MEDIATION AND THE PROCESS OF FAMILY LAW REFORM

Forrest S. Mosten

The family law system needs fixing. The real question is how to go about fixing it. The concept of mediation and its process should be vital in the rethinking and restructuring of the system. This article discusses how mediation can be used in policy-making to get all the stakeholders in the family law system to creatively and non-judgmentally work toward reform. The author contends that increased legal access and speedy low-cost dispute resolution should be at the top of the reform agenda. Courts and professional offices are valued for their consumer-friendliness, stressing nonadversarial settings and client education. Unbundling is urged to be not only accepted but also promoted as a practice to meet the legal needs of families. The article concludes with the argument that effective reform should incorporate the principles of mediation, and the reform process should take advantage of models of consumer friendliness from both the public and private sectors.

> Families who litigate are nearly always worse off when they leave my courtroom than before they ever met me.
>
> —Hon. Anne Kass
> Albuquerque, New Mexico

Jurisdictions throughout the world are embarking on family law reform due to the nearly universal recognition that the current judicial system is failing to meet the goals and needs of families, judges, lawyers, and their communities.

This article offers a focus for policy makers in establishing an agenda for family law reform and a process for implementing that agenda. I shall attempt to integrate three themes in sharpening that focus: (1) the use of mediation principles as a process model for approaching family law reform; (2) the importance of the symbiosis of reform that occurs in cross-fertilization between the courthouse and the private sector, particularly in innovative legal delivery

Author's Note: *This article is based on chapter 22 (The Legacy of Mediation) of Forrest S. Mosten's "The Family Law System of the Future" (in* The Complete Guide to Mediation, *American Bar Association, 1997). The author dedicates this article to his mentor of over 25 years, Louis M. Brown (1909-1996), the "father of preventive law," and wishes to acknowledge Jody Grotzinger, Lynn Carp Jacob, Monica Butschek, and William Howe III for their invaluable assistance.*

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society, it is being used to manage and prevent disputes and to facilitate consensus, team building, and policy formulation in both the private and public sectors. The examples of such expanded use of mediation are too numerous to set forth here, but a few illustrations may be helpful.

If an engaged couple comes to a mediator with an agenda to work out a prenuptial agreement, the mediator, along with helping the partners negotiate the terms of their prenuptial agreement, can also provide a legal and communication wellness checkup and information to help strengthen the couple's marriage and avoid marital conflict down the road.[1]

In business projects, mediators are now being used to "partner" with parties from the conception stage through completion. For example, in the development of an international resort, the parties might hire a mediator to help resolve differences in the negotiation stage that might prevent a deal from being consummated. In that role, the mediator could help establish a process for future dispute resolution. The mediator could then be available either on-site or on call to work with parties at the first signs of impending conflict to smooth out difficulties and help the project run more smoothly and at a lower cost.[2]

A final example of a public sector use of mediation is in the area of community facilitation and team building. In low-income public housing projects that are governed by boards of residents from different ethnic backgrounds, mediators work with board members to facilitate communication, reflect on perspectives, and help residents resolve conflicts. The mediator can help enable the board to create policy that will have present and future impacts on the residents and their children in the areas of violence, drugs, community economic and employment centers, relationship with police and merchants, and other aspects of community life.[3]

The success of a mediative peacemaking approach is evidenced by Jimmy Carter fashioning the Camp David accords between historical enemies and by George Mitchell building peace in Northern Ireland. Why would it not be used to make changes in the family law system?

In analogizing mediation principles for use in family law reform, the first step is for agents of reform to accept the stakeholders "where they are" while serving as agents of reality to help stakeholders articulate the problems of the system and the need for change.

In mediation, a nonjudgmental neutral third party attempts to help parties change their perspectives so that they can change ways that are not working and create new ways that may require different behaviors and agreements. In working off an agenda created by the parties stressing empowerment and recognition, a mediator can work on two seemingly incongruous paths. First, a mediator can help the parties surface and better understand their true needs and interests as opposed to their stated positions. Second, through reality test-

COURTS AND PROFESSIONAL OFFICES SHOULD BE CLASSROOMS FOR CLIENT EDUCATION

The foundation of mediation is informed participant decision making based on education. The participants' ability to make informed decisions is seen as the bedrock of the process so that the mediator spends time and attention making sure all participants are ready to make decisions.

One of the innovations resulting from the mediation movement is that of client libraries. Client libraries require the allocation and commitment of space and resources for client education. Client libraries contain consumer-friendly books, videos, and audio tapes. They have computers for parties to prepare their own legal work and serve as child care centers with toys and age-appropriate learning materials so that children will have a place to stay if other child care cannot be arranged.

Currently, there are successful models of client libraries in courts in Maricopa County; at law schools such as the University of Southern California and the University of South Texas; in public libraries in Sydney, Australia; and in a growing number of professional offices such as Sherman, Lober & Williams in Santa Cruz, California, Madden & Butler in Brisbane, Australia, and the Louis M. Brown Client Library in my own firm in Los Angeles.[11]

Most courthouses have law libraries for the lawyers and judges. Although the public is not barred from using such libraries, materials are generally not readily accessible or easy to understand. Judges find that informed litigants who represent themselves protect their rights better, are better prepared (fewer shoeboxes with receipts), put on their cases in less time, and do not sacrifice their rights by putting judicial officers in the position of having to be their advocates.

As indicated in Professor Janet Walker's research on client information in England, courts should be thinking not just about providing client-accessible legal information but also how such information should be presented to the public. England has considered it such important public policy that Parliament has legislated a required information meeting for divorcing spouses to take place before any court proceedings are filed.[12] This legislated mandatory meeting is in addition to the Citizen Advice Bureaus, which exist throughout England and Canada to educate citizens about their legal rights.

In planning for family law reform, citizen education should be explicitly written into any system. If it is determined that budgetary constraints do not permit for full-time staff for a courthouse citizen's library (as exists in public libraries in Sydney, Australia), perhaps an effort can be made to recruit volunteer citizen library staff from the ranks of retired persons or neighboring churches and synagogues. Courts are institutions of the community, and peo-

The differing stakeholders spoke directly with each other. Each stakeholder (or representative) was allowed the opportunity to be heard and to articulate important values and concerns. In turn, each participant was willing to listen and did listen to different approaches.

Although the Oregon Task Force may have been willing to modestly settle for increased awareness and empowerment rather than rush for concrete results at the expense of an incongruous process, the task force's commitment to a mediative approach resulted in significant legislative results. The ultimate litmus test of the task force's commitment that the reform remain with the stakeholders was underscored by its unique and selfless decision to plan for its own sunset termination.

SYMBIOSIS OF COURT AND PRIVATE INNOVATIONS

Family mediation started in the late 1970s as a private sector reaction to an inflexible and nonresponsive court system. Courts around the country then began creating mandated mediation programs in the courthouse that fostered policy breakthroughs in confidentiality, assessment criteria, and the treatment of families harmed by domestic violence.[5] The success and innovations of these court programs in turn spurred greater growth in private mediation that focused on conflict resolution theory, negotiation strategies, and training innovations. The Association of Family and Conciliation Courts is founded on a belief in the values of the interdisciplinary court-private sector symbiosis on a national scale, and this public-private cross-fertilization is occurring in nearly every community in this country, as well as many foreign jurisdictions.

Two overriding trends mark this symbiosis:

1. Taking its lead from private mediators and client-centered lawyers, therapists, and other professionals, courts are shifting from institutions that decide cases to institutions for public education and brokering options to resolve disputes.
2. Inspired by the rapid pace and success of family court reform, private professionals are contributing directly and indirectly to court reform by offering consumer-oriented service products and innovative delivery systems.

In 1994, the American Bar Association established the Louis M. Brown Legal Access Award to recognize innovative efforts to improve the delivery systems to moderate-income persons. A quick perusal of the nominated programs reveals the vast number of both court and private sector programs that are attempting to creatively meet the needs of families.[6] In developing an agenda for family law reform, policy makers might attempt to integrate some

ally been seen by the public as very consumer friendly. Researcher Jessica Pearson has found that disputants consider mediation less damaging to relationships, and that mediation helps parties identify real issues, feel as if they were treated fairly, and feel as if they were treated with dignity and respect.[8] From the lessons of mediation, many lawyers and mental health professionals are beginning to train their staffs to be better on the telephone and more client friendly. Because failure to return telephone calls is a major source of ethical complaints, lawyers are stressing consumer-oriented follow-through practices. Client-friendly office brochures and information and client-oriented service products are being developed with the understanding that much like other professions and service industries, professionals in family matters must be responsive to overall consumer needs.[9]

This same consumer-friendly approach is being adopted in the most progressive court jurisdictions. The platinum model of court reform is the Maricopa Superior Court (Phoenix, Arizona). Through the leadership of Judge Rebecca Albrecht, court administrator Gordon Griller, and lawyer-nun Noreen Sharp, Maricopa has a national reputation for putting the public first. This court system has even relabeled litigants as "customers" and has established a self-service center on the fourth floor of its courthouse to service the growing number of pro se litigants. As indicated in the accompanying Maricopa diagrams, using technology, this court has totally revolutionized and facilitated the way citizens can access the court and its information through easy-to-read pamphlets and court forms, and consumer-oriented service representatives are trained to help citizens meet their legal needs.[10] Working with other institutions in the community, Maricopa has earned the respect and support of Phoenix's lawyers. The consumer-friendly Maricopa model is being taught to judges and court administrators from other jurisdictions in "litigants without lawyers" seminars, which are held on a regular basis. The result of this combined effort of technology, collaboration, innovation, and gutsy political leadership should be a blueprint for the court system of the future.

SETTLEMENT IMPACT STUDIES

If only 3% to 5% of cases are ultimately decided by a judge, why are court systems not designed for the 95% to 97% of cases that settle?

Mediation offices have different features than courthouses. Mediators try to have offices that are private and quiet, with comfortable chairs that promote discussion. Mediators typically have telephones and fax and copy machines available to facilitate the sharing of information. Some mediators' computers are available to write up the agreements made on the spot. Many

CONSULTING LAWYER IN MEDIATION

Many clients are afraid to enter into mediation without the support, information, and advice of a lawyer. This discrete task role by mediation-friendly lawyers may be the single greatest catalyst to the further expansion of mediation.

Because full-service representation is the conceptual framework upon which most ethical and professional rules are based, there are significant institutional and attitudinal barriers to promoting unbundled legal services. There is also a great deal of misinformation. Many opponents of unbundled legal services are fearful that lawyers will jump in and out as counsel of record. Unbundled legal services are designed for parties to represent themselves so that discrete court appearances are not part of the model. On the other hand, court reformers are free to revisit their own concept of special appearances to accommodate lawyers helping litigants in court on a limited basis, as is being considered in Ventura, California.

Notwithstanding the many barriers, progressive jurisdictions such as Maricopa actually have a list of unbundled attorneys available in the courthouse and run cutting-edge training programs through the courthouse. The response by the local bar has been overwhelmingly supportive. The Oregon State Bar has worked with malpractice insurance carriers to inform lawyers that if they unbundle,[19] they will be covered by their malpractice insurance in order to alleviate fear in that direction.[20] State bars of Colorado and Massachusetts have just issued unbundling-friendly ethical opinions, and state bar task forces in Wisconsin, Maryland, Hawaii, Minnesota, and England view unbundling as key to family law reform and are exploring ways of reconciling this legal access innovation with ethical and professional barriers.

The key for family law reform is that this unbundling and other types of legal service delivery innovations in the private sector offer an expanded vision of the reformers to meet the needs of the citizens in their jurisdictions. Concrete suggestions for reform are as follows:

- Courts, the legislatures, and the legal profession should reaffirm their commitment to legal access as top public policy, with explicit statements that laws, procedures, and professional responsibility rules should encourage legal access to justice generally and to discrete task representation specifically. Any statutes or obligations on lawyers to the contrary should be assessed and modified to comport with legal access policy.
- Consistent with the growth of mediator immunity, states should enact statutes granting civil immunity to lawyers who unbundle their services with respect to any service not expressly requested by the client. To facilitate informed client decision making, states should ratify a model discrete task lawyer-client en-

lawyers cannot narrow the range of results. Such open-ended cases are often ripe for escalation; they can be even more susceptible to mediated resolution because neither side can be confident of how they will turn out. With the crunch on the courts and settlement talent weighing heavily in the private dispute resolution industry, it is no wonder that mediators are filling their calendars with these high-conflict matters.

In designing a new system, both judicially imposed and mediated case management deserve a place on the reform agenda.

PROFESSIONALS AS CLIENT COACHES AND CONSULTANTS IN MEDIATION: UNBUNDLED OR DISCRETE TASK SERVICES

Should litigants begin representing themselves in court in greater numbers, they do so at their peril. Research has shown that self-represented litigants receive less child support, fewer temporary orders, and less or no tax advice; they also use mediation less frequently, which keeps these divorcing families from receiving interventions from knowledgeable professionals that can resolve conflict within the family system and ameliorate it in the future. Many self-representers can afford lawyers but do not want to use them because they do not want to spend the money, are afraid of losing control over their own lives, or believe that lawyers would actually add to their problems.

The ABA Comprehensive Legal Needs Study in Maricopa, Arizona, found that 88% of family law cases have only one lawyer and 62% of the cases have both parties unrepresented.[17] If lawyers are now being totally eliminated in nearly two out of three family law cases in some jurisdictions, lawyers as a professional interest group may have a stake in keeping market share by providing services to pro se litigants where they might otherwise be eliminated altogether.

Rather than requiring clients to pay a high economic entry fee (retainer) and having the lawyer perform all of the services necessary for competent representation as required by the full service package, many lawyers are now offering their services à la carte. These discrete task services can be purchased by the hour, and the client is in charge of both the extent of services and the depth of the service. "Unbundling" offers clients a middle ground between dispensing with lawyers altogether and signing on for the full service package. The client is in charge of determining which services are to be performed by the lawyer and which tasks are to be done by the client. The client also decides the extent of responsibility that the lawyer will have for the case.

court system. This understanding can take place via client education, including visits to consumer-oriented libraries and websites (see http://www.divorceinfo.com and http://www.divorcelawinfo.com), in courthouse self-help centers, and especially between parties and their lawyers.

In 1989, I proposed an approach to such a discussion between lawyer and client that might provide at least one template for family law reform:[15]

1. Courts and professionals should educate consumers as to appropriate options to the litigation process that might affect the overall result, cost, impact on relationships, speed of resolution, control over result, and emotional impact on the litigants.
2. Courts and professionals should provide written, video, computer, and oral information that would help litigants compare and contrast appropriate alternatives to litigation with the court process in light of the above factors and in view of the relevant facts and circumstances of the litigants' situation.
3. If litigants decide that an alternative to court litigation is the most appropriate vehicle to resolve the matter, courts and professionals should provide resources from which the litigant can choose. Such resources should at minimum educate litigants as to the following:
   a. Training and experience of mediators and other service providers in the community
   b. Model mediation and other contracts used by neutral providers with explanations of how litigants will be affected
   c. A description of different styles and approaches of mediators
   d. Affirmative encouragement to litigants that resources should be accountable to them and to their lawyers and that lawyers are very helpful in the process
   e. A thorough explanation of how lawyers can be helpful in the use of mediation and other ADR processes.

This information can be contained in custom videotapes, in conferences as mandated in Britain, or in a hybrid multidoor process as envisioned by Sanders. Regardless of the ultimate result, court reform should ensure that the discussion and consideration of alternatives to the court system be afforded litigants at the earliest opportunity.

CASE MANAGEMENT AND CREATIVE EVALUATIVE PROCESSES SHOULD SUPPLEMENT ULTIMATE RESOLUTION AS GOALS OF THE FAMILY LAW SYSTEM

Just as courts are now more institutions of settlement than final decision making, within litigation itself, courts are assuming more of a management

minder notices concerning important legal events such as a change in school, modification of support, and the sale of a house.[22]

The underlying causes of conflict are rarely resolved when a party makes an agreement or a judge renders an order. Even in mediation, research has shown that the interventions are too short and superficial to have any long-term impact on behavior.[23] In the process of court reform, there should be exploration as to how parties can be educated and given assistance in the community during and after the court process so that future conflict can be prevented and maximum satisfaction within the new family units can be attained.

CONCLUSION

A process of reform that incorporates the principles of mediation, that takes advantage of models from both the public and private sectors, and that is based on an agenda of core beliefs and vision has a better chance of being implemented and ultimately meeting the present and future needs of families in our society.

NOTES

1. In conjunction with therapists and local clergy, the Beverly Hills Bar Association has served its community with the Committed Couples Program based on the preventive law writing of Louis M. Brown and his inauguration of the program during his presidency of the Beverly Hills Bar, 1961-1962. See Louis M. Brown, *Lawyering through Life* (Littleton, CO: Rothman, 1986). The original counseling for newlyweds program is described by Brown as "a test tube experiment in preventive law" (p. 138).

2. The American Arbitration Association is credited with developing the partnering concept in its Construction Panel of Mediators and Arbitrators.

3. With the assistance of a Ford Foundation grant, nationally recognized mediators Michael Lewis and Linda Singer of Washington, D.C., launched this project in Los Angeles in 1995. I had the honor to serve as mentor to an interracial, intergender, interdisciplinary mediation team on this project.

4. See James C. Melamed and Kathleen O'Connell Corcoran, *Mediating Divorce Agreement* (The Mediation Center, Inc., 1997), 3. See also Robert A. Baruch Bush and Joseph P. Fogler, *The Promise of Mediation* (San Francisco: Jossey-Bass, 1994), 99-101, in which the authors describe their transformative approach to empower mediation participants and afford them the opportunity to give recognition by acknowledging each other's perspectives. See also Roger Fisher and William Ury, *Getting to Yes: Negotiating Agreement without Giving In*, 2d ed. (New York: Houghton Mifflin, 1991).

15. Forrest S. Mosten, "The Duty to Explore Settlement," *California State Bar Family Law News* 12 (1989), 1, cited in Nancy Rogers and Craig McEwening, *Mediation: Law, Policy, & Practice* (2nd ed., 1994) and in Mosten, *supra* note 5, at 100.

16. See chap. 12, "'Cases from Hell,' Mediation Case Management," in Mosten, *supra* note 5, at 173, citing Donald King, "Family Law Case Management," *Association of Certified Family Law Specialist Newsletter* (May 1996) and "Save the Courts, Save the Families," *California Lawyer* (January 1992).

17. Sales, *supra* note 10.

18. See chap. 21, "Mediation Related Service Products," in Mosten, *supra* note 5, at 321.

19. William Howe III, chair of the Oregon Task Force on Family Law, in remarks from his presentation on family law reform at the AFCC annual meeting (May 1998).

20. Michael Milleman, Nathalie Gilfrich, and Richard Granat, "Limited-Service Representation and Access to Justice: An Experiment," 11 *American Journal of Family Law* 11 (1997): 1-11; Mary Helen McNeal, "Redefining Attorney-Client Roles: Unbundling and Moderate-Income Elderly Clients," 32 *Wake Forest Law Review* (Summer 1997); Mosten, "Unbundling Legal Services," 57 *Oregon State Bar Bulletin* (January 1997); Massachusetts Bar Association, "Model Limited Scope Engagement Attorney Counseling Service Agreement" (January 1998); Colorado Bar Association Ethics Committee Formal Opinion 101, "Unbundled Legal Services" (January 1998); Mosten, "Unbundling Legal Services in Family Law," *Family Law Quarterly* 28 (1994): 421; Mosten, "Unbundling Legal Services," *Wisconsin Lawyer* (September 1997); Mosten, "Increasing Access to Legal Services," *Public Interest Law Reporter* (Spring 1997).

21. See California Family Code § 2330, which requires the California Judgment of Dissolution Form to read: "Please review your will, insurance policies, retirement benefit plans, credit cards, other credit accounts and credit reports, and other matters you may want to change in view of the dissolution or annulment of your marriage or your legal separation," cited in chap. 18, "Drafting Court and Ancillary Documents," Mosten, *supra* note 5, at 291. See chap. 19, "Preventing Future Conflict," in Mosten, *supra* note 5, at 305. See generally Constance Ahrons, *The Good Divorce* (New York: HarperCollins, 1995).

22. See chap. 19, "Preventing Future Conflict," in Mosten, *supra* note 5, at 293, 313.

23. Joan Kelly and Lynn Gigy, "Mediator and Adversarial Divorce: Initial Findings from a Longitudinal Study," in Folberg and Milne, *supra* note 8: "The mediator intervention was not powerful enough to selectively reduce major psychological distress beyond the passage of time" (pp. 465-6).

Forrest S. Mosten is a practicing mediator, a worldwide conflict resolution trainer, and a consultant to courts and other organizations. He is the author of The Complete Guide to Mediation *(ABA 1997),* Operating a Profitable Mediation Practice *(1998), and the ABA is publishing his* Complete Guide to Unbundling Legal Services *in early 2000.*

EDITORIAL NOTES

THE LAST ISSUE OF THE TWENTIETH CENTURY

As is typical of our October issues, this last issue of a volume of *FCCR* is a bit thinner than the others because of page limitations. The articles, however, are authored by outstanding members of the Association of Family and Conciliation Courts (AFCC) community and are rich in ideas and experience.

The following articles are particularly appropriate for the last issue of *FCCR* in the twentieth century in that they provide both a historical and a forward-looking perspective on the family law dispute resolution system.

Forrest ("Woody") Mosten is one of the nation's most creative thinkers and doers in family law reform—a family mediation pioneer and an innovator in the delivery of legal services to underserved populations. Woody draws these experiences together in an article that uses a mediation model to set an agenda for the future of family law reform, an agenda that moves away from court decisions and orders to facilitated settlement and informed consumers.

The student staff and I look forward to continuing to work with *FCCR* readers and the AFCC community in the new millennium. We will continue to face the challenge of building a family court system responsive to the needs of the communities it serves.

—*Andrew Schepard*
Hempstead, New York