

# **DIVORCE MEDIATION**

## **Theory and Practice**

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## Lawyer and Therapist Team Mediation

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*Mediation conducted by a lawyer and a therapist working as a team offers advantages not available when either a lawyer or a therapist practices alone. Team mediation is used to address a number of issues—including gender bias, neutrality, power balancing, and the interface of legal and emotional issues—that are germane to the mediation process. The limitations of cost and logistics notwithstanding, the team model, as presented by this author, who has practiced both as a sole mental health mediator and as a member of an interdisciplinary team, provides a unique synthesis of skills and expertise.*

If we accept divorce as a problem of restructuring rather than dissolving the family unit (Ahrons, 1980), the interdisciplinary mediation team can assist the divorcing family to restructure itself legally, economically, and psychologically. The lawyer and therapist mediation team provides a framework of change for the divorcing family that neither traditional legal intervention nor counseling can independently provide.

In conventional practice, the lawyer and therapist respond to their clients quite differently. Legal intervention focuses on individual advocacy. The lawyer is concerned with championing the cause of the client and may be compelled to ignore the family unit in favor of the individual, given the ethical and professional considerations that encourage adversarial as opposed to conciliatory posturing.

Clinical intervention focuses on the transition of the family unit by attending to the emotional alliances and reducing the intensity of the divorce so that the parenting function can be maintained. The clinician may not be aware of the legal ramifications of these decisions for the individual adults. The attorney-therapist team mediation model has the potential to offer a "full service" divorce and to respond to the interrelated psychological and legal problems of dissolution more comprehensively than a single mediator. Interdisciplinary co-mediation played a significant role as one of the earlier models of mediation. Many practitioners seemed to have abandoned this approach as they became more experienced. There has been no research evaluating co-mediation in divorce or comparing it to other models. At best we have clinical experience and impressions. The chapter describes the interdisciplinary mediation model, discusses theory and practice, and suggests guidelines for using this approach.

### LAWYER AND THERAPIST ROLES IN CO-MEDIATION

The most common structure for co-mediation in divorce is the gender-balanced lawyer-therapist team, which functions either collaboratively or conjointly. In the collaborative approach (Wiseman & Fiske, 1980), either the attorney- or therapist-mediator meets with a couple to discuss the issues relevant to his or her area of expertise and refers the couple to the other mediator as indicated. In this model, the attorney and the therapist are consultants to each other and meet with the couple sequentially, not jointly.

The second model, and the focus of this chapter, is the conjoint mediation team. In this approach a gender-balanced attorney-therapist team together meet with the couple and respond to both the legal and the emotional content. Although most of the sessions involve both the attorney and therapist, separate meetings may be arranged around specific issues in which the role of one mediator would be so minimal as to make joint sessions cumbersome or unnecessarily expensive. For example, when detailed evaluation of retirement benefits or business partnerships is involved, or when time must be spent on the development of workable parenting agreements, it can be more effective to meet with one member of the team. Typically the team meets with a couple for three to six 90-minute sessions, spanning a period of 1 to 6 months. If the couple have not separated, interim financial and parenting arrangements are established. The parties agree to view these arrangements as temporary, even though this could establish precedent if litigation were to take place later. The attorney team member may draft the temporary separation agreement or memorandum and refer the parties to legal counsel to formalize the agreement. Alternatively, the couple may decide an informal agreement is sufficient. When a couple are not separated, it is generally premature to deal with details beyond temporary financial and living arrangements. This seems to be the limit of what most people can absorb at the time of initial separation. The next appointment is usually not scheduled for 1 to 2 months.

In the conjoint team model, the roles of the attorney and therapist are defined as mediators, neutral facilitators, problem solvers, and resource people. Neither team member is functioning in a traditional role, and this must be made clear to the clients. The team members' training and expertise represent resources available to the couple. Although the lawyer is not defining his or her role in traditional terms and may have the clients sign waivers to that effect, there is controversy about the constraints and liabilities on attorney-mediators, and bar ethics opinions about this vary (Silberman, 1981).

The focus of the therapist is to improve communication, identify the underlying issues, and deal with emotional conflict that interferes with negotiations. The therapist can also function as a resource person by providing information about the children's needs, the emotional dynamics of divorce, and the restructuring of the marital relationship into an effective parenting unit.

The lawyer provides information about statutes, case law, and local judicial tradition. Legal standards can be used to establish parameters within which bargaining can take place. It is assumed there are rights to private

ordering (Mnookin & Kornhauser, 1979). The lawyer serves to remind the couple that they are bargaining "in the shadow of the law" and that, if negotiations fail, legal rules would be invoked. The extent to which parties choose to use legal standards is negotiable. Having an attorney as part of the team may make the parties more aware of the legal standards, although the lawyer does not represent either party and each is advised to seek independent legal counsel.

The lawyer-mediator reviews the list of issues to be addressed, the range of resolution that might be imposed in a court setting, and the options available for a negotiated settlement. Both parties can rely on the lawyer's expertise and experience knowing that full disclosure and review of all the issues and options will lead to a more informed and a more satisfactory set of client choices.

Both team members actively engage in the bargaining and negotiation process, but bring different skills to the table. The lawyer is trained to give information, and the therapist is trained to *elicit* information. The attorney helps identify the "what" of the options, and the therapist the "why." The attorney makes sure the parties understand their rights, the facts, and the options. The therapist probes for fuller exploration of needs and clarifies motivation so the parties can make informed decisions.

It is important that the parties reach decisions that are based on a realistic assessment of needs, goals, and available resources. Often negotiations begin before the parties have achieved a level of objectivity about the other person or a sense of their own independence. When feelings of guilt, anger, or fear remain strong and the parties are emotionally attached, it is difficult not to use the economic settlement for emotional ends. The question of what is fair is highly subjective and influenced by the circumstances of the marital breakdown. Many decisions about the ending of the marital relationship do not "feel" fair, especially for the nonconsenting partner or when a third party is involved. A person may feel he or she has already lost what was valued and may not be inclined to view an equal distribution of assets as fair. If the emotional issues are not resolved and the parties do not come to understand their part in the failure of the relationship, the demand will be to organize the settlement to correct past injustices, rather than to assess future needs and goals. A party who feels victimized often attempts to align the mediator. In these instances, the therapist may explore the compensatory demands and clarify the feelings involved. The attorney, on the other hand, serves to remind the parties of the separation of legal and emotional issues, reinforces the boundaries within which rational decisions need to be made and can prevent the therapist from being co-opted into alignment by the party with strong, emotionally laden perceptions of entitlement.

Three variables seem to influence the functioning of the team and the level of activity of each team member: (1) the stage of the emotional disengagement and acceptance of the decision to divorce (Federico, 1979; Kessler, 1975); (2) the stage of the mediation process (Haynes, 1981); and (3) the complexity of the assets.

The therapist tends to be most active in the initial sessions in terms of creating a context for cooperation and a positive emotional climate, particularly when there is anger, mistrust, or nonmutuality about the decision to divorce. Addressing these issues directly is often necessary for the parties to be able to move beyond them. A brief marital history is elicited and feelings about the divorce decision and the possibility of reconciliation are explored.

Most couples approach mediation with a mixture of anxiety and hope and with the experience of failure in communicating and resolving issues. Many divorcing couples are in an interdependent survival relationship, each controlling what the other needs. Mediation is hard work. The stress is greater in face-to-face contact. Historical issues and patterns emerge, often making the parties feel stuck and mistrustful. Some couples discontinue mediation because they cannot tolerate the pain and frustration of dealing with each other, even though the substantive disagreements may be narrow. These negative patterns, when they exist, must be reversed for the couple to feel that they are making progress. A skillful therapist, particularly in the beginning of mediation, can reduce defensiveness, diffuse tension, and help keep the process emotionally manageable, especially when a couple's readiness to mediate is questionable.

The attorney, in the initial sessions, tends to focus on the factual circumstances. The attorney outlines the legal parameters and begins to establish a data base by asking questions and eliciting financial and legal information. Although this is a more structured approach, the attorney is not indifferent to the couple's emotional concerns. Support, validation, and rapport are equally important. The attorney's more systematic interventions help a couple organize their thinking and remind them of the external standards that must be considered in making decisions. Implicit in the interdisciplinary approach is the message that emotional expression may be allowed, but decisions must be within legal guidelines and must be based on equity, not emotional compensation.

The fact-finding and negotiation phases of mediation are relatively businesslike in tone compared to the emotional intensity of the previous sessions. The therapist may be inactive as the attorney discusses the more technical aspects of the division of assets. Even when not actively participating, however, the therapist has a valuable symbolic presence, providing gender and power balance and a safety net when negotiations are fragile.

As settlement offers are formulated, the attorney reviews the details and drafts a memorandum or proposed agreement. The attorney is responsible for raising other issues that should be addressed, such as insurance, provision for children's education, medical costs, extraordinary expenses, and tax consequences. It is important to note that a judge has a wide range of discretion to divide property, establish support, and impose visitation schedules and limitations. It is unlikely that cases with identical facts would result in identical resolutions if heard by different judges. Therefore, an attorney can only relate the range of options and potential resolutions. In mediation, this should be an incentive for the parties to create their own terms for settlement.

The therapist reviews plans for the children and guidelines for handling the continuing parental relationship forecasts changing circumstances, and

suggests procedures for resolving future conflicts. The therapist may help the parties prepare for closure by asking each person for feedback about the process and for his or her view of the final agreement.

It is the attorney-mediator's responsibility to see that the legal issues and ramifications are understood by the parties. At the conclusion of mediation, the attorney-mediator drafts a memorandum setting forth the parties' agreement, which they will take to independent legal counsel for review and incorporation into the final decree. The proposed agreement may be modified in mediation following the parties' consultation with their attorneys, or modifications may be made outside mediation. The agreement belongs to the couple. If the parties do not return to mediation after consultation with their attorneys, the mediation agreement will be formalized when the final decree is submitted to the court. In practice, many couples do not proceed immediately with the divorce, and minor modification of the agreement may be made by the parties' attorneys in the months following the conclusion of mediation.

### *THE PROCESS OF CO-MEDIATION*

The real potency of mediation may lie in the experience of a constructive, corrective process. The process as a whole has an integrity and healing power that is greater than the benefits derived in any given session.

Many clients report feeling more positive about each other, able to communicate better, more resolved about the decision to divorce, and able to handle their conflicts less destructively. These issues are not the focus of mediation and are rarely addressed directly in any systematic or consistent manner. They are a function of a constructive process and are generally considered secondary benefits or subgoals of mediation.

Although there are considerable differences among practitioners regarding the relative emphasis on content versus process and settlement versus relational issues, the team approach is characterized by the inherent and intended balance of the process/substance focus. Interdisciplinary mediation is based on a view of divorce mediation that recognizes the interplay of the emotional resolution of divorce with the settlement tasks of divorce. Although the goal of mediation is to reach agreements regarding financial distribution, support arrangements, and the parenting of children, it is in this process that new learning takes place. The method creates the new experience that for many couples may be the first significant exposure to constructively resolving conflict.

The inherent structure of co-mediation changes and probably enhances the process of mediation. The modeling of collaboration, the symbolism of the gender balance, as well as the increase in technical resources, has the potential to indirectly augment the secondary therapeutic benefits. For instance, the mediators model alternatives to dysfunctional communication or act as role models for individuals whose sense of identity or competence has been shaken, and this has an impact on the parties' perceptions and attitudes. Because psychological change is not the primary function of mediation, there has been



little attention in the literature to investigating the impact of the process on the individuals or the postdivorce family, or to investigating how to augment the psychological benefits. Mediation is a multilevel experience that affects clients on more levels than the mediator can be aware of at any given time. Most practitioners make process interventions when this interferes with the settlement tasks. What is not sufficiently understood is how to capitalize on the positive aspects of the process to promote psychological growth and adjustment without changing the goals & focus of mediation. The single mediator has limited resources to focus on other than the settlement tasks. Co-mediators, like co-therapists, change the process and have greater symbolic and indirect impact psychologically.

Three dimensions of the team process may have an impact different from that of the single-mediator model: (1) empowerment or teaching new skills, (2) "seeding" behavioral and cognitive change, and (3) enhancing the psychological adaptation to the divorce.

The process of mediation gives the parties the opportunity to develop new skills. The mediator can interrupt and redirect dysfunctional patterns. Substantive discussions about support, child custody, and so forth are the vehicles to teach and model new communication patterns and provide a positive experience in resolving conflict. For example, a couple involved in a power struggle that stems from the need to be right may be arguing about time-sharing plans and who can better assess the children's needs. A mediator can simply focus on consent and help negotiate a reasonable plan (bypassing the power issue), or can ask if what they are doing is constructive. If they agree it is not, the mediator can work with the couple to develop new ways to share control, accept differences, and be solution-oriented instead of power-oriented. Two mediators have more resources to teach new skills without losing sight of the settlement goals.

A second dimension of the mediation process can be called the "seeding" function of the process. This refers to introducing an idea that is not part of the client's typical range of cognitive or behavioral responses. Seeding can be accomplished directly, through reframing a statement, or indirectly, through the use of paradox or metaphor. It forces clients to think of themselves and their problems in new ways. These ideas then become the cornerstone for change. For example, the mediator might say, "I wonder what your children will think about you and the way you handled the divorce when they are grown." Or, "You are like people fighting over who started the fire while the house is burning down all around you." This kind of intervention usually stems from intuitive thinking. It is difficult for a single intervenor to step back and get that kind of perspective when concentrating on factual information and analysis, but the mediation team has the resources to have an observing and an interactive member at any given time.

A third dimension is the psychological change that occurs as a function of the negotiating. The process of negotiating helps the parties through the stages of emotional disengagement. The concrete act of separating possessions or discussing child-sharing arrangements has parallel meaning on a deeply emo-

tional level. As each detail is negotiated, compromised, or conceded, a simultaneous, perhaps unconscious, emotional shift occurs about the approaching reality of divorce (Gold, 1982). Discussion of entitlement or fairness can bring out feelings that increase understanding of the reasons for the marital breakdown and help a couple feel more resolved about the decision to divorce. A cooperative process in which painful feelings can be aired is healing and allows a couple to make peace with one another. The division of roles between the two mediators allows one mediator to attend to and acknowledge these underlying feelings while the other can refocus on the settlement tasks. Couples probably receive more emotional support with two mediators.

### *THE ADVANTAGES OF THE TEAM MEDIATION MODEL*

The most obvious advantage of interdisciplinary mediation is the expertise of both professionals. Each has broad training and experience that a single mediator would not possess unless cross-trained. The team approach affords a fuller exploration of the legal and psychological issues and allows the team to confront unforeseen complexities and questions that otherwise might require referral to a lawyer or a therapist. The therapeutic benefits are likely to be greater because of the presence of the clinically trained mediator. The need to table issues or interrupt negotiations in order to obtain information about a point of law can be minimized because of the presence of the lawyer. The parties may have fewer nagging doubts about the settlement because the legal questions and the emotional aspects are aired in tandem.

It is important, however, that each mediator's role be defined and differentiated so that the clients do not have unrealistic expectations based on the traditional view of each profession. Even with this clarity, the expectation of traditional role performance may carry over. The team approach may be attractive to couples who have different agendas regarding reconciliation or divorce. The person wanting to move forward with the divorce may see the attorney as an ally. The person hopeful of a reconciliation may see the process as an opportunity to review the marital breakdown and may appeal to the therapist for help.

Screening for reconciliation is an important task in any model of mediation. The team approach may be beneficial when a couple have a high degree of ambivalence about a divorce. The therapist's skills in raising questions about the viability of the marriage and exploring the decision to divorce may open new doors for the relationship. The role of the therapist at this juncture is to surface and explore the issues sufficiently for the couple to make a decision about continuing mediation, seeking marriage counseling, or talking more on their own. Should the couple decide to seek marital counseling, a referral is made. The therapist is advised against changing the contract to become the couple's therapist, according to the Model Standards of Practice (1985). The team approach may also heighten ambivalence about the decision to divorce, particularly for couples who separate without having consulted a marriage counselor. Each professional traditionally represents a different choice regard-

ing a troubled marriage, and the presence of both a lawyer and a therapist serves as a visible reminder of those choices. The professional background of the mediator may influence the process more in team mediation than in individual mediation, where there is no functional division of labor.

The team approach provides an important male-female balance and a secondary modeling function. The mediators' autonomous and cooperative behavior provides an example of how a couple can communicate constructively and work together. The gender balance provides an opportunity to be understood, validated, or challenged by persons of both sexes, thereby minimizing sexual stereotypes and triangulation. If the mediators are divorced, they can share their successful divorce resolution as an intervention technique. The mediator, as a survivor of a divorce, seems to impart a sense of hope to the client facing the challenge of being alone.

Although there are no data about the influence of the sex of the mediator on the outcome or process of mediation, the gender-balanced team seems to reduce potential problems. The team mediator can capitalize on gender identification, whereas a single mediator needs to guard against it. Marital rupture often creates a deep sense of vulnerability toward people of the opposite sex. Some clients may feel threatened by a mediator of the opposite sex or may fear the mediator will be more sympathetic to the spouse. The single mediator is more likely to be perceived as biased because of the increased caution and mistrust toward members of the opposite sex that seems to occur during a divorce. This anxiety can be eased because the client sees the same-sex mediator as someone who can identify with the client's situation and be sympathetic, if not an ally. Confrontations, therefore, may be more effective because of common gender. A client may be more willing to hear from the same-sex mediator because he or she feels less threatened and less concerned about mediator bias. Rigid positions can sometimes be deflated by acknowledging and identifying with a client's feelings in a way that a person of the opposite sex cannot convey. Humor or discussion that capitalizes on sexual identity ("man to man" or "woman to woman" jokes) can also be used with greater liberty. Generally the team can use gender-linked rapport as a strategy in ways that would be risky for a single mediator.

Negotiation about spousal support can be eased by the male-female balance of the team. The duration and amount of spousal support is often a highly charged conflict that raises many issues relating to changing values about men's and women's roles in our culture. Beliefs and positions concerning what is owed or what is fair can run deep. The same-sex mediator's support and careful reframing of the issues for each person seems to increase understanding and ease positional bargaining at a more effective level than when one mediator has to interpret and support two people in such a value-laden conflict. It may be easy to achieve a settlement figure for spousal support, but if the myths and realities that surround this issue are not fully explored, they can tear at the fabric of the agreement.

The conjoint team also minimizes the influence of personal and professional biases. Team consultation provides checks and balances to personal

reactions and an opportunity to explore different professional views about settlement terms. Given the lack of definitive guidelines in divorce settlements, clients are probably better protected with the input of two people helping them evaluate what is fair. The biases or countertransference reactions of a mediator can be countered by the other mediator, either during a session or in postsession consultation. There is a built-in peer review.

Maintaining a sense of balance and impartiality is extremely important. A mediator who is perceived as biased loses credibility and effectiveness. A single mediator is vulnerable to real and perceived biases because of the emotional reactivity of the clients, the changing values of fairness, and the wide range of discretion in the legal process. The team approach helps to guard against bias and maintain impartiality and balance.

Another advantage of the team approach is the management of client projections and complaints. Some individuals in a divorce crisis will be acutely vigilant toward the mediator and will project emotional needs onto the mediator or misinterpret the mediator's responses. Trust, power, fairness, and dependency are sensitive issues. They represent areas in which emotional wounds may have been suffered as a result of the marital breakdown. To the extent that a person is working through these issues, he or she will be sensitive to that behavior in the mediator. With the team, when a client projects a grievance, the co-mediator can provide another perspective and help process the issue without being personally caught up in it. The single mediator runs a greater risk of becoming defensive or becoming involved in a power struggle with the complaining client.

In a case in which an 18-year marriage was terminating, the wife was frightened, resisted having to stand on her own, and expressed continual dissatisfaction with the male attorney-mediator for not being more helpful. She was being asked by the team to try to develop some of her own goals, but she seemed to want the attorney-mediator to tell her what to do. Her desire to be taken care of was being transferred from the husband to the male mediator. The attorney-mediator was confused about what was really being asked of him and responded by being more supportive and giving more information while trying to maintain balance and neutrality. Even with the therapist's interventions to try to sort out the issues, the woman decided that she wanted the protection and security of her own attorney and, to the husband's consternation, terminated mediation.

Another aspect of the team relates to the symmetry of four people. This can minimize triangulation, help maintain impartiality, equalize bargaining power, and divide the labor. One facilitator can be more actively confrontive or supportive because the cofacilitator is capable of responding on the other side of the issue, thus reducing the potential for the process to be perceived as biased. Confronting unreasonableness can also be more effective when both mediators respond. It is more difficult to dismiss confrontation by two people. Greater risks can be taken with innovative strategies because there is a backup system in the co-mediator.

In addition, the mediators have collegial support, the opportunity to check perceptions, and the benefit of cross-disciplinary expertise and learning.

Unequal power relations between the participants are among the major difficulties facing any mediator. Power inequities can be the result of differences in knowledge, verbal abilities, emotional vulnerability or leveraging bargaining chips. If the power relationship cannot be equalized, the couple may not be appropriate for mediation. Two facilitators have more resources within the mediation process to equalize bargaining relationships and thus have less need to use outside referral.

The lawyer and therapist working as a team may deter legal or psychological manipulation because of the implicit or assumed monitoring of the process by both professions. A person is less likely to take advantage of another when knowledgeable authorities are so close at hand. This can provide a feeling of safety for a person who is at an emotional disadvantage because of a historic interaction pattern, at a legal disadvantage because of a gain by the other, or at a financial disadvantage because of a lack of information or skill.

When the spouses have different levels of skill regarding financial matters or knowledge of the family assets, this power imbalance can be made explicit, and one mediator can define his or her role as that of a consultant to the less informed party in order to make bargaining more equitable. The "consulting" mediator can help the less informed spouse ask the right questions, make sure he or she understands what is being discussed, and ensure that the spouse is not being intimidated. It is important that the less informed spouse be protected in mediation. Sometimes it may be necessary for the less knowledgeable person to consult more regularly with his or her attorney or an independent financial advisor.

The dominant-accommodating spousal system is another pattern with inherent bargaining inequities. The submissive spouse's quiet manner can be mistaken for agreement or comprehension. That person's concerns and feelings may, in fact, have to be carefully and painstakingly elicited. A single mediator will need to focus on the substantive issues and may not sufficiently attend to the needs of the quiet, unassertive spouse. In a team approach, with the therapist assisting the process, the submissive person can be drawn out and encouraged to be more assertive. In addition, the mediator of the same gender as the unassertive spouse is often a good role model for businesslike, assertive behavior.

When fear of the spouse or guilt underlies a bargaining stance, the therapist can help the person understand this and feel safe enough to raise issues in his or her own behalf. The attorney's job is to make certain the parties comprehend their rights and options; the therapist must attempt to bring an understanding of the reasons underlying the choices. If, for an emotional reason, a person chooses to give up entitlement, it is important that this be an informed choice.

The use of the team as a training vehicle has been largely unexplored (Folberg & Taylor, 1984). The interdisciplinary mediation team may be the best training vehicle for exposing beginning mediators to the full range of psychological and legal issues in divorce. Whether it is the intent of a practitioner to mediate the full range of issues or limit practice to either the financial or parenting

aspects, it is important to understand both. Team mediation can serve as an internship providing formal or informal experience for two beginning mediators, or for a senior mediator to supervise or train a beginning practitioner.

Although it is not the responsibility of clients to pay for the training of mediators, advantages are likely even with a beginning team, because of the protection offered by the fuller exploration of the issues. When the team model is used in training or supervision, the fee can be reduced or a sliding scale may be used.

#### *DISADVANTAGES OF THE TEAM MEDIATION MODEL*

An evaluation of team mediation must consider the economic implications. Team mediation costs more per hour than employing a single mediator unless each team mediator proportionally reduces his or her hourly fee. In practice it appears that the total number of hours to reach an agreement using the team mediation model may be sufficiently less than with a single mediator, so that the overall expense is similar. The costs of team mediation may even be less when the reduced attorney time outside mediation is considered. From 1979 to 1982 the average team mediation case from the Family Mediation Center in Portland was concluded in 5 hours, plus an additional 1 to 2 hours of drafting time, for an average cost of \$500.00, compared to \$440.69 as reported in a survey conducted by the Divorce Mediation Research Project (Pearson, Ring, & Milne, 1983). If mediation is seen only as a way to save money, a higher hourly fee to compensate the team may be difficult to justify. The principal advantage of the team is not economy. It is a better service, not a cheaper one (Folberg, 1983).

Establishing and structuring the service may be problematic for the mediation team. There are ethical constraints on attorneys working with nonattorneys. Structuring a practice, establishing a fee schedule, and determining method of payment all require careful consideration. Legal ethics prohibit attorneys from forming partnerships, splitting fees, or practicing under a trade name with nonattorneys. Most clinicians do not have such ethical constraints. The most acceptable method for payment of fees is for each mediator to serve as an independent contractor, billing separately for the hours worked.

Logistics can also be a problem with the team approach. Scheduling or changing an appointment is easier with three people than with four. Many attorneys and therapists who mediate together do not share offices. Deciding whose office to use for a case or session can be an issue for the mediators. It is important for clients to meet in the same office each time. The familiarity of the surroundings can ease some of the anxiety for the clients but causes additional travel time for the person whose regular office is not used. Reserving regular blocks of time each week for mediation may simplify scheduling for the mediators but create a hardship for clients, as they must accommodate a more limited appointment schedule.

The other challenge for the team is to develop a working relationship. Attorneys and therapists are trained to think differently, to view their roles

with a client differently, to analyze the process differently, and to respond to different aspects of a situation. Even if both team members have similar training in mediation, each is likely to draw on familiar strengths as he or she develops a new set of mediation skills. The attorney-mediator may offer advice and give suggestions too readily, depriving clients of opportunities to think for themselves. The therapist-mediator may explore emotional issues too readily, losing sight of the objectives of mediation.

Team mediation provides opportunities for considerable learning, but not without effort and additional time commitments to develop the team relationship and to consult before and after sessions. The mediators must have rapport and feel they can work well with each other. The team must learn how to share authority, territory, and control. They must work together enough to be comfortable with each other's style and develop shared perceptions of procedures, interventions, and strategies. They must be able to collaborate and avoid competition. Early in practice, each will probably defer questions to the other according to their respective spheres of expertise. The longer a team works together, the more likely role boundaries are to blur, as each member learns more about the other's area. The attorney becomes more comfortable discussing emotional and parenting issues, and the therapist becomes more comfortable with financial issues. Even within this merging of functions, each retains the responsibility and authority for the issues related to his or her primary professional identity.

### ASSESSING TEAM REFERRALS

To date, no clear-cut rules guide the use of the team mediation model over the single-mediator model. General guidelines might follow a medical or managerial model for the use of teams; more complex cases require greater resources or specialized expertise. The complexity of a case—a primary reason for a team referral—should be considered in both economic and emotional terms. The team is rarely used when custody is the only issue presented for mediation. The following six considerations, derived from clinical experience, can be used to evaluate the potential complexities of a case. Couples with these profiles seem most likely to benefit from the team approach.

1. *High levels of conflict or manipulation.* The team approach can be useful to help couples who are enmeshed or who display negative intimacy patterns stay focused and separate their marital dynamics from the settlement tasks. The level of limit setting and behavioral management necessary with this type of couple can often be more effectively managed by two mediators than by one.
2. *Power imbalance.* The team can help balance power where inequities exist because of different levels of financial knowledge, negotiation and communication skills, or dominant-accommodating marital systems. One mediator can support the less powerful spouse.
3. *Complex assets.* Marital dissolutions involving businesses, real estate

holdings, professional corporations, partnerships, and pensions can involve strong feelings, disparate beliefs about entitlement, and different levels of knowledge about the assets. The resources of the team can address the technical financial details while also assisting the less knowledgeable spouse.

4. *Informational consultation.* Couples who want basic legal information about the divorce process and information about children's needs and restructuring family relationships can benefit from the specialized expertise of an interdisciplinary team. These tend to be lower conflict couples who may not have decided to divorce yet need information and wish to avoid adversarial conflict.

5. *Nonmutuality regarding decision to separate.* Some couples may not be separated and are at different levels of emotional readiness to negotiate, despite the need to resolve certain issues. One party may have grudgingly agreed to attend mediation. The issues are likely to be emotionally charged. Because the needs of these couples are so disparate, they are often turned away from mediation as unready. With the team, each person can be emotionally supported; both can feel that they have someone in their corner. Feeling understood and supported may increase a person's ability to negotiate when the separation or divorce decision is strongly opposed.

6. *Adversary posturing.* The breakdown in trust and communication when there has been litigation is difficult to reverse. The commitment to mediation may not be based on good will, but may be an effort to avoid a potentially worse outcome in court. These couples must learn to problem solve, develop a minimum level of trust around the issues that require cooperation, and understand the legal implications of changing existing orders and bargaining positions.

Another consideration for using the team relates to beginning mediators. Working in teams provides an excellent opportunity for learning from each other and serves to better protect the client. In deciding whether to use the team approach, all the options need to be presented and discussed.

A telephone interview or an initial half-hour consultation can be used to evaluate whether the team is appropriate. The following information is useful in making that determination:

1. The length of separation and mutuality of decision to divorce
2. level of deterioration in communication and trust
3. whether the parties have seen a therapist, together or separately
4. ages of children and whether there is a dispute about them
5. whether there is a business, partnership, or professional corporation, or extensive real estate holdings
6. whether attorneys been retained and whether there are legal orders in effect or motions pending.

Generally, the team is most appropriate for couples with poor communication, a volatile situation, and complex assets. Child-related conflicts and cases with simple assets can be handled by the therapist-mediator. An attorney-



tionally disengaged couple (sometimes measured by length of separation), ready to do the business of dissolving the marriage, may be most comfortable seeing just the attorney-mediator. Couples who have been in therapy and are more resolved about divorce and thus more objective about settlement may also prefer the attorney-mediator.

All couples using the Family Mediation Center in Portland from 1979 through 1982 were seen by teams. From 1982 through 1983 the couples were given the options referred to earlier, and the fees for each mediator were reduced in team mediation. In 1984 we did very little team mediation because of economic considerations for both the clients and the mediators and because our experience allowed us to be comfortable mediating alone for most situations. An experienced mediator will be more comfortable mediating alone than a beginning practitioner. A second mediator can always be called in after mediation has begun, but the beginning practitioner should err on the side of the team approach.

Experience in the private sector has shown that clients who choose to mediate their divorce settlement—that is, property as well as custody—tend to screen themselves. Most are self-referred. They are usually looking for an amicable outcome, wish to preserve a decent relationship, and want to avoid the adversary system. Many are distrustful of lawyers and are not represented by legal counsel. They are often more highly motivated toward resolution than clients referred by attorneys. Eighty-five percent of our clients reach agreements. Severe conflict over custody is low. There is often agreement in principle about the best interests of the children but a lack of knowledge about options and arrangements. Many choose joint custody.

Despite the high degree of motivation and the desire to work with mediators rather than lawyers, couples in the private sector are not necessarily convinced of the benefit of mediation and often have major disagreements about entitlement and serious communication problems. Some couples simply want a neutral place to divorce. These individuals have usually accepted the divorce and are in agreement about some of the issues, but want the informational and educational resources of the team.

Sometimes a couple negotiating only custody with a single mediator may subsequently choose to mediate the financial issues. At that point they can continue with the therapist, the team, or the attorney, depending on the complexity of the financial issues involved and their own emotional volatility. A second team member coming into the process in the middle, however, presents some potential problems because rapport, credibility, and a relationship have already been established with the first mediator, and it will take time for the couple to feel comfortable with the new mediator. The second mediator may be viewed primarily as a consultant, may not be as effective, and may not develop as strong a relationship with the couple as the initial mediator.

One couple seen collaboratively at the Family Mediation Center in Portland had been separated for 4 months. The father was living in the family home with temporary custody of two preschool daughters. He resisted allowing the mother access and had gained custody through a restraining order when the

mother decided not to reconcile after a temporary 4-week separation. The father felt the mother had significant parental inadequacies, and the mother was in a rage at the limited access to her daughters. Their interaction was characterized by accusations, threats, manipulation, and angry outbursts. The mother had a volatile temper, and the father knew how to rile her. She would threaten to terminate mediation and would leave the room in hysterics at least once during each session. The investment in this behavior pattern was so high that it was very difficult to keep the couple problem-focused and behaving rationally for an extended period. It was questionable whether this couple were even appropriate for mediation.

A lawyer-mediator joined the process after the third session, because a \$25,000 bank note was due. The note required both signatures to refinance, and each was using this note for leverage. The tenor of the session changed remarkably with the lawyer's presence. With his questions and with the authority he represented, the lawyer created a structure that forced the couple into a more rational mode of operation. He could more directly thwart manipulative, infantile responses because he represented the boundaries of what is acceptable or unacceptable under the law. Dynamically, this couple acted like rivalrous children. They were simply more than a single parent could handle!

In general, this type of couple is a poor mediation risk. In the typology of divorcing couples developed by Kressel, Jaffee, Tuchman, Watson, and Deutsch (1980), the enmeshed couple is described as having the poorest outcome in mediation because strong forces of attachment run counter to the mediator's goal of resolution. A team might be able to deal with this kind of couple more successfully than a single mediator even when the only issue is custody. The attorney provides structure by imposing legal rules, which establish limits that force the couple to respond more rationally. It is also easier for two mediators to manage volatile couples. If need be, the team can take a timeout during joint meetings, and each team member can talk with one client when things become too tense.

Experimenting with the team approach will provide additional information about its use. Dividing the issues between the team members may be efficient and cost-effective, but it does change the dynamics and potency of the process, reducing the benefits of gender balance and emotional support for the clients and the mediators. Therefore, the importance of these less tangible aspects needs to be weighed against the advantages of separating the team.

## CONCLUSION

Interdisciplinary team mediation holds much promise for many divorcing couples and may provide an effective training vehicle for mediators. Research is needed to isolate the significant variables in the team approach and to compare outcomes with those for other approaches. The symbolic aspects of the team, the dynamics of a gender-balanced process, and the power of the context are theoretical concepts derived from clinical experience but unsub-

stantiated by research. Their value has not been measured in any systematic analysis.

The interdisciplinary team presents a unique synthesis of skills by providing a level of expertise that is rarely available with a single mediator. The goals of team mediation generally go beyond simply reaching an equitable financial settlement. They include the quality of the coparental relationship, the parent-child relationship, and the restructured family formation. The team also emphasizes the educational use of mediation. The negotiation process can be used to teach communication and problem-solving skills and to facilitate post-divorce adjustment. These subgoals are not unique to the team but should be considered basic to the team approach.

There are currently no models for service that integrate the multiple needs of the divorcing family. Perhaps as our social concept of divorce incorporates more models for a constructive divorce process and a healthy postdivorce family, team mediation will be seen as a service that can meet the comprehensive needs of the divorcing family. The team approach, like the full-service bank, has the expertise and resources to expand the definition of mediation and to offer a broad range of services to the divorcing family, beyond the model described in this chapter.

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# 12

## Structured Mediation and Its Variants: What Makes It Unique

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*A comprehensive book on divorce mediation would not be complete without a chapter on O. J. Coogler and the structured mediation model. The author, a friend and colleague of Coogler's, offers a concise description of structured mediation and its more popular variants in use today. The rules of structured mediation were developed to assist the typically naive negotiators in divorce to settle divorce issues. Although the rules and practice of structured mediation have engendered comment and criticism, this chapter aptly describes how the rules establish the conditions for cooperative conflict resolution and financial and emotional independence—goals that continue to guide the divorce mediation field today.*

In the preface of his book *Structured Mediation in Divorce Settlement: A Handbook for Marital Mediators* (1978), O. J. Coogler refers to his divorce experience and how he decided to handle the aftermath. He states:

I am indebted to my former wife and the two attorneys who represented us in our divorce for making me aware of the critical need for a more rational, more civilized way of arranging a parting of the ways. Her life, my life and our children's lives were unnecessarily embittered by that experience. In my frustration and anger, I kept thinking of something Mahatma Gandhi wrote over half a century ago:

"I have learnt through blither experience that one supreme lesson, to conserve my anger, and as heat conserved is transmuted into energy, even so our anger can be transmuted into a power which can move the world."

This system of structured mediation is, therefore, my anger transmuted into what I hope is a power to move toward a more humane world for those who find themselves following in my footsteps. (p. v.)

O. J. Coogler was born in 1915 and raised in Jonesboro, Georgia. He received a bachelor of science in psychology from the University of Georgia in 1934. Coogler received his law degree from Emory University in 1937 while serving in the Georgia State Legislature. He was appointed honorary consul to Mexico (1946-1956) and later served as legal counsel to the Consulate of Germany (1955-1960) and ran several successful businesses before turning to