

What's Special About Family Mediation? Surely any mediator – or lawyer – can mediate family disputes!

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The title of this article is a bit tongue-in-cheek as, in my experience, special skills and training are essential for family mediators. I felt compelled to bring the debate out of the closet when I recently heard very senior lawyers express their belief that a law degree adequately trained lawyers to act as mediators. They were sincere. And, they aren't alone. Others question the need to acquire and continuously upgrade mediation skills, particularly in the context of family mediation.

So, what is special about family mediation?

MEDIATION

Let's start with "mediation" and the tension between legal training and mediator orientation. In a 2006 article published in the *Family Court Review*, Cohen noted that:

... the adversarial format is premised upon the notion of the attorney's zealous advocacy of the client's position, which is usually accomplished by attacking the other party and highlighting the differences between the litigants.¹

The vast majority of instruction in law schools, and at professional legal training courses (PLTC) delivered to students who have just completed law school, is focused on court hearings in which only one party "wins" and the other "loses". Trial decisions are analyzed and applied to fact patterns and statutory or common-law principles. Students compete in imaginary trials, or moots, with the goal of convincing the court, an impartial 3rd party, that their client was right and the other party was wrong.

The pre-disposition to vigorous advocacy on a client's behalf is required by the ethical rules of most Law Societies. For example, British Columbia's Canons of Legal Ethics provide:

3. (5) A lawyer shall endeavour by all fair and honourable means to obtain for a client the benefit of any and every remedy and defence which is authorized by law.²

Mediation culture is vastly different. The other party, not the judge, must be persuaded. Criticizing the opposition's behaviour, peppered with personal attacks or discourteous interactions, are counter-productive. There will be no ruling vindicating one party over the other. At best, there will be an enduring outcome that meets the goals and objectives of each party. These resolutions can and do include apologies and compensation. The key feature of mediated outcomes is that they are acts of self-determination by the disputants.

There are aspects of mediation that are similar to lawyering. Perhaps it is these that give rise to the belief that legal training is "enough" to mediate:

1. In both mediation and litigation a neutral, impartial third party controls the process. However, the trial judge is the decision-maker whereas the mediation parties reach their own decisions.

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2. Statutes and judicial applications of legal principles such as equity and *parens patriae*, are relevant in court and at mediation. In fact, trial judges are constrained by the law. They may not make orders beyond their authority. In mediation, the "rule of law" is nothing more or less than "objective criteria" that parties consider as they craft their unique accord. Agreements reached at mediation frequently include provisions that a court could not order.
3. Finally, both mediation and courts bring disputing parties together for the purpose of resolving a conflict. There will be only one winner at the end of a trial. The goal in mediation is that the parties reach a resolution in which each experiences that their goals were addressed; that they have achieved a "win-win".

Law school and PLTC train lawyers to litigate. Why not train lawyers to mediate? And, for those coming to mediation from other professional backgrounds, why not acquire mediation skills as well as knowledge about the mediation process and familiarity with substantive aspects of family law?

FAMILY

Let's consider the other half of the original question – what's so special about "family"? In the case of legal education, once the local Law Society licenses lawyers to practice, they are presumed to know all areas of the law. It is counter-intuitive to traditional legal education and to their governing bodies to suggest that lawyers who have completed their law degrees and passed their bar exams are in any way limited in the scope of their legal practice.

My point is that any lawyer can practice family law. In reality, few choose to. Why? Explanations typically involve a disinclination to be impacted by the emotional behaviour of divorcing parties.

This is where I get confused. Lawyers are aware of the emotional dimensions of inter-personal disputes. They do know that emotional clients present practical problems. Why would any lawyer believe that a license to practice law also includes the skills to mediate inter-personal disputes, particularly divorces?

In fact, the Law Society of British Columbia does require that lawyers practicing as Family Law Mediators meet specified requirements.³ Similarly, mediators listed on the Family Mediator Roster and on the Child

Protection Mediator Roster of the British Columbia Mediator Roster Society⁴ as well as mediators delivering custody mediation services as provincial Family Justice Counselors, must have special training. Why? In answering this question, the topics of abuse, power imbalance and complex, changing laws are illustrative.

Abusive Relationships

The most obvious reason for special training in the context of family mediation is the existence of spousal abuse. Mediators need to be able to identify (screen) whether the relationship is abusive before they can determine whether it is safe, realistic and fair to facilitate a couple's negotiation. If the wife is being threatened or beaten by the husband between the mediation meetings, how can she be said to have voluntarily agreed to any settlement? Mediators can be trained to screen for abuse, and, if appropriate, to work with parties who come to mediation despite the presence of abuse.⁵

At this point, many professionals say that in their experience, there are relatively few abusive relationships, so why train for the odd case? Canadian statistics reveal a different picture. 40 - 60% of separating and divorcing couples report abuse yet 78% of lawyers in a recent survey underestimated the incidence of abuse for their family law clients.⁶ How can the experience of professionals be at such variance with statistical data? One explanation is that if a professional is not trained to identify abuse, he or she will miss important clues. When a lawyer fails to recognize the presence of abuse, there are said to be checks and balances in place within the legal system, such as equal opportunity to be heard, impartial decision-making or the presence of guards in a public court house, that ensure a fair outcome at trial and personal safety. These checks and balances do not exist for mediation. Hence, the need for special training of all mediators working with disputants who are involved in abusive relationships.

Power Imbalances

Abuse is one way in which an imbalance of negotiating power is created. There are many other examples.

A surprising number of adults are illiterate. Child Protection mediators have learned to anticipate this possibility and to read all written material out loud for the benefit of participants who do not read either English or French.

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Often separating couples come to the mediation with distinct power bases. The wife may be a skilled parent who enjoys the loyalty of the children. The husband may be expert at managing the family's cash flow and investments. One party may have only recently learned about their spouse's infidelity and is experiencing surprise, rage and loss of self-esteem.

There are sophisticated power-balancing techniques. Mediators can invite lawyers into the mediation room to help balance power. A party lacking financial acumen can be encouraged to work with a financial planner. A child specialist may be involved to help the parents develop a parenting plan that focuses on the children's needs and that avoids marginalizing either parent. A mental health coach specially trained to help a spouse cope with the feelings of grief, particularly anger, can work with the spouse who is forced to accept the other spouse's decision to end their marriage.

Complex and Changing Laws

While mediators are not expected to know the law for the purpose of pronouncing judgments, if they lack a basic understanding of the substantive law, how can they provide mediation services that competently address the many complex issues that must be considered by divorcing couples?

The Child Support Guidelines were amended in 2006. Most mediators are aware that the amounts to be paid were increased. Do they also know that there were other amendments? For example, are they familiar with the revised definition of what qualifies as an extraordinary expense?

Spousal Support Guidelines were recently introduced. British Columbia courts are continuously re-interpreting the *Family Relations Act* and its relationship to the *Divorce Act, Canada*.

Many couples have pensions to divide. This is a complex aspect of property division that can have far-reaching impact. For example, federal pensions are so different from provincial pensions that simply agreeing to divide an RCMP pension and a fire fighter pension equally at source actually results in unfairness.⁷

CONCLUSION

The knowledge and skills required of family mediators are indeed special. Mediation skills can be taught, just as litigation skills or medical skills are taught.

From my perspective, the foregoing examples make a compelling argument for not just family mediation training, but also for continuing mediation training.

Perhaps, in the case of Family Law Mediators, the Law Society of British Columbia is already considering the need for continuing education:

On December 20, 2006, the Benchers approved the Lawyer Education Task Force's preliminary report at their December meeting, taking a first step toward making continuing professional development mandatory for BC's practicing lawyers.⁸

While there is no indication that continuing professional development for lawyer-mediators was contemplated, one can hope! ❖

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¹ Cohen, Dori. *Making Alternative Dispute Resolution (ADR) Less Alternative: The Need for ADR as Both a Mandatory Continuing Legal Education Requirement and a Bar Exam Topic*, 44 (2006) *Family Court Review* 640 @ 641.

² Section 3(5), Chapter 1, Canons of Legal Ethics, Professional Conduct Handbook, Law Society of British Columbia, as reported on www.lawsociety.bc.ca, February 20, 2007.

³ Rule 3-20, Family Law Mediation, Law Society Rules Law Society of British Columbia, as reported on www.lawsociety.bc.ca, February 20, 2007.

⁴ See *Admission to the Rosters* at www.mediator-roster.bc.ca.

⁵ There are training courses in British Columbia. Continuing Legal Education offers a 3-day skills-training course entitled *Family Dynamics: Screening for Abuse and Control*. The Justice Institute offers an online course entitled *Family Violence: Impact on Separation and Divorce*.

⁶ Neilson, L. "Spousal Abuse, Children and the Legal System: Final Report for Canadian Bar Association" Law for the Futures Fund, March 2001 reported at www.unb.ca/arts/CFVR/spousal-abuse.pdf.

⁷ Local pensions expert, Tom Anderson, recently described to me the significant differences between a federal, RCMP pension and a provincial, fire fighter pension.

⁸ Bautista, Dom C., "Life-long Learning – Going Beyond Mandatory CLE". Published in *Briefly!* January 2007.