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The Massachusetts Council On Family Mediation is a nonprofit corporation established in 1982 by family mediators interested in sharing knowledge and setting guidelines for mediation. MCFM is the oldest professional organization in Massachusetts devoted exclusively to family mediation.

PRESIDENT'S PAGE: Jonathan E. Fields

Dear Mediators:

The most recent professional development meeting, "Collaborative Law and Mediation Tools and Techniques: A Common Ground" was a product of the joint committee of the MCFM and the Massachusetts Collaborative Law Council chaired by our own Lynn Cooper. The panelists, in addition to Lynn, were Dan Finn, Kate Fanger, Karen Levitt, and Lisa Smith.

The committee was created in order to foster close reciprocal relationships between the organizations – and we are succeeding. As a result of the committee's efforts, for example, we are now cross-promoting each other's events.

Being trained in the two disciplines has informed the way I practice both.

What can Collaborative Law teach the mediator? Collaborative Law taught me to provide summary notes to the clients following each mediation. Although some mediators have been doing this for years without any influence from Collaborative Law, it wasn't until I was trained in Collaborative Law that I understood the effectiveness of this procedure. One of the panelists suggested discussing with mediation clients their goals for the process, a staple at the beginning of the first Collaborative meeting. I haven't done this yet but I'm considering it.

What can Mediation teach the Collaborative Practitioner? Mediation skills such as listening and reframing are critical for the Collaborative practitioner; in fact, I believe that every Collaborative Practitioner should be required to take a course in mediation.

In any event, I think all of us can agree that the communities have a lot to teach other. I look forward to more of these joint ventures in the future.

Yours,

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IT'S NO SIN: FILING & SERVING A COMPLAINT BEFORE OR DURING FAMILY MEDIATION

By William M. Levine & E. Chouteau Levine

Mediation occurs at many different stages of the family law life cycle. Parties may seek this process mid-stream or even late in a court action, when they have grown frustrated, discouraged or simply weary of litigation. Others see mediation as a first resort: a means of avoiding the costs and confrontation of the courtroom; and perhaps a way to preserve or even enhance the remaining good will in their relationship, as they move forward as parents and former partners.

Yet, even for people who view court as the last resort, there are a host of reasons why they need to know, and to appreciate, that the simple pendency of a court action may be an essential adjunct to their private resolution efforts. Sometimes the lack of this information will make no difference in the party's experience or outcome at all. On occasion, though, the result can be negative, even profoundly so.

The stakes of this discussion are important and broad. They implicate the following basic interests of every family law mediation client:

- What protection do they have from each other's dissipation of assets, or other prejudicial financial changes, while the mediation is underway?

- Can clients be comfortable that they will receive all of the financial information that they need to make knowing and voluntary settlement decisions?

- Will the parties' alimony, child support and enforcement rights be altered by the passage of time during mediation when a complaint has not been filed and served?

- Will divorce statutes and rules cause unwanted delays if the mediation does not result in settlement, when a complaint has not been filed and served?

These questions suggest a critical "need to know" for the parties, and they have a proper place in most if not all family law settings. The answers will lead to the conclusion that some mediation clients should, and in some cases will need, to file. How, then, does the mediator address this seeming dilemma: his[1] clients are mediating because they do not want to deal with lawyer-led litigation; but for reasons that we will discuss, they should knowingly decide if their mediation can safely proceed without this minimal court support. We do not advocate for unnecessary court activity, nor do we believe that a pending court action is always necessary or beneficial. But, we also do not

believe that filing of a legal action and service of process are necessarily hostile to mediation work; and they are sometimes simply necessary.

The mediator has a constructive, and perhaps proactive, role to play in helping clients to navigate this difficult passage. It is just one of many reasons to encourage lawyer-supported mediation, but some mediation clients simply will not work with counsel; and some lawyers are, themselves, reluctant to "interfere" with the client's mediation experience. In this article, we review the potential impact of filing and service on family law matters, the positive ways that mediators can help clients address this dilemma openly, knowingly and well.

Family Law Actions Family law cases fall into three major categories: (a) divorce and other matters that initially address the break up of existing family systems;[2] (b) enforcement of the judgments that result therefrom, known in Massachusetts as contempt actions; and, (c) modification cases, brought to alter those judgments when circumstances have significantly changed.[3] All of these actions have a common root: a complaint[4] and a summons.

A plaintiff starts a case by filing a complaint with a court. This invokes the jurisdiction (i.e., it requests the exercise of judicial authority) of the state and, and in Massachusetts, the Probate and Family Court specifically, over the family law matter. The filing party then "serves" the complaint by causing a process server to deliver it to the defendant;[5] or by having that person "accept service" by signing a summons. Service is the legal prerequisite for asserting the court's authority over the parties as individuals.

Filing and service by themselves do not change the parties' legal status. They do, however, start a process that leads them, in one way or another, along a path towards a divorce or other judgment.[6] That path may be a litigious one leading to a trial before a judge who decides all status, financial and/or custody and parenting issues; it may be a parallel route of lawyer-to-lawyer negotiation; it may involve an alternative form of private dispute resolution, such as mediation; or it can be a hybrid.

Whatever resolution process the parties pursue, a pending court matter will frame, or at least influence, it through a combination of rules and statutes. When the parties choose mediation before either of them has filed and served a complaint, they both nonetheless retain the right to begin an action at any time. The parties' knowledge about these options will vary, as will their attitudes; and the manner in which the mediator addresses the issue with them, or fails to do so, may be crucial to the success or failure of the mediation process.

The Rules Service of a Massachusetts family law complaint triggers several court rules that regulate the parties' case activities and related economic behaviors, starting with Probate and

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Family Court Standing Order 1-06 ("Standing Order 1-06"). These case management and time standards rules assign responsibility to the Massachusetts judges to regulate the litigation process. They give the trial court powers and tools with which to exert control over cases, and to keep them moving. The "aspirational goals" of Standard Order 1-06 are to "measure the movement of cases in the Probate and Family Court"[7] at a pace that is geared to avoid judicial logjam and to promote efficiency.

Most practitioners and judges view Standard Order 1-06 as a mandate to bring cases to completion, where possible, within the times set forth in the Order: fourteen months from service to settlement or trial of a divorce or equity complaint; and eight months for paternity, modification and most other family actions.[8] To promote the goal of these "tracks", every case is to begin with a case management conference no fewer that thirty days after "filing of the return of service, answer or counterclaim", if the parties are not already scheduled to attend court for some other preliminary matter.[9] The parties may bypass the in-court conference, by use of a written scheduling stipulation.[10]

As part of the case management conference or stipulation, the court requires that the parties establish a discovery and pre-trial schedule; and every court appearance is supposed to beget another court "event". These time standards are frequently honored in the breach, especially the track time limits, no doubt in part at least because of ongoing financial and staffing crises in the Probate and Family Court; but they do frame every case in some respect and their aspirational goal is significant. Service also activates Supplemental Probate and Family Court Rules 401, 410 and 411. Rule 401 requires the parties to prepare and exchange sworn financial statements within forty-five days, and periodically thereafter, including at permitted intervals upon demand of the other party. Rule 410 mandates that the parties exchange three years of specified financial documents during the same timeframe. Finally, Rule 411 prohibits the parties from dissipating or manipulating property, from unilaterally causing debt that would impact each other and from changing coverage or beneficiaries of many forms of insurance policies, without prior consent or approval from the Court.

The Statutes If a party files a unilateral no-fault complaint for divorce under M.G.L., chapter 208, section 1B, as distinguished from a suit to divorce for cause – so called "fault grounds" under section 1 – she may not seek a contested or uncontested hearing on her complaint for the purpose of obtaining a judgment of divorce, for a period of six months. This is true whether the mode to settling the divorce is an agreed resolution or a trial by a judge of the Probate and Family Court. The six-month period runs from the date of filing, irrespective of the date of service. (Parties who mediate without a

divorce complaint on file proceed by way of a joint petition for divorce under M.G.L., chapter 208, section 1A, which does not have the six-month provision.)

A more recent statutory development is last year's Alimony Reform Act. That enactment is now codified as M.G.L., chapter 208, sections 48 through 55. Sections 48 and 49(b) particularly inform and influence decisions about filing, and may motivate service of divorce complaints sooner rather than later. Specifically, the new law (which became effective on March 1, 2012) defines several different types of alimony, including as relevant here, three brief fixed forms, two of which are called "reimbursement" and "transitional", and the more extensive "general term alimony".

The first two remedies are limited in their scope, permitting a judge to order either a lump sum of cash, or periodic alimony, but for a short duration and in a form that cannot be extended; and critically here, they will only apply to marriage of five or fewer years' duration, by reason of section 48. Meanwhile, the general-term alimony provisions require judges to limit the duration of alimony in marriages of fewer than twenty years' length. The limits are defined in section 49(b) by sliding percentages of the number of marital months that follow the date of marriage (or earlier cohabitation with evidence of economic partnership) and that precede, not the entry of a divorce judgment, but the service of a divorce complaint, as specified in section 48. Thus, the length of marriage, as bounded by service of a complaint, can limit a recipient to a non-extendable form of alimony in shorter marriages (advantage: payer), and extend the obligations of the alimony payer in longer ones (advantage: payee).

Another statutory consideration arises in the context of child support modification. Specifically, M.G.L., chapter 119A, section 13(a) regulates the right to request retroactive relief, by prohibiting the court from revising child support, up or down, for any period of time before the service of a filed complaint upon the defendant.

Finally, in contempt actions, M.G.L., chapter 215, section 34A entitles a successful plaintiff to receive an extraordinarily high rate of interest[11] for the defendant's proved failure to comply with financial orders. However, interest rights apply only to the time that runs from and after the date upon which the complaint is filed (not date of service), and not before that time.

Motivations to File and Serve Often, people will file and serve a divorce complaint because they need immediate help from the court. They may do this because of emergencies such as domestic abuse, abandonment, acute disagreements about parenting; or because of other less pressing but nonetheless important matters that elude resolution by the parties and counsel, such as allowances of counsel fees, regulated support or custody. To approach a court for orders by way of

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motion, a case – commenced by filing and service of a complaint – must be pending.

Sometimes, though, a spouse may have other substantive, if more subtle, or structural, reasons for beginning a domestic relations action that relate to the rules and statutes identified above. For example, a party who does not wish to file a "fault" divorce (or lacks the grounds to do so) but who fears that her spouse will lack motivation to seek a timely resolution, may wish to file solely for the purpose of starting the six month "clock" of M.G.L. chapter 208, section 1B and/or, theoretically at least, the momentum of the Order 1-06 time standards. Potential alimony payers may file and serve to stop another clock, this one on the length of marriage, wishing to qualify for one of the shorter, non-extendable forms of alimony, or to foreshorten the duration of general term alimony. A person seeking to change child support may want to preserve retroactivity request rights; and a contempt plaintiff may be hard-pressed to ignore the lure of twelve per cent interest.[12] Other persons will file simply to avail themselves of the protections of Rules 401, 410 and 411: triggering enforceable financial disclosure and protection of the integrity of the marital estate.

These are all substantial and important rights and obligations.

Considerations of Filing and Service in the Context of Mediation Mediation is an out-of-court process, but it does not exist in a vacuum. Rather, it works with or against this very real legal backdrop. Despite that, many people who embark on alternative dispute processes know little or nothing about the ramifications of filing and service, or the failure to do so. Frequently, people investigate mediation on their own (often through the internet) and without the guidance of counsel, reducing the opportunity to gain this important knowledge. Even those with some awareness may choose not to focus on it for some understandable reasons: fear of enmeshment with lawyers; to limit emotional escalation; to save money; to minimize damage to co-parenting efforts; for privacy; promotion of self-determination; or simply, to go at their own pace.

As a result, many divorce mediations begin without any complaint on file, and therefore, no service – not as a knowing election, but out of ignorance. This means that there are no mandatory financial statement or document exchanges; no restraints on assets, debt and insurance; no cut-off of applicable alimony or support duration; no retroactive child support or interest; and if divorce mediation fails, delayed time standards, a full six month wait after filing before a party can seek a hearing on her complaint.

For many – maybe most – cases, none of this will matter. The mediation population tends to be self-selecting, and many parties share the values that drive them to opt into private dispute resolution; but the picture is not always

so clean or neat. After all, mediation clients, like all other domestic relations parties have experienced relationship breakdown and failures of trust to one degree or another. Some parties have mixed motives for mediating. Just because people elect against litigation or traditional lawyer-to-lawyer negotiation, that does not mean that they check all strategic sense, or for that matter common sense, at the door.

For those people who do choose, for whatever reason(s), to file a family law complaint while mediating the issues at hand, Standing Order 1-06 poses a potential challenge. Because the rules require that a case management conference occur, or alternatively, that the parties stipulate to a specific timeline for discovery and a pre-trial conference, the acts of filing and service can result in time and other external pressures not otherwise existing in mediation.

There are two ways to address this. First, the time standards specifically say that:

Parties engaged in in alternative dispute resolution may request an extension of a scheduled Case Management Conference by filing a joint or assented to motion which attests that the parties are engaged in alternative dispute resolution…[13]

This rule requires a supporting statement that identifies the mediator and the dates of previous and scheduled sessions.[14] Second, the time standards expressly identify case management conference as a time for "…early intervention by the Court…[and]…offer[ing] Alternative Dispute Resolution processes…"[15] Thus, a reasonable request of the parties to go "off track" for the purpose of pursuing mediation should be granted; especially during an era of courthouse crisis.

Might this impose unwanted timelines on the mediating parties? Absolutely. Yet, in those cases where the considerations that led a party to conclude that she needs to file, time parameters are not always or necessarily a bad thing. Anecdotally, many lawyers observe that judges have been historically reluctant to grant lengthy mediation-related delays because of the understood time standard goals of promoting active case management by the courts. However, given the prominence of ADR in the case management rules, and the court's pressing practical struggles, the courts should, and we believe that more and more over time the courts will, grant relief to permit mediation with greater frequency and leeway.

The Election to File and Serve – or Not Effective mediation is built on a foundation that is meant to promote knowing and voluntary decision-making. Without this, fairness of process, and often of result, cannot occur. Shouldn't all divorce clients know what a divorce action has to offer by way of preliminary relief and protections that come merely from filing and service?

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We believe that mediation parties should know these facts. This is one reason that we encourage all of our mediation clients to have independent attorneys as early as possible in the process. Without knowing that substantial rights exist, the client cannot even approach making a knowing decision to file or not to file and serve a complaint. In the process, the parties should also learn the drawbacks of filing: becoming subject to external time pressures; potentially being drawn into an unwanted court process; increased legal fees; a more adversarial feeling; and sense of compromised self-determination.

The mediation parties who need to know this information the most include those who wish to mediate despite considerable trust reservations about their negotiating partners. It is especially important for these people to know how to start the six-month clock to a contested divorce hearing in default of a successful mediation; about the protections and rights of Rules 401, 410, 411; child support retroactivity issues and interest; and where relevant, the time elements of the new alimony statutes. Armed with this knowledge, this potentially vulnerable client can make a knowing and voluntary decision.

The Effect of the Election So, what happens if a person, with adequate information and perhaps advice of counsel, concludes that mediation cannot proceed without a court filing and service? This decision may end a mediation process before it begins; or if action is taken in the midst, it can cause a premature conclusion. The other spouse may believe that a court filing undermines the mediation process. He or she may see it as belying the good faith required for a facilitated conversation that is based heavily on trust. A spouse may feel that the anxiety of an open court proceeding will inhibit willingness to talk openly or to negotiate flexibly. Some may fear that the existence of a pending court action pushes them to an active lawyer-client relationship before they feel ready to do so. The time standards practicalities that we discussed above are a real consideration, too.

These party-to-party attitudes require a potential divorce complaint filer to make a cost-benefit analysis about starting a court action. She may forego mediation if filing causes the other spouse to refuse to proceed and the filer concludes that the risks of giving up the court rules and/or statutory impact outweigh the expected benefits of mediation. Or, this person may conclude that the promise of mediation makes the non-filing risks secondary, or at least acceptable. Either way, it is a careful decision made in the light of knowledge and understanding.

The Mediator's Role Sometimes, the person who is considering whether or not to file will be discouraged from doing so by the mediator himself, directly or subtly. This may arise from the neutral's fear that the act of filing will alienate the other spouse from the mediation process, or that the action may itself constitute a form of coercion within the mediation. In some cases,

both fears may be warranted, and bear consideration. Other mediators, however, will share the view of the reluctant spouse identified above: that filing and service are inherently hostile to the mediation process, and inimical to good faith participation.

We believe that this mediator's view is unfortunate. It denies critical realities, it narrows the circumstances in which the mediator may be effective, and it may actually harm clients. A party who feels the need for the security of the Rule 411 restraining order to negotiate comfortably is not necessarily acting in a hostile fashion: events and circumstances may justify this person's concern, and addressing it may be the key that unlocks the ability to negotiate free of fear of loss, or further loss. The mandatory financial document exchange under Rules 401 and 410 may be implemented or suspended, yet they may give both parties the confidence that the candor will be mutual because compliance could be compelled, if necessary. From among the alimony cutoffs, potential for child support retroactivity, contempt interest and the commencing of the M.G.L., chapter 208, section 1B clock and Probate and Family Court time standards, one or more right or protection may be just what is necessary to allay the fears of the oppressed spouse or expected alimony payer, that the other party will be motivated to "slow roll" the mediation – i.e., to strategically shape the ultimate result more to his or her liking by extending the process unreasonably.

If the mediator supports the notion that in all circumstances, all court filings are antithetical to good faith mediation, then he is undermining the parties' right to make a knowing decision about whether a filing and mediation are mutually exclusive, or if, in fact, they can effectively co-exist, or even support one another. Clients who believe that it is important to have one or more of the rights and protections that come from filing and serving a complaint should not be placed in the position arbitrarily by the mediator, of having to make a binary choice: either mediate or file.

The better practice is to be transparent with clients about the implications and effects of the commencement of a divorce action during mediation, including the various court rules and statutes discussed above. The mediator should assist the parties with solid information, encourage legal consultation and not bias this choice any more that he would a substantive issue between the parties. People can and do mediate under all kinds of circumstances, including right in the midst of litigation; and sometimes and in some circumstances, it is irresponsible for a party not to file.

None of this implies that a mediator should advise a client to file and serve, or not to file and serve a family law complaint. In fact, we may not do so. But, this ethical proscription does not relieve us of our obligation to inform. If a party knowingly chooses not to seek advise from a proper source, that is, itself, a knowing and voluntary decision

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of an informed free agent, even if we may personally disagree with it. One way to address this might to be to give written materials on point, to both parties, so that they may read, know, consider, seek advise and if appropriate, act.

All mediators share the goal of facilitating not only settlements, but ones that are fair, fairly negotiated, knowing and voluntary. Urging clients to ignore the legal realities outside of the mediation room is neither fair to, nor safe for, the clients; and is it not effective mediation.


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The authors gratefully acknowledge the editorial review and contributions of friend and colleague, *David A. Hoffman*, Esquire, mediator, arbitrator, collaborative lawyer, lecturer and author, of the *Boston Law Collaborative*, Boston, MA.

Footnotes

[1] For convenience we use female pronouns for the potential filer and male pronouns for the mediator.

[2] These include matters to resolve parentage, custody and support controversies between never married parents, and complaints for separate support and in equity. Outside of Massachusetts, these may also include legal separation.

[3] Typically, modifications provide a remedy for substantial and material changes in circumstances.

[4] In some jurisdictions and contexts, the action begins with a petition.

[5] In Massachusetts, divorce and other initial complaints must be served in-hand while contempt and modification actions do not require in-hand service, but permit other hybrid forms of delivery to last and usual residence and mail.

[6] Petitions end in decrees, rather than judgments.

[7] Probate and Family Court Standing Order 1-06, Preamble, second paragraph.

[8] Probate and Family Court Standing Order 1-06, paragraph 7.

[9] Probate and Family Court Standing Order 1-06, paragraph 2.d.

[10] Probate and Family Court Standing Order 1-06, paragraph 2.h.

[11] M.G.L., chapter 231, section 6C (twelve per cent interest).

[12] *Id.*

[13] Probate and Family Court Standing Order 1-06, paragraph 2.i.

[14] *Id.*

[15] Probate and Family Court Standing Order 1-06, paragraph 2.c (third paragraph).

"I'M SORRY YOU FEEL LIKE THAT..."

By Michael Jacobs

People often arrive in mediation wanting an apology. Common complaints include feeling unheard, disrespected and unfairly treated. These get translated into statements such as:

- "I feel totally ignored and excluded."
- "You treat me like some kind of child."
- "Nothing I want seems to matter. All you care about is you!"
- "I feel you don't trust anything I do and constantly undermine my decisions."
- "I can't believe you won't even try and be civil about this. I'm really upset."

In some sense, the issue isn't whether the other person actually intended to do any of these things. Hurt has been caused; an apology is due.

So why is it when the aggrieved party hears "I'm sorry that you feel like that..." it makes so little difference? If anything it can make the situation worse. Despite the presence of the word "sorry" the one looking for an apology is neither satisfied nor soothed.

And having commiserated for the way the other feels, the apologiser is now confused by the rejection of their sympathy. They begin to suspect that the 'victim' doesn't actually want an apology. That what they really want is to punish, to ratchet up the guilt, to get their pound of flesh. "I've said I'm sorry – what more do you want? Do I have to get down on my knees?"

And now it's the injured party's turn to get angry. "I want a real apology – that's not a real apology!" Icy stares are exchanged, fingers pointed, voices raised. We are moments away from emotional meltdown.

So what is it that makes an apology 'real' or not?

I believe the difference revolves around the quality of repentance. To repent is to turn towards oneself. The problem with offering sympathy for the upset is that it leaves oneself out of the loop. It is precisely this absence that is so keenly felt.

This attitude is reflected in the language used:

- "I can see how upset you are."
- "You're obviously very distraught"
- "That wasn't my intention."
- "You've clearly got the wrong end of the stick."

The responses fall into two categories. In the first, the apologiser positions themselves as a sympathetic witness rather than a culpable participant. At best, the aim of sympathy is to close down conversation. Once expressed, there is nothing else to say. One has tried to soothe hurt feelings, to make things better. Having done so, there is the expectation that things should now get

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back to normal. The incident is closed and need not be referred to again.

In the latter replies, the speaker admits to being part of the dynamic, but disavowals any responsibility for the subsequent distress. This reluctance to admit responsibility is often linked to the fear of incurring punishment and blame. So to avoid the 'blame game' we adopt a kind of legalistic thinking. Believing that our intentions were blameless, the only sensible response is to plead not guilty. "Of course I was in the vicinity your honour, but I never had the slightest intention to cause any harm..."

Only repentance isn't about accusation and blame. Repentance is about admitting to imperfection, of possessing something less than perfect knowledge. It invites a fuller stepping into the messiness of the human condition. A repentant attitude sees life as a space in which our actions often lead to unexpected consequences.

An apology is an admission that there is still more to learn.

Having done a handful of doctor/patient mediations, what struck me was the capacity for some doctors to convey repentance. They were able to acknowledge their limitations and the terrible consequences that sometimes arise precisely because of their humanness. These cases usually settled. Those doctors who mouthed an apology for the pain and suffering, without including their part in the proceedings, invariably went on to tribunal.

Each of our actions – whether taken or avoided – belongs to us. I may not have wished or wanted what happened, but I can't deny my part. For an apology to have meaning, what needs to be said and what needs to be heard is that pain was caused. Without this acknowledgement, this acceptance, we try to leave responsibility behind. Only we can't. Not now, not ever.

Mediators need to remember that repentance isn't about apportioning blame. Blame is a label, it isn't a conversation. Mediation is a mode of conversation, some of them about very difficult and painful things. The context of these conversations is always a relational one, where individuals are invited to step into a mutual space, rather than fracturing the world into 'us' and 'them'.

Fundamentally, an apology is an admission that there is still more to learn. As in any lesson, we can only start from where we currently are – which in this case entails seeing the impact of our thoughts, feelings and actions. That these moments usually correlate with another's pain and suffering makes it harder to just ignore or pretend. And in educational terms, not being able to turn away from what's directly in front of us has to be a good thing.

For mediators, the challenge is to help parties understand that apologies aren't about the apportioning of blame, but the need for more human conversations. For better or worse, pain is often the clearest marker of ignorance and misunderstanding. To apologise is one way of saying that there is yet more to learn – both about the other and about oneself.

Michael Jacobs has been a practicing mediator for nearly sixteen years. He loves what he does and wishes he had the humility to refer to himself as a peacemaker. Currently he trains mediators in both family and workplace mediation. He lives just outside of Hereford in the UK, and can be contacted at mjabobs2012@yahoo.co.uk

"Marriage brings one into fatal connection with custom and tradition, and traditions and customs are like the wind and weather, altogether incalculable."

Soren Kierkegaard

SAME-SEX CONFLICTS: A PRIMER FOR MEDIATORS

By Katherine Triantafillou

Editor's Note: *This article is excerpted from the original of the same title available as a resource at www.bostonlawcollaborative.com with full legal citations. Also see Hoffman, David and Triantafillou, Katherine, Cultural and Diversity Issues in Mediation, draft chapter of a book to be published by MCLE entitled Mediation: A Practical Guide for Mediators, Lawyers and Other Professionals. The author wishes to acknowledge the invaluable assistance of Anne O'Connell, Special Project Manager of the Boston Law Collaborative in preparing this article.*

The Not So Distant Past In Massachusetts, sexual orientation was not added to the list of protected categories in our discrimination law until 1989. Moreover, well into the 1980's gay men were frequently subject to criminal prosecution for certain sexual conduct which could and did affect their employment status and complicated custody matters. Two criminal statutes in particular — M.G.L. c. 272 §34 ("crimes against nature") and M.G.L. c. 272§35 ("unnatural and lascivious acts") — were used by police to either entrap gay men at rest stops or other outdoor locations and public restrooms because they were having consensual sex with other men. These felony prosecutions often turned on whether the so-called perpetrator of the crime had an "expectation of privacy." Although *the Lawrence case* [Lawrence v. Texas, 539 U.S. 558 (2003)] did away with these statutes ("unconstitutional to apply sodomy laws to non-commercial sex between consenting adults in private") we still have other statutes such as "open and gross lewdness and lascivious behavior" and "lewd and lascivious behavior" that are sometime used by the police for the same purpose. The 1980's also brought enormous pressure viz. the AIDS crisis, as the legal system grappled with the effect of the disease in multiple areas of the law.

While society tended to view all gay people through the prism of what they did sexually, the reality for most lesbians and gay men is that they woke up, got dressed, had breakfast, read the newspaper, went to work, had relationships, bought property, got sick, saw doctors and died — just like everyone else. However, because the law did not recognize their relationships (or actively punished them for those relationships) gay people were forced to create arrangements that suited their needs. They did this by consulting with sympathetic lawyers who crafted legal instruments that would — everyone hoped — protect them if their biological families or angry ex-spouses stepped into a health or other crisis and asserted their heterosexual privilege. The father who hadn't spoken to his gay son for years could and did appear in court to contest the disposition of that son's ashes; the philandering husband with a drinking problem and without custody could and did contest his wife's having a lesbian live-in lover in the presence of their children years after the divorce; the

hospital could and did bar a lover's bedside vigil; the employer could and did fire the gay man whose name appeared in the newspaper for his arrest at a highway rest stop.

Given this history of discrimination, it should be no surprise that lesbians and gay men have been distrustful of the legal system, lawyers, and all things connected to the courts. In the same way that members of the gay community developed their own social networks to deal with their isolation from the mainstream, such as gay bars, newspapers, religious and professional organizations, gay people in general engaged in types of private ordering of rights unheard of in most heterosexual relationships. "Prenuptial agreements" — contracts entered into prior to marriage to delineate property rights upon divorce — were certainly used by wealthy heterosexual individuals but their use was the exception not the norm.

It should be no surprise that lesbians and gay men have been distrustful of the legal system, lawyers, and all things connected to the courts

Family Formation – Similar But Different What is similar in gay relationships is the manner in which couples form their relationships. Like heterosexuals, lesbians and gay men meet each other in a variety of ways – through work, church, social networks, online, the gym or grocery store — and at some point decide to move in together to share living arrangements. Prior to the *Goodridge* case [Goodridge v. Dept. of Health, 440 Mass. 309 (2003)] members of the LGBT community did not have the option, as do heterosexuals, to take the relationship one step further and exchange marriage vows.

State sanctioned marriage brings with it a panoply of laws regarding familial rights and obligations that are frequently beyond the reach of private contractual ordering. As the court stated emphatically in *Goodridge*: "... in a real sense, there are three partners to every civil marriage: two willing spouses and an approving State." Furthermore, "... the benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death…. 'hundreds of statutes' are related to marriage and to marital benefits."

Although some people registered domestic partnerships in the several cities in Massachusetts where city ordinance allowed it, the rights conferred upon couples doing that were/are limited. However, Municipal ordinances cannot impact the bulk of rights described by the *Goodridge* court. Some states have enacted domestic partnership statutes, which are more comprehensive than municipal ordinances in an attempt to provide a "marriage like" alternative. (Coincidently, since *Goodridge* became the law of Massachusetts, some companies and towns no longer provide health insurance to domestic partners,

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preferring instead to offer that benefit only to those who are married — gay or straight.)

Many couples resorted to a variety of documents to safeguard their relationships and joint property once they began to live together. These include: Living Together Contracts or Household Agreements; Wills; Powers of Attorney; and Health Care Proxies. Some couples with greater resources also established trusts. However, many couples do not have such documents and this is one of the major problems confronting the separating unmarried couple. Thus the threshold issue for any mediator dealing with a same-sex dissolution is to determine if the couple is married under the laws of Massachusetts (or any other state allowing same-sex marriage or civil union/statewide domestic partnership) or not. If not, then the mediator must determine whether the couple has entered into any written agreements about their property as the laws which apply to their situation are vastly different.

If the couple is married, then the matter is relatively easy (as easy as any divorce is) and the same divorce and separation laws apply to the situation with one major exception, The Defense of Marriage Act or DOMA. Therefore, if the couple is married, M.G.L. c. 208 and c. 209 apply to the division of assets, alimony, child support, custody, etc. The Probate and Family Court has complete jurisdiction to decide the case. One court, one set of statutes.

If the couple is not married but has a living together agreement or any form of written contract detailing how they will divide property or transition from their formerly blissful state of domestic partnership, that too, is relatively easy. In 1998 the Supreme Judicial Court in Massachusetts in *Wilcox* [Wilcox v. Trautz, 427 Mass. 326 (1998)] saw fit to recognize that contracts between couples regarding their property, straight or gay, could be enforced. Historically, the reason against doing so was because of the need for all contracts to have "consideration" to validate the agreement, such as mutual promises or a money payment. Prior to this decision jurists veered into an alternative reality and assumed that the only consideration between unmarried co-habitants would be "sexual services," and thus against public policy.

In addition, as part of the efforts to enforce such a contract the parties will also need to nullify their domestic partnership if it has been registered with a city or employer as well as changing other estate planning documents. When one is divorced, the relationship is severed by the court automatically, as are many other aspects of marital life. For example, the status of being divorced from a spouse automatically cuts off certain statutory rights to inherit property from a former spouse.

Special attention also needs to be paid to any employer provided health insurance arrangements. Divorce statutes provide for the soon to be divorced or uninsured spouse; contract law does not except to the extent that the terms of an existing family policy provided by the employer allows for insurance coverage to be

extended following dissolution for a non-marital partner.

Health insurance benefits (along with taxes) can be extremely complex and involve fact gathering specific to that employer and the employer's health plan as well as the assistance of experts in the field. In general, private sector employers with 20 or more employees are usually governed by federal law, except when the company is "insured" rather than "self-insured" and therefore covered by state regulations. If the employer is the Commonwealth of Massachusetts then state law applies; if the employer is the federal government, then federal law applies. Self-employed people are not usually covered by federal law. This distinction is important because of the effects of DOMA. Note too, that an individual providing health insurance to his partner is taxed for the value of that benefit. Therefore, if the parties agree and can extend health insurance benefits post dissolution, then they may wish to recapture not only the actual cost of providing insurance but the amount of additional income tax paid by the former domestic partner.

It is when the parties do not have any written documents (and aren't married) that the legal process of dissolution becomes much more difficult substantively and procedurally. Therefore, once the mediator has determined that no formal documents exist, the questions to ask include: What do the parties own? How do they own it? Where is it located? Do they have any documentation evidencing ownership or payment for the property? In the usual scenario, most couples will have a house, one or two cars, household furnishings, bank accounts, maybe stocks or other investment/retirement tools either through work or otherwise.

The threshold issue for any mediator dealing with a same-sex dissolution is to determine if the couple is married under the laws of Massachusetts (or any other state allowing same-sex marriage or civil union/statewide domestic partnership) or not.

Children Having children adds a layer of complexity to the dissolution of any relationship straight or gay, as couples struggle to balance their needs with the needs of the children and how they will manage two new households. Once couples with no children divide up their "stuff" they are pretty much free to never see each other again and have no contact. With children, however, there is the additional stress of having continued contact as they juggle day care, schools, vacations, holidays, birthdays, visits with extended families, etc., until the

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children are emancipated. This is not easy under the best of circumstances, but certainly challenging when parties dissolve their relationship.

Children are part of the dissolution mix in gay partnerships in three ways: through adoption, surrogacy/alternative insemination, or a prior marriage. Therefore, the initial inquiry should focus on how the parties came to have a family with children. If it is through a prior marriage, one can assume that there are previous court orders in place regarding child support and custody, etc. These previous orders normally don't involve the non-biologically related partner in a same sex couple; the previous spouse has the parental duties and obligations. However, if the current partnership has existed for a period of time, that partner may have formed a bond with the child or children and there may be issues of future contact with them. It is unlikely that the contact will be continued without agreement from the previous spouse and former partner. It is also unlikely that a previous court order will be modified to allow such contact absent extraordinary circumstances.

In Massachusetts if the parties have jointly adopted a child, then both parties have parental responsibilities for that child imposed by law. In other words, each person, whether biologically related to the child or not, has a legal relationship with the child and therefore the manner of dealing with the issue of dissolution is relatively straightforward via the Probate Court and an action under M.G.L. c. 209C. There is some controversy among practitioners and judges whether the appropriate vehicle for dealing with this issue is M.G.L. c. 209C (known as the paternity statute) or an equity complaint in the probate court. Either way, both adoptive parents are equally entitled to/or responsible for support and custody.

The court will pretty much decide the case in the same way that it does a heterosexual divorcing couple with children: child support guidelines apply and the parents will be expected to enter into a parenting agreement regarding time with the child and where the child will reside, health care costs, education, etc. If not, the court will do it for them applying the usual standards.

Interestingly, the court deals with the "presumption of paternity," similarly whether the parties are gay or heterosexual. Where the parties are married and a child is born during the marriage or "within three hundred days after the marriage was terminated by death, annulment or divorce…" the husband is presumed to be the father of that child. Likewise, in *Della Corte* [Della Corte v. Ramirez, 81 Mass. App. Ct. 906 (2012)], the court found that where the lesbian couple were married, jointly decided to have a child and participated in the insemination process together, then both women will be considered the parent of that child and obligated to pay child support.

If the parties have not jointly adopted a child that means one of the parties does

not have a legal relationship with the child. The absence of a co-parent adoption may arise simply because the parties never got around to completing the paperwork for the adoption before things starting going south in their relationship or the country one of them adopted the child from doesn't allow joint same-sex joint adoption. It may also be the case that one of the parties had the child via alternative insemination prior to the relationship or during the relationship and they didn't, for a variety of reasons, pursue an adoption.

When the parties do not have any written documents (and aren't married) that the legal process of dissolution becomes much more difficult substantively and procedurally.

This situation is particularly vexing to the non-biological partner who sees herself as an equal parent. She may not be considered a parent by the law without protracted litigation to determine that issue. These cases involve, equity complaints in the Probate or Superior Court alleging that the non-biological partner is a "de facto parent". The leading case in this area of the law is *E.N.O.* [E.N.O. v. L.M.M., 429 Mass 824 (1999)]. If the court finds there is a de facto parent then it will obligate that person to pay child support and allow visitation as it would in other situations. If not, then the partner won't have any rights and will not be able to see the child unless the parent consents. Some advocates have pushed for the courts to recognize other theories of parenthood, such as "parent by estoppel" or "parent by contract." For now, the court has expressly foreclosed this possibility in two cases: T.F. V. B.L., 442 Mass. 522 (2004) and A.H. v. M.P., 447 Mass. 828 (2006).

An issue that comes up frequently with gay men is that of surrogacy. If the child was born through a surrogacy arrangement, the mediator should obtain a copy of the surrogacy contract to determine if there are any provisions that apply to the dissolution of the couple's relationship. Surrogacy contracts usually just cover financial and health issues prior to birth and legal issues shortly after birth, but there may be additional facts relevant to the mediation.

A more likely scenario involving third parties is when a straight or gay male friend ("known donor") donates sperm and participates in the raising of the child. There will be a contract spelling out everyone's "rights" during the child's lifetime called a "co-parenting agreement." This contract usually includes procedures to be followed if any of the parties dissolve their significant relationships. It may be that the presenting issue for the mediator will be a breakdown of that agreement and therefore it is crucial to have a copy of

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that document to understand the facts of the controversy. It is also important to determine whether an adoption has taken place, either a co-parent adoption (between the lesbian couple) or a three-parent adoption (between all three parties). Yes, we're not in Kansas anymore: three-parent adoptions have been allowed in several Massachusetts courts.

The Defense of Marriage Act and Why it Matters Most people outside the LGBT community have hardly heard of the Defense of Marriage Act, popularly known as DOMA. As I write this article the constitutionality of DOMA is currently being considered by the U.S. Supreme Court, having been struck down by several federal District Courts that have ruled it is unconstitutional. What you need to know as a mediator is this: DOMA is a terrible statute contradicting hundreds of years of American family law by superimposing federal policy onto what has traditionally been thought of as the province of the states — i.e., the definition and regulation of marriage. It was passed by Congress in 1966 in a hysterical legislative frenzy shortly after the Hawaii Supreme Court decided the case of *Baehr* [Baehr v. Lewin, 74 Haw. 650 (1993)] which held that a refusal to issue marriage licenses to same sex couples was a violation of that state's equal protection clause.

DOMA was an attempt to make an end run around the growing movement for same-sex marriage by declaring that marriage was only between a man and a woman and further, that the Full Faith and Credit Clause of the United States Constitution did not apply to same sex marriages. The Full Faith and Credit Clause [FFCC], in case you've forgotten, is that pesky little language which allows the United States to operate as a nation so that contracts in Oregon, can be enforced in Florida and vice versa. Or that a judgment in Michigan for money damages can be enforced in California. There are many, many examples of how the FFCC makes it easy for Americans to conduct commerce and travel across state lines living their lives to the fullest. Congress, and later many state legislatures, decided that heterosexual marriage was in such grave danger from the hordes of gay people seeking recognition for their relationships that it carved out this huge exception just for us. In practical terms it means your job (not to mention the lives of gay people) is a bit harder when you are attempting to mediate dissolutions between same sex couples.

For example, if a gay couple is married, they can file joint state tax returns in Massachusetts, but have to file separately for the federal government. When heterosexual couples divorce and transfer property between them, a specific statute allows that transfer to be "tax-free." For a married gay couple, that is not available. Married heterosexual couples can expect to receive certain social security benefits if their spouse dies or retires; gay people cannot. Married heterosexual couples can rely on receiving a portion of the spouse's retirement assets without much fuss; for

gay people it depends upon the type of retirement fund and whether it is governed by state law or federal law. In heterosexual divorces it is relatively easy to rotate who gets the dependency exception or split it; for gay couples only the person who is the legal parent can claim the deduction. If a lesbian couple is married in Massachusetts and then each partner moves to another state, they may not be able to get a divorce in that state. The reverse is not true; those coming to Massachusetts from states with civil unions or state domestic partnerships can have those relationships dissolved here according to two recent Supreme Judicial Court cases, *Elia-Warnken* [Elia-Warnken v. Elia, 463 Mass 488 (2012)] and *Hunter* [Hunter v. Rose, 463 Mass 488, 492 (2012).

The point that needs to be remembered is that the law treats LGBT relationships unequally. Your experience with heterosexual divorcing couples may be inadequate.

In addition, one party's assumptions about what is "fair" in a given situation may be influenced by the leverage of what the law provides. The party who knows he/she will win hands down in a custody battle may be less inclined to be accommodating to the non-biological non-adoptive partner. The person whose name is on the deed may not be so generous with the partner who didn't pay the mortgage but bought groceries and paid for vacations. On the other hand, many gay couples may be inclined to "ignore" the letter of the law and agree to an arrangement that they think is fair in the circumstances given the history of their relationship. For example, a couple may not be married but might agree to be governed by the factors in M.G.L. c. 208 §34 even if they aren't married.

Additional Considerations There are two additional considerations to be dealt with by the mediator, which are actually "pre-considerations." As with all relationships, gay or straight, it behooves the mediator to determine whether there has been violence in the relationship. M.G.L. c. 209A, the Abuse Prevention Act applies equally to married and unmarried couples, so there is truly an accessible remedy for dealing with this issue via the courts. All three levels of the trial court — district, superior and probate court — have jurisdiction to hear such cases, however the district and probate courts are the most available forums for obtaining 209A orders. Most domestic violence advocates do not think that mediation is appropriate in cases involving abuse and most courts have followed suit. Mediators should therefore

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make sure to do thorough intakes to determine whether or not violence has been an issue in the relationship prior to taking on the clients.

The second preliminary issue is whether to accept a mediation case involving same sex couples. While most of this article has emphasized how gay people are just like straight people, there are some cultural nuances that may influence the case as it would with couples who are of a different race or ethnicity. Beyond being "gay friendly," are you truly comfortable working with members of the LGBT community? Are you familiar enough with the resources available to gay people that you can provide meaningful referrals? Do you understand the family dynamics present in a gay family that are different from the "usual" case? Some individuals may be suffering from "internalized homophobia" or have fears of being "outed" when a party is not ready to be public about his or her orientation, either in employment situations or with their family.

If there are sexual issues involved in the case, can you maintain your neutrality despite your discomfort with some of the practices? For example, some gay male couples may not adhere to strict monogamous relationship rules; the issue may therefore be whether someone was having "safe sex" with the stranger, not whether one party feels "betrayed." Some couples may prefer to work with a gay mediator because of his or her familiarity with the LGBT community, so be prepared for one or both of them to ask your sexual orientation or whether you have worked with a gay couple before. For gay couples, this is an important question and while you wouldn't necessarily share your sexual orientation with most clients, it will usually be necessary to discuss this up front. On the other hand, because the LGBT community tends to be smaller, some gay couples may prefer to work with a straight mediator to avoid the discomfort of having someone involved with their breakup show up at a social event!

Conclusion In many respects mediating conflicts between LGBT clients is no different than involving heterosexual couples. Many of the emotional issues are the same but the law is decidedly different in its treatment of some of the issues involved with resolving the conflict. It is up to the mediator to be armed with as much information as possible about these differences in order to better serve his/her clients. In addition, the "best practices" will involve referrals to accountants and lawyers who are not only "gay friendly" but who are familiar with the changing landscape of LGBT law.

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MEDIATION AND THE UNAUTHORIZED PRACTICE OF LAW: PRACTICAL CONSIDERATIONS

By David A. Hoffman

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As a practical matter, mediators face three primary risks from the standpoint of the unauthorized practice of law.

First, the riskiest area for mediators who are not lawyers is the drafting of divorce agreements (typically called "Separation Agreements" in Massachusetts). Even for mediators who are lawyers, the drafting of such agreements can pose risks, and some mediators will not do so unless both parties are represented by counsel. (One of those risks is making a costly drafting error, but the other type of risk for lawyer-mediators relates to ethical rules regulating the dual representation of clients who have conflicting interests.[1]) A related risk, when the parties are not represented by counsel, arises if the parties ask for the mediator's assistance in filling out the forms necessary for filing their agreement with the court. In divorce cases, there are a number of forms that the parties are required to file. Most of them are primarily for administrative purposes, and some mediators are willing to help the parties prepare them. But the Rule 401 Financial Statement form, which each party must sign under the penalties of perjury, is a critical document, and mediators should never prepare such a statement for the parties because the mediator could be seen as vouching for the accuracy of the statement.[2] An ethics opinion from Michigan states that a mediator's preparation of all of the papers necessary for filing a mediated divorce agreement constitutes the practice of law.[3] An ethics opinion from Maine expresses the opposite view.[4] An ethics opinion from the ABA Section of Dispute Resolution contains a survey of the views from nine states and concludes that:[5]

> A lawyer-mediator may act as a "scrivener" to memorialize the parties' agreement without adding terms or operative language. A lawyer-mediator with the experience and training to competently provide additional drafting services could do so, if done consistent with the Model Standards governing party self-determination and mediator impartiality. Arguably, before taking on any new role in the process, the mediator must explain the implications of assuming that role and get the consent of the parties to provide those services. The mediator should also advise parties of their right to consult other professionals, including lawyers, to help them make informed choices.

Second, for mediators who are lawyers, there are risks associated with conducting mediations in jurisdictions where the lawyer-mediator is not admitted to practice law. This question is closely related to the question of whether mediation representation and advocacy in another state or foreign jurisdiction constitute the unauthorized practice of law. While that question must be determined by each state or jurisdiction, the ABA Model Rules of Professional Conduct – and the corollary Massachusetts Rules – explicitly permit such representation and advocacy "on a temporary basis" if the services are not of the kind "for which the forum requires pro hac vice admission."[6]

For all mediators there is the challenging task of differentiating "legal advice" from "legal information."

Finally, for all mediators, there is the challenging task of differentiating "legal advice" (which mediators are prohibited by the standards of mediation ethics from providing) from "legal information" (which mediators generally consider to be appropriate for sharing with the parties).[7] For example, most mediators would probably agree that informing the parties in a divorce mediation about the existence of the Court's child support guidelines is useful legal information, but predicting how the Court would apply the guidelines to particular factual circumstances (such as voluntary unemployment by one of the parties) would constitute legal advice.[8]

The Supreme Court of Virginia has published "Guidelines on Mediation and UPL" [9] that provide the following definition of "legal advice":

> "[A] mediator provides legal advice whenever, in the mediation context, he or she applies legal principles to facts in a manner that (1) in effect predicts a specific resolution of a legal issue or (2) directs, counsels, urges, or recommends a course of action by a disputant or disputants as a means of resolving a legal issue.

The Guidelines also caution mediators against "drafting settlement agreements that may be viewed as legal instruments." More specifically, the Guidelines states that "[u]nless required by law, a mediator should not add provisions to an agreement beyond those specified by the disputants.

The Virginia Guidelines offer the following examples of permissible "legal information":

- A mediator may provide legal resource and procedural information to disputants.

- A mediator may make statements declarative of the law (but the manner in which law-related information is provided to the parties, the purposes for which it is provided, and the expectations of the disputing parties can transform an otherwise permissible statement into legal advice.

- A mediator may ask reality-testing questions that raise legal issues.

- A mediator may inform the disputing parties about the mediator's experiences with a particular court or type of case.

The Guidelines also note that, when the parties are represented by counsel in the mediation, the impact of "legal information" from the mediator may be reduced.

Mediators must carefully consider whether, under the totality of the circumstances, a law-related statement is likely to have the effect of predicting a specific resolution of a legal issue or of directing the actions of the parties. Under this totality of the circumstances analysis, statements made by a mediator in the presence of the disputants' attorneys are less likely to influence or direct their actions than if made outside of the attorneys' presence.

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Footnotes

[1] See MBA Ethics Opinion 85-3 at 8 (noting that the parties' representation by separate and independent counsel may be a factor in assessing concerns about "dual representation" of the parties by the lawyer-mediator).

[2] In section 2(c) of the sample Agreement to Mediate in Appendix V, the following statement addresses this question: "Although the Mediator will provide the Parties with copies of the basic forms that they, or their counsel, need to submit to the Court, and the Mediator will answer questions about those forms, neither the Mediator nor the Mediator's staff will fill out the Parties' financial statement forms, since the Mediator (a) does not represent either or both of the parties, (b) does not engage in any independent inquiry into the Parties' finances, and therefore (c) cannot vouch for the accuracy or completeness of the Parties' financial disclosures."

[3] See Michigan Bar Ethics Opinion RI-351 (April 29, 2011) (available at http://www.michbar.org/opinions/ethics/numbered_opinions/ri-351.htm) ("A lawyer who acts as a mediator in a family law matter cannot draft all of the instruments, including pleadings, necessary to consummate an agreement reached by the parties through mediation while representing to both parties that the lawyer is acting only as a mediator and not as a lawyer representing either party. Drafting all of the instruments necessary to effectuate the divorce, including all pleadings, constitutes the performance and delivery of legal services to

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such an extent that the lawyer who provides all of those services is no longer serving merely as a third-party neutral.").

[4] Maine Professional Ethics Commission of the Board of Overseers of the Bar, Op. 137 (Dec. 1, 1993) (stating that a lawyer-mediator may draft the divorce judgment and other ancillary documents, such as promissory notes and deeds, so long as the mediator remains neutral, reflects the parties' resolution of the matter in the documents, and encourages parties to consult with independent legal counsel to review draft documents; construing language of bar rule broadly to find that "settlement agreement" can include ancillary documents that may be necessary to reflect fully the parties' resolution of the matter).

[5] ABA Section of Dispute Resolution, Committee on Mediator Ethical Guidance, Opinion SODR-2010-1 (2010) (available at http://meetings.abanet.org/webupload/commupload/DR018600/relatedresources/SODR_2010_1.pdf). For a comment by a lawyer-mediator opposing this view, see Elayne E. Greenberg, The Ethical Compass – Two for the Price of One is a Costly Choice: The Ethical Issues for Lawyer-Mediators Who Consider Drafting Agreements, 3 NYSBA New York Dispute Resolution Lawyer 8 (Fall 2010).

[6] ABA Rule 5.5(c)(3); Massachusetts Rule 5.5(c)(3).

[7] This task of differentiating legal advice from legal information is not unique to mediators. Many courts have wrestled with this question in the training of court personnel. See John M. Greacen, Legal information vs. legal advice—Developments during the last five years, 84 Judicature 198 (Jan. – Feb. 2001).

[8] For an interesting dissenting view – namely, that mediators should provide the parties, particularly unrepresented parties, with legal advice – see Russell Engler, And Justice for All – Including the Unrepresented Poor: Revisiting the Roles of Judges, Mediators, and Clerks, 67 Fordham L. Rev. 1987 (1999).

[9] The sources for the following discussion of the Guidelines can be found in ch. 2 (available at http://www.courts.state.va.us/courtadmin/aoc/djs/programs/drs/mediation/resources/upl_guidelines.pdf).

"There is no subject on which more dangerous nonsense is talked and thought than marriage."

George Bernard Shaw

COMPULSORY MEDIATION

By Paul Randolph

Imagine for a moment that mediation is a product—a stain remover—that can be purchased from any supermarket. Almost all who have used it praise it highly. The product "does what it says on the tin": it is cheap, quick, is easy to use, and saves time, cost and energy. On the adjacent shelf is another stain remover called litigation.

Almost all who have used it are highly critical of it: it frequently fails to deliver its promise of success: it is extremely costly, very slow, and takes up huge amounts of time, money and energy. Yet people queue up to purchase litigation, and leave mediation on the shelf. Why?

This bizarre situation, which defies all market trends, was confirmed by Professor Dame Hazel Genn in her research into the Automatic Referral to Mediation Pilot Scheme at Central London County Court, where in approximately 80% of cases, one or both parties objected to mediation. Other research also shows that people are not as enthusiastic about mediation as the government, the judges, and the mediation community think they ought to be.

So what is it that drives the public to purchase in droves a product they know is costly, lengthy and risky to use, in preference to one that is cheaper, faster and has little or no risk?

History of the Problem Many will argue that it is a matter of education: that there are still too many who remain ignorant about mediation, and who merely need to be informed. Indeed, in his Final Report on Civil Costs, Sir Rupert Jackson recommends that there should be a serious campaign to ensure that all litigation lawyers and judges are properly informed of how ADR works, and the benefits that it can bring.

However, the sad fact is that UK mediators have spent the last 20 years in just such a campaign—educating firstly solicitors and barristers, then judges, the public, financial institutions, insurers and large and small corporations. Can any of these people remain truly uninformed about mediation, in this age of IT, where Google can fully define any concept, and explain every variant of its use, in nano seconds? Or is it a case of the public, for some reason, not wishing to know?

Throughout history, Christian clergy, Rabbinical teachers, Muslim clerics, Buddhist monks, and Confucian philosophers have sought to teach the essence of mediation. Abraham Lincoln's 1850 notes for a lecture to his law students contained the following: "Discourage litigation. Persuade your neighbors to compromise whenever they can...As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough."

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Why Have All These Teachings Fallen Upon Deaf Ears? It is true that many law firms, corporations and insurance companies have been converted to mediation. Some judges have found that by referring, for example boundary disputes to mediation, they relieve themselves of having to hear the most tiresome and futile cases in their lists.

But still mediation has not been accepted by the legal system in the way most would have hoped.

"Even where the judiciary are not entirely convinced of compulsory mediation, they are virtually unanimous in agreeing that there must be "robust encouragement" to mediate."

The Problem Explained—Psychologically As a species, we are not programmed to compromise, we are programmed to win—and in winning we want to see blood on the walls! We have an innate aggression, which, when we are in dispute, transforms itself from a mere instinct to "survive" into an acute need to crush the opposition. We no longer act rationally or think commercially; instead we are driven by an emotional craving to triumph over our opponent.

Such emotions are not confined to squabbles over property boundaries or family assets. A survey in October 2007 by the Field Fisher Waterhouse, found that 47% of the respondents (chief executives and in-house lawyers) involved in commercial litigation, admitted that a personal dislike of the other side had driven them into costly and lengthy litigation.

The Amygdala—A Biological Rationalisation There is a biological explanation for such behaviour: it is the Amygdala, a part of our brain that controls our "automatic" emotional responses. From an evolutionary perspective, it governed the "fight or flight" reflex, associated with fear of attack. The amygdala reacts to the threat of attack by initiating a reaction within the brain which overrides the neo-cortex (the "rational" thinking part) and physically precludes any reliance upon intelligence or application of reasoning.

In present day terms of course, the attack which can trigger such a reaction is not necessarily a physical attack, but rather a personal attack upon our values and integrity. In a legal context, few attacks can be more deeply penetrating than an allegation of individual or corporate negligence or breach of contract.

It is for this reason that parties in dispute find themselves unable to approach the matter rationally—particularly in the initial stages of the dispute, when the emotions are raw, self esteem has suffered a battering, and the parties are driven by feelings of anger,

frustration, humiliation, and betrayal. It is at this stage that the lure of litigation is at its most powerful, offering everything a litigant yearns for: complete vindication, outright success, public defeat and humiliation of the other side, and vast sums of money!

Mediation cannot compete with such promises, and so little wonder that litigation is the disputant's preferred choice of a resolution process. It is not until the stress of protracted litigation begins to bite, that litigants start to consider alternative forms of resolution. Is it time for some form of compulsion to be introduced, to protect litigants from their own folly?

The Arguments Purist mediators have an intelligible aversion to compulsion: a cornerstone of mediation is that it is a voluntary consensual process. Mediators further argue that mandatory mediation would:

• create another strata of costly procedure;
• unfairly impede the public's right of free access to the courts;
• achieve statistically lower success rates.

Lord Phillips, the former lord chief justice, refuted these contentions at a Delhi Conference in 2008, stating "court- ordered mediation merely delays briefly the progress to trial and does not deprive a party of any right to trial"..."Mediation is ordered in many jurisdictions without materially affecting the prospects of success". He described it as "madness" to incur "the considerable expense of litigation....without making a determined attempt to reach an amicable settlement".

Mediation may not be appropriate in all cases, for instance where a definitive ruling on the law is required, or an injunction is sought; or the visibility of litigation may be desirable (as in some copyright cases). Yet it remains commercially indefensible to continue in dispute with another, where there is an alternative possibility of early resolution. Lord Clarke, then master of the rolls, in his speech at Grays Inn in June 2009, stated: "only a fool does not want to settle".

The Answer Surely it must be time to oblige parties to mediate without necessarily compelling them to settle? Mandatory ADR is accepted globally, from the US, through Scandinavia and China, to Australia and New Zealand. Furthermore, there is no constitutional bar in the UK to mandatory mediation. Article 5(2) of the EU Directive in effect permits our national legislation to make mediation compulsory, providing it does not deny the parties a right of access to the courts.

Positive sentiments upon mandatory mediation have been echoed by other senior members of the judiciary, pointing to the fact that the courts have existing powers under the case management provisions in the CPR to direct mediation. Even where the judiciary are not entirely convinced of

Continued on next page

"Throughout history, Christian clergy, Rabbinical teachers, Muslim clerics, Buddhist monks, and Confucian philosophers have sought to teach the essence of mediation."

compulsory mediation, they are virtually unanimous in agreeing that there must be "robust encouragement" to mediate.

Sir Rupert Jackson's Final Report concludes that despite the considerable benefits of mediation, parties should never be compelled to mediate. He recommends that courts can and should in appropriate cases:

• encourage mediation and point out its benefits;
• direct the parties to meet and/or discuss mediation;
• require an explanation from the party which declines to mediate; and
• penalise in costs parties which have unreasonably refused to mediate.

A "direction to meet and/or to discuss mediation" may amount to "robust encouragement", but is it sufficient? If not, then there will be an inevitable temptation to ever raise levels of robustness—and the line between encouragement and compulsion will gradually erode.

Protracted litigation can be one of the most destructive elements in society: it destroys businesses, breaks up marriages, and damages health. There is therefore an urgent social need to dissuade our neighbours from unnecessarily entering into prolonged disputes.

Baroness Scotland, when Attorney General, announced the government's aspiration of making ADR the mainstream dispute resolution process, and litigation the alternative. If persuasion through commercial logic cannot achieve this, then some form of compulsion is likely to be the obvious and most effective answer.

Paul Randolph is a highly successful mediator, with an established career as a Barrister, and many years' experience mediating in a large number and wide variety of disputes. He has developed a special expertise in the psychology of conflict, enablling him effectively to handle the emotional and psychological blockages that so frequently arise in disputes. Paul can be contacted online at www.paulrandolph.net

"Genius is eternal patience."

Michelangelo

HEALTH INSURANCE TAXATION ISSUES POST DIVORCE

By Chris Chen & Justin L. Kelsey

With children and income issues on top of the list of critical concerns, health insurance is often overlooked by divorcing individuals, their mediators and lawyers. Everyone usually agrees that health insurance is important, but expects that a solution will find itself.

In the case when one of the divorcing parties has employer provided health insurance, it is assumed that this will continue for the divorcing spouse. This is in fact mandated by Massachusetts law. Furthermore, people usually assume that there is no tax consequence to continue employer based health insurance for divorcing spouses. That is because employer based health insurance is considered a non-taxable fringe benefit for the employee and his or her family under IRS rules. Yet that does not necessarily imply a tax free benefit.

Under IRS rules, a benefit provided by an employer to the former spouse of an employee (hang in there!), is a taxable benefit to the employee. Hence the employee must pay federal income tax on his ex-spouse's health insurance. In turn that imputed income could be deducted as alimony by the taxed employee. That would create additional taxable income for the ex-spouse.

Yes, it is complex. To make matters worse, employers are just waking up to the issue. Starting in 2013, employers have started to apportion the value of fringe benefits on employees' W2 forms. This will greatly facilitate including an ex-spouse's share of health care insurance on the employee's W2 form in January 2014,and, thus increase the employee's taxable income. In turn, should the employee deduct the insurance as alimony, the ex-spouse must include it in his or her own taxable income, or face the consequences of underpaying taxes.

In divorce negotiation where the amount of alimony and the sharing of tax benefits are vigorously argued between the parties, to add health insurance choices and their consequences to the menu may not be welcome. It would be hardly better, for the parties find out the consequences after the fact.

As financial planners with a divorce specialty, we recommend that the ex-spouse should get his or her own insurance as soon as possible. That is not always feasible in the short run. As an alternative, we recommend choosing an option with all eyes open to the consequences.

Justin L. Kelsey is an attorney and mediator, who also practices collaborative divorce. His firm, Kelsey & Trask, P.C. is located in Framingham, MA and concentrates on Family Law and Bankruptcy. Learn more at www.KelseyTrask.com.

Chris Chen, CFP®, CDFA™ is a financial planner and partner at Insight Financial Strategists. He specializes in navigating clients through challenging life transitions such as retirement, divorce, and business succession. Learn more at www.insightfinancialstrategists.com.

MASSACHUSETTS FAMILY LAW: A Periodic Review

By Jonathan E. Fields

Court Must Consider Tax Consequences if Presented Under the Internal Revenue Code, alimony cannot be contingent on a child-related event lest it be re-characterized as non-deductible support. Here, the Probate and Family Court entered a judgment requiring the Father to pay alimony until the youngest child graduated from high school at which point it would be reduced. The Father sought post-judgment relief from the Probate and Family Court to no avail and appealed the denial. The Appeals Court affirmed the trial court judgment, and the SJC reversed, holding that because the law requires a court to consider "income" when determining alimony and property division, that court must consider income tax consequences as well when such evidence is presented. *L.J.S. v. J.E.S.*, 464 Mass. 346 (February 8, 2013).

Imputing Income: Reasonable Efforts to Find Employment The Probate and Family Court imputed income to an ex-wife based on her present ability to obtain employment. On appeal, the Appeals Court reminds us that the test for imputing income is a two-part inquiry: (1) whether the person has a present ability to obtain a particular job and (2) whether the person exercised "reasonable efforts" in the job search. Here, the trial court made no findings regarding the second requirement. Accordingly, the case was remanded to the trial court for further fact finding on the "reasonable efforts" issue. *Ulin v. Polansky*, 83 Mass.App.Ct. 303 (February 19, 2013).

Modifying Age of Emancipation of an Out-of-State Child Support Order As mediators and lawyers, we are often confronted with out-of-state divorce judgments. Since Massachusetts has the most generous emancipation statute in the country, those out-of-state judgments often provide that support ends long before a child's 23rd birthday, depending on the state. Steve and Mary Ellen Freddo had four children and were divorced in Florida. Following the divorce, they both moved to Massachusetts. Mr. Freddo brought a complaint for modification in Massachusetts when all of the children were over eighteen. Mr. Freddo's argument was (1) that under Florida law, children are emancipated at age eighteen, with exceptions not relevant here, and the age of emancipation is a non-modifiable matter and (2) under the Uniform Interstate Family Support Act (UIFSA), if an obligation is non-modifiable in the "issuing state" (Florida, in this case), then the "responding state" (Massachusetts) cannot modify it. The Probate and Family Court found Mr. Freddo's complaint frivolous and dismissed it, relying on the "post-eighteen" provisions of G.L. c.208 s.28. In this significant case of first impression, the Appeals Court reversed, holding that

Massachusetts could not modify the age of emancipation where it could not have been modified in Florida. Acknowledging the inconsistency between G.L. c.208 s.28 and UIFSA, the Appeals Court found that the latter takes priority; both the "full faith and credit purpose" of UIFSA and the fact that it was enacted after G.L. c.208 compel this conclusion. *Freddo v. Freddo*, 83 Mass.App.Ct 353 (February 26, 2013).

Inconsistency Standard v. Material Change of Circumstances What standard must a Probate and Family Court use when faced with a modification of a child support order when the case is within the Child Support Guidelines? The trial judge in this case dismissed the modification complaint because, although the ex-husband's income had increased, she found there was not a "substantial and material change in circumstances." Notably, the judge's decision did not mention the "inconsistency standard" in G.L. c.208, s.28 which states that a modification is appropriate "if there is an inconsistency between the amount of the existing order and the amount that would result from applying the Guidelines." Nevertheless, the Appeals Court affirmed her judgment. The SJC, however, reversed; it held that the "inconsistency standard" rather than the "material change in circumstances" applies where modifications of child support within the Guidelines are concerned. *Morales v. Morales*, 464 Mass. 507 (March 12, 2013).

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"Marriage is really tough because you have to deal with feelings...and lawyers."

Richard Pryor

WHAT'S NEWS?
National & International Family News
Chronologically Compiled & Edited by Les Wallerstein

American Adoptions From Abroad Plummet The number of foreign children adopted by Americans has plunged to its lowest level in more than a decade. The sharp decline in foreign adoptions dropped by 62 percent to 8,668 in the 2012 fiscal year from a high of 22,991 in 2004, according to a report released by the State Department. In the 2012 fiscal year, 2,697 children came to the United States from China, down from 7,038 in 2004, the statistics show. In 2004, 5,862 children from Russia were adopted here as opposed to 748 in the 2012 fiscal year, which ended in September. (Rachel L. Swarns, NY Times, 1/25/2013).

Suicide & Guns in America The gun debate has focused on mass shootings and assault weapons since the schoolhouse massacre in Newtown, Conn., but far more Americans die by turning guns on themselves. Nearly 20,000 of the 30,000 deaths from guns in the United States in 2010 were suicides, according to the most recent figures from the Centers for Disease Control and Prevention. The national suicide rate has climbed by 12 percent since 2003, and suicide is the third-leading cause of death for teenagers. Guns are particularly lethal. Suicidal acts with guns are fatal in 85 percent of cases, while those with pills are fatal in just 2 percent of cases, according to the Harvard Injury Control Research Center. (Sabrina Tavernise, NY Times, 2/14/ 2013).

Germany Backs Adoption by Same-Sex Couples Germany's highest court has ruled that "children do not differentiate whether their parents are of the same sex, united in a civil union, or a man and a woman in a traditional marriage, and therefore neither should the law," placing Germany on a growing list of European countries to expand the rights of same-sex couples. The Constitutional Court in Karlsruhe ruled in favor of a doctor from Münster who had challenged existing laws that forbade her to adopt her same-sex partner's daughter, who was raised by both women. The judges ordered the government to draw up legislation by June 2014 to allow such adoptions within same-sex unions. (Melissa Eddy, NY Times, 2/19/ 2013).

In Paid Family Leave, U.S. Trails Most of the Globe When it comes to paid parental leave, the United States is among the least generous in the world. The American situation hasn't materially improved since the landmark Family and Medical Leave Act, which requires larger employers and public agencies to provide up to 12 weeks of unpaid leave — as well as continuation of health benefits — for the birth or adoption of a child, or to care for an opposite-sex spouse, a parent or a child who has fallen ill (or

to deal with your own health problem). But about 40 percent of workers fall through the cracks because the law only requires many companies with 50 or more employees to comply. To get the benefit, employees must also have worked for the company for at least a year and logged 1,250 hours within the last 12 months. According to the Bureau of Labor Statistics, only 11 percent of all private industry workers have access to paid family leave (16 percent of state and local government employees have access to some paid family leave; federal workers don't get any, though all employees may be able to use accrued sick leave). (Tara Siegel Bernard, NY Times, 2/23/2013).

You May Now Kiss the Computer Screen In a twist that underscores technology's ability to upend traditional notions about romance, people are not just finding their match online, but also saying "I do" there. Internet marriages are on the rise in some immigrant communities. They are called proxy marriages, a legal arrangement that allows a couple to wed even in the absence of one or both spouses. Proxy marriages actually date back centuries. One of the most famous examples was between Louis XVI and Marie Antoinette, who were first married in her native Austria in his absence, before she was shipped to meet him in France. Proxy marriages via telegraph have also been documented. Only a few states in the US permit proxy marriages, and most require one partner to be in the military. But the United States generally recognizes foreign marriages as long as they are legally conducted abroad and do not break any laws here. (Sarah Maslin Nir, NY Times, 3/6/2012).

Pediatrics Group Backs Same-Sex Marriage The American Academy of Pediatrics declared its support for same-sex marriage for the first time, saying that allowing gay and lesbian parents to marry if they so choose is in the best interests of their children. The academy's new policy statement says same-sex marriage helps guarantee rights, benefits and long-term security for children, while acknowledging that it does not now ensure access to federal benefits. When marriage is not an option, the academy said, children should not be deprived of foster care or adoption by single parents or couples, whatever their sexual orientation. The academy's review of scientific literature that began more than four years ago concluded that a child's well-being is much more affected by the strength of relationships among family members and a family's social and economic resources than by the sexual orientation of the parents. (Catherine Saint Louis, NY Times, 3/21/2013).

Dementia Care Cost Is Projected to Double by 2040 The most rigorous study to date of how much it costs to care for Americans with dementia found that the financial burden is at least as high as that of heart disease or cancer, and is probably higher. And both the costs and the number of people with dementia will more than double within 30 years, skyrocketing at a rate

Continued on next page

that rarely occurs with a chronic disease. Financed by the federal government and published in The New England Journal of Medicine, the study provides the most reliable basis yet for measuring the scale of the problem. It shows that nearly 15 percent of people aged 71 or older, about 3.8 million people, have dementia. By 2040 that number will balloon to 9.1 million people. It also found that direct health care expenses for dementia, including nursing home care, were $109 billion in 2010. For heart disease, those costs totaled $102 billion; for cancer, $77 billion. The study also quantified the value of the sizable amount of informal care for dementia, usually provided by family members at home. That number ranged from $50 billion to $106 billion, depending on whether economists valued it by the income a family member was giving up or by what a family would have paid for a professional caregiver. (Pam Belluck, NY Times, 4/3/2013).

Who's Minding the Kids? A new Census Bureau report entitled "Who's Minding the Kids" found that US families with an employed mother and children under 15 paid $143 weekly on average for child care in 2011, compared with $84 (in 2011 dollars) in 1985. But the proportion of families that reported using paid child care at all dipped to 32 percent from 42 percent. And the share of monthly family income over all spent on child care has remained constant since 1997, at about 7 percent. Five percent of children ages 5 to 11 and 27 percent ages 12 to 14 regularly cared for themselves, the census survey found. Among children ages 5 to 14, 23 percent spent more than 10 hours a week unsupervised. The report also found that 13 percent of the children were in a day care center, 6 percent in nursery or preschool, a slightly smaller share in Head Start or kindergarten programs and about 11 percent were cared for by other nonrelatives. (Sam Roberts, NY Times, 4/4/2013).

Les Wallerstein is a family mediator and collaborative lawyer in Lexington. He can be contacted at (781) 862-1099, or at wallerstein@socialaw.com

"Of all the things I've lost, I miss my mind the most."

Mark Twain

MCFM NEWS

MCFM'S NEXT FREE PROFESSIONAL DEVELOPMENT WORKSHOP & ANNUAL MEETING

BILL AND SALLY GET A FINANCIAL EDUCATION: FINANCIAL STRATEGIES FOR MEDIATORS

Wednesday, May 8, 2013
WELLESLEY PUBLIC LIBRARY
530 Washington Street, Wellesley, MA
Wakelin Room, 2PM – 4PM

PRESENTED BY CHRIS CHEN & DIANE PAPPAS
MODERATED BY KATHY TOWNSEND

Chris Chen, CFP®, CDFA™ and Diane Pappas, CDFA™ of Insight Financial Strategists LLC, will present a finance professional development workshop specifically designed with the divorce mediator in mind. They will break down some of the major tax and financial issues that are often encountered in a divorce using case studies, supporting documentation and role playing. Some of the changes in the tax code due to the American Tax Payer Relief Act of 2012 and the subsequent impact on divorce settlements will also be addressed.

Chris and Diane will show you the benefits of working with a divorce financial professional and how it can help you and your clients achieve the best possible outcome.

PLEASE REGISTER IN ADVANCE AT
WWW.MCFM.ORG

ATTENDANCE AT MCFM PROFESSIONAL DEVELOPMENT WORKSHOPS QUALIFIES FOR CREDIT EARNED TOWARDS BECOMING AN MCFM CERTIFIED MEDIATOR

CONTACT TRACY FISCHER FOR CERTIFICATION DETAILS
tracy@tracyfischermediation.com

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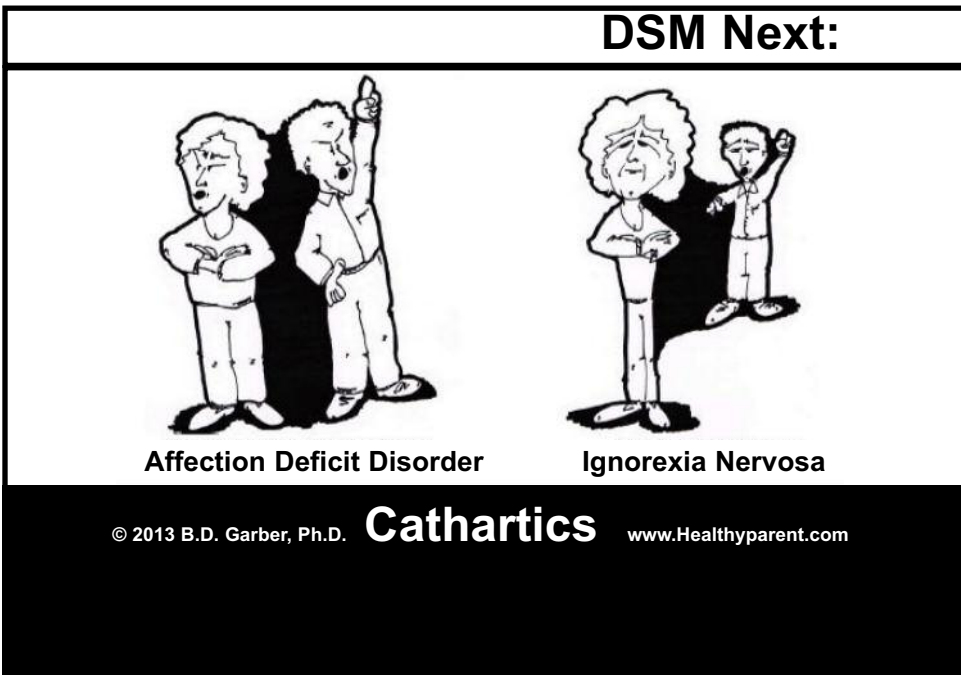
MEDIATION PEER GROUP MEETINGS

NEW Peer Group Focused on Financial Issues in Divorce Open to all divorce professionals, the purpose of the group is to focus awareness on the financial intricacies of divorce in an open forum that promotes discussion of a wide range of issues. Discussions will be led by Chris Chen, CDFA, CFP, Diane Pappas, CDFA, and group members. **FIRST MEETING: Thursday, May 23, 2013 from 10:00 am – noon at Cambridge Savings Bank, Arlington Center**, 626 Mass Avenue – upstairs conference room. Seating is limited. Please contact Diane @ (978-833-6144), diane.pappas@insightfinancialstrategists.com or Chris @ (781-489-3994), chris.chen@insightfinancialstrategists.com.

Central Massachusetts Mediators Group: We serve mediators in Central Mass and towns along Rt. 2 West of Rt. 128. We meet to discuss topics and/or cases, sometimes with guest speakers, in the offices of Interpeople Inc. in Littleton. Interpeople is located about 1/2 a mile off Rt. 495, at Exit 31. Meetings begin at 8:30 AM on the last Thursday of every month, except December, July and August. If you are a family and divorce mediator — attorney or non-attorney — you are welcome to join us. New members are asked to please call ahead of time: 978-486-3338, or email Shuneet at drthomson@interpeople-inc.com.

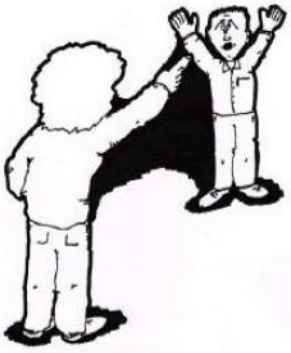


North Suburban Mediators Group: Join fellow mediators meeting to learn and share and network. Meetings are held at 8:30 a.m. on the second Tuesday of the month from January to June and from September to November at the offices of Lynda Robbins and Susan DeMatteo, 34 Salem Street, Suite 202, Reading. Please call Lynda at 781-944-0156 for information and directions. All MCFM members are welcome.

Pioneer-Valley Mediators Group: This Western Mass group will be meeting monthly in December on the first Wednesday of every month at the end of the day, from 4 to 6 pm or 6 to 8 pm (depending on the interest) in Northampton at a location to be announced. Please email Kathy Townsend for further information at Kathleen@divmedgroup.com.

Mediators in Search of a Group? As mediators we almost always work alone with our clients. Peer supervision offers mediators an opportunity to share their experiences of that process, and to learn from each other in a relaxed, safe setting. Most MCFM directors are members of peer supervision groups. All it takes to start a new group is the interest of a few, like-minded mediators and a willingness to get together on a semi-regular, informal basis. In the hope of promoting peer supervision groups a board member will volunteer to help facilitate your initial meetings. Please contact Kathy Townsend <Kathleen@divmedgroup.com> who will coordinate this outreach, and put mediators in touch with like-minded mediators.

Disorders of Divorce



Blamerexia Nervosa

Reactive Detachment Disorder

Benjamin D. Garber, Ph.D. is a New Hampshire licensed psychologist and certified Guardian ad Litem and Parent Coordinator. Ben is a nationally renowned speaker, researcher and an award winning freelance journalist, writing in the areas of child and family development, as well as an accomplished cartoon artist. He invites you to visit his website at www.healthyparent.com can be contacted at papaben@healthyparent.com

OFFER MCFM's BROCHURES TO PROSPECTIVE CLIENTS

Copies of MCFM's brochure are available for members only. Brochure costs are: **[1-20 @ 50¢ each, 21-50 @ 40¢ each & 51+ @ 30¢ each]** plus shipping, (unless you pre-arrange to pick them up at a professional development meeting or other MCFM event). A blank area on the back is provided for members to personalize their brochures, or to address for mailing. **Remember: when you buy 21 or more brochures the "per copy" price is less than the cost to print!**

TO OBTAIN COPIES MEMBERS MAY
call Ramona Goutiere: 781-449-4430
or email: masscouncil@mcfm.org

AN INVITATION FOR MCFM MEMBERS ONLY

All MCFM members are invited to fill out the Member Profile Questionnaire posted on the MEMBERS ONLY page of mcfm.org and submit it for publication in the FMQ. Please email your questionnaire with a personal photo (head shot) and an optional photo of your primary mediation space (or office) to wallerstein@socialaw.com. Since the questionnaire is intended to help others learn about you, feel free to customize it by omitting questions listed, or adding questions you prefer. Only questions answered will be published, and all submissions may be edited for clarity and length. **Please help us get to know you.**

HELP BUILD AN ARCHIVE!

In the spring of 2006, MCFM entered into an agreement with the Department of Dispute Resolution at the University of Massachusetts to create an archive of Massachusetts family-related mediation materials. The two key goals are to preserve our history and make it available for research purposes. We're looking for anything and everything related to family mediation in Massachusetts — both originals and copies — including: meeting agendas and minutes, budgets, treasurer's reports, committee reports, correspondence, publications, fliers, posters, photographs, advertisements and announcements.

We need your help to maximize this opportunity to preserve the history of mediation in Massachusetts. **Please rummage through your office files, attics, basements and garages.** ***If you discover materials that you are willing to donate please contact Les Wallerstein at wallerstein@socialaw.com.***

ANNOUNCEMENTS

* *

All mediators and friends of mediation are invited to submit announcements of interest to the mediation community to wallerstein@socialaw.com, for free publication.

* *

ELDER /ADULT FAMILY MEDIATION TRAINING

Presented by Elder Decisions - A Division of Agreement Resources, LLC

This program teaches mediators specialized skills and techniques for working with seniors and adult families facing issues such as living arrangements, caregiving, financial planning, inheritance/estate disputes, medical decisions, family communication, driving, and guardianship.

THREE DAY TRAININGS
July 30 - August 1, 2013

9:00 AM – 5:30 PM on days 1 & 2
9:00 AM – 4:00 PM on day 3
Newton, MA

Lead Trainers:
Crystal Thorpe and Rikk Larsen

Cost: $775 by early registration deadline, $875 thereafter.
Trainings include lunches, snacks, and course materials.

For detailed information and registration:

visit: Elder Mediation Training
email: training@ElderDecisions.com
or call: 617-621-7009

$100 DISCOUNT FOR MCFM MEMBERS

NEW BEGINNINGS

An interfaith support group for separated, divorced, widowed and single adults in the Greater Boston Area. **Meets year-round, every Thursday, from 7:00 to 9:00 PM, at** Wellesley Hills Congregational Church, 207 Washington Street. For more information call 781-235-8612. **Annual Dues $50.**

For program details & schedule visit
www.newbeginnings.org

Continued on next page

THE DIVORCE RECOVERY SERIES

Led by Mary Vanderveer, M. Ed., LCSW

The Divorce Recovery Series is an outreach program of The First Congregational Church in Norwood, offered as a community service. Groups are ongoing and continue throughout the year. All participants are welcome, regardless of religious affiliation.

Divorce Recovery is a support group for those who are separated, considering divorce, or divorced. It offers support and healing to people experiencing the pain of separation and divorce. Group members gain knowledge regarding the emotional stages of divorce and how to cope with lifestyle changes. Each session includes discussion and presentation of topics such as denial and bargaining, anger, depression, acceptance, forgiveness, alone without loneliness, letting go, spirituality in one's life, and creating a new lifestyle. **The cost is $90 for eight consecutive weekly sessions.**

Moving Ahead is a support group for those who have completed *Divorce Recovery* that addresses the needs of people who are rebuilding their lives after divorce. As a person's self-esteem takes a toll when experiencing divorce, the focus is to support people in creating a new and positive lifestyle. Topics include affirming and validating ourselves, self-acceptance, taking responsibility, changing negative thinking, reconnecting and developing spirituality, developing support systems, setting limits and boundaries. **The cost is $90 for eight consecutive weekly sessions.**

FOR MORE INFORMATION VISIT: http://firstcongregational-norwood.com
TO REGISTER: call 781-762-3320, or email: firstcongo.norwood@verizon.net

THE CHILD & FAMILY WEB GUIDE
ONLINE ACCESS TO CHILD DEVELOPMENT INFORMATION

The Child & Family Web Guide was created in April 2001 by Professor Fred Rothbaum and Dr. Nancy Martland, of the Tufts University Eliot-Pearson Department of Child Development. The Web Guide describes trustworthy websites on topics of interest to parents and professionals that have been systematically evaluated by graduate students and faculty in child development. The Web Guide is easily searched by subject, including many of constant concern to family mediators, e.g., divorce, separation and stepparents. It also offers several features requested by parents, e.g., 'ask an expert' sites and 'research news' sites. **The goal of the Web Guide is to give the public easy access to the best child development information on the Web**.

www.cfw.tufts.edu

JOIN US

MEMBERSHIP

MCFM membership is open to all practitioners and friends of family mediation. MCFM invites guest speakers to present topics of interest at four, free, professional development meetings annually. These educational meetings often satisfy certification requirements. Members are encouraged to bring guests. MCFM members also receive the Family Mediation Quarterly and are welcome to serve on any MCFM Committee. Annual membership dues are $90, or $50 for fulltime students. Please direct all membership inquiries to **Ramona Goutiere at masscouncil@mcfm.org**.

REFERRAL DIRECTORY

Every MCFM member with an active mediation practice who adheres to the Practice Standards for mediators in Massachusetts is eligible to be listed in MCFM's Referral Directory. Each listing in the Referral Directory allows a member to share detailed information explaining her/his mediation practice and philosophy with prospective clients. The most current directory is always available online at www.mcfm.org. The annual Referral Directory listing fee is $60. Please direct all referral directory inquiries to **Rebecca J. Gagné at rebecca@gagneatlaw.com**.

PRACTICE STANDARDS

MCFM was the first organization to issue Practice Standards for mediators in Massachusetts. To be listed in the MCFM Referral Directory each member must agree to uphold the MCFM Standards of Practice. **MCFM's Practice Standards are available online at www.mcfm.org**.

CERTIFICATION & RECERTIFICATION

MCFM was the first organization to certify family mediators in Massachusetts. Certification is reserved for mediators with significant mediation experience, advanced training and education. Extensive mediation experience may be substituted for an advanced academic degree.

MCFM's certification & recertification requirements are available online at www.mcfm.org. **Every MCFM certified mediator is designated as such in the Referral Directory.** Certified mediators must have malpractice insurance, and certification must be renewed every two years. Only certified mediators are eligible to receive referrals from the Massachusetts Probate & Family Court through MCFM.

Certification applications cost $150 and re-certification applications cost $50. For more information contact **S. Tracy Fischer at tracy@tracyfischermediation.com**. For certification or re-certification applications contact **Ramona Goutiere at masscouncil@mcfm.org**.

DIRECTORATE

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EDITOR'S NOTICE

MCFM

Family Mediation Quarterly

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The FMQ is dedicated to family mediators working with traditional and non-traditional families. All family mediators share common interests and concerns. The FMQ will provide a forum to explore that common ground.

The FMQ intends to be a journal of practical use to family mediators. As mediation is designed to resolve conflicts, the FMQ will not shy away from controversy. The FMQ welcomes the broadest spectrum of diverse opinions that affect the practice of family mediation.

The contents of the FMQ are published at the discretion of the editor, in consultation with the MCFM Board of Directors. The FMQ does not necessarily express the views of the MCFM unless specifically stated.

The FMQ is mailed and emailed to all MCFM members. The FMQ is mailed to all Probate & Family Court Judges, all local Dispute Resolution Coordinators, all Family Service Officers and all law school libraries in Massachusetts. An archive of all previous editions of the FMQ are available online in PDF at <www.mcfm.org>, accompanied by a cumulative index of articles to facilitate data retrieval.

MCFM members may submit notices of mediation-related events for free publication. Complimentary publication of notices from mediation-related organizations is available on a reciprocal basis. Commercial advertising is also available.

Please submit all contributions for the FMQ to the editor, either by email or computer disk. Submissions may be edited for clarity and length, and must scrupulously safeguard client confidentiality. The following deadlines for all submissions will be observed:

Summer: July 15th Fall: October 15th
Winter: January 15th Spring: April 15th

All MCFM members and friends of family mediation are encouraged to contribute to the FMQ. Every mediator has stories to tell and skills to teach. Please share yours.

MASSACHUSETTS COUNCIL ON FAMILY MEDIATION

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