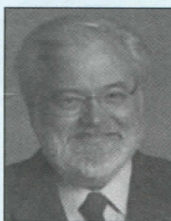


Where We Have Been, Where We Are, and the Road That Lies Ahead

By Stephen K. Erickson

As Family Mediators, we are in a field that developed out of a reaction to the excesses and misadventures of the way divorce was practiced in the early 1970s. Our beginnings took family conflict on a completely new track and our future must continue in that same new direction. This column and subsequent ones will discuss a theme I have written about in the past, covering concerns most recently expressed in an article (see <http://natlctr4adr.org/>) that I co-authored with Marvin Johnson, about seepage of adversarial methods into the practice of family, as well as other areas of mediation. I have called this the “lawyerization” of the field and it is essentially a blurring of the boundaries between an adjudicative process of conflict resolution and a mediation process. The reason this topic is so important is that it affects our own survival as a distinct profession; we are not a subset of the practice of law.

When I worked with Jim Coogler in 1979, after receiving a fellowship to study mediation, very few people were doing divorce mediation. We did not know as much as we do now about the interventions that work, but we knew that we must create a different path that moved us away from the courthouse and the law. Recently, I happened upon a box of old training manuals that I had prepared in 1980, as director of training for the old Family Mediation Association. I noticed that, even then, I was writing about the importance of moving away from the law. I suggested in one section of the training manual that it seemed to work much better to ask a couple to work on building a parenting plan instead of fighting over who was a better or worse parent, or who should get custody (i.e. ownership) of the



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children. My lecture notes talked about how this allowed couples, with less expense, to actually focus on developing a mutual plan rather than on a contested battle, and resolve the real issues of correcting poor parenting, addressing safety issues, dealing with the presence of significant others, and a host of other important parenting problems that lead to custody disputes. My therapist friends pointed out that this is called re-framing, and we soon began to recognize its power.

I recently talked to a couple who was considering using me as a mediator in their divorce. The husband expressed a great deal of reluctance, stating they had already spent over two thousand dollars in a half-day of mediation as they paid for their two attorneys and the two mediators, and it got nowhere. When I inquired about what happened, it soon became apparent that he had participated in the mandatory court ordered Early Neutral Evaluation (ENE) program. This program involves a couple of attorneys, or maybe a retired judge and an attorney hearing each lawyer pitch his or her case to two evaluators who then tell the parents which of them has the weakest or strongest case, and they predict what would likely happen in court if there were a custody trial. Many of the court clerks and lawyers frame this to clients as a required “mediation process”

(within the evaluative mediation approach) But, this couple clearly had not read the article Marvin and I wrote about how adjudication is seeping into the mediation process, like a cancer, so how can I fault the guy for not knowing what is going on?

I hate to sound like an alarmist but let me ring the bell here as loudly as I can. Around the country, the public is being confused by the way the term mediation is now being used. In the early days, we never had this problem, because it was either litigation or mediation, and, in those days they said mediation had no chance of working effectively with the high emotional conflict of divorce. But, of course, we showed the way.

Assisting couples to find fairness, self determination, and mutual preservation of relationships through a guided process of mediation must, as in the early years of the field, move us onto a different road that takes us beyond the law and away from the courthouse. On this road, we must voice our opposition to those in the Bar and in the Court who persist in mis-naming an adjudicative process as mediation. What the husband with whom I spoke was describing was not “evaluative mediation,” it was in fact not mediation at all, but rather an adjudicative early neutral evaluation that predicts the outcome of a case in court

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based upon a down and dirty quick-pitching of the facts by the parties' lawyers. To counter this trend (and I hear about versions of this evaluative approach being used around the country and in Canada), I suggest that we think of ourselves as a small organization of practicing professional mediators, rather than an all-inclusive, eclectic group of those who are mildly interested in mediation. As we make our path known, we may end up not claiming as members collaborative lawyers, cooperative lawyers, well-meaning retired judges who think they are mediating, or anyone else who thinks mediation is a nice idea, but are not actually trained in mediation. They will often tell you, "I really don't need any training, I have actually been mediating in my (law practice) (therapy practice) for the past twenty years without knowing it." Those folks have their own organizations, which are called the ADR section of the bar, the retired judges newly announced ADR firm, or whatever their profession of origin might be until they decide to learn the difficult and demanding skills of mediating conflict within the framework of intense emotional family issues. We certainly can welcome anyone who wants to help in this cause, but I, for one, am tired of debating models of mediation. There is one model and it is 180 degrees opposite from the assumptions of an adjudicative process. And, as Judge Jack Ethridge wrote in his marvelous 1989 book, *A Guide to Mediation in Georgia*: "Mediation is not about right or wrong." All adjudicative models of conflict resolution are about right and wrong, and mediation is about going down a different path. This new path has brought us parenting plans, preserved parental relationships, created better post-divorce compliance rates, and most importantly, supported families in not being damaged by the high cost and excesses of an adjudicative model of conflict resolution.

Let us move, not just physically away from the courthouse, but away from the evaluating, coercing, badgering, posturing, controlling, manipulating, bullying, predicting, advising, winning, losing, and fighting behaviors of an adjudicative process. The reason that the husband I spoke with was so guarded about starting mediation again is that he said one of the mediators/evaluators told him that since he was unlikely to prevail in a custody battle, why didn't he just try to accept and make the best of being a less than half-time parent to his two boys. However, he was principled about not being marginalized as a visiting, non-custodial parent.

In my next column, I will write about how our future road must be on a path towards building a strong network of skilled, professional, client-centered mediators devoted to a completely different way of functioning, complete with certification, much stronger standards of practice, and branding what we do. Otherwise, we will go the way of Xerox (Ever hear much about them anymore? They invented copying, but it got away from them).

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