Chapter 4

MEDIATION AND OTHER DISPUTE RESOLUTION ALTERNATIVES

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"The great challenge for mediators and advocates alike is to help disputants figure out what they are really fighting about and to develop resolutions based on the substantive merits." John Lande, "Mediation Paradigms and Professional Identities," 4 Mediation Q. 19, 23 (1984).

§ 4.1.1 Introduction

At least one-third of the approximately 21,000 couples who divorce each year in Massachusetts do not want the adversarial process. The "adversarial process" refers to traditional divorces involving two lawyers who negotiate directly with each other and make court appearances on behalf of the husband and wife, with varying degrees of acrimony or cooperation. These approximately 14,000 people want to do as much of their own divorce as possible. They recognize that they need help with the technical aspects of their agreement, but see no need for each of them to have a lawyer advocating for him or her. For these couples, mediation offers attractive advantages, such as control, simplicity and speed. The mediation process can save couples money and guide them to informed solutions that each spouse will, like the White Knight in *Through the Looking Glass*, always consider "my own invention."

§ 4.1.2 Definition

Mediation is a process in which disputants voluntarily use a neutral person to help them agree. The mediator has no power to decide the outcome, and any participant may terminate the process at any time. In this respect, the process

differs from other dispute resolution processes. In arbitration, the arbitrator listens to each spouse and then makes the binding decision for them. In negotiation, each disputant is represented by his or her own counsel, who usually speaks for the client. In adjudication, a judge decides the outcome. Conciliation has various meanings, including using a neutral person to help spouses reconcile their marriage.

The private mediation model defined in this chapter is one of numerous approaches. It must not be confused with other mediation, such as "mandatory mediation" by probation officers in the probate and family courts—now called "dispute intervention" for clarification, or with "caucus mediation" in the Superior Court. The mediation in this chapter takes place in the private office of the mediator with both spouses, who are free to terminate at any time and who pay an hourly fee for the services of the mediator. Such mediation communication is privileged by statute, with no "recommendation" to a judge at the end. Almost all divorce mediation takes place with both clients in the room the entire time, with no lawyer present unless the client wants a lawyer there, which clients occasionally do.

In divorce mediation, the lawyer who serves as mediator does not represent either party, informs each spouse that each may hire his or her own lawyer at any time, preferably at the outset, and has no further role if either party terminates mediation. The ethical position of the lawyer in mediation is discussed in greater detail below.

Judicial Commentary

The subject of mediator ethics is a work in progress—particularly for mediators with other professional affiliations (like attorneys and psychologists). As the ethics evolve, you will do yourself a favor (if you intend to engage in mediation work) by reading the several ethical opinions in Massachusetts that have already addressed some of the issues. Be sure that the decisions you make for your own practice are based on careful research and extensive discussion with others in the field.

Note that in Massachusetts, the ethical opinions that exist so far contain some confusing and inconsistent language. See, for example, the discussion in § 4.2.8, Ethical Position of the Lawyer in Mediation, below.

§ 4.1.3 Current Use

The legal profession has accepted divorce mediation as a useful process for appropriate couples. Most law schools now offer courses in mediation. The Dis-

pute Resolution Section of the American Bar Association has over 10,000 members. In its annual Representation in Mediation Competition, the ABA says that "representing clients in a mediation setting is now an essential lawyering skill." The Probate and Family Court has a number of court-connected dispute resolution programs providing mediation to divorcing clients, and Rule 5 of the Uniform Rules of Dispute Resolution requires lawyers to so advise their clients and then certify such to the court. Further information is available from the Massachusetts Council on Family Mediation at http://www.mcfm.org/ or by calling (781) 449-4430.

As the use of mediation increases, so do concerns. The rising awareness of domestic violence has raised questions about the appropriateness of using mediation when one disputant is so terrified of the other that a hopeless imbalance of power is created. See, e.g., G.L. c. 209A, § 3, which prohibits mediation in any case where abuse is alleged and does not even allow the parties to meet in the same room to gather information. The proliferation of mediators is raising questions about the competence of people holding themselves out to the public as mediators when they are not qualified or trained for this demanding role. The new Uniform Rules of Dispute Resolution establish systems of court-connected mediation partly because the Supreme Judicial Court is concerned that our society is moving toward two systems of justice. The court fears the schism of the legal system into a private and well-funded ADR system that is available only to wealthy disputants and the tattered remains of the court system, used only by poorer litigants.

As mediation continues to evolve and spread, you need to make your own decisions about how it affects your practice. You can choose, as many other lawyers have, to develop your professional skills as a mediator and then add mediation to the repertoire of skills you offer your clients. You may choose simply to understand the process better so you know when to refer a client to mediation and how to conduct yourself as counsel for a spouse who is using mediation to reach agreement on the terms of a divorce or separation or other marital resolution. *You cannot ignore mediation completely* without risking a violation of the new rules, which require you to advise your clients about this alternative.

The thesis here is that lawyers have analytical, listening and negotiating skills that are essential to being a good mediator. There are many other skills you will need in order to mediate successfully, some of which you may already have. You may decide to take further training from organizations such as MCLE, the MCFM, the Association for Conflict Resolution (ACR) or mediation trainers. This chapter contains information about the mediation process that may supplement this training or help you decide whether to develop a mediation practice. This chapter does not encourage you to try one or two mediations a year because you think it will be easy. It is not.

§ 4.1.4 Deciding to Use Mediation

(a) *Criteria for the Lawyer*

There are various legal approaches to a family dispute. In deciding whether mediation appears suitable in a particular case, the family lawyer may find the following questions helpful to ask his or her client:

- Can the couple talk and listen to one another?
- Is there a manageable balance of power between the parties?
- Is each person willing to make a complete disclosure of his or her finances to the other and to the mediator?
- Is each person willing to trust that the other party has made such a disclosure?
- Is each spouse ready and able to make decisions about his or her future?

This checklist can be used by the mediator when first meeting with the couple.

Judicial Commentary

One of the best-kept secrets about mediation is that even very angry people can mediate effectively if they are working with a mediator who has the skills to manage high emotion. So even if a couple appears at the outset to have trouble talking and listening to each other, they can actually learn these skills during the mediation—not always, but sometimes.

This is an example of how difficult it is for a beginning mediator (let alone an untrained person) to make valid judgments about the parties' ability to mediate.

Financial Disclosure

The necessity for full financial disclosure is paramount to successful mediation. Couples who cannot readily make and accept financial disclosures are not good candidates for mediation. It is problematic to help people move toward an agreement when, for example, the wife thinks the husband is manipulating the books of his business or the husband says the wife has refused to disclose her inheritance.

Ability to Communicate

Evaluating another party's ability to communicate is subjective. The mediator must always be mindful of the level of communication possible between the mediating parties. Here looms the first of many differences between mediating and representing an individual: you are working with two people rather than one. You also have to measure and manage the level of communication between them. If you first see them in your waiting room sitting next to each other and talking, or if they came in the same car, they probably have this fundamental ability.

Balance of Power

One of the most common criticisms of mediation comes from women's groups who contend that women do not have equal power to participate in mediation. Yet the evolution of mediation has been led by many forceful female mediators, whose dedication to protecting the rights of women cannot be questioned. For example, two leading articles about power imbalance in mediation are written by Diane Neumann and Joan Kelly. See Joan Kelly, "Power Imbalance in Divorce and Interpersonal Mediation: Assessment and Intervention," 13 Mediation Q. 85 (1995) and the following paragraph.

The complex and constantly shifting power relationships within many couples are well defined by Diane Neumann in "How Mediation Can Effectively Address the Male-Female Power Imbalance in Divorce," 9 Mediation Q., Vol. 3, p. 227 (1992). The first challenge for the mediator is to recognize the power imbalance, which Neumann concludes exists between traditional divorcing spouses. The man may make all the money and run his company, but the woman decides what they eat and how to deal with the children. Depending on the issue debated, one may have more power than the other, with the man in traditional couples usually having more power. The mediator's second challenge is addressing this imbalance, which is discussed below.

Another useful article is Albie M. Davis and Richard A. Salem, "Dealing with Power Imbalances in the Mediation of Interpersonal Disputes," 6 Mediation Q. 17 (1984), which offers 10 specific mediation techniques that are available to address power imbalances.

Where the power in a relationship lies is not always discernible, especially during your first meeting, when so much is happening so fast. You are busy establishing a connection with each spouse and explaining mediation and alternatives, and trying to decide whether mediation will work for the couple. The person who does not want the divorce may have more power but you may not know who he or she is. The man who is used to negotiating in his business may have

more power, but his wife may have a far better understanding of the emotional component of any subject discussed. The tendency of one spouse to do all the talking may indicate a power imbalance. Your challenge is to figure out if an imbalance exists and, if so, what to do about it, if anything. Talking to each member of the couple alone to ask if he or she is intimidated by the other or feels that the other has all the power and control is sometimes useful or required. Most couples with a strong power imbalance do not find their way into the office of a mediator, but some do, and you need to use all your faculties to determine whether there is an imbalance that will impede the mediation process.

Readiness to Make Decisions

Mediation is a dangerous process for someone who is not ready for it because the process vests so much power in the client to arrive at substantial decisions. If the client does not know what he or she wants, it is not possible for the mediator to move the couple toward an agreement, as the ultimate agreement is essentially the legal statement of a plan. A person who is not ready to decide whether living in the house is more important than seeing the children during the week, for example, is not ready for mediation. The mediator does the couple a service by advising people who are not ready for the many complex legal and emotional decisions involved in agreeing on a permanent resolution of their mutual rights and responsibilities to wait until they are more prepared. With the consent of both parties, a referral to a counselor for help in understanding what they want can be useful at this point.

(b) *Advantages of Mediation*

The advantages of mediation are numerous. The following are important ones:

- self-determination,
- efficiency,
- control,
- cost,
- empowerment and
- voluntary acceptance.

After participating in mediation, the parties often emerge with an intense commitment to, and possession of, the agreement they have constructed. The knowledge that they have done it themselves serves as a model for them to remember

in confronting their inevitable future disputes. The process is very efficient and, if necessary, swift; there is no need for the husband to call his lawyer to tell him or her to call the wife's lawyer to tell the wife something. Lawyers who mediate know how quickly they can extinguish brush fires, real or imaginary, simply by putting the issue on the table and making sure the parties communicate about it directly until it is resolved. If the parties are working under a deadline, successful mediations may take less than one month from the time of the first meeting until the agreement is signed. The parties decide for themselves what issues are important and how they are best handled. The process can save the couple substantial time and legal costs, depending on their ability to reach agreement and each spouse's need to consult with his or her own attorney. Both spouses recognize that participation in mediation is voluntary, and their presence at mediation sessions signals their desire to reach agreement.

Mediation can produce many satisfied customers. One such party commented as follows:

> My wish for others, the many, many others who are in irrevocable breakdown is to be able to benefit from such a sensible and powerful process. While at times the adversarial way may be the only plausible approach, I strongly encourage any couple who is *willing to try* to enter mediation. If it does not work, they can always fall back to the more traditional approach. For me, mediation provided . . . benefits [such as]:
>
> - understanding each other's needs, expectations and fears;
> - clarifying and understanding further the reasons for the separation;
> - working together to visualize and structure our separate and joint futures;
> - understanding the divorce agreement by creating it rather than having it written by someone else and explained to me;
> - greater ownership of, and therefore, commitment to the agreement;
> - further clarifying some of my own values regarding money, parenting and commitment;
> - appreciating more fully (the spouse's) situation;

- a chance to know and understand my own unreasonableness; and
- the opportunity to create a base from which a possible new relationship might emerge.

An early mediation commentator noted, "A major difficulty of family law is that the problems brought by clients are frequently not primarily legal problems; they are deep human problems in which law is involved." Howard Irving, *Divorce Mediation: The Rational Alternative*, p. 147 (Personal Library Publishers 1980). The divorce mediation process focuses people on their own solutions to their own deeply human problems, in which their separation agreement is involved.

(c) *Disadvantages of Mediation*

There are some drawbacks to mediation, making it totally inappropriate for some couples and risky for others. Depending on the parties and the knowledge of the mediator, there can be less emphasis on legal rights than in a divorce resolved by legal negotiation or adjudication. The process is not functionally designed to extend great protection to the weaker spouse if there is a large power imbalance, particularly if he or she will not hire independent counsel. If the parties fail to reach agreement in mediation and cannot use what they have accomplished to finish their agreement by negotiating, they have wasted time and money and hardened their own positions. Finally, constructive critics of mediation remind us that some things simply cannot be compromised, or they worry that mediators may not be adequately trained to address complex tax or pension distribution issues. *See* R. Crouch, "Divorce Mediation and Legal Ethics," 16 Fam.L.Q. 219 (1982); R. Budd, "Mediation: Caution," *The Boston Globe,* p. 14 (Aug. 13, 1981); R. Budd, "Divorce Mediation: Some Reservations," 28 B.B.J. 33 (May/June 1984).

The Gender Bias Study of the Massachusetts Court System (1989) has criticized "dispute intervention" by the probate and family court probation department for not protecting the rights of women, as the process is neither voluntary nor confidential and women complain about feeling pressured to reach agreements they do not want. Gender Bias Study, pp. 23–27. Tina Grillo argued that women lose in forced mediation because they are more willing to compromise. Tina Grillo, "The Mediation Alternative: Process Dangers for Women," 100 Yale L.J. 1603 (1991).

Judicial Commentary

Power imbalances are sometimes obvious and sometimes subtle. One party, for example, may be more verbal than the other. One party may be more emotionally vulnerable than the other at the time of the mediation. One party may have lengthy and detailed experience with the financial management of the family and the other may have no knowledge and no experience with money. The mediator must pay attention to subtle and obvious power imbalances. Even where there is great imbalance, the mediator can sometimes help the parties structure a process that can overcome the imbalance. For example, if the woman is the one with little knowledge about the family finances, can the parties agree that she will hire a financial advisor? Or that they will suspend the mediation until she gets the instruction she feels she needs? Or that each idea that arises concerning a financial issue will be on hold until she can review it with her attorney? There are people (even those who feel disadvantaged on some issue in the mediation) who nevertheless want to engage in the process as long as the disadvantage can be acknowledged and adjusted for.

Within the public justice system (and especially when mediation is still fairly new), it makes sense to establish some policies that protect against undue pressure toward settlement. This is true for all mediation cases, and is even more important in cases where there is an obvious power imbalance. So, for example, people who are parties to abuse protection orders may not be compelled to participate in mediation. And as a matter of policy, mediation programs within the public justice system will not even offer mediation services to such people.

§ 4.1.5 How to Introduce Mediation

(a) *Getting Started*

If you are going to mediate divorces, begin with the mind-set that you can do it, recognize you will occasionally falter and get started. You will find good training programs available locally. There are other lawyer-mediators who will help you, and the MCFM provides professional support, referrals, colleagues of various disciplines, training and education. Mediation will always be a human, subjective process. It is vital for any mediator to retain the style of mediation most expressive of his or her own strengths, within the boundaries of professional standards and ethical opinions. Therefore, you should design your own personal systems to take advantage of your own excellent quality. For further informa-

tion, see J. Fiske, "An Enthralling Introduction to Divorce Mediation," 25 B.B.J. 15 (Dec. 1981) and various issues of *Mediation Quarterly,* published by Jossey-Bass and the national Academy of Family Mediators (AFM).

(b) *Initial Telephone Calls*

It is important to discuss mediation with every caller. A client who calls you to represent him or her in a divorce has probably never heard of mediation, so you need to ask the caller if he or she thinks mediation would be appropriate. If the caller lets you explain, take the opportunity. The choice to be made by the client at this point—whether to hire you as his or her own lawyer or to arrange an introductory appointment for the couple to explore hiring you as their mediator—is a critical junction. This initial decision needs to be clearly explained to and understood by the caller. You need to make sure that he or she understands the different roles you offer and can make an informed choice—the first of many.

(c) *What to Send People Who Call*

After you have described mediation briefly, it is efficient to send basic material about the process to any caller who seems to be interested. Seldom will both members of a couple call. To reach both spouses and to avoid contacting someone who has not called you, you can send two sets of material to the caller and ask him or her to pass the second set to the other spouse. The materials should include a basic description of mediation, how you employ it, a list of advantages of the process and a copy of the agreement you will ask people to sign if they decide to hire you as a mediator. All of these are useful documents for people to read in considering mediation. You may also want to include other information about mediation to ensure that people have enough information to decide whether to pursue the process. Although you will send many letters without response, you will also receive calls to set up introductory meetings.

(d) *The First Meeting*

The primary purpose of the first meeting is to help people make informed decisions about mediation. In some cases, they will have already agreed to proceed, but most couples need to think about the process and size you up. Give them time to do that, whether by leaving them alone after about an hour or by telling them to go home and think about it before making a commitment.

Neutrality

Both spouses should be at the initial meeting. Your position as a neutral, and the constant appearance of neutrality, must be rigorously preserved. The initial impression you convey will be a lasting one, and for this reason, you need both parties to meet with you for at least the first meeting. You also need them together so you can apply your own criteria about their suitability for mediation, including their ability to talk and listen to each other and their willingness to make complete and fundamental financial disclosures to each other.

Both national and state standards for mediators require you, at this first meeting, to make sure that people understand the basic principles of mediation and other alternatives available to them. Your role as a neutral mediator who does not represent either party needs to be carefully explained, as some people will want to believe that you somehow represent them. It is essential to make sure they understand that they have the right to their own independent counsel, who is not you: you will under no circumstances go to court with them or for them. The AFM and MCFM standards are useful guides in establishing your own system of mediation from the outset.

Mediation Fees

Fees need to be thoroughly discussed right away. Explain your fees in the first telephone call, if at all possible. Contain a careful explanation of your fees in the written material you mail to callers. Most criticisms of lawyers center around fee disputes, and you as a mediator do not need one. You should provide your best estimate of the cost of the mediation in advance and explain your retainer policy. You will need to help clients decide how to divide your fee. Some mediators require all fees to be shared equally; however, it may be helpful to let them decide for themselves. It is important that each pay something but it may be unfair to impose a formula where one party is liquid and the other is not. It is also instructive to see how people go about discussing the issue: some resolve it in two minutes and others need more careful discussion.

Identifying a Common Purpose

After explaining mediation, ask if the couple is in agreement on their purpose in coming. This careful wording is designed to focus on what they want in the future, avoiding what went wrong with the marriage in the past. Your goal is to help them define what they want to accomplish in the mediation. The inquiry goes to the quick, usually provoking emotion and sometimes surprise. “I am here for a separation,” says one; the other says, “I am here for a divorce.” You will develop your own skills in dealing with the answers, and realize over and

over how difficult it is to deal with two different people at once from your neutral seat.

The couple's common purpose needs to be defined from the outset, if possible. Some couples prefer to decide the outcome as they go, following the "I'll find out where I'm going when I get there" philosophy. During some mediations, it helps to remind the couple what they agreed on in the beginning. Do not be surprised if they change their purpose before the end.

Focusing on the Issues

Once the purpose dust has settled and you have found out whether the couple is separated, with or without children and other basic information, you may find it useful to ask them to tell you about an issue that they think they will find hard to resolve by themselves and then discuss it for a short time to give them a sense of what it would be like to use mediation to work through their particular issues. Some couples will tell you that they can resolve many issues themselves if they just know what they are; the author finds it efficient to give each of them a list of basic issues raised by a separation agreement. In the author's experience, this two-page list is the most educational document clients encounter during the entire divorce process. Of course, everything you provide to one party you have to provide to the other, so make sure you have a good copier available when you mediate.

When you have followed these or equivalent steps, the couple should feel well enough informed about mediation to decide whether to proceed. Although either can terminate the process at any time, the initial commitment must be to a good faith effort at agreement. If the couple decides to proceed, you may want to give them each mediation homework forms to be done on their own time before attempting to decide on financial and other issues. Once you decide to establish a mediation practice, you should design your own forms. There are numerous samples to consult as you make your own choices.

§ 4.1.6 Methods of Conflict Resolution

A benefit for lawyers who mediate is the development of negotiation and conflict resolution skills. Law schools have trained us well in adversarial rules and techniques but only recently have broadened the curriculum to include settlement methods. There is much literature on this subject, and R. Fisher and W. Ury, *Getting to Yes,* is one place to start. This section is a brief summary of some helpful techniques and approaches when addressing family disputes.

(a) *Courtesy*

Certainly, it is important to let people vent their emotions and to encourage them to say what they are thinking or feeling, but keeping the discussion within a framework of basic courtesy will help expedite agreement. If one spouse is rude to the other, the mediator is in the ideal position to correct that, more so than counsel for either party. As mediator, you symbolize the hope of these people that you will bring out the best in them, and if you can get them to treat each other with courtesy, you are partway home. Joseph Steinberg, a Connecticut judge and former divorce lawyer, always tried to treat the other side with the utmost human dignity. We should all aspire to this goal, as mediator for both or advocate for one.

Mediation struggles are usually about control. Hence, a useful rule is that neither party can speak for the other person, which is another form of control. In an early mediation, the author asked a couple if they wanted coffee. The husband said, "No, we don't." The wife said, "Yes." They settled their divorce two years later at the pretrial conference. Since the parties are coming to you to help them separate, you can remind them that part of separating is not being able to speak for the other anymore. Some people have trouble with this principle, and they will have trouble with cooperative conflict resolution in any form.

(b) *Planning*

Mediation is an opportunity to plan. Each client must be encouraged to think of what he or she wants and make sure that the separation agreement is consistent with this direction. The late Franklin Flaschner, former chief justice of the district courts, used to teach that short-term goals should be consistent with long-term goals. This guide helps in designing a separation agreement. Because the parties can basically develop whatever plan fits their situation, they may find it useful to break down the future into discrete parts. For example, until the youngest child is in first grade and the wife can work full-time, their financial situation is often much tougher than it will be when there are two regular incomes. The timing of when the house is sold may require more attention than how to divide the proceeds.

(c) *Focus*

One of the most useful things a mediator does for a couple is to focus them on the issue at hand. Without this help, they will replay old tapes. With the help of a referee who knows when to intervene and when to let them go forward without interruption, they may resolve not only the terms of the divorce but even issues that have troubled them for years.

(d) *Controlled Agenda*

The parties may control the mediation process in many ways but the mediator should be able to decide what is discussed and when. One of the benefits of controlling the agenda is controlling the amount of time spent on each item and their sequence. The decision of when to work on easy or inflammatory issues should be yours, not theirs. You may find it helpful to resolve a number of relatively easy issues in the beginning to give the couple a sense of accomplishment before they work on harder ones. The access of the noncustodial parent to the children is usually a simple issue. Other issues may not be resolved easily, such as alimony termination or whether the agreement survives. If you have answered all the other questions by the time these issues are reached, the couple may find it easier to resolve them, because there are no other obstacles to agreement and they have given themselves a model of resolution.

Beginning mediators often start with easy issues and use the solution to set a good tone for the more difficult questions to come. Other mediators choose to attack the difficult issues first, when people have their energy and concentration. Clients will tell you which issues are hard for them, and you can always put a stalemated question on hold and go on to something less difficult. If the couple is hopelessly deadlocked on an important issue, you can try to resolve the rest of the separation agreement and then come back to that issue at another meeting, putting it in the context of either cooperating or going to court. You may also find it helpful at that point to refer them back to their counsel, if any, for work on that issue.

(e) *Framework for Successful Negotiations*

Many creative directions await discovery by mediators. For example, comediation with a therapist can be a huge help in the negotiation process. Working with a therapist, the author devised the following simple five-step procedure to allow couples to focus on what they want as their ongoing guide or compass to a desirable agreement:

- Determine what *you* want (this is the most important, and is often arduous).
- Tell your spouse what you want.
- Make sure your spouse hears you.
- Your spouse tells you what he or she wants, and you listen.

- Work it out with him or her, keeping in mind what your spouse says he or she wants.

See John A. Fiske and Janet Miller Wiseman, "A Lawyer-Therapist Team as Mediator In a Marital Crisis," *Social Work* (Nov. 1980).

A person who is able to follow these five steps will have a basis on which to negotiate a fair agreement. "Fair" in this sense means an agreement that will work for both parties—an agreement that is practical and reflects the values most important to each.

The best way to get what you want is to give the other person what he or she wants, as long as this gesture does not jeopardize your own goals. R. Fisher and W. Ury, *Getting to Yes*, at 79–83. This approach to conflict resolution presumes a good understanding of what you want—of values that are most important to you. Lawyers may assume that people know what they want and therapists may assume that they do not. You will need to adopt your own litmus test.

Some things cannot be compromised. As a mediator promoting conflict resolution, you must be ready to defend the right of a person not to agree to something he or she considers wrong, unfair, unworkable or otherwise unacceptable, particularly concerning children. For example, one person, wanting the right to move out of state with the children, requests the other to sign a separation agreement under G.L. c. 208, § 30 authorizing the move, and the other parent objects. You are in an awkward position if you try to persuade either parent to give up legal rights at this point. It would be better to guide them toward a mechanism to resolve the issue when and if it actually occurs, including their right to litigate. There will be times when you as mediator are grateful for the probate and family court.

(f) *Help from Counsel*

Participation of independent counsel may be the ultimate conflict resolution tool, depending on who they are, their attitude toward peaceful settlement and the timing of their help. A person uncertain whether to accept a particular offer or focused on an issue of relative insignificance may be reassured by a talk with his or her own advisor. When the mediator has tried every variation he or she can conceive to resolve a particular stalemate and the parties remain unable to agree, inviting their lawyers to a brainstorming session will help the parties decide whether they can agree. Some mediators prefer to have counsel present during sessions but many do not, preferring to allow a client to consult independently with his or her counsel or "coach" according to individual preference.

§ 4.1.7 Concerns About Mediation

(a) *Obtaining Full Disclosure*

Because mediation sidesteps formal discovery procedures, some lawyers worry that parties will not fully disclose their financial situations. However, the mediator has his or her own procedural arsenal, based on the expressed purpose of the parties to come to agreement. If either party does not appear to be making a full disclosure, the mediator may simply stop the discussion of any substantive issue until the disclosure is made to the reasonable satisfaction of the other. At this point, the disclosure itself becomes the issue on which the entire mediation turns. For example, in a case where the husband could not convince his wife that he had disclosed all he then knew about a possible inheritance from his mother, the parties had to be referred to their own counsel to complete the agreement because the wife needed to have her own lawyer assure her that her husband had indeed done everything reasonable to effect full disclosure, and she was too distracted by her mistrust to discuss other issues.

The mediator should protect the right of the skeptic to doubt, encouraging him or her to voice reservations about the various forms of perceived and actual concealment already familiar to family lawyers, including inheritances, closely held corporations, small businesses, professional practices, pensions and other incomes. It is legitimate for the spouse who has been traditionally shut out of the family finances to worry about his or her ignorance, and the mediator needs to foster open expression of such vital concerns. With this sensitivity and the power of the mediation process itself, the parties should be able to obtain full disclosure. After all, each person wants the other to come to agreement, and he cannot get her to agree to anything if she thinks he is concealing any financial information.

(b) *Addressing an Imbalance of Power*

Every marriage of significant duration has power imbalances, some more pervasive than others. Some see divorce as a crisis that upsets the traditional power imbalances in the relationship, so the mediator can help empower the weaker spouse. For example, the spouse who does not want the divorce feels less powerful. Thus, "the central issue of uncoupling" becomes the need "for each partner to define himself or herself in the absence of the other person." *See* Diane Neumann, "How Mediation Can Effectively Address the Male-Female Power Imbalance in Divorce," 9 Mediation Q., Vol. 3, p. 227 (1992); Joan Kelly, "Power Imbalance in Divorce and Interpersonal Mediation: Assessment and Intervention," 13 Mediation Q. 85 (1995).

In the disorienting process of divorce, the mediator can make each party aware of his or her own power, thereby equalizing it. For example, the woman who withholds her agreement until she is satisfied that her own needs and wants have been met has considerable power in negotiating with a man who wants to obtain a separation agreement, as long as she knows she can insist on her own needs and exercises this right. The mediator may reframe an issue to help each party realize that there is nothing wrong with looking out for yourself, however difficult that may be. "If I Am Not for Myself, Who Is for Me?" is the frontispiece Talmud quote in Gary Friedman's book, *A Guide to Divorce Mediation: How to Reach A Fair, Legal Settlement at a Fraction of the Cost* (Workman Publishing 1993).

Although by definition you as the mediator have no power and are a neutral without power to decide the dispute, in many cases the couple's subtle need for your approval gives you immense power. People often see you as someone judging them; they want you to find them good or fair. If one of them proposes a settlement that you do not consider fair, you should tell them and they will listen intently. They will want to know if their proposed settlement is within the range of what a court would do and although some mediators will not answer that question, it requires your best answer, as various commentators suggest. *See* R. Mnookin and L. Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce," 88 Yale L.J. 950 (1979). The new approach of "transformative mediation" encourages the mediator to help the parties discover their own solution and not to interfere by telling them what you think, thereby empowering them to recognize their own selves and answers. *See* Joseph P. Folger and Robert A. Baruch Bush, "Transformative Mediation and Third-Party Intervention: Ten Hallmarks of a Transformative Approach to Practice," 13 Mediation Q. 263 (1996). No matter how opposite these viewpoints, all mediators want their clients to make informed decisions. Even if the couple knows they are not within the range, they are free to persist in their agreement, subject to the power of the probate and family court under G.L. c. 208, § 1A to disapprove the agreement. Most couples will adjust without that threat. It requires great skill and tact on your part to deliver this message without losing them, but you have the support of their basic commitment to resolve their issues by agreement if possible.

After you have skillfully hinted or bluntly told a spouse that you think he or she is being unfair or giving up more than necessary, clients often make adjustments. If they do not and you have tried every approach to change the terms to something more balanced, you need to ensure that the spouse you believe to be weaker or somehow disadvantaged is thoroughly represented by his or her own independent counsel as soon as possible, certainly before any proposed agreement is executed. Some mediators require from the beginning, as a condition of mediation, that both parties be represented by independent counsel. If the parties

refuse to see counsel and, over your carefully stated objections, arrive at an agreement that you consider very unfair, you may want to discuss with them your withdrawal from the mediation process. This drastic step is governed by professional standards for mediators and may result in more harm than help; as long as you are still working with the couple, you will have more opportunity to shape a balanced process and result. Such professional withdrawals are drastic medicine and rarely occur.

(c) *Reaching a Fair Agreement*

No one really knows what is "fair." The divorce laws of every state give different answers to the same questions. Within Massachusetts, the law may offer various definitions. Some clients insist that there are other standards of fairness besides the law. One couple may define fairness as a willingness to exchange places with the other after the agreement is signed. Other couples look for an agreement that will work for each of them, allowing them to go forward in a productive life. While he or she may develop his or her own sense of fairness, a mediator must always be mindful of the standards established by the case law and appreciate that all agreements must be reviewed by the judge, who must find the agreement to be fair and reasonable. *See Dominick v. Dominick*, 18 Mass.App.Ct. 85, 91, 463 N.E.2d 564, 569 (1984). A divorce mediator must be prepared to tell the parties that their solution is unfair, explain the criteria and reasons for that opinion and try to persuade them to adopt something more balanced. If the parties are unwilling to change, a mediator should again guide them to independent counsel and may simply let the couple make their own informed choice to face a judge.

Judicial Commentary

Once again, this is an issue of great controversy within the field of mediation. Some mediators believe that it is improper to comment in any way on the fairness of the parties' agreement. Others believe that it is practical to help them understand if they are negotiating toward a solution that might be rejected by the court. Some believe that the only truly fair agreement is one that comports with the law. Others believe that as long as the parties are satisfied with their agreement, the law is irrelevant (as long as the agreement is not illegal). Keep your eyes on the philosophy of the mediator your client selects and the changes in the field that will undoubtedly accrue over time.

(d) *Confidentiality*

General Laws c. 233, § 23C makes confidential all work product of a mediator and all communication in mediation. These materials are not subject to disclosure in any judicial or administrative proceeding. A mediator is defined as a person who is not a party to a dispute, has a written agreement to help the parties resolve their disagreement and who also meets other qualifications, including having completed at least 30 hours of mediation training. In the absence of statutory privilege, there is little protection for the confidentiality of mediation communications and work product.

A single justice of the Appeals Court has held that this statute confers an absolute evidentiary disqualification for all mediation materials. *Leary v. Geoghan*, No. 2002-J-0425, 2002 WL 32140255 (Mass. Super. Aug. 5, 2002). The Appeals Court reversed a Superior Court determination that the statute creates an evidentiary privilege that the parties can waive. In her decision for the Appeals Court, Justice Cohen wrote,

> . . . whether or not the parties have chosen to maintain the confidentiality of the mediation, G.L. c. 223 § 23C does not permit a party to compel the mediator to testify, when to do so would require the mediator to reveal communications made in the course of and relating to the subject matter of the mediation. Compelling such testimony, even if potentially helpful to the motion judge's decision on the merits of the parties' dispute, would conflict with the plain intent of the statute to protect the mediation process and to preserve mediator effectiveness and neutrality.

2002 WL 32140255 at *3.

This absolute protection of confidentiality will remain the law until the full Appeals Court or Supreme Judicial Court rules otherwise or the Legislature amends section 23C. The Uniform Mediation Act has been adopted by six states and is now being considered for adoption here. The primary subject of the Act is confidentiality and it would replace section 23C with a comprehensive definition of the privilege, including subjects covered, who can waive the privilege and exceptions to the privilege. See "The Uniform Mediation Act: Upgrading Confidentiality in Mediation," David Hoffman and Vicki Shemin, Massachusetts Lawyers Weekly July 18, 2005 p. 12.

(e) *Qualifications and Training of Mediators*

There are various sources of training for lawyers and others who wish to learn more about the mediation process or become mediators. Divorce Mediation Training Associates offers five-day basic training courses twice a year and additional two-day advanced training courses. The Cambridge Dispute Settlement Center offers advanced divorce mediation training twice a year. The MCFM has peer support groups and educational meetings for mediators throughout the year. The graduate program in mediation at the University of Massachusetts provides an academic degree in mediation. The Supreme Judicial Court is requiring training of mediators as part of implementing the Uniform Rules of Dispute Resolution, which became effective in February 1999. The Massachusetts Bar Association is requiring training of mediators as part of its Alternative Dispute Resolution Referral Service. Various courts have developed mediation programs that provide excellent training opportunities for mediators, including the unusual and invaluable chance to observe an actual mediation. Mediation, by its nature a confidential process, cannot readily be observed: thus does the privacy inherent in divorce mediation complicate the career path for would-be mediators.

Mediators are not licensed in Massachusetts. A person who wants to hold himself or herself out to the public as a mediator of family disputes may currently do so, although minimal training and other requirements must be observed in order to obtain the statutory shelter of confidentiality under G.L. c. 233, § 23C. As a practical matter, the mediators surviving in Massachusetts are lawyers, mental health professionals and others trained in conflict-resolution techniques. In 1983, a Divorce Mediation Research Project survey found that 78 percent of mediators in the private sector were mental health professionals and 15 percent were lawyers. Ann L. Milne, "Divorce Mediation: The State of the Art," 1 Mediation Q. 15, 21 (1983). The percentage of mediators who are lawyers is no doubt significantly more than 15 percent now. In 1998, the membership of the MCFM consisted of approximately 40 percent lawyers, 40 percent therapists and 20 percent members of other backgrounds, ranging from a sociologist to a former chief executive officer of an ice cream company. Any person interested in mediation may join most mediation organizations, regardless of qualifications or educational background.

There are several states that now require mediators to be certified or licensed, although Massachusetts has not yet seriously contemplated this step. For example, New Hampshire requires marital mediators to be certified by a board of judges, lawyers, mental health professionals and mediators, and to have their certification renewed every three years. *See* N.H. Rev. Stat. Ann. 328-C. The MCFM, anticipating further public demand for certification or credentials, adopted their Criteria for Credentials for Divorce Mediators in December 1990.

The credentials required to become a mediator certified by the MCFM include the following:

- adherence to the standards of the council,
- a graduate degree in dispute resolution or a related field,
- a total of 90 hours of training in mediation and various aspects of divorce,
- at least 100 hours of face-to-face family mediation experience in at least 10 cases,
- three mediated memoranda of understanding or separation agreements approved by the council and
- 10 hours of continuing education credit per calendar year.

The ACR divides its membership into two categories: general members and practitioner members, requiring the latter to meet qualification criteria similar to those of the MCFM. The rapid growth in membership of these organizations evinces the willingness of professionals to increase their own skills and training.

Judicial Commentary

The Supreme Judicial Court Standing Committee on Dispute Resolution recently published for comment a draft of Rule 8 of the Uniform Rules on Dispute Resolution. Rule 8 will (if and when it is finalized and approved by the Court) establish qualifications for mediators who provide service to the courts through approved programs. The rules give authority to each chief justice of the seven trial court departments to establish special qualifications, if necessary, for mediators who serve the particular needs of that department.

(f) *The Overlap of Lawyer and Mediator*

The complex issue of overlap between lawyer and mediator leads to the most difficult role in a mediation—that of the independent counsel for a spouse. Mediators do well to encourage any client who plans to consult a lawyer to do so as early as possible in the mediation process. The lawyer who is presented at the eleventh hour with an agreement already constructed in mediation is in an unsatisfactory professional position, and is either reduced to rubber-stamping an agreement or challenging something to which the client is emotionally and perhaps financially committed. If the lawyer asks to start from the beginning, the whole mediation process may become meaningless. One solution is for the law-

yer to tell the client, before their first meeting, to bring in all documents and financial disclosures from both spouses during the mediation. The lawyer can then go over this material and obtain sufficient facts from talking with the client to provide a basis for advising him or her. If the client is satisfied with the agreement, the lawyer can still give his or her opinion of the reasonableness of the agreement—in writing, if necessary.

The lawyer who represents a client in mediation becomes more of a coach than an advocate, educating the client on how to stick up for himself or herself and helping the client define his or her own negotiation goals, styles and strategies. The lawyer can protect the client by making sure he or she is comfortable with the process, checking in before and after each session and, if necessary, talking directly with the mediator about any concerns the client may have. In some cases, the lawyer may attend one or more mediation sessions. The key is that the lawyer is involved in the process from the outset, whether by insistence of the client, the recommendation of the mediator or another reason.

The divorce process educates clients on how they best can utilize the services of professionals, including financial planners, lawyers, mediators and therapists. The professionals can help this process by teaching the client how to take advantage of the respective contributions that the lawyer and the mediator can make in the process of creating a fair agreement. For this reason, some mediators prefer to deal with the client's lawyer through the client, making sure the client knows how to work with his or her lawyer, and how to ask him or her questions and understand his or her answers. For example, a lawyer may tend to emphasize the client's best alternative to a negotiated agreement (BATNA) and ignore the worst alternative to a negotiated agreement (WATNA), and the mediator may need to remind the client to go back to his or her lawyer and say, "You have told me my best-case scenario. If we go to court, what is the worst thing that might happen to me?" The mediator may also help the lawyer make sure the client hears the answer, which not all clients want to do. The mediator is often in a good position to provide a "reality check."

A cooperative relationship between lawyer and mediator is the best answer to the concern for overlap. As noted above, if a party is going to be represented by independent counsel, the lawyer should be engaged from the outset. Whether the attorney participates actively in the negotiations or, more typically, remains on the sidelines to counsel the client from time to time on the direction of the mediation or a specific position to take on an issue, the lawyer will be familiar with the product as it evolves. The mediator will talk with both lawyers as the mediation progresses to make sure their concerns are being addressed.

Whether the mediator or counsel for a spouse should draft the agreement is up to the parties, although the Massachusetts Bar Association has cast some ethical

doubt on the role of the lawyer-mediator who drafts the agreement, as explained in the following section. The task of drafting the agreement should be assigned early. Many lawyers who support mediation prefer that the mediator write the agreement because of his or her neutrality.

The risks facing the lawyer representing a client in mediation are not the main subject of this part of this chapter. Suffice it to say here that all the parties involved should be sensitive to their respective roles: the lawyer counseling a client in mediation is more coach than zealous advocate, and the lawyer needs to be sure that his or her client assumes responsibility for the decisions made by the client. The lawyer who is concerned about future criticism for not being more aggressive, for example, may want written assurance from the client that he or she was fully informed of all procedural and substantive rights and chose the mediated solution in a voluntary and informed manner.

§ 4.1.8 Ethical Position of the Lawyer in Mediation

Massachusetts lawyers who are considering mediating a divorce should begin by reading Opinion 85-3 of the MBA's Committee on Professional Ethics, approved by the Board of Delegates on June 27, 1985. This opinion allows the lawyer to work simultaneously for both parties to a divorce as their mediator, given that the lawyer makes clear that he or she does not represent either party, that the issues are not too complex for mediation and that a mediator who drafts the separation agreement, in so doing, becomes a joint lawyer for both of them as long as they make informed consents to such representation and it is obvious under Disciplinary Rule (DR) 5-105(c) that the interests of the parties can be adequately represented.

> **Ethical Commentary**
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> Rule 1.7(b) of the Massachusetts Rules of Professional Conduct is the rule that most closely resembles the former DR 5-105(c). Rule 1.7(b) prohibits a lawyer from representing a client if the representation may be materially limited by the lawyer's responsibilities to another client, a third person or the lawyer's own interests, unless the lawyer reasonably believes that the representation will not be adversely affected and the client consents after consultation. See also Mass.R.Prof.C. 1.2(c), which permits a lawyer to limit the objectives of the representation if the client consents after consultation.

There are also other ethical opinions about the role of lawyer as mediator. The Boston Bar Association's (BBA's) Committee on Professional Responsibility held in June 1979 that an attorney may act as mediator in connection with the divorce and the preparation of the separation agreement as long the attorney

cautions the parties that he or she will not act as attorney for either of them, fairly explains the benefits and disadvantages of mediation and counsels them, if they are going to have their own lawyers, to speak to these attorneys at the outset. The American Bar Association (ABA) adopted in August 1984 Standards of Practice for Lawyer-Mediators. They require behavior similar to that demanded by the MBA and BBA ethical opinions: the lawyer explains the alternatives, assures a free choice, does not represent either party, recommends that they have their own lawyers from the outset, assures a full financial disclosure like that received in the normal discovery process and suspends mediation under certain conditions of perceived unfairness. "Standards of Practice for Lawyer Mediators in Family Disputes," 18 Fam.L.Q. 363 (1984).

Many other bar associations have addressed these issues and authorized, with varying degrees of concern, a professionally neutral role for the lawyer-mediator. The mediator needs to satisfy certain precautionary steps, well summarized in the 1980 New York City Bar Association opinion quoted by Massachusetts.

In May 1984, the MCFM adopted standards governing the practice of mediation by its members and recently amended them to address certain conflict-of-interest situations. In addition to the requirements of other opinions and standards, the standards clarify issues raised by prior or subsequent professional relationships between the mediator and one or both clients. These standards include a defined procedure for handling complaints by the public about the conduct of mediators subject to the standards.

§ 4.1.9 Conclusion

The turmoil of divorce or family separation is a confusing time for clients. Mediation offers a process to allow couples who want to confront this confusion in a cooperative way to participate in shaping their own goals and settlement terms. They are allowed and encouraged to take into account their own particular goals, and their concerns for their children, throughout the process. Mediation is totally voluntary; it is unsuitable for some and remarkably useful for others. The family lawyer who coaches his or her client through a careful mediation process to a fair agreement will enjoy seeing his or her client become more empowered and in control of his or her own life. The family lawyer who serves as a divorce mediator for a couple will usually find himself or herself paid on time, professionally challenged and satisfied and very appreciated by the clients.