

# NEW YORK STATE COUNCIL ON DIVORCE MEDIATION

# THE REPORT



VOLUME 2014, No. 1

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The issue immediately prior to this one was Volume 2013, No. 3.

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@yahoo.com](mailto:nyscdmpubs@yahoo.com). We look forward to hearing from you.

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

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## EDITORS' PAGE

Twenty fourteen is off to a promising start with THE REPORT. Assembling this issue has been a rewarding learning experience in more ways than one, and we hope you find the articles as enjoyable to read as we did to review.

Fun times were had by all at the Downstate Mini-Conference on December 14, 2013, as Susan Arnold discusses at [p. 14](#). The program struck a balance between hard legal information and ideas about how to use that information in mediation sessions. Ken Neumann and Donna Petrucelli's whimsical and informative presentation about spousal support was a prime example. Mark Josephson discussed QDROs, taxes, and life insurance, and Dan Burns ran a thoughtful discussion about self-determination. It was a wonderful way to spend a snowy winter day, says Susan.

And Dan was not alone in his reflection on the underpinnings of mediation. The tone of this issue of THE REPORT is philosophical. Rachel Fishman Green explores the contours of neutrality in our Ask the Ethicist installment, [p. 32](#). Though many mediators believe that neutrality is a cornerstone of mediation, Rachel goes a step further, singling this feature as the most important one of mediation (and good mediators). And Gary Shaffer interviews Simeon Baum, [p. 5](#), who speaks about what draws him to mediation, and reflects on the philosophical differences between the way lawyers are trained to think and the way mediators often think.

Ide Katims and Eileen Rowley discuss their experience with co-mediation, [p. 19](#), which can (as it did in their case) be a process that starts with one mediator guiding the other, and develops into one in which the strengths of each mediator complement each other. Elaine Nissen addresses the particular challenges and concerns that characterize mediations with parents of special needs children of all stripes, [p. 24](#). In a decidedly non-astral plane, Gloria Ciolli reviews *Men are From Mars, Women are From Venus*, [p. 34](#), with particular attention to what it offers for divorce and family mediators.

In her President's Page, [p. 4](#), a regular feature of THE REPORT, Clare Piro advocates for accreditation and explains its benefits. In our Mediator's Toolbox series, one of my co-editors, Chuck Newman, offers a checklist of things to think about when considering interim agreements during divorce mediation, [p. 36](#).

In our "Inside Scoop" section, we have information about the NYSCDM Board's most recent meeting, [p. 43](#); the Public Awareness Committee explains what it's been doing for all of us lately, [p. 45](#); and you're reminded to submit nominations for NYSCDM officers and directors, [p. 46](#), to guide your organization into the future.

The editors welcome feedback and connections with other mediators. Mediation is a practice that requires dialogue, as much outside the sessions as within them. Please contact us at [nyscdmpubs@yahoo.com](mailto:nyscdmpubs@yahoo.com). Meantime, enjoy the issue!

January 2014.

— Justine Borer

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## PRESIDENT'S PAGE

By Clare A. Piro



My very best wishes to all of you for a happy, healthy and prosperous 2014!

For those of you who like to make resolutions for the new year, I have one for you that is likely to increase your stature as a divorce mediator and enrich your mediation practice. Resolve to become an accredited member of the NYSCDM!

There are not many designations out there that demonstrate proficiency as a divorce mediator. If you volunteer at a Dispute Resolution Center, you may get a certification from them, and if you are in a county that has a Divorce Mediation Panel and meet their requirements, you can say that you were chosen to be a mediator on that panel. Those are significant credentials, certainly, but I believe that the designation of “an accredited member of the NYSCDM” does much more.

Imagine you are getting a divorce and come to the Council’s website. (Given our ranking on search engines, this is likely the first place you will go.) You learn about mediation and decide that yes, it’s something you want to do. Then, you search for a mediator in your area, and you see that some of those who come up are “accredited members” and some are “mediator members.” (You also probably gravitate towards those who have a photograph and an expanded biography that you can click to. Hint, hint! to members who haven’t updated their listing yet!)

As a person looking for a mediator, you wonder what “accredited” means? So, you read the descriptions on the top of the search page. You learn that an accredited member has demonstrated education and a certain level of experience. Do you think that as a consumer, you are likely to seek out that person? I do, and I have gotten clients who tell me they came to me from the Council’s website and chose me because I was accredited.

A member told me yet another way accreditation can impact your practice. He said that if he was asked for a referral for a mediator outside of his area, the first thing he would do, of course, would be to visit our website. Then, if he didn’t know any of the members personally, he would see if any were accredited members and would feel that even though he didn’t know the member personally, he would know that the member had a lot of experience and had demonstrated proficiency in mediation, so that he would feel comfortable recommending that person.

I do want to emphasize, however, that getting potential referrals is an added bonus, but it is not the reason why I became accredited or why I so firmly believe that all members should become or strive for accreditation. I believe that as a professional, I want to have the best credentials in the profession that I can possibly attain. To be able to say that I am an accredited member of the NYSCDM is an honor to me that is a reward unto itself.

The Council has been accrediting members since 1986, a process it began just a few years after the Council was founded. Even in its earliest years, the Council recognized how important it was to acknowledge mediator excellence and provide to the public a mechanism to seek a qualified mediator.

So, please make 2014 the year that you submit your application for accreditation.

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## THE INTERVIEW

### A CHAT WITH SIMEON BAUM

By Gary Shaffer



Simeon Baum

On the year's most quiet Monday, December 23rd, just before the Christmas/Winter break, I sat down with Simeon Baum to discuss his career and his ideas about mediation.

Simeon is well known as a long-standing leader in the effort to expand mediation.

He was the founding chair of the New York State Bar Association's Dispute Resolution Section, has trained State Supreme Court Commercial Division mediators for many years, and is President of Resolve Mediation Services, Inc. ([www.mediators.com](http://www.mediators.com)) in Manhattan. He has conducted over 1,000 mediations over the last 22 years, including a number that have hit the press. Among them is the Libeskind-Silverstein dispute over design fees for the Freedom Tower, as part of the master plan for rebuilding the World Trade Center; a billion-plus dollar dispute between Trump and Vornado over the Penn Yards buildings on the West Side of Manhattan; and the recent shareholder battle over Archie Comics. He has taught ADR for years at Benjamin N. Cardozo School of Law, and has twice been named "Lawyer of the Year" for ADR or Mediation in New York City by the Best Lawyers' listing.

We thought it would be interesting to speak with Simeon, who is known particularly for mediating commercial and a broad range of disputes, but not as a matrimonial mediator. We hoped that his perspective as one who has written, taught, and trained hundreds of mediators over the years, could be of interest, and possibly generate fresh thoughts, for matrimonial mediators.

Among his writings are a chapter in NYSBA's book, *Definitive Creative Impasse Breaking Techniques*, provocatively entitled, "The Technique of No Technique: A Paean to the Tao te Ching" and a chapter in *Contemporary Issues in International Arbitration and Mediation, The Fordham Papers* (2011), entitled, "Hawking Our Wares in the Marketplace of Values — Sell Quality, Not Cost, When Promoting Mediation; The Interplay of Global Norms of Justice and Harmony in the Mediation Forum." From these pieces, and from his trainings — and as further explicated in our discussion — we see that Simeon draws upon the Taoist tradition and other long-standing religious traditions and cultural resources for insights helpful in mediation.

What ensued when I sat down with Simeon was a discussion reminiscent of "My Dinner with Andre." Given the length of our talk, his responses to some of our core questions are summarized and excerpted below.

*What attracted you to mediation as a career?*

Well, that's a rather long answer and actually goes back to a time, roughly 45 years ago, when I was in 10th grade, at what was then called Horace Mann School for Boys. Horace Mann was an intense, and highly competitive, place, although I did not realize it at the time — just as fish might be unaware of the water in which they swim. As a 15 year old, I simply took it for granted that that was just the way things were. But during my sophomore year, I had an English class with Tek Young Lin, who turned out to be one of my greatest influences. Mr. Lin was born in China, and in addition to teaching English, he was the cross-

## THE INTERVIEW, Continued



Simeon Baum

country coach, and the school gardener. Mr. Lin had us read the *Tao Te Ching*, which has influenced me ever since.

Our history teacher — believe it or not, named Bill Clinton — had us read it again in 12th grade, and I carry it in my briefcase to this day. Indeed, I read a random passage before every mediation, in part to remind me — despite the massive preparation and questions I have developed and the parties' and counsel's expectations of me — that the mediation is not about me. It is a reminder that we are participating in something much greater, and that we make most headway by letting it happen.

Core messages I drew early from the *Tao te Ching* included the idea that there was an alternative to competition, where one was always driving to be best, proving one is right, excelling against others. These, of course, have their value — both as promoting survival, and more, and in generating good for oneself and even others. Yet, the *Tao te Ching* presented an alternative. In place of competition, one could consider cooperation, accommodation, and even, at times, avoidance of conflict. There was the value of yielding, which could have the strength of flexible bamboo. There was a value symbolized by water — taking the low places, benefiting all, adjusting to circumstances. It represents humility, but also has the quality of neutrality (even its pH level, which balances acid and base, or HOH), and of being life supporting. Rather than standing apart or acting on things, the *Tao te Ching* opened the possibility of seeing oneself as harmoniously and naturally participating in a greater

whole. In place of absolutes — good and bad, win and lose — there was a recognition of the mutual dependence of these concepts, of forming a complementary whole. There was a reality beyond what is captured in words and concepts. And, very significantly, there was a comfort with silence and with deep listening. There were also values of simplicity, not going overboard, and deep love.

First in high school, and then in college, I also started exploring contemplative traditions and practices. Seeing Len Riskin and others teaching the value of mindfulness over the last decade, resonates with my own sources of influence, experience, discipline and reflection. All of it created the foundation for my entering mediation.

*Can you say something more about how you continued this pursuit in college?*

At Colgate, where I studied philosophy and religion, I had the good fortune of finding an excellent advisor early on in Dr. John Ross Carter. Dr. Carter was a Southern Baptist minister who had studied at the Harvard Divinity School and was a professor of Buddhist Studies. Dr. Carter had a profound influence on my world view and I could go on about him for some time.

*So what did you learn from Dr. Carter and how does it relate to mediation?*

The most influential ideas and approaches related to the comparative study of religion. In the early phases of inter-religious studies, there was a tendency to characterize others according to an outsider's own world view. Often, the comparative study focused on

## THE INTERVIEW, Continued

competing truth claims. Dr. Carter, as a student of Wilfred Cantwell Smith, recommended a different approach. First, he presented a humanistic view, with truth sought not outside, but within persons. Persons were seen as a locus of truth. Second, rather than take an "us/them" approach, he proposed, "we", emphasizing our common humanity and acknowledging the limits of knowledge. Rather than reifying "religion" — seeing it as a great something — he substituted two concepts: tradition, meaning the empirically ascertainable, including writings, beliefs, rituals, practices, etc.; and faith, which is more subjective and reflects one's orientation toward self, world, others, and which has a transcendent quality. In place of using the Aristotelian "either/or" in an effort to choose which tradition was "right", he suggested using "both/and." He encouraged us to act with disciplined self-consciousness when studying traditions other than our own.

All of this disposed me toward an approach of openness and exploration, rather than looking to "get it all together." You might imagine how this fit with law school and legal practice.

*Indeed. So you must have taken those teachings and run right to law school.*

Hah, not exactly. Dr. Carter arranged for year and a half master's program for me, which involved my going to Japan and writing a thesis about a Zen temple called Myoshinji, which translates as "Marvelous Mind Temple." After that I had to face

what to do next. Particularly in the area of religious studies, I was uncomfortable with an "ivory tower." I also was uncomfortable with the risks of "publish or perish" and being dependent on an institution. I actually thought of becoming a Rabbi and then getting a Ph.D. in Buddhist studies, taking the approach of a participant in one living tradition in dialogue with another. But I was not sure I could be comfortable representing a tradition and having my job tied to ideas that might in the future change. My grandfather, whom I admired, was a trial lawyer. So, from the time

I was 5, I had figured I would be a trial lawyer. Law seemed interesting, and not stuck in one industry or another. That was before we became so specialized. While writing my Master's thesis, I concluded that I would like to keep involved in "real life" problems and take the skills of the comparative study to help people work out resolutions despite conflicting or differing values. In retrospect that is not so different from what we do as mediators, though it's clear now how my understanding of the legal profession back then was somewhat off the mark.

*"I read a random passage from the Tao te Ching before every mediation, in part to remind me that the mediation is not about me."*

*What did you think of law school, given the background you've described?*

While stimulating in some ways, after seven years of studying contemplative traditions, I found legal thinking confining. I was never fully engaged by the Aristotelian either/or world of winners and losers, affirmation and rejection, that is required by legal decision making. I am sure there is a good reason for it, but it seemed to me a flat system of rights and duties. I wondered if there weren't another way to capture the

## THE INTERVIEW, Continued

living reality of the litigants' situations, so they could create solutions that were in harmony with the reality of change and their actual circumstances.

*But aren't there times when that's just not possible? Take, for example, the passage of the civil rights laws in this country. The Jim Crow laws were not going to be disbanded because people saw the light. Or look how Title IX opened the door for women in sports. Sometimes law can actually lead the way by forcing people to do what they might not otherwise do on their own.*

Absolutely. Law can certainly be a positive force for change. Of course the civil rights laws found supporters because a sector of the public that had already changed its views were clamoring more openly for change, and thus emboldened legislators to develop these new laws. On the flip side of change, law is also essential in helping us organize social relations and create a safer place, where there is needed predictability. For example, commerce flourishes because we can rely on contracts. Property rights keep one's family free from strangers breaking down the door and sleeping in one's bed.

*Given your ideas about conflict, did you choose an area of law that didn't focus on conflict and judicial resolution?*

I went directly into litigation. Now it turned out that litigation could be exciting, had good stories, and offered a chance for interesting human interac-

tions in depositions, motions, jury selection, and trials in particular. As we know, it was also painstakingly slow in discovery, costly, past oriented, and adversarial. It also required fitting facts into a rubric that did not exactly represent the color, dynamism, living subjectivity, and nuance of reality. I did 10 years of tort defense, commercial, and re-insurance litigation. Ironically, those ten years proved to be extremely good training for what I did after that.

*And what did you do after ten years?*

Sometime around 1991 I saw a blurb in the *New York Law Journal* about a mediation program that was beginning in the U.S. District Court for the Eastern District of New York in Brooklyn. I was accepted into the program, and joined the Southern District [in Manhattan] panel shortly after that. I remember my first trainings, with Margaret Shaw, Cathy Cronin-Harris, Linda Singer and Michael Lewis. I felt as if what I had been thinking all through law school

and during the previous 10 years of legal practice, was being expressed by these trainers. Litigation is a tortuous process designed to generate a winner and loser, shaped like a pyramid as the decision point is approached. Mediation, on the other hand, offered a big open space, where there was a legitimate place for wonder, ambiguity, and uncertainty. It was a process where emotion and values would not be deemed immaterial or irrelevant. It was a zone of freedom, not coercion.

I still vividly remember my first mediation, a case involving a somewhat well-known entertainer

*"The most influential ideas and approaches about mediation related to the comparative study of religion."*

## THE INTERVIEW, Continued

who claimed to have been fraudulently divorced. It proved once again, as all mediators know, that fact is stranger than fiction. I had just spent 3 1/2 years litigating one big reinsurance case generating \$1,000,000 in fees, bickering over boxes of half a million underwriting, actuarial and claims files. Now, in just 3 1/2 hours, an interesting case was resolved. Plus, in those days, the counsel sent glowing letters of gratitude to the Court. I was hooked.

In a providential moment, I learned that a friend had just left his firm and needed help. He had overflow work and an extra office. I worked with him and eventually built my own legal practice to support my family while I built a mediation practice. I developed a five year plan, the gist of which, in the early '90s, was to find someone who would pay me to mediate by the end of 5 years. I joined Bar committees, put together CLE panels, did some writing, joined mediation panels, and mediated as much as I could. Eventually, it led to teaching at NYU and Cardozo, service on court system ADR advisory groups, taking greater leadership roles in the Bar, and training mediators. I also got the [www.mediators.com](http://www.mediators.com) domain name for my website, a benefit of an early start in the field. The hope was that pro bono mediations would generate repeat users. Little by little, my practice grew.

*You mentioned that you thought your litigation experience was in fact very useful for mediation. How so?*

On the surface, that may seem contradictory, given the potentially collaborative nature of the mediation process and the need to create a safe forum for people to explore alternatives and be creative in deal making. Still, litigation gives one an understanding of the court process. This can be useful when engaging in risk analysis and transaction cost analysis. As a

practical matter, being a former litigator can also give one credibility with the parties and counsel. That, too, can be useful.

*Most of the people reading this are divorce mediators. Since divorce mediation is such a popular area of practice, how come you decided not to do divorce mediation?*

Candidly, I was concerned about my tendency to seek reconciliation, and that I might wish to bring parties back together again. I am sure they generally do not come to a divorce mediator for that service!

*What do you think would be essential to know or learn before serving as a divorce mediator.*

Well, I am guessing it would help to know the child support guidelines, to have a better sense of the nuances of custody arrangements, and to have more knowledge of tax law. I certainly don't know how to do a QDRO.

*[Laughter] Simeon, no one knows how to do a QDRO. At every CLE course on divorce mediation, there's ten minutes on what a QDRO is, followed by a list of firms that handle QDROs.*



Simeon Baum and Gary Shaffer (right) look at a picture of one of Simeon's daughters' soccer team.

## THE INTERVIEW, Continued

*Have you ever done a divorce mediation?*

I've actually done three, under special circumstances, but that was out of over 1,000 mediations. Plus, I have done a number of same-sex dissolutions. That was a very interesting area, particularly before there was any law permitting gay marriage. As an uncharted area of law, it required application of bits and pieces of legal concepts, claims and processes, and also creativity by the parties in developing values and arrangements. Typically, for some reason, in my experience, the parties in these matters also had business arrangements to unwind. It felt like a special service mediation could provide, where the law was silent.

*There are several different schools of mediation – among them: Facilitative, Evaluative and Transformative. There is also the Himmelstein/Friedman Understanding-Based Model. Do you feel you fall into any particular camp?*

Not really. Lori Matles, an employment mediator, had a good phrase: the 360 degree mediator. I think a good mediator needs to connect with the participants and have a high degree of awareness, empathy and sensitivity. One needs to be very attentive, responsive, receptive, and flexible, and not interfere too much, though as I said earlier, that doesn't mean being passive. Barry Berkman has said that being neutral doesn't mean you're not on one side. It means you're on everyone's side. In trainings I emphasize facilitative approaches because I identify with their core values: non-coercion, party lead, openness, flexibility, and helping others help themselves. Nevertheless, there are times when I will put in my two cents if I think it seems appropriate, devel-

ops rapport, or can help the parties see freshly and reach a resolution.

*How have your ideas about mediation changed over the past 22 years?*

I have to confess that in the most essential ways, my ideas about mediation have remained constant. I suppose the greatest change is that, over time, I have been a bit more open to giving evaluative feedback. But it is always dependent on having first encouraged the parties to participate in a process in which I am a facilitator and they are the stars. I still believe, but have grown clearer, that the mediator helps create the atmosphere, connecting with everyone through the mediator's presence, sending the core message: we are all in this together; we are all persons of good will and capacity, and we are working together towards resolution. This is done with every pore of the mediator's body.

*Do you mediate cases differently now than you did 20 years ago? If so, how?*

Well, I used to really use silence. I still do, but possibly I do a bit more talking. I am not sure whether this is a good development. I do think that sometimes one communicates genuineness through active participation, just the way disclosure by one party can induce disclosure by another party.



Gary Shaffer and Simeon Baum

## THE INTERVIEW, Continued

*Mediation has been the next best thing for many years now, but overall a very small number of cases are mediated. Why do you think that's so and what do you think can be done to expand the use of mediation?*

I actually think that the use of mediation has grown tremendously over the last 20 years. And it continues to grow. We see mediation in all areas of practice: securities, real estate (landlord/tenant), construction, insurance and reinsurance, first and third party matters, intellectual property, environmental matters, a wide range of tort claims, commercial matters, unfair competition, trusts and estates, employment — you name it. And I have mediated in all of these areas. Primarily, I think it is a function of time and acculturation. I think use of mediation will continue to grow. One countervailing force, which is a good thing, is that as the collaborative law or the "new civil lawyer" culture spreads — and as litigators continue to settle cases and to have experience in mediations — there should be an increase in lawyers' belief that they and their clients can arrive at a resolution themselves, without the need of a neutral third party. If we encourage more use of effective negotiation, that would be a wonderful by-product of the growth of mediation.

*What do you think about court ordered mediation?*

That is a good point, Gary. I do think court-ordered, or court-annexed mediation has been a major cause of the growth of mediation. I support manda-

tory mediation, as long as the parties are getting a real mediation process. I recall when letters to the Court saying "we came in kicking and screaming, but thanks to the good efforts of the mediator, we left with a deal." Mandatory mediation does lead the horses to water. Once they are there, quite a good number of them drink. Folks see that this is a great opportunity. With the mediator's encouragement, they take advantage of that opportunity.

*"I was concerned about my tendency to seek reconciliation, and that I might wish to bring divorce mediation parties back together again."*

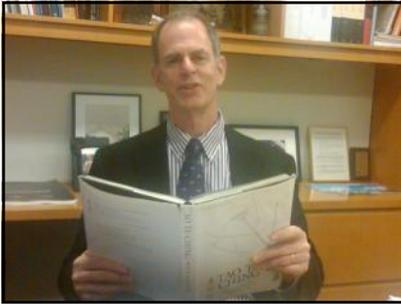
It is important, though, in most instances, to preserve a wall between the mediation and the court. Providing a "real mediation" means giving the parties a process where party self-determination and non-coercion by the mediator are paramount. It includes giving the parties and counsel confidence that their communications will be kept confidential. They need to trust the mediator and the process.

*What changes have you observed in the mediation field since you began to practice?*

It has become a more "normative" aspect of the legal field. Not only are more people engaged in it, but we now see the growth of mediation clinics in law schools and bar association committees that provide a forum to discuss ADR issues and can present quality CLE courses.

*If you were going to choose five books for a mediator to read, what would they be?*

## THE INTERVIEW, Continued



Simeon Baum

My top by far would be the *Tao te Ching*, which I consider to be the mediator's Bible. I assign this in my ADR

and Negotiation

classes and have used excerpts from it in the commercial mediation training that Steve Hochman and I have given for the last 18 years. This book towers over any others I might mention. After that, one that people might not otherwise consult is Martin Buber's *I and Thou*. I see it as a counterpoint to the Fisher/Ury, Harvard Negotiation Project books, such as *Getting to Yes*, *Getting Past No* and *Beyond Reason: Using Emotions As You Negotiate*, by Fisher and Shapiro. I see *I and Thou* as a corrective to Fisher, Ury and Shapiro's observations that being "soft on the people" and sensitively handling emotions aids in the creation of an environment for collaborative bargaining, which enables one to generate the best deal. These observations, while valid, are a bit utilitarian, in which kindness and respect are a means to an end. Buber helps us see a distinction between dialogue and negotiation. His message of the primacy of relationship to living a fully human life, involves a view of self as defined by standing in relationship, one whole person encountering another, and finding oneself in this relationship. These readings provide insights into self and interpersonal processes. Particularly with the *Tao te Ching* and Buber, they provide the opportunity for a shift in orientation that opens one to richer possibilities for living life and being human. And, to be utilitarian after all, the ensuing shift to empathy and understanding makes for a better mediator. Moreover, if we see mediation as a facili-

tated negotiation, the insights offered by the Harvard Negotiation Project books help the mediator grease the wheels of the parties' and counsels' negotiation.

*What kind of training do you think is necessary for a person to become a good mediator?*

Well, I have been training mediators for 18 years, so I should be careful what I say. Of course, I believe training is useful. People love role plays and exercises for good reason. They are fun and therefore memorable ways to be surprised, to learn, and to have opportunities for reflection. We can also model skills, like active listening or "looping" (a Himmelstein/Friedman term), and we can prepare a context for mediation that enables the mediator to have a sense of what is going on and provide guidance where ethical or practical issues arise.

That said, I believe that character and orientation are paramount. People bring these with them into trainings. It is the result of their life experience, life choices, worldview, personal commitments, sense of the world and the nature of, and possibilities for, humanity. It includes whether one has values that might help in mediation, *e.g.*, patience, love, forgiveness, generosity, a sense of ethics, insight, energy, empathy, compassion, even sympathetic joy. I know this sounds like a lot — and might make one gag — but I believe you find many of these qualities in many of the most effective mediators. Mediators are, by and large, a fairly altruistic bunch. Is one comfortable not being in control? Can one be a participant without having to be the star of the show? Is one inclined endlessly to learn from and listen to others? There is so much that can be said for character, disposition, orientation. This is not the product of 40 hours. Rather, 40 years.

## THE INTERVIEW, Continued

*What do you think the differences are between commercial mediation and divorce mediation?*

It is tempting to say that matrimonial mediation is emotional and commercial is just about the money, but we know that is not the case. My colleague, Steve Hochman, asks during our trainings: in how many commercial mediations are emotions involved? And he answers: 100%, give or take. And, of course, there can be a heavy focus on financial issues in a good number of divorce mediations.

Still, commercial mediations generally involve deals which commenced with an interest in money, some sort of profit motive or desired financial return.

*What advice would you give people in building a successful mediation practice?*

My advice would be to do the things I described when I mentioned my five year plan earlier. For lawyer-mediators, get involved in ADR Bar groups. The NYSBA Dispute Resolution Section has had up to 3,000 members. It is a great place to get a sense of what is happening in the mediation field and

to be known as a mediator. Take leadership roles. Write. Take trainings and where possible, facilitate and learn to do trainings. Mediate as much as possible to get notches in your belt, even if it is for free. Read in the area. Find a source or sources of depth and inspiration, including, *e.g.*, developing a mindfulness practice or something that gets one in touch with what is happening within, and something that gets one clear on, and refreshes recognition of, one's values.

I believe that mediation is a process skill, and one need not be a practicing expert in the substantive area of the mediated dispute. However, users of mediation sometimes are looking for folks with expertise. So, one might take advantage of that for marketing purposes. If one has an area of substantive legal expertise and an accompanying network, let that network know that you are mediating. Attend meetings of that substantive group. Send out emails, do the blitz. Set up a mediation website.

While it is not as undeveloped a field as it was 22 years ago, I would add advice that I got from Margaret Shaw at the time: keep your day job. It still takes a long time to develop a mediation practice.



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## NYSCDM'S DOWNSTATE MINI-CONFERENCE

By Susan Arnold

NYSCDM's Downstate Fall Mini-Conference was held at John Jay College on a snowy Saturday, December 14, 2013. The turnout was excellent notwithstanding the storm, as members arrived, anticipating an informative and collegial day.

Ken Neumann, Ph.D., and Donna Petrucelli, Esq., of the Center For Mediation & Training, presented the first morning segment, entitled "Mediating Spousal Support Without A Net." (Ken was the second president of NYSCDM.) The format was a great way to start the day, as they staged a delightful and entertaining mock radio show, with Donna interviewing Ken on his perspective and approach to mediating spousal support. The presentation provided food for thought and practical tips.

The recommendation was to start with the easier parenting issues in order to achieve some momentum and set the stage for overcoming the unpleasantness of the spousal support issues. Next, Ken suggests moving into Equitable Distribution, which impacts how much maintenance should be paid.

Ken's essential message was to "take the sting out of" paying maintenance to a former spouse. Tax treatment of these payments is very helpful to this end: one can re-characterize spousal support as a "tax benefit," and/or reduce child support and increase maintenance. Ken values the use of the Family Law Software and budgets in making these decisions.

Ken and Donna discussed the presumptive temporary maintenance formula, noting that many

couples choose to use the temporary maintenance formula for permanent maintenance. In mediating post-divorce maintenance, Ken usually tells couples that the norm is for maintenance to continue for a period of 1/3 to 1/2 the duration of the marriage, unless the recipient is older than about 50 and hasn't worked for several years.

Ken advised us to communicate conventions: they help couples get comfortable with their solutions. The discussion segued into the effect of remarriage/cohabitation on maintenance,

and how to creatively address this issue, with an eye towards not discouraging remarriage where a former spouse might otherwise stay single, in order to keep receiving maintenance. It was noted that cohabitation clauses are rarely, if ever, enforced.

In conclusion, say Ken and Donna, our goal when mediating maintenance is to neutralize the issues for the couple. Maintenance can be seen as a fair response to the fact that in most cases, lifetime income can't recover from the recipi-

ent's having spent several years out of the workforce. If the mediator calculates this long term effect with the clients, it can soften the brunt of maintenance for the payer, contextualize it for the payee, and help the couple to adjust other parts of the overall plan.

The second presentation, "Mediation at the Crossroads: Where Are We and Where Are We Heading?" was delivered by Maria R. Volpe, Ph.D., Professor of Sociology and Director of the City University of New York Dispute Resolution Center at John Jay College, [www.johnjayresearch.org/cdrc](http://www.johnjayresearch.org/cdrc).

*"Ken and Donna staged a delightful and entertaining mock radio show to talk about spousal support without a net."*

## DOWNSTATE MINI-CONFERENCE, continued

Maria maintains a dispute resolution listserv, <http://listserver.jjay.cuny.edu/cgi-bin/wa.exe?SUBED1=NYC-DR&A=1>. She spoke about mediation's growth worldwide, but noted there are varied perspectives on where the field is heading.

Maria noted the many training programs — dozens in NYC alone — but that significant need to educate the public persists, to fully tap mediation's potential.

She cited common questions about mediation:

Are mediators born or made? Can a mediator mediate anything? Do we need substantive knowledge, or process knowledge? How many steps are there in mediation? There are many ways to answer these questions, depending on our perspective and the context. Maria realized, after listening to the maintenance discussion, that training and experience specific to divorce mediation is essential for us, since we are guiding very complex conversations.

Maria's conclusion was encouraging, as she highlighted popularization, globalization, institutionalization, acceptance by lawyers and progress in competence and professionalization. She spoke of the vastness of our potential market, while we need to create new markets and harness existing potential.

Mark A. Josephson, Esq., CPA, CFP, CFE, a founder of Murray & Josephson, CPA's, then gave a comprehensive presentation of the "Biggest Financial Mistakes Divorce Mediators Make" which alerted us to the depth and breadth of financial issues we encounter. Mark, a member of the Board of NYSCDM, started by reminding us to use one another as resources. \We

benefit from conferring with other professionals, and should view our essential roles as educating both parties, and making sure that everything is on the table.

Mark advised us that in order to identify all retirement assets, we must ask certain questions, even where particular asset types don't seem relevant. For example, querying about employment history may reveal an old plan that a party had forgotten to disclose. Asking for pay stubs, W-2's and tax returns can fill in gaps. He discussed Non-Qualified plans such as four kinds of IRA (traditional, Roth, SEP and Simple), and

Qualified Plans including Defined Contribution Plans such as 401(k), 403(b), 457, ESOP, and Defined Benefit Plans. We need to value such assets, and many cases require actuaries or other specialists. All valuations require setting a valuation date, and grappling with pre-marital contributions. Some plans allow for early retirement, and parties may have to compromise between different valuation dates. We were cautioned to avoid double counting of pension income, and to always distinguish separate assets plus growth, from marital assets plus growth.

*"Prof. Maria Volpe spoke about mediation's growth worldwide, but noted there are varied perspectives on where the field is heading."*



Mark Josephson, Donna Petrucelli, Sydell Sloan, Glenn Dornfeld, Ken Neumann, Dan Burns, & Maria Volpe

## DOWNSTATE MINI-CONFERENCE, continued



Conference attendees at John Jay College of Criminal Justice

Failure to secure a QDRO is another common mistake. Mark advised that in addition to ensuring that QDRO's are properly drafted, we should always check plan rules — this is the only way to fully understand the plan and to verify issues like whether distributions prior to retirement age are permitted.

Another commonly mishandled asset is equity compensation. There are different types of plans, including Restricted Stock, different types of options, including Incentive Stock Options (ISO's) and Non-Qualified Stock Options (NSO's), Stock Appreciation Rights (SAR's), and Phantom Stock (PS). Mark urged us to review employment history, employment agreements, company stock purchase plans and other documents, communicate with employers, and work with a financial or other specialist professional to ensure complete understanding.

In general, mediators and our clients need to understand assets in order to decide which to transfer, and how to determine and factor in tax consequences. In addition, we must answer questions concerning vesting and timing of services rendered in order to determine whether assets are marital. Another concern is whether stock options should be treated as an income

stream or an asset, and Mark suggests that we rely on professionals to value and help with these.

By the time Mark moved on to the family residence, I, for one, was relieved to move into more comfortable territory! Mistakes here were failures to understand the financial burden of keeping the home, analyze the benefit to both parties of selling the home, and evaluate current equity in the home. As Ken did earlier, Mark emphasized the benefits of using budgets.

We were cautioned about the importance of tax planning: improper planning can lead to loss of significant tax benefits. We learned that the \$250,000 capital gain exclusion on the sale of a primary residence may be available to each party if properly handled. For example, where a couple agrees to co-own the residence for a period of time, perhaps until a child finishes high school, a former spouse may claim the exclusion even if he has moved out of the "primary residence" — provided this is written into the agreement.

Mark discussed many other tax issues, advising us to always consider tax basis because a high tax upon disposal may affect the value received or enjoyed. He reminded us that in stating which parent will claim dependent exemptions, the IRS requires Form 8332 to be filed. Without it, the election is not valid. He referred us to IRS Publication 504 as a useful resource covering divorces.

Mark offered two especially helpful pointers on life insurance. One, a spouse receiving support should be the owner of the policy so that they will be notified if their ex misses a premium payment. And two, policies should be obtained prior to the final settlement in order to be sure the spouse is insurable.

*"Mark reminded us to use one another as resources."*

## DOWNSTATE MINI-CONFERENCE, continued

Mark cautioned us not to have clients waive too much child support as part of a tax plan because an agreement ought not give the appearance of a device to avoid paying taxes. Also, if a citizen or resident of another country is a party, we should caution our clients to learn about tax implications in the foreign country and to know whether the country has adopted The Hague Convention. If not, a child could be relocated, leaving the US spouse with no recourse.

The day's final presentation was given by Dan Burns, attorney, mediator, and past President of NYSCDM. The topic was "The Limits of Self-Determination," and this presentation was a highly interactive seminar in which we collaborated on analysis of hypothetical case studies.

Through Dan's hypotheticals, we examined scenarios involving the balance between self-determination and our professional responsibility to intervene and advise. This gave us the opportunity to consider challenging ethical and mediator-liability issues on a number of fronts. At different times during Dan's engaging session, we were called upon to read and consider the impact of The Model Standards of Practice For Family and Divorce Mediation, excerpts from the NY Rules of Professional Conduct of lawyers, and excerpts from Ethics Opinion 736 from the Committee on Professional Ethics on various scenarios — which itself was the result of a very non-hypothetical case of Dan's.

It was particularly beneficial to have this type of open forum to hear how one's peers might handle various uncomfortable mediation scenarios. The hypotheticals raised issues including how the mediator

should respond to blurted communications from one party outside of the other party's presence; what kinds of things we as mediators would prefer not to know about our couples' relationships; implications of illegal activity; mediating with parties whose capacity may be diminished; refusal to cooperate with valuation of assets; agreements whose terms might be against public policy; wildly inequitable settlement terms; parenting plans that seem to be in the children's worst interest; and involvement of children in parenting decisions.

*"Through Dan's hypotheticals, we examined scenarios involving the balance between self-determination and our professional responsibility to intervene and advise."*

Over lunch — and cookies for dessert! — many in the audience shared their usual processes in some of these situations, and suggested best practices to each other in the hypothetical situations Dan posed. As one might expect, some in the audience who thought they "had the answer" soon learned otherwise, as their peers pointed out pitfalls in proposed solutions and came up with different ways of handling the situation.

One of the universal principles that many members took away from the complex discussion was our need to continue to review and fine-tune our Agreements to Mediate and the ground rules that we establish. Dan's format created an exciting forum where participants were able to brainstorm, collaborate and learn about our practices, and remind ourselves of our ethical responsibilities.

It was a successful and rewarding Conference for all who attended and as always, chock-full of valuable information and networking.

## DOWNSTATE MINI-CONFERENCE, continued



*Susan Arnold is an attorney, certified mediator, facilitator, mentor and coach. As a lawyer for more than 25 years, she has worked for several major global companies, mainly in music and entertainment. She now mediates and coaches for couples and others in conflict and is a Mediator Member of NYSCDM. Susan has offices in Hastings-on-Hudson and Manhattan and can be reached at (914) 693-4950 or [susan@arnoldresolution.com](mailto:susan@arnoldresolution.com). Her website is [www.arnoldresolution.com](http://www.arnoldresolution.com).*

### ***A note of gratitude from Mini-Conference co-chairs Sydell S. Sloan and Glenn Dornfeld.***

*We've had the privilege of co-chairing the Downstate Mini-Conference for 15 years (give or take one or two), and we've too infrequently taken the opportunity to thank all those who make it the success it has traditionally been. We'd like to express our gratitude to all those who have contributed to the success of the event from year to year.*

*First, many thanks to our presenters, who have always graciously given of their time to share their knowledge and expertise.*

*Second, extra special thanks to Kathy Jaffe, NYSCDM's CLE Queen, who toils behind the scenes to help many of our members receive essential credit for attendance, while always taking care to protect the Council's status as a CLE provider. Through Kathy's work, NYSCDM is able to maximize member benefits, resulting in robust membership levels for the organization.*

*Third, many thanks to those who attend — many year in, year out — and who have more than once (including a month ago) braved bad weather to be at the Mini-Conference and share their unique insights and collective support.*

*Fourth, of great importance, thanks to Maria Volpe, who has supported New York City and State mediation and DR communities more than many of us will ever know or fully appreciate. For years, Maria has enabled us to stage our event at John Jay's incredible venue.*

*And finally, we thank each other for being so flexible, cooperative, and fun to work with.*

***See you next year!***



Conference Co-Chairs  
Sydell Sloan and Glenn Dornfeld

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## THE POSITIVES AND CHALLENGES OF CO-MEDIATION: THE PERSPECTIVES OF A TWO-WOMAN TEAM

By Ide Katims and Eileen M. Rowley

### Background

We are two mediators in private practice who co-mediate most of our cases, the majority of which are couples seeking divorce or legal separation. Not wanting the complexity of a formal business structure, we each have our own practice and office. Although located in two different counties, our offices are only 30 minutes apart, which means easy travel for mediating cases, debriefing, and cultivating a friendship that has nurtured our relationship and our enjoyment of each other's company.

Our partnership started as a mentor-mentee relationship. Eileen (says Ide) is a mediator of vast experience and true generosity of spirit. Ide came under her tutelage about six years ago as an experienced community mediator but a novice divorce mediator. As Ide honed her skills, our first challenge was to overcome the unequal relationship of mentor and mentee. The transition was not without obstacles. As we worked out the dynamics of our professional relationship, we learned to accommodate each other and share leadership — based on respect, honesty, openness, willingness to acknowledge conflict, problem-solving, and setting guidelines to resolve disagreements. As a result, we formed a partnership of equal footing that has given us a great deal of satisfaction over time.

Most significant, however, is that we have settled into a relationship that exhibits an essential characteristic of any successful co-mediation. Both of us are fully vested in the fundamental principles of mediation. We acknowledge common goals, but we also concede openly to each other that we have very different personalities, thought processes and mediation styles. In our case, our dissimilarities extend to

our cultural and ethnic heritage as well as professional backgrounds. With a firm belief that there is never one size that fits all, we simply adopt a non-competitive stance in the mediation room and model for clients how two very different people can collaborate to generate perspectives and options. In the overall scheme of things, however, our agreed-upon guideline is that the mediator whom the clients initially contacted will be the lead mediator in that case. It is important to note, however, that co-mediation has two or more mediators working as a team, rather than as individuals, despite the necessity of having one mediator taking the lead role.

### When Can Co-Mediation Be Used To An Advantage?

Co-mediation can be useful in mirroring participant diversity, be it race, ethnicity, gender or age, just to name a few. Diversity at the mediation table is not to emphasize differences. Rather, the atmosphere of inclusiveness makes all parties comfortable and confident that everyone, regardless of differences, will be heard and understood. Our clients seldom take issue with two female mediators, but occasionally a client — usually the husband — does ask for a male-female team. We accommodate their requests by bringing in a male colleague in place of one of us. Further, we view it as a positive when we work with mixed race couples or couples of color, as the two of us are from different racial and cultural backgrounds. Ide is Chinese, born and raised in Hong Kong. Eileen's family has roots in Eastern Europe.

## CO-MEDIATION, CONTINUED

Mediators may also find co-mediation helpful in volatile emotional situations. With high conflict, deep hurt and mistrust, emotional responses can get very intense. By the mediators quietly switching the lead, a “different” voice, a “new” inflection and a slight shift of focus can break up the morass of tangled emotions into more manageable elements and dramatically calm things down. We also had the occasion of having to separate a couple mired in histrionics and emotions. One of us — who had a number of prior phone conversations with the wife during intake, as well as subsequently supporting her because of her emotional fragility — worked with the wife. The other of us worked with the husband. Separately, we were able to help each of them articulate the salient issues and concerns without the emotional elements that were derailing the process.

And there are times when one mediator is simply stymied. In our experience, the co-mediator invariably steps in with an idea or a question that will again take the mediation in a productive direction.

On a personal level, co-mediation can be most rewarding. When the temporary lead role is passed from one to the other co-mediator, there is this gift of a short reprieve from the intensity of the mediation, so that one has a moment to take stock of the situation. Debriefing and gaining feedback from a trusted colleague generate new perspectives and fresh approaches. An added benefit, too, is our practice of sharing with each other information acquired in conferences, workshops, readings, etc. Further, by working as a team, we keep each other accountable, keep

each other “honest,” so to speak, to stay true to the tenets of mediation.

### A Framework To Keep Both Co-Mediators On Track

In co-mediation, we believe that it is helpful to have some loosely formulated framework for the mediation. This keeps both mediators moving in the same general direction. It allows the mediators to

recognize each other’s intention when one doubles back to unexplored or only partially-resolved issues. Since most of our work relates to divorce mediation, the net worth statement serves the purpose of an organizing framework.

The creation of a statement of net worth is a data-driven process which we make into a very visual exercise on a flip chart for the couple. Done in the initial phase of the mediation, we start the process by assigning concrete tasks to the clients — locating account statements, getting an appraisal for the house,

etc. This is particularly helpful for clients who have little idea of what has to happen in order to get a divorce, or for clients who exhibit high-conflict behavior and fervid emotions at the start. We model for the clients, as well as help them act collaboratively, share information, build trust, problem-solve and generate options based on solid data.

For us, as co-mediators, we have this common framework in mind in order to organize what the clients are bringing to the table. We use the net

*“Our relationship exhibits an essential characteristic of any successful co-mediation. Both of us are fully vested in the fundamental principles of mediation.”*

## CO-MEDIATION, CONTINUED

worth statement as a springboard to help clients talk about fairness, articulate what they value, state their concerns and justifications for special considerations. Options can be generated by comparing and contrasting various configurations of the data on the flip chart.

Once the clients have a grasp of their financial resources, they can begin earnestly to settle support issues. We, as co-mediators, keep this known landscape in mind, thereby allowing us to be fluid and natural within the mediation process without confusing each other.

### **Bridging Differences Between The Co-Mediators**

As do all mediators, we support the fundamental principles of neutrality, confidentiality, maintaining our own competence and role boundary, the disputing parties' voluntariness, self-determination, and informed consent. Our common goal is to facilitate clients to make informed decisions and reach a fair settlement with each other. For the majority of mediations, we have similar views and approaches.

Occasionally, differences in our backgrounds, our views of the rational human being and the limits of self-disclosure and self-determination do show up in our understanding of a case.

Eileen's background is in alternative dispute resolution and she strongly adheres to the idea of keeping the mediation process "pure". To the greatest extent possible, she probes for unarticulated needs and motives to achieve full disclosure, in order for clients to have all the facts and reasons on the table to craft what is for them the best and most equitable settlement.

Ide comes from the fields of health care, research and higher education. She believes that data-

driven problem-solving has a central role within the mediation process. She further believes that people have a multitude of motives, reasons, emotions, pains and hindrances far too complex to disclose in a few hours of mediation. People can only admit to themselves and reveal to others what they can emotionally handle at any moment in time.

Here is an example. Some elements of this case scenario have been altered to protect our clients' privacy.

The two soon-to-be ex-spouses were at an impasse regarding whether the husband should be entitled to some future equity in the marital home when it sells in a few years. The house was refinanced a few times. There was no equity at the time of the mediation. Towards the end of the mediation, the wife was pushing to reach settlement while the husband was reluctant to move on any decision. He finally agreed to have another mediation session scheduled.

Not until later did the mediators discover that prior to the marriage, the wife had a very painful chapter in her life. As a young, unmarried single mother, she made some decisions regarding an infant son, who is not the child of the husband, which caused her a lifetime of shame and guilt. Having a baby was not in her life plan at the time and she gave the infant to her aunt to raise. The aunt failed to recognize a significant congenital health problem, and medical treatment was not initiated until serious organ damage had occurred. The child grew up with his great-aunt. Now in his twenties, he suffers the consequences of those early events, is in poor physical and emotional health, and lives with chronic kidney problems. During the marriage, cash was taken out at each refinancing of the house, and a good portion of the money was used to redress what happened to this child, and to assuage the wife's guilt. The husband apparently had been

## CO-MEDIATION, CONTINUED

admonished by the wife that what had happened could not be brought up in mediation because it was simply too private and painful an issue for her.

In preparation for the upcoming mediation session, we discussed the husband's resistance and our sense that there was a power imbalance between the parties. From an objective point of view, there was also a lack of fairness in what the wife was seeking in the settlement. We decided to set up a meeting prior to the mediation session for separate caucuses with the husband and wife, since they were aware that a caucus would guarantee confidentiality and equal-time. For logistical reasons, the mediator who was initially contacted by the couple would conduct the caucuses.

In the caucus with the husband, the couple's situation was disclosed to the mediator. (The wife subsequently declined to participate.) The husband felt that much of the cash taken out of the equity in the house over the years was spent on the child's care as well as spent on things to ease the wife's guilt. He speculated that perhaps he should be given some consideration when it comes to the division of future equity in the house. Despite the divorce being imminent, he was still inclined to honor his wife's privacy and pain, and was reluctant to bring up in mediation what his wife did and what happened to the child.

We have different views of the situation. One of us believes in full disclosure. With a "gag order" in place, the parties cannot negotiate with each other on an equal footing. Not all motives, reasons and concerns are on the table, not to mention the

veiled threat from the wife: "Husband, if you bring this up, I am going to fall apart." Skillful probing questions can bring to the surface hidden reasons and concerns from both parties.

The other of us believes that painful events surrounding the wife's decision and what happened to the child could be so sensitive and emotionally charged that it is detrimental to draw them out unless the wife is able to handle this in public. We could leave this issue unspoken and help the couple seek alternative justifications and options to give the husband a fair settlement on the house.

In order words, it may be possible for the parties to arrive at the same conclusion based on different justifications.

How do we reconcile our differences? We are fully aware that one of us believes in the power and utility of deep probing while the other of us allows for the hindrances and limits of self-disclosure, and by extension, the right of self-determination. Perhaps in a light-hearted moment, we might say there is the danger of one of us not taking

"I agree" for an answer, and the other of us accepting an "I agree" answer too readily. Thus co-mediation provides another advantage. We can help each other avoid the pitfalls of conditioned responses and habits based on our natural inclinations. For this mediation, as in all mediations, we will let the clients show us how they wish to proceed. If our differences become an issue, we agree to use our tie-breaking guideline: the mediator whose case it is determines the overall approach for the mediation. Over time, we confront differences and we learn from each other.

*"Occasionally, differences in our backgrounds, our views of the rational human being and the limits of self-disclosure and self-determination do show up in our understanding of a case."*

## CO-MEDIATION, CONTINUED

**Conclusion**

Unlike a solo mediator, co-mediators not only attend to the dynamics and interplay of the participants, they also need to be in sync with their co-mediators. One goes with the flow of passing the lead back and forth, always aware of the direction and intentions of the other mediator sitting beside you at the table. Outwardly, we hope our clients experience a seamless process without noticeable contradictions and competition between the co-mediators. The most important ingredients, then, for successful co-mediation are honesty, a willingness to confront and work through differences, and a deep respect for each other.

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*Eileen M. (Lee) Rowley is principal of Atlantis Mediation based in Rhinebeck.. A member of NYSCDM, she has served in several New York State court-funded county mediation programs as director, trainer and supervisor of mediators. She has been certified as parent educator in New York State's Parent Education & Awareness Program. Lee's website is [www.atlantismediation.net](http://www.atlantismediation.net).*

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## SPECIAL NEEDS CASES REQUIRE SPECIAL HANDLING

By Elaine H. Nissen

Sooner or later you will meet parties who are seeking mediation and have a child with special needs. Celebrate that they have arrived in your office as these families absolutely need to work with a mediator who understands how important it is to fully explore the scope of what is needed to create creative parenting and support plans that can serve their unique circumstances. This is detailed, time-consuming work and it is hoped that this article will help to enhance your comfort and competence in working on their behalf.

### Spotting and Exploring the Issues

Public Radio's *A Prairie Home Companion* describes itself as reporting from the town where "all the women are strong, all the men are good looking, and all the children are above average." We all want our children to be as perfect as is humanly possible and one of the journeys of parenthood is accepting them for who they are while encouraging them to be all that they can be.

The term "special needs" reflects a wide range as to what those needs are. They don't all impact the child or the family in the same way. Before getting to those which have the greatest effect on the lives of the children and their families and the most complexities in terms of doing mediation, I want to address an unusual variation.

First of all, in a very small minority of cases the concept of "special needs" refers to children otherwise called "gifted and talented." While they are unique because of acknowledged talents, goals and pursuits instead of disabilities, they also need an unusual dedication of parental time and resources and

sometimes the effect on families can be similar to the impact on families with disabled members. For example, at an extreme end of this spectrum, one or both parents might relocate, temporarily or permanently, to enable a child to train for the Olympics or take advantage of world-class resources. Costs can be enormous: tutors to keep up academically while not regularly attending school, coaching, lessons, reservations of practice arenas, costumes, hotels, airfares and other special needs are expensive, in both parental time and money. Even in less extreme examples, costs can be significant, such as with high quality music lessons and instruments acquired for an especially talented child. In these cases the parents typically see what they are doing as an investment in the child's future, financial and otherwise.

I bring this up because it is helpful to remember that the focus on extraordinary arrangements to meet a child's needs can arise out of many different sets of circumstances. Mediations with parents of children who might be seen as especially blessed need creative handling that might differ greatly from a more usual case when it comes to parenting plans and finances. There can also be conflicts not ordinarily seen in your practice, such as about the extent of the talent and whose dreams it is that are being fulfilled. These high-achieving children can easily enhance the sense of parental well-being and pride and the mediator will probably quickly be made aware of them by parental bragging.

On the other hand, where, as is more usual, the special needs tag reflects parenting within a context of health, achievement, disability and dependency concerns the initial presentation and scope of areas to cover can be very different. While it is not always necessary to know a diagnosis there are some things

## SPECIAL NEEDS, CONTINUED

that need to be known by the mediator. Is the condition temporary or permanent? Is it chronic or acute? Does it affect only one area of the child's life or is it pervasive throughout? Is it life threatening? Is mobility or one of the senses impaired? Are there multiple disabilities? Is intellect or cognition impaired? Will the child ever fully emancipate and be capable of self-support and independent living? Are there other children and how are they doing?

For example, a child may have diabetes and may otherwise be perfectly healthy. The parents may have concerns about day-to-day management and may utilize special camps to help their child to learn to best live with the chronic disease, but may also anticipate a regular progression to full emancipation. Similarly, a child with a broken leg may need a great deal of caretaking and attention but under ordinary circumstances the problem will heal and eventually recede into the past. A parenting plan may need to have special provisions only for the immediate future.

While all children are busy with activities, children with medical or psychological diagnoses don't just make the rounds of enrichment programs and do other extra-curricular activities that keep the parents' expenses high and eat into their free time. There may be a constant round of therapies and doctor visits and there can be reasons why use of another family member or paid babysitter to help out just wouldn't work. There may be many other things to cope with as well, such as special diets, constant blood tests and injections (and learning how to do

them), medications, observations, inhalations and the like. They may need special equipment for mobility or respiration and home modifications, such as widened doors or wheelchair ramps. And parents may not be forthcoming about their realities. It is good to ask if there is an IEP (Individual Educational Plan) as there may be certain procedures to be followed at home when intellectual, emotional or educational impairments exist and it is helpful to know about them in creating a parenting plan. In fact, asking if one exists can unlock a parent's reluctance to discuss the situation.

*"Where, as is more usual, the special needs tag reflects parenting within a context of health, achievement, disability and dependency concerns the initial presentation and scope of areas to cover can be very different."*

There are many other issues and concerns that may face parents of children with special needs involving serious medical or psychological problems. Do the parents blame the other's DNA or carelessness for the existence of the disability? Are their families of origin very different in their acceptance of the child? Do they fear losing their health or income or dying while their child is still dependent upon them? Are there people who they can depend upon to help them with their responsibilities now or take them on in the future? Is one angry at the other for

not pulling his or her full weight in caretaking? Does one think the other is overprotective or careless? A mediation which involves a child with a serious illness or disability may have issues which can feel beyond the mediator's scope. It is important to be open to the fact that these might arise and need to be heard. There is no reason why you cannot suggest pulling in someone experienced in these sorts of issues to move through them.

## SPECIAL NEEDS, CONTINUED

Even if this is your very first mediation involving a special needs family, you probably know people living with similar realities: the friends with the 45-year-old quadriplegic son who can only meet for Sunday brunch if attendant hours can be arranged; the brilliant neighbor whose child struggles in school; the child who is very difficult to be around because he or she seems uncontrollable; the relative whose child has just received a devastating diagnosis; the family down the hall who had window guards installed in their new apartment even though their daughter is in her teens; the family who must remain within a school system for special services even though there is now a long commute to new jobs; or the child whose mother called in advance of your son's birthday party to check out the menu. In some cases we, ourselves, are these families and we're the ones who have had to face the many challenges. It is generally recognized that divorce is common in families coping with children's disabilities and it is equally true that other families are made stronger by doing so successfully.

In meeting with these clients it is important to understand that life is not bleak for them, and to be appropriately upbeat. Parents of children who have special needs arising out of illness or disabilities also brag about their children and feel proud of their accomplishments. Coincidentally, as I was taking a break from finishing this article I checked my Facebook account and saw that a friend had posted a picture of her 40-year-old daughter, who has significant intellectual and emotional disabilities and lives at home. In it Stephanie was proudly displaying the 15-year job performance certificate that she just received from the Gap for her part-time job in their stockroom.

By the time I saw the posting my friend had already received over 40 comments and 27 "likes." There is indeed pride and joy in the tenacity and achievements of special needs children.

**Understanding the Day-to-Day Details**

When addressing the parenting and support plans where there is a child with special needs, the mediator needs to understand how these impact the family. What happens during a typical day, week, month or year, and what atypical things can occur? What is the prognosis and, to a lesser extent in terms of need to know, the diagnosis? What are the parental time commitments and costs? What concerns exist for the future? What resources have the parents identified to help them on their journey?

**Understanding and Encouraging Unique Planning Needs**

If the parties haven't already begun down this path, and particularly if there are concerns about their child ever being able to live independently and become self-supporting, the parties need to be counseled to consult with specialists and to do long-range planning. It can be terrifying to think of planning even beyond one's own health and lifespan, but if the child may never be able to be totally emancipated this is a necessity. Usually parents come into mediation with the idea that they are working on creating a contract for up to the next 23 years or so. While estate issues may be touched upon they are seldom front and center in terms in the ordinary case. Where there is a

*"Parents may not be forthcoming about their realities."*

## SPECIAL NEEDS, CONTINUED

special needs family with concerns about life-long responsibilities, however, estate and other planning issues take on significant importance.

While it is not your job to impart the information, your clients may need assistance to understand the existence and limitations of the social safety nets for which they or their child might qualify. In fact, there is a constant legislative battle about whittling down safety nets, and even ending them, so there is great insecurity about what actually will exist. Parents may not initially fully understand their need to be proactive because even if benefits continue to exist there are budget and income limitations to qualify and the benefits are not driven by the budgetary and other needs of the recipient. It may be possible for their child to exist in relative poverty but not according to standards the parents would want. Fortunately, there are disability rights groups and websites. If there is an association devoted to helping people with their child's particular disability, the parents can find out, in general terms, what they need to know. This information can be very helpful to you as the mediator as well.

Your clients will also need to understand the concept of the Special or Supplemental Needs Trust, which allow lifestyle enrichments without forfeiture of Social Security and medical and caretaking benefits, but they will need to work with a trusts and estates attorney to create one as well as to carefully do their own estate planning. They will also need to work with a life insurance agent, a financial planner or investment broker, and a tax accountant.

*“Do the parents blame the other’s DNA or carelessness for the existence of the disability?”*

If their child will not be able to independently manage money as an adult, they will need to decide how the disability checks will be banked and distributed. If there was or will be a personal injury or medical malpractice case or settlement they will also have to make provisions for the holding and use of those funds on behalf of their child. While some parents will have amassed enormous knowledge of resources and medical and other information, others — particularly those who have not actively involved themselves — may need to be strongly encouraged to find those resources. In this case you can help by formulating and presenting questions to be asked.

Parents will also need to carefully map out plans for the individuals and institutions who will become involved in their child's life. You may need to incorporate decision-making and access clauses concerning management of the child's health and future living situations.

### **Budgeting and Setting Up Child and Spousal Support**

It's easy to miscalculate the budget by failing to consider each Net Worth Statement category in depth, especially with the addition of unusual expenses. Is there an in-home caretaker and does he or she eat a lot and keep the thermostat on high? Are frequent taxi rides a necessity to transport the child or because of constant parental time-crunches? Is there a service dog gobbling up food and creating veterinarian bills? Is the expense of post-toddler diapers, pads, testing strips and other supplies a long-term constant without meaningful reimbursement from the health

## SPECIAL NEEDS, CONTINUED

insurance policy? Is there a vitamin regimen and are there special health or other foods that must be provided? Is there a need for a household generator because of reliance on a respirator and fear of another big storm? Are special furnishings, appliances or equipment needed with periodic replacements? Remember that the court-issued Net Worth Statement is a guide, but you have to be thorough. Sometimes ordinary expenses are not incurred, as when education and camp costs are picked up by others. These “freebies” should also be noted, as doing so may help the parties to feel a bit better about some of their extraordinary expenses.

If the parties haven’t already taken care of their necessary legal and other affairs then you should try to assist them by setting parameters for doing so in the future and perhaps setting aside funds for the chores. Be sure to include these arrangements in the Memorandum of Understanding.

Parties’ must do estate planning, because if their child remains dependent on them they will need to make arrangements for what is to be done if their child outlives them.

Among other things, Guardians and Trustees must be named and they will need guidance as to what must be done to arrange for the child’s living situation beyond their lifespan.

It should be noted that there is incredible sophistication in creation of strategies. For example, if there is no one who could act as a Trustee, federal law allows for a Pooled Income Trust in which a non-profit holds an account separate and manages the funds. Whether this or some other device would best work for parents should be determined with a specialist attorney. The parties need to be assured that they

don’t have to feel overwhelmed in searching out resources, which are plentiful.

**Creating a Unique Parenting Plan**

In one case, a child had severe food allergies. When the father successfully completed lessons with a chef who taught him to shop for food and prepare the child’s special diet, the mother’s resistance to the child’s overnight visitations with his father vanished.

It is not uncommon for parents of a special needs child to require training about caretaking issues. Such training has the benefit of allowing each parent to relax about time that the child spends with the other. While most of us become used to our children having independent lives beginning in grade school, some parents have little or no experience of their special needs child being out of sight except for relatively short periods of time. Overnights away from home can terrify parents.

One formerly married couple with a wheelchair-bound child together purchased and maintain an adapted van for their separate use when with the child. Another child, due to his need for night-time breathing assistance equipment, can’t sleep at her father’s house. So the mother dedicated one room in her house for the father’s use. The mother established rules about privacy, room maintenance, etc. Now the father can keep to a regular schedule of overnight parenting, and work around the social schedule and other needs of his former wife, whether she retreats elsewhere in the house or goes out.

*“It can be terrifying to think of planning even beyond one’s own health and lifespan, but if the child may never be able to be totally emancipated this is a necessity.”*

## SPECIAL NEEDS, CONTINUED

Parents can use creative methods to arrange regular, holiday and vacation schedules.

With the help of the mediator, the parents can create workable parenting plans.

**Spousal Maintenance and Child Support**

Prior what would ordinarily be emancipation by reason of age, these areas follow the usual principles. So long as such matters as a possible inability to work outside the home because of child care responsibilities, there really aren't any special issues involving child support for unemancipated special needs children and spousal maintenance for their parents.

Complex issues do arise in the planning for maintenance and spousal support if the child is technically an adult but needs care as if still a child.

Domestic Relations Law Section 236(6)(a)(11) specifically cites to "the care of the children or stepchildren, disabled adult children or stepchildren ... that has inhibited or continues to inhibit a party's earning capacity" as one of the categories to consider in looking to maintenance questions. Unfortunately, the money that is paid is only partially available for the self-support of the recipient because much of it will address the needs of the dependent. In high payee income situations the recipient can suffer a huge tax disadvantage, and in low payee income situations may earn too much to qualify for a medical insurance subsidy. Therefore, money contracted as to be paid for the adult child's needs would be better paid in some

other way if possible. On the other hand, under current law the only mechanism to collect arrears through the system is to pay it as maintenance.

In all discussions of maintenance, it is important to assess the impact, if any, on a parent's earning ability while raising the child and whether this has caused limitations for the future. Note that more than half of the states allow child support to continue for someone with a disability that precludes independent living and self-support. New York has not yet recognized that the law should be changed in this regard.

*"So long as such matters as a possible inability to work outside the home because of child care responsibilities, there really aren't any special issues involving child support for unemancipated special needs children and spousal maintenance for their parents."*

There are programs and sometimes private jobs for which disabled adults might qualify. These can provide activities outside the home and sometimes may release a caretaking parent from hours of responsibility. However, whether or not it is reasonable for a primary caretaking parent to hold a job under the circumstances, or to work sufficient hours for the maintenance payee's own self-support, is an issue which needs to be worked through.

In addition, home care assistance can be arranged for privately (at high cost) or through Medicaid or in some combination. As I write this article, New York is more generous than most states in providing for home care assistance. The parties should contact a disability rights organization or an attorney for more information.

**Siblings and Other Relatives**

One of the most important things that a mediator can do when working with a family with

## SPECIAL NEEDS, CONTINUED

multiple children is to assist the parents in creating parenting plans that enable the children individual access to each parent. The unique needs of the siblings have to be recognized.

Children don't always understand why a household can seem to revolve around a brother or sister that they simply see as spoiled or demanding. Their parents may be less available to them, and they may not understand why only their friends get to go to restaurants and on vacations.

They may have responsibilities over and above those of their schoolmates. The kids down the block may make fun of them and sometimes strangers stare. They may have ugly hospital equipment in a shared bedroom. Sometimes siblings act out to try to get their share of attention.

Children may also fear having to take on the burdens of the special needs sibling in the future. In some cases, as they study genetics they may become concerned about their own abilities to have healthy offspring. There is also a danger that siblings will minimize or withhold their own concerns to spare parents who they see as over-burdened.

It can sometimes be hard for a child to understand why a sibling's seemingly simple achievement gets celebrated when nothing he or she does at a much higher skill level seems to matter. Where the special needs child is a prodigy, the same tendency to compare produces a sibling who may feel that his or her achievements will never be enough.

On the other hand, many such siblings develop extraordinary empathy that may even influence

later career choices and abilities in a very positive way.

The ramifications of a parenting plan that doesn't fully address the needs of all the children may be serious, and have the potential to cause life-long problems and jealousies.

As to the extended family, the parties should be encouraged to share certain realities with them and bring them aboard. Perhaps they can help in the care-taking and entertainment of all of the children. Perhaps the use of obsolete, hurtful terms such as

"retarded" needs to be stopped. It's important that a grandparent who wishes to benefit all grandchildren equally in an estate plan follow alternate directions provided by the parents to ensure that there will be no risk of loss of necessary governmental benefits. Words of love may have to substitute for a direct bequest. This is brought up in this context because of the hope that mediation will enable the parties to communicate about some tough issues and understand the entire picture of needs.

*"Sometimes the parents – or one of them – can think that their or the other's role should be 100% sacrifice."*

**Addressing the Parties' Own Needs for "a Life"**

Remember the proverb "All work and no play makes Jack a dull boy"? While parents need income, and must attend to their household needs and chores, they also need to live for themselves. "Having a life" should be a topic in the mediation checklist where there is a special needs situation, especially if the time, energy and financial commitments to the child are overwhelming.

## SPECIAL NEEDS, CONTINUED

Sometimes the parents — or one of them — can think that their or the other's role should be 100% sacrifice. It can be worthwhile to review the parenting expectations to assist in creating realistic parenting plans.

One of the fears parents often express in these situations is that it can feel hopeless to ever be able to remarry given the many pre-existing commitments and responsibilities and the necessity of having a strong tie to the parent of a child or children from the earlier marriage. When that fear is raised it shouldn't be ignored. Particularly if one parent feels "dumped" or reluctant to get divorced the feeling may create a stumbling block to moving the case forward to resolution. It is appropriate to offer assurances and to state how important counseling and/or coaching can be during this time of transition. Support groups should be mentioned as other parents of children with special needs have faced similar issues and they are the best resources. The fear cannot be ignored but it can be contained.

**Addressing Future Decision-Making and Conflict Resolution**

None of us has a crystal ball to assist us in our lives and our cases and therefore we have had to become comfortable with helping to create strategies for future decision-making and resolving issues that are as yet unknown or are deferred. Setting up a protocol for future mediation and perhaps pulling in experts to help in the future is essential.

**Conclusion**

By helping your clients through a thorough and peaceful divorce process it is possible for them to achieve workable agreements and satisfaction in their lives. You will feel rewarded by truly making a difference in their lives.



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## ASK THE ETHICIST

## ETHICS: REVISITING NEUTRALITY

by Rachel Fishman Green

What is the most basic and primary characteristic of good mediation? Neutrality! I usually tell clients, “Why would you come here, to sit in this room and have your spouse and me gang up on you? You would not. That is why my neutrality is essential. If at any point either of you feels that I’m not hearing you, or that I have misunderstood you, I ask you to please bring that to my attention, because it is not my intention.”

A good mediator must be neutral as to the result in order to honor Standard I, the principle of self-determination by the participants. We must always remember – it’s about them, not us! A copy of the Model Standards of Practice for Family and Divorce Mediation is available to members who are logged in to the Council website at <http://nyscdm.org/resources/model-standards-of-practice-for-family-and-divorce-mediation/>.

Standard I also says:

B. The primary role of a family mediator is to assist the participants to gain a better understanding of their own needs and interests and the needs and interests of others and to facilitate agreement among the participants.

Recently, “Ailene” came in to see me as a review attorney. She told me that she and her husband, “Josh”, were working together in mediation, and that the mediator had suggested she consult with an attorney, since her husband is an attorney. (All names have been changed.)

I asked Ailene the name of the mediator with whom they were working. I was very surprised to

hear the name of a prominent and well-known litigator. (“Grrr,” I thought, “more encroachment on our field by litigation attorneys.”) I had not known that “Bob Bobert” worked as a mediator.

I asked Ailene how it was all going, and as she began to tell me about their “mediation” process, I grew increasingly surprised. As I listened to Ailene, it appeared that Bob Bobert was slipping down the slippery slope of advocacy during their mediation process.

Ailene related that Bob had told Ailene and Josh exactly what amount of maintenance Josh should pay, and for how long. Bob told them how much Josh’s law license (earned during their marriage) is worth, and what percentage of it he thought would be reasonable to transfer to Ailene. Bob then outlined, in great detail, how a payout could be structured to accomplish that.

I found myself faced with a conundrum. It was pretty clear to me that Bob had stepped over the line of neutrality. What he was doing sounded closer to Early Neutral Evaluation – where a very experienced matrimonial attorney renders a “down-and-dirty” (quick) opinion regarding what he or she predicts would happen in court. This process (I have heard) has been effective for some cases that are actually headed toward trial, as the parties have an opportunity to do an abbreviated presentation of evidence and arguments, and see how it all sounds to the expert – a kind of non-binding arbitration.

The conundrum wasn’t all. I also felt an internal conflict about the situation, because the recommendations that Bob made were in fact great for Ailene. As her reviewing attorney, I loved the generous *result* that Bob was engineering with this couple. But as a mediator – I shuddered. They were not in a mediation process.

## ASK THE ETHICIST, CONTINUED

Giving Bob the benefit of the doubt – perhaps he felt the need to be more active, more opinionated, and more directive because Ailene is not an attorney – she has been out of the workforce for a number of years – and Josh, in contrast, is a highly-paid finance attorney. Perhaps Bob felt that he was acting ethically, consistent with the terms of Standard VI:

B. Consistent with standards of impartiality and preserving participant self-determination, a mediator may provide the participants with information that the mediator is qualified by training or experience to provide. The mediator shall not provide therapy or legal advice.

But when Bob outlined the precise amount and duration of maintenance, was he not providing legal advice to Josh and Ailene?

As chair of the Joint Ethics Committee, I found myself worrying about whether I should report Bob to the Ethics Committee. And would my role as Ailene’s review attorney conflict with my doing that? But luckily, the process of mediation corrected itself. Ailene forwarded to me a note she had received from Josh, in which he stated to Bob that he would not come back to mediation, because he perceived Bob as

not being neutral. He said that he had had a chance to meet with his own reviewing attorney, and he listed five legal arguments in his favor which he said that Bob had not mentioned at all during mediation, and that after he met with his own attorney, he felt that Bob had been advocating for Ailene.

Whenever I start to think of legal arguments during mediation, I make sure to describe both sides – for this very reason. “Now your attorney would argue x, y and z, and those are the strengths of your side. But [to the other spouse], your attorney would then argue a, b and c.”

When I first began mediating (lo, these many years ago) I had the feeling that I knew best – that I knew what a healthy family and a healthy relationship looked like, and that I could guide people to have a healthy divorce. But I found that – whenever I shared my brilliant ideas with participants – they were rejected. One of the powerful tools we have in mediation is that we let them (help, encourage, guide them) to come up with their own ideas. It is then much more likely they will reach agreement, and that they will comply with the ultimate terms in the agreement, because they came up with those ideas themselves.

I don’t know how this will all end for Josh and Ailene. And I don’t know if Bob will be doing much more work as a mediator. But in this case, Josh’s review attorney did his job and helped create a win for the process of mediation.



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## BOOK REVIEW

JOHN GRAY'S *MEN ARE FROM MARS, WOMEN ARE FROM VENUS*

Reviewed by Gloria Ciolli

When asked by THE REPORT to write a review of John Gray's book, *Men are From Mars, Women are From Venus*, it came to mind that I read this book years ago. "Was it still around?" I asked myself. The quest for a satisfying, enduring and happy relationship is a goal of most people. The concept that males and females are different is not a new idea and as far as I am concerned it has not changed since the book was published in 1992. No matter how old you are, I am sure you have probably been mystified, confused, and frustrated in your own attempts to interact with the opposite sex.

With this in mind, I re-read the book to see if it still holds water in the 21<sup>st</sup> century. I read the book at the beauty parlor and nail salon, and at a doctor's office. Surprisingly, just carrying the book brought responses from people I did not know. Each person remembered the book, although not the name of the author or when it was written. They had either read it, read an article about it or heard about it from an outside source. It certainly left an impression on these people! Each agreed that there will always be gender differences. Men and women are just different.

*Men are From Mars, Women are From Venus* was Gray's first book. It was an immediate best seller. It has been published in 42 languages and over 50 million copies have been sold worldwide. The book established a theme for Gray's 17 subsequent books, as well as for his seminars, lectures, infomercials, audio and video tapes, and board games. He also established the Mars-Venus Institute in 1996. His books inspired a one-man Broadway show that will be premiered in the United States this year. According to Gray's website, "millions of people have improved their relationships by reading Dr. Gray's books."

Gray used the metaphor of two different planets to describe male-female communication. The book does not claim to "directly address the challenges of a dysfunctional relationship but it does provide a new twist on the ways we communicate and interpret the other sex." In other words: "Don't change your partner, but change the ways you communicate, react and respond." In my own opinion, it does not matter what a reader believes or what research has tried to prove. All that matters is that couples are interested in improving their relationships. This book provides an uncomplicated road map for couples to follow.

Gray imagines that once upon a time, Martians and Venusians met, fell in love and had happy relationships together because they respected and accepted each other's differences. Then they came to planet Earth, amnesia set in, and they forgot that they were from different planets. Using this metaphor to illustrate common conflicts occurring between men and women, Gray explains how differences can come between the sexes and hinder mutually fulfilling and loving relationships. In his book he gives advice and concrete suggestions on methods to work out the differences, always keeping in mind the importance of understanding one another, maintaining a good relationship and getting your own emotional needs met.

For example, these are typical differences in male and female styles of communication noted in the book:

- Women are more likely to talk to other women when they have problems, need to make decisions, or are experiencing stress. Men, on the other hand, keep their problems to themselves and don't see the point in sharing personal issues unless they decide on an action and want to discuss it.

## BOOK REVIEW, CONTINUED

- Women are more relationship oriented. They look for commonalities and feel a need to connect with other women. Men tend to relate to other men on a competitive basis where dominance and status is important.
- Women focus on building rapport by sharing experiences, asking questions, and making suggestions. Men like to tell and give information. Their main goal is to solve problems.
- If women have a disagreement with each other, it affects all aspects of their relationship. Men can have a disagreement, move on to another subject, and then go out for a drink together.
- Women crave understanding and men crave acceptance.
- Women crave respect and men crave appreciation.

Men rarely say “I’m sorry” because on Mars it means you have done something wrong and you are apologizing. Women need to realize the best way to help a man grow is to let go of trying to change him.

Gray looks at gender communication and miscommunication and tries to answer the age-old questions “What do women want?” and “What do men want?”

He focuses on the importance of respect and the art of listening, and on how men and women talk, act and feel differently. Gray talks about the ideas that are ingrained in all of us, about how women and men “should” behave in relationships, and about whether they actually can.

Though much of what he says is common sense, I found the book informative and thought provoking. It is also a good start for couples who want to acquire a basic understanding of the importance of good listening and communication skills. It provides insight into how to process interpersonal relationships between men and women even though the two genders will always think, understand, and react differently.

As mediators, we must not stereotype and assume that “all men” or “all women” are created with similar attitudes and predilections, or that they will act or react in the same ways. While it is good to be aware of communication differences, mediators must go beyond assumptions and decide how to respond and interact based on actual behavior and apparent feelings. We need to be aware of differences not only between sexes, but between individuals.

This book is a classic and a “must-read” and I definitely recommend it to my colleagues.



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

### INTERIM AGREEMENT ISSUES IN DIVORCE MEDIATION

By Charles M. Newman

In Volume 2013, No. 2, of THE REPORT, we brought you an article by one of my co-editors, Eli Uncyk, on the essentials that have to be considered for all Memoranda of Understanding. This issue, we thought we'd go back a little earlier in the process and take a look at the issues that might be covered by interim agreements that the parties could enter into during the course of mediation. Interim agreements are designed to be binding but only until a full separation agreement or stipulation of settlement is signed, covering the same subjects (and of course, a great many more), and superceding the interim agreements.

Interim agreements are sometimes useful and sometimes necessary in all sorts of divorces: mediated ones, party-negotiated ones, lawyer-negotiated ones and even heavily litigated ones. Two of the reasons for parties to enter into interim agreements are the clock and the calendar. We all know that divorce mediation can sometimes take months or longer. But life doesn't stop while the parties mediate. (John Lennon reminded us that life is what happens to you while you're busy making other plans.) Some real-world things have to be dealt with before even the most efficient couples can come to a full agreement about all the issues in their divorce.

If the spouses are willing to look one another in the eye and say, "Yes, in the middle of the breakup of our marriage, I'm willing to trust you about some very important things," then maybe

(*maybe*) they don't need any written interim agreements. In truth, there are such couples, people who are knowledgeable and really do intend to keep their word without the need for a binding contract. But whether the parties rely on good will, honesty and a handshake, or if they have their professionals carefully write out their ideas about how things will work before their divorce comes through, they need to know what all those issues *are*.

*"Two reasons for parties to enter into interim agreements are the clock and the calendar."*

Some interim issues will be obvious to them. "If one of us moves out, who are the kids going to stay with?", for example. If they're careful, they may think of some others, or parts of some. "We have to sign tax returns next month. Who's going to pay the taxes?" And there may be issues that don't naturally occur to them at all. "What's the cut-off date between marital and separate property?"

Both lawyers and mediators very often have to tell clients about the issues that certain interim agreements might cover that are relevant to the client (of the lawyer) or to the clients (of the mediator). Since both my law and mediation practices include divorce, I've developed a cheat-sheet of things to think about when thinking about interim divorce agreements. I can use it both as advocate and neutral. It's not that every case has to have an interim agreement for every topic. Quite the contrary, and that's why my cheat-sheet is written as a reminder,

## TOOKBOX, CONTINUED

not a template. The divorce lawyer or divorce mediator can use the cheat-sheet as a sort of clearinghouse, a simple checklist of what *could* be covered in interim agreements when the client or clients need one or more of them. Some couples may not need any, some might want a handful of separate ones, and some might prefer an omnibus interim agreement that covers lots of subjects in great detail.

It is important that readers understand what the cheat-sheet is, and is not. It's a checklist to remind professionals about possible issues. The cheat-sheet is not a drafting guide. Questions about what to write, how to write it, and who is competent to write it are not covered in this article or in the cheat-sheet.

If readers would like a future article in THE REPORT about the writing of interim agreements, please contact the editors. You can reach us — about this or anything else you'd like to see in THE REPORT — at [nysdcmpubs@yahogroups.com](mailto:nysdcmpubs@yahogroups.com).

My cheat-sheet follows. If you find it helpful, please feel free to use it however it works best for you. I ask only one thing in return. When you improve on it, please let me know what changes you made. With all the know-how in NYSCDM's membership, we'll make this thing bullet-proof.



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## TOOLBOX, CONTINUED

LAW, MEDIATION AND ARBITRATION OFFICES OF  
**CHARLES M. NEWMAN**

**DIVORCE and FAMILY  
 INTERIM AGREEMENTS**  
**Subjects to Consider During Mediation or in  
 Negotiation-Phase, Pre-Litigation or *Pendente Lite* Agreements**  
 January 2014

(Note about the scope of this checklist. It is only a reminder of issues, not a drafting guide.)

1. **Scope of interim agreement is up to the parties.**
  - 1.1. *May* cover virtually anything the parties want, particularly given their new realities.
  - 1.2. "May" isn't "must". Don't need to cover if client isn't worried that s/he needs that protection.
  - 1.3. To create dependable expectations
  - 1.4. To allay concerns
  - 1.5. To protect and maintain, particularly status quo and the changes needed for new realities.
  - 1.6. To permit/encourage trial-and-error of key issues
  - 1.7. Silence in the interim agreement is not to be deemed anything other than that normal rules and principles apply (or another specified rule of construction).
  - 1.8. Other
  
2. **Client's particular concerns and issues in this family and case**
  - 2.1. Family
  - 2.2. Personal
  - 2.3. Specific business or financial issues
  - 2.4. Process
  - 2.5. Other
  
3. **Concerns and issues of the spouse that can be anticipated in this particular family and case; same subs as above.**
  
4. **Children**
  - 4.1. Separate comprehensive interim or permanent parenting plan?
  - 4.2. Primary residence with whom?
  - 4.3. Access
  - 4.4. Health, special care
  - 4.5. Particular issues for this family
  - 4.6. Financial support: see "Support", ¶10 below

## TOOLBOX, CONTINUED

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- 4.7. Spheres of responsibility/ decision making/influence (e.g., religion, education)
- 4.8. Travel restrictions
  - 4.8.1. Time
  - 4.8.2. Destination
  - 4.8.3. Activities
  - 4.8.4. Traveling companions
  - 4.8.5. Maintaining contact with the child(ren)
  - 4.8.6. International/who holds passport
- 4.9. See also "tell the kids about us," ¶12.1 below
- 4.10. See also "tell the kids about significant other," ¶12.3.2 below
- 4.11. Other
  
- 5. **Cut-Off Date**
  - 5.1. Distinguish between marital and separate property
  - 5.2. Valuation dates for assets/liabilities
  - 5.3. Other
  
- 6. **Stand-Still**
  - 6.1. Make sure parties are aware of statutory automatic stays and cover any issues of concern in an interim agreement as a substitute if no action is pending
  - 6.2. No transfers or spending out of the ordinary course
  - 6.3. Financial accounts maintained, including credit cards and other credit
  - 6.4. Who protects assets not covered elsewhere
  - 6.5. Who pays expenses
    - 6.5.1. Family/joint/children
    - 6.5.2. Individual to each spouse
  - 6.6. Where does income get deposited
  - 6.7. Who pays debts not covered elsewhere
  - 6.8. Access to records and info
  - 6.9. Investment accounts: who/limits/cooperation/notice of investment decisions?
  - 6.10. Insurance maintained
  - 6.11. Wills maintained
  - 6.12. Agreed measuring dates for ED (typically start of negotiations), including specifying specific dates for specific assets.
  - 6.13. Agreed measuring dates (same as above) for all other §236 Part B.
  - 6.14. Who pays/ advances payment for specific debts
  - 6.15. Other
  
- 7. **Move-out.** Frequently its own agreement, sometimes the only or main one. In addition to the list here, some things it might cover are included in other suggestions in this list, including stand-still, marital and other residences, kids, etc.

## TOOLBOX, CONTINUED

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- 71. Creates/does not create long-term presumptions of occupancy, or it's permanent
  - 72. Creates/does not create presumptions of value and value-sharing
  - 73. Creates/does not create presumptions about kids: parenting, custody, visitation, child support
  - 74. Expense and upkeep responsibility for the new residence
  - 75. Other
8. **Marital Residence.** *See also Move-Out.*
- 8.1. Occupancy
  - 8.2. Carrying charges
    - 8.2.1. Mortgage
    - 8.2.2. Utilities
    - 8.2.3. Homeowner's insurance
    - 8.2.4. Other
  - 8.3. Upkeep
    - 8.3.1. Who does it?
    - 8.3.2. Who pays for it?
  - 8.4. Contents and other personal property
  - 8.5. Redecorating, remodeling, etc.
  - 8.6. Access by other spouse
  - 8.7. If already certain it is to be sold, ...
    - 8.7.1. Listing price and acceptable price
    - 8.7.2. Responsibility for showing, communicating with broker
    - 8.7.3. Cooperate in the negotiation, contracting, closing the sale and emptying/preparing the home for sale
    - 8.7.4. Split of value, if there is reason to decide that early
    - 8.7.5. Holding of net proceeds pending divorce or post-nup agreement
  - 8.8. Other
9. **Other Residences**, existing second homes and new home of separating spouse.  
Same subs as Marital Residence, ¶8 above.
10. **Support**
- 10.1. Spousal
    - 10.1.1. Needs-and-abilities arrangement
    - 10.1.2. Consideration of rights under temporary maintenance statute
    - 10.1.3. Temporary maintenance worksheet calculations, if desired
  - 10.2. Child(ren), if relevant
    - 10.2.1. Basic
    - 10.2.2. Add-ons
    - 10.2.3. Unreimbursed medical
    - 10.2.4. Particular, for this family

## TOOLBOX, CONTINUED

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- 10.3. Insurance, spouses and children
  - 10.3.1. Health
  - 10.3.2. Life
  - 10.3.3. Disability
  - 10.3.4. Physical property. See also "Marital Residence", ¶8 and "Other Residences", ¶9 above.
- 10.4. Other
- 11. Income Taxes.
  - 11.1. Which tax years?
    - 11.1.1. Tax year in which physically separated
    - 11.1.2. Tax years after separation
    - 11.1.3. Tax years prior to separation, if necessary
  - 11.2. Who pays?
    - 11.2.1. Advancing of payments only with final reckoning in later agreement; or decide now who is actually responsible to bear the cost?
    - 11.2.2. In what ratios, by what formulas?
    - 11.2.3. When payments are to be made (including estimateds)?
    - 11.2.4. Consider withholdings and estimateds already paid
  - 11.3. No admission of other spouse's facts
  - 11.4. Who is responsible for preparation/choosing preparer of returns?
  - 11.5. Timely cooperation in...
    - 11.5.1. Sharing relevant information
    - 11.5.2. Preparation of returns
    - 11.5.3. Filing of returns
    - 11.5.4. Endorsing and sending refund checks; paying the other, if necessary, for his/her share of refund
  - 11.6. Refunds on previously filed returns
  - 11.7. Refunds on returns to be filed in the future
  - 11.8. Indemnification
  - 11.9. Other
- 12. "On the Ground"
  - 12.1. What/when/how to tell children about separation/divorce
  - 12.2. What/when/how to tell others about separation/divorce
  - 12.3. Significant others
    - 12.3.1. How to advise other spouse
    - 12.3.2. For the kids (if any)...
      - 12.3.2.1. Learn about
      - 12.3.2.2. Introduce, relationship explained
      - 12.3.2.3. Extensive interaction
      - 12.3.2.4. Stay over
  - 12.4. Expected level of cooperation
    - 12.4.1. How to do it
    - 12.4.2. Things to do

## TOOLBOX, CONTINUED

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- 12.4.3. Things to not do
- 12.4.4. How to communicate
- 12.4.5. How not to communicate
- 12.4.6. Specific courtesies that are concerns of client
- 12.4.7. Specific courtesies that are anticipated to be concerns of spouse.
- 12.5. Other
  
- 13. **Some Specifics About the Interim Agreement Itself**
  - 13.1. Duration
    - 13.1.1. Limited by time
    - 13.1.2. Limited by event
  - 13.2. Does/does not establish precedent for permanent agreement
  - 13.3. Built-in reviews
  - 13.4. Process for built-in or requested reviews
  - 13.5. Recite topics specifically chosen not to be resolved in this agreement
  - 13.6. Indemnifications and specific obligations
  - 13.7. Effect of death, disability, loss of job, etc. during effectiveness of this agreement.
  - 13.8. Other
  
- 14. **Divorce Process**
  - 14.1. Notice before commencing action or other serious move
  - 14.2. Agreed pre-litigation processes/ cooperation
  - 14.3. Agreed litigation processes/level of cooperation
  - 14.4. Other
  
- 15. **Other**

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## INSIDE SCOOP/AROUND THE COUNCIL

<b>Board Highlights</b>
-------------------------

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 December 2013 meeting.

With much reluctance, the Board accepted the **resignation of Gail Ferraioli** of Fairport. Gail's calm presence and keen insights will be sorely missed. However, the Board is pleased to announce the **appointment of Renee LaPoint** of Rochester to fill the balance of Gail's term to May 2015. Welcome Renee!

In addition to his written report, **Treasurer David Louis reported** that there was a cash balance as of September 30, 2013 of \$68,511.43.

Clare reported that there were still quite a few members who had not **renewed their membership**, and Board members agreed to follow up with them. Directors will encourage renewing NYSCDM members **to serve on committees**, to increase participation in the work of the Council and have more geographically diverse committee membership.

**Bob Badolato** reported in writing that he has been working on membership renewals and follow up notices.

**Melissa Burns** reported in writing that she is adding fields to our online conference registrations so that we can be sure to reach out to any non-members attending our conferences; that 51 members have updated their profiles on our website; that she is searching out alternatives to the Yahoo listserv, including possibly a second blog; that she assisted THE REPORT editors with the third issue in 2013; made the arrangements for our December Board meeting, and is already hard at work helping the Annual Conference co

-chairs. She will also send a reminder email about the Abel award to members.

The Board unanimously approved the following:

(1) The Finance Committee's recommendation to adopt a policy to **maintain a minimum operating cash reserve** of the greater of (a) 1/3 of previous year's expenses or (b) \$25,000; that the Reserves could not be invaded to fund a deficit budget; and that if the Board authorizes the use of cash reserves which bring the reserves below the minimum in any given year, the budget for the following year must restore the deficit in the operating cash reserves.

(2) The Annual Conference Committee's recommendations on fees, including a use of reserve funds to help pay for the fees for **Woody Mosten** and keep the **conference fees** as low as possible.

(3) The Executive Committee's recommendation to approve the 2014 contract proposed by **Melissa Burns as Administrative Consultant**.

(4) The Finance Committee's recommendation of the **Annual Budget**, which will be posted on the website. The Board acknowledged the hard work of David Louis, the Committee Chair, in completing the budget.

(5) The Conference Committee's recommendation to **change the dates** of the Annual Pre-Conference to Friday instead of Thursday and to begin the Annual Conference on Friday evening and run through Sunday afternoon; and

(6) The Accreditation Committee's recommendation that the Board determine the **proper designation for an accredited member** of the Council. The Board specified the designation as an accredited member or mediator of the New York State Council

## INSIDE SCOOP/AROUND THE COUNCIL

**Board Highlights**

on Divorce Mediation and directed that the proper designation be made clear to all accredited members.

(7) The Public Awareness Committee's recommendation to disseminate the **PowerPoint presentation** made by the Committee and our Public Relations independent contractor, Patty Murray. This will be emailed to all members for their own use in publicizing their mediation practices along with some guidance as to how members could secure speaking engagements. The Board acknowledged the hard work of committee chairs, Susan Ingram and Helene Bernstein, in completing this presentation.

In light of the length of the meeting, Clare moved recommendations from the Accreditation Committee on CE credits, and of the Ad-hoc Committee on Strategic Partnerships to the February meeting.

Written reports were submitted by the following committees:

Upstate Mini-Conference Committee reported that the conference and the ADR mixer were a huge success and generated a net income of \$1,600. Kudos were given to the Upstate Conference co-chairs, Nadia Shahram and Bridget O'Connell.

The Accreditation Committee provided minutes of their meeting in May 2013 at which they discussed the use of the **accreditation designation**, proper MOU's, reporting of CE credits and a policy for accredited members who have suspended their practices.

The Membership Committee reported that they **revised the membership letter** and included a **new letter explaining the buddy program**, revamped the new member welcome package and that they discussed possible uses of the Council's cash reserves to promote/encourage membership, as well as plans for a new survey.

The Revenue Ad Hoc Committee submitted minutes from their two meetings at which they **identified potential revenue sources** which should be followed up by specific committees and we look forward to their recommendations at the February meeting on advertising in the Report and advertising on our website.

The Education Committee reported that they are at work establishing **guidelines for competency in mediation** and are addressing the issue of new mediators gaining practical experience.

The Ethics Committee reported that it received one complaint this year, which is in process, and it continues to write articles for THE REPORT.

The Public Awareness Committee reported that in addition to drafting the PowerPoint presentation, they added new members to their committee; that Patty Murray was able to place an **article in the Buffalo News** on the Upstate Mini-Conference; that **new blogs** are posted on a regular basis; and that co-chairs Susan Ingram and Helene Bernstein attended the kick-off for Mediation Settlement Day. Patty implemented an **MSD blog-a-thon** of our members' blog posts on Facebook and Twitter. Susan also presented the Board with the Google analytics from the website, which showed **increased visibility and ranking of the Council's website** in search engines, as well as an increased number of unique visitors and length of visits to our website. Thank you Patty Murray and the Committee for all of your efforts in increasing the visibility of the Council!

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## INSIDE SCOOP/AROUND THE COUNCIL

## Public Awareness Committee

The Committee continues to work closely with our public relations consultant, Patty Murray. We are close to launching our PowerPoint presentation, which can be utilized by individual NYSCDM members to market themselves to the community and professional organizations. The Board of Directors will also promote the council throughout the state with the assistance of our PPT. At the annual conference in May, Patty will be offering a presentation on marketing tools and strategies to promote your mediation practice. The PPT will be reviewed and tips on making an effective presentation will be discussed.

Throughout the Fall and Winter months, we continued to reach out to new members who have expressed working with the Committee.

Original blog posts and articles continue to be reviewed and posted on our website and social media pages. This is an excellent way to promote your mediation practice, bring attention to the Council, and raise both your own and the Council's website in search results. Just send your posts and articles, or links to them, to Patty at [patty@murraypublicrelations.com](mailto:patty@murraypublicrelations.com).

We utilize Google Analytics to monitor our exposure on social media and are proud to report we have maintained our first-page status under a search for "New York Divorce Mediation."

In order to spread the word about the Council, please...

- "Like" our Facebook page at <https://www.facebook.com/NYSMediate> and share our posts on your Facebook feed.
- "Follow" us on Twitter at <https://twitter.com/NYSMediate> and re-tweet our tweets to your followers.
- "Join" our LinkedIn group at [http://www.linkedin.com/groups?home=&gid=4274271&trk=anet\\_ug\\_hm](http://www.linkedin.com/groups?home=&gid=4274271&trk=anet_ug_hm)

Public Awareness of the NYSCDM helps all of us, and not only by promoting the Council. It also allows members of the public to find an individual mediator by clicking our "Find a Mediator" tab. Please check that you have updated your profile recently so that we have the most current information about you and your practice.



*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](http://www.susan-ingram.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's website is [www.hbernsteinlawandmediation.com](http://www.hbernsteinlawandmediation.com).*

*Helene and Susan are the Co-Chairs of the NYSCDM's Public Awareness Committee.*

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## INSIDE SCOOP/AROUND THE COUNCIL, continued

**Nominations Sought**

The New York State Council on Divorce Mediation is seeking qualified members to join the Board of Directors. If you or anyone you know is interested in being considered, please send me the candidate's name and qualifications on or before March 1, 2014, via email at [bdillon@mediationctr.com](mailto:bdillon@mediationctr.com).

Bobbie L. Dillon

Nominating Committee Chair

**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! For detailed instructions: <http://nyscdm.org/find-a-mediator-instructions/>

Questions? Contact Melissa Burns at [mburns@nyscdm.org](mailto:mburns@nyscdm.org)

**Feel Free to Share!**

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