Shahram is a divorce mediator and Collaborative lawyer in Amherst. While traveling in 1997, Ms. Shahram studied the various alternative dispute resolution methods used in other countries, and she saw especially the value of family mediation as it is practiced in Europe and Asia. Ms. Shahram is a Member of the Board of NYSCDM, and is a member of the Women and Erie County Bar Associations. She can be reached at attorneynadia@gmail.com; her website is at http://www.buffalomediation.com/.

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THE U.S. PATIENT PROTECTION AND AFFORDABLE CARE ACT: BRIEF EARLY NOTES ABOUT "OBAMACARE" FOR NEW YORK DIVORCE AND FAMILY MEDIATORS

By Eli Uncyk

Health insurance costs are an important aspect of mediating a divorce. The federal law normally shortened to be called the Affordable Care Act (or "Obamacare", originally an epithet from the right, but later embraced by the President), as implemented in New York, will make health insurance available to all legal residents of New York, and will provide subsidies for lower-income residents. The details are important to help parties estimate the costs of health insurance as parts of their budgets.

It has occasionally been suggested that parties not get divorced, in order to keep health insurance coverage, often subsidized or paid for by an employer. These parties could simply live separately with a "post-nuptial agreement" addressing all issues which would have been addressed in a divorce. The new health care laws will insure that insurance is available to people who would previously not be able to get insurance at an affordable rate, under COBRA or after COBRA expires.

"It has occasionally been suggested that parties not get divorced, in order to keep health insurance coverage, often subsidized or paid for by an employer."

Mediators may direct clients to the New York State web site describing the new insurance laws, coverage options and costs, at

http://www.healthcarereform.ny.gov/

More information about New York's "Age 29 Rule" is available on the New York State Department of Financial Services website,

http://www.dfs.ny.gov/insurance/health/S6030_Age29.htm

Important information about the interplay of Medicaid, the ACA and income levels is available at the Kaiser Family Foundation:

http://kaiserfamilyfoundation.files.wordpress.com/2013/01/8168.pdf

New York State is reviewing rules issued by the U.S. Department of Health and Human Services to determine how federal requirements will interact with state health care law (including reform that allows young adults to stay on their parents' health insurance policy until age 26 , as compared to New York's Age 29 law, which will presumably continue).

Mediators should become familiar with the ACA sufficiently to be helpful to families with limited or no health care insurance; people who will not have employer-sponsored health insurance after the COBRA eligibility period expires; and people who may not be able to afford the costs of COBRA insurance. However, mediators should remember the division of responsibility among themselves, their clients and other professionals. Many mediators may conclude, for example, that as helpful as it is for the mediator to understand the way the system works, it is up to the parties or other professionals

OBAMACARE, continued

to determine their own best choices for health insurance. (Bear in mind that under the ACA, there's a new category of specially-trained advisors, called the "Navigators," whose job is to explain the new law and help individuals and families work out their best options.)

An important aid in determining the costs of health insurance for families and individuals with income below $88,200 (currently the highest level eligible for tax or payment benefits) is the calculator offered at the following web site:

http://kff.org/interactive/subsidy-calculator/

Try it, using hypothetical numbers, to see how much money can be generated or saved by adjusting the parties' obligations to each other from taxable-to-the-recipient income (maintenance) to non-taxable payments (child support or non-taxable maintenance). This is just one piece in the puzzle of calculations to maximize the funds available to parties after slicing up the assets, income and expenses.

It may be useful to re-allocate support between child support and maintenance, to take advantage of subsidies available to people with lower incomes. Unfortunately, calculations may become more complicated for lower-income parties who are least able to pay professionals to do the calculations.

Eligibility for some level of insurance will not be dependent on income, but income will affect how much of a subsidy will be provided by federal and state resources. The income levels eligible for subsidies are reprinted in part below. Details of how the "insurance exchange" (which will offer insurance policies at different coverage levels and prices) will work, the types of policies, and how to calculate individual policy costs, will be available at the following web site:

https://nystateofhealth.ny.gov/.

The basic income structures and relationship to income (as explained in the nystateofhealth.ny.gov website, shown above), are based on the chart set forth below:

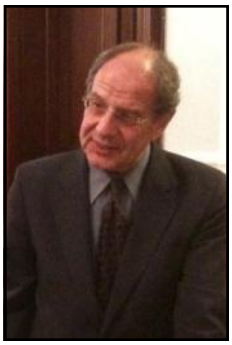
% of Federal Poverty Level	Income for Family of 4	% of Income for Premiums
Up to 133%	$29,327	2%
133% up to 150%	$29,327 - $33,075	3% - 4%
150% up to 200%	$33,075 - $44,100	4% - 6.3%
200% up to 250%	$44,100 - $55,125	6.3% - 8.05%
250% up to 300%	$55,125 - $66,150	8.05% - 9.5%
300% up to 400%	$66,150 - $88,200	9.5%

Tax rebates or subsidy payments become available if the costs of premiums exceed a certain percentage of income, represented by the last column in the chart above.

OBAMACARE, continued

Reading isn't enough to understand the issues. If parties in mediation take their individual information and complete mock tax returns, and apply the resulting information to their expected expenses, the benefits of getting insurance through the ACA insurance exchange will show up. However, mediators shouldn't undertake the calculations, any more than they should do mock tax returns for the parties.

The ACA and the web sites above are good tools. They are not, however, solutions to the problem of insufficient income to cover the expenses of two households.



Eli Uncyk, a lawyer and mediator, is a founding member of Uncyk, Borenkind & Nadler, L.L.P. in Manhattan. He has a varied practice both within and outside family law. A sought-after speaker, Eli is an active and/or founding member of NYSCDM and many other mediation and Bar groups. He is co-editor of THE REPORT. Email: euncyk@ubnlaw.com. Web: www.ubnlaw.com.

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ASK THE ETHICIST: AN ETHICAL DILEMMA? BEST PRACTICES? OR MUCH ADO ABOUT NOTHING?

By Abby Rosmarin

This article will discuss what concepts shape the boundaries of a mediator's duty to reveal not just the *existence* but also the *nature* of information learned outside the mediation process.

Mediation is grounded on several principles, including impartiality, self-determination, informed decision-making, and voluntariness. As we analyze a situation, we must also consider the viewpoint from which we assess it — that of the clients, that of the mediator, or both? We may also need to take into consideration the working relationship of the mediator and the clients as well as the ground rules established in the process.

Let's explore this in the context of a divorce mediation. Take, for example, the following facts:

Mediator has a friend who is actively dating and now reports that he/she has found "the one", whom he/she initially met on a dating website. Friend is gushing about "the one" and to add a visual to the elation, shows the website profile of "the one" that includes a photo. Mediator realizes that "the one" is a client who is deep in the mediation process with spouse. "The one" has three unemanicipated children, lives with spouse in the martial residence, and has a tight budget. Friend is not informed that Mediator knows anything about "the one" and Mediator changes the topic.

(Depending on the circumstances, Mediator may feel an obligation to tell Friend about the personal situation of "the one", but this would be restrained by Mediator's obligations of confidentiality. For purposes of this discussion, let's only focus on Mediator vis a vis the mediation process and clients.)

What is Mediator to do?

The Model Standards of Practice for Family and Divorce Mediation, as adopted by the NYSCDM Board of Directors, May 2002 and updated May 2012, provides:

> …[I]f a bias or conflict of interest clearly impairs a mediator's impartiality, the mediator shall withdraw regardless of the express agreement of the participants…. Conflict of interest means any relationship between the mediator, any participant or the subject matter of the dispute, that compromises or appears to compromise the mediator's impartiality.

Standard IV; Standard IV B.

"It could be beneficial for Mediator first to tap into his/her own feelings about the information learned."

In determining whether Mediator believes he/she is impartial, it could be beneficial for Mediator first to tap into his/her own feelings about the information learned, which may include the context in which it was learned.

Does Mediator, for example, have strong feelings about dating while married? If abhorrent, Mediator may determine without further analysis that his/her impartiality is so affected that withdrawing as the mediator is warranted.

Perhaps, because the information was learned from Friend, it may be possible that Friend will introduce "the one" to Mediator or share relevant information in the future. This would be a different context than if Mediator, for instance, overheard the information. Or, perhaps Mediator

ASK THE ETHICIST, continued

feels that it will be impossible to separate what might be in Friend's best interests from issues which may come up in the mediation (think cohabitation, housing choices, budget items, custody arrangements, etc.). Under these circumstances, there is the potential, at the very least, for a perception of partiality.

If Mediator feels that the circumstances require withdrawal, should Mediator share the reason with the clients? Would a general statement that Mediator has become aware of information which disqualifies Mediator from continuing as the mediator in the matter be sufficient? Is Mediator obliged to refund fees? (That issue is a topic for another article.)

How must Mediator address the obligation of disclosure in general? The Model Standards provide:

> A family mediator should resolve all doubts in favor of disclosure. All disclosures should be made as soon as practical after the mediator becomes aware of the bias or potential conflict of interest. The duty to disclose is a continuing duty… The mediator should facilitate full and accurate disclosure and the acquisition and development of information during mediation so that the participants can make informed decisions.

Standard IV E; Standard VI A.

"If Mediator has decided to continue the mediation, how far should Mediator go in disclosing information learned outside of mediation?"

If Mediator has decided to continue the mediation, how far should Mediator go in disclosing the information obtained from Friend? Some might believe that Mediator may not keep secrets from clients. Others may disagree. Others might contract to keep confidential information learned in caucuses. And, what is relevant is open to interpretation.

Mediator could advise the clients that Mediator and one of them have a shared friend. Mediator could determine if both clients want more information. If both do not, then Mediator would not share additional information and each client would decide if he/she will continue under such circumstances.

If they both agree to more details, then Mediator could share that "the one" and Mediator have a friend in common and perhaps name Friend. Whether more information about Friend would be shared is also a possibility. If Friend is only named without more information, it may be up to "the one" to share with the spouse how "the one" knows Friend. If this information is shared in front of Mediator and it is patently false, (*e.g.*, Friend is my bookkeeper and Mediator knows Friend is not a bookkeeper) what should the Mediator do (if anything)?

Or, should Mediator first disclose the information to "the one" because of concerns of confidentiality? If so, and "the one" instructs Mediator not to reveal the information to the other spouse — with Mediator's knowledge that possibly relevant information is being withheld — can Mediator continue?

Some might believe that because "the one" is on a dating site, there is no expectation of privacy. So, if Mediator decides to reveal the information to the spouse as well and the spouse is caught completely unaware, the spouse may feel that participation in a process that is grounded on trust cannot continue.

Mediator may try, prior to disclosure, to address the clients' social life, and, through that inquiry, may discover that both spouses are dating and they are aware of the other's activities. Then, does Mediator have an obligation to disclose the particulars about Friend?

ASK THE ETHICIST, continued

The Model Standards provide that:

> A family mediator shall disclose all actual and potential grounds of bias and conflicts of interest reasonably known to the mediator.
>
> A family mediator shall recognize that mediation is based on the principle of self-determination by the participants.

Standard IV; Standard I.

The clients would need the knowledge to make their own assessments. Perhaps one or both of the clients would feel uncomfortable continuing in the process with Mediator if they knew the relationship between Mediator and Friend. What if "the one" breaks up with Friend and worries that Mediator would then be partial? Or, the spouse thinks that Mediator will favor "the one" because of Friend.

Clearly, there are no objective answers and the above reflects the beginning of an inquiry that would take its own shape depending on the nuances of the particular facts. I hope that the discussion presses each of us to consider our fundamental notions about our values, practices, and the nature of mediation. I welcome thoughts and dialogue.

Abby Rosmarin, Esq., LMHC, is Mediation Counsel at McCarthy Fingar, LLP; Executive Director of the New York Association of Collaborative Professionals; and a member of the NYSCDM and Family and Divorce Mediation Council of Greater New York Joint Ethics Committee. Abby can be reached at arosmarin@mccarthyfingar.com. Her website is at http://www.mccarthyfingar.com/attorneys/abby-p-rosmarin.aspx

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T4: THE MEDIATOR'S TOOLBOX: TIPS, TRICKS & TECHNIQUES

Mediators have excellent listening and communication skills. Many of us can benefit from concrete tips about the business aspects of mediation. Billing is different from practitioner to practitioner and is very individualized. Here are a few possible methods to use when billing clients:

• Emphasize to clients at the consultation that they will need to pay your hourly rate for each mediation session, even if they arrive late or end the session early. In this vein, collect fees at the beginning of the session, not the end. Doing so means that the last thing they do is to work on the problem, not to reach into their pockets to part with money. This increases the likelihood that clients will leave the session feeling that they've communicated productively and meaningfully.

• In addition to collecting fees at the beginning of each session, bill every two weeks for time between sessions. Mediation can be a long process with lag time between sessions. If you wait to collect fees for work done outside of sessions, the longer you wait from the time of service, the more difficulty you may have with payment.

• Bill for time spent outside sessions in 10 minute increments. Lawyer-mediators are often accustomed to doing this; it may take time for non-lawyer-mediators to get used to tracking their time so closely. Doing so has the potential to benefit the dynamic of the mediation session, and it increases the chance that the mediator will feel that his hard work is appreciated.

• Don't be afraid to let clients use credit cards to pay your fees. You can set up low cost internet portals for accepting credit card payments through sites like PayPal. It is more convenient for many clients to pay with credit cards, and thus more likely that clients will pay your bills. Though credit card companies take fees with each transaction, receiving upwards of 90% of your invoice when it is paid with a credit card is preferable to receiving 0%.

— Justine Borer

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INSIDE SCOOP/AROUND THE COUNCIL

Board Highlights

The Board of Directors of the New York State Council on Divorce Mediation meets four times per year. In order to keep the membership informed of Board activities, we present you with some of the highlights of the September, 2013 meeting.

Treasurer David Louis reported that there was a cash balance as of June 30, 2013 of $76,803.02, and that even with a lower attendance than anticipated, the Annual Conference generated a profit of $12,500. Congratulations were given to co-chairs David Louis and Dan Burns.

Clare reported that the Council will be sponsoring the APFM conference in Denver on October 3-6, 2013 and the NYSDRA conference in Albany on October 27-28, 2013, and that our members will receive the member rate in exchange for our advertising the conferences on our listserv. The Council also will be making a donation of $75 to the APFM and will be taking out an advertisement in the NYSDRA Journal for $200.

The website upgrade is now complete, and we have added plug-ins so that we can post the videos made by Patty Murray at the annual conference.

Bob Badolato reported in writing that our current membership count is 230 and that he will be ready to send the renewal applications out to the organization in early September.

Melissa Burns reported in writing that she has answered calls and emails, created a photo album on our website from the conference and updated all website pages for new officers and board members. With our web designer, Michael Conaty, the website directory was upgraded, and while only about 25 members have updated their listings, Melissa will continue to help any member needing assistance to do this. She also worked with THE REPORT editors to format and publish No. 2 of Vol. 2013.

Patty Murray reported in writing that her attendance at the Annual Conference was helpful for her to learn more about our organization and to secure interviews of Bobbie on Northeast Public Radio and Look TV 8. She also posted on our website the video vignettes she made of members at the Conference. She continues to work on the Power Point presentation on the basics of divorce mediation which soon will be available to our members, and she continues to update the blog.

The Board unanimously approved the following motions as recommended by the Executive Committee: that the Board meetings be scheduled the day before upstate and downstate conferences and that Board members be reimbursed for lodging, if necessary, for them to attend mini-conferences so that Council members in all locations have the opportunity to meet with and interact with Board members; that the Board is the exclusive owner of its mailing list; that all Board policies be maintained by the Administrative Coordinator and stored in a remote storage location and placed in all Board member books; that all conferences and board meetings be scheduled so as not to conflict with the observance of any religious holiday; that the NYSCDM become an institutional Subscriber to the APFM; and that the Report archives will be available to the general public on our website and not just members only.

Chuck Newman gave a written report on THE REPORT and introduced a new item called the Water Cooler as a way for members to informally interact, and was given positive feedback on the latest issue.

Susan Ingram reported that the Public Awareness committee will be tracking the success of the blog and updated website through analytics on the site, and will insure that the blog is updated more frequently.

Clare reported on a newly formed *ad hoc* committee that will discuss the goals of the Council partnering with other groups (increase membership and increase awareness of the NYSCDM) and the groups to consider (RAFM, ADFP, APFM, FDMC, ADR committees of bar associations and mental health groups). Kate Bar-Tur and Chuck volunteered to work with Susan and Clare on this committee.

Bobbie, Kathy Jaffe, Susan and Chuck agreed to serve on an *ad hoc* committee to explore the possibility of advertising to raise revenue for the Council.

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INSIDE SCOOP/AROUND THE COUNCIL, continued

Public Awareness Committee

By Helene Bernstein and Susan Ingram

We are the co-chairs of NYSCDM's Public Awareness Committee. We continue to work closely together with the goal of spreading the word about the virtues of divorce mediation to the public and the professional community. Our search engine optimization (SEO) efforts have brought increased visibility to the Council. Patty Murray, our public relations consultant; our members who offer their blog posts; and the Council's administrator, Melissa Burns, all contribute greatly to the success of our online efforts.

Patty has completed our video vignettes that were recorded in May at our Annual Conference in Saratoga. They are currently being displayed on a rotating basis on our website, and can also be viewed on our YouTube channel. They were created in order to educate the public about the advantages of mediation as an option during the divorce process.

Our Power Point Presentation (PPT) about divorce mediation is nearing completion and awaiting final comments by the Board. The PPT will be available to all members, who may personalize and use it as a marketing tool to promote their own mediation practices.

Patty continues to work on editing several videos to be placed on our website which will highlight April's presentation at John Jay College. The purpose of the video is to provide the public with an opportunity to view a typical divorce mediation role play and — do you see any pattern developing here? — to provide information on the benefits of divorce mediation.

On October 8, 2013, Helene and Susan, as well as THE REPORT's editors, Eli Uncyk, Chuck Newman and Justine Borer, participated at a kickoff event for Mediation Settlement Day at the NYC Bar Association. The Honorary Chair and Keynote Speaker was Kenneth Feinberg, Esq., a mediator who spoke about his involvement as Special Master of the 911 Compensation Fund, BP Gulf Oil Spill Compensation Fund, Sandy Hook Newtown Compensation Fund and many other well-known funds to compensate victims and families of mass tragedies in the United States. Mr. Feinberg shared his admiration and praise for divorce mediators and believed the traits of a good mediator are derived from experience, compassion and character. Mr. Feinberg's description of his involvement with the victims and families of these disasters was truly inspiring.

Helene Bernstein (left), Kenneth Feinberg (center) and Susan Ingram (right)

Mediation Settlement Day is a program spearheaded by the New York State Office of Court Administration. It will be officially celebrated on October 17, 2013. Patty will be suggesting to our members that they "tweet" on this day in order to promote the hard work of the mediation community and the benefits of the mediation process.

INSIDE SCOOP/AROUND THE COUNCIL, continued

Public Awareness Committee, continued

The Upstate Mini-Conference was held in Buffalo on September 7, 2013. The Downstate Mini-Conference will be held at New York City's John Jay College on Saturday, December 14, 2013. Patty continues to use her contacts to promote all of our conferences and welcomes any suggestions for promoting these events.

Finally, the Public Awareness Committee is growing and we will be reaching out to all interested members throughout the fall. For further information, please contact Susan at susan.ingram.esq@gmail.com or Helene at helene@hbernsteinlawandmediation.com.

Helene Bernstein is a divorce mediator and attorney in Brooklyn. Her practice has been serving adults and children for the past twenty-five years. Helene is on the Advisory Board of FamilyKind, Inc., a nonprofit organization that assists adults and children with parenting education, mediation, and parent coordination services. Helene's website is www.hbernsteinlawandmediation.com.

Susan Ingram has a diverse practice in Manhattan. Before becoming a mediator and business, career and life coach, she held several high-level positions in corporate legal departments and had her own law practice. In addition to being a member of the NYSCDM Board of Directors, Susan is the President of the Learning Disabilities Association of NYC and a co-founder of the Parents Diabetes Network of NYC. Susan's website is www.susan-ingram.com.

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DON'T FORGET TO UPDATE YOUR NYSCDM MEMBER PROFILE!

We have a new member database to make it easier for the public to "Find a Mediator" on our website. You can update personal information, add a bio and photo, even links to your website and social media pages!

Questions? Contact Melissa Burns at mburns@nyscdm.org