Resolving the Legal Problems of the Poor: A Focus on Mediation in Domestic Relations Cases

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by Penny L. Willrich

I. Introduction

And the king said, Bring me a sword. And they brought a sword before the king. And the king said, Divide the living child in two, and give half to the one, and half to the other. Then spoke the woman whose the living child was unto the king, for her bowels yearned upon her son, and she said, O my lord, give her the living child, and in no wise slay it. But the other said, Let it be neither mine nor thine, but divide it. Then the king answered and said. Give her the living child, and in no wise slay it: she is the mother thereof.

Kings 3:24-27 (King James)

In the normal course of family law disputes and custody litigation, we do not encounter persons who are so self-sacrificing or conscientious, and thus most resort to the legal system to resolve issues of custody, property division, and domestic violence.

Family disputes and domestic relations matters comprise the largest category of applications for assistance to LSC-funded civil programs across this country. Statistics show that one out of every three marriages will end in divorce, that this proportion is steadily increasing, and that a majority of these divorces involve children. As a result, a growing number of family disputes become a part of the adversarial process involving lawyers and courts.

This article will consider the use of mediation in domestic relations matters and offer perspectives that may be used as tools for legal services advocates. Special attention will be focused on the differences and similarities between conciliation, arbitration, negotiation, and mediation; however, this article will not address family mediation in parent-child disputes or in juvenile justice cases.

A family is bound together by intense and long-lasting ties of past experience, social roles, mutual support, and expectations. The actions of any one affect the whole. A ripple set in motion anywhere, internally or externally, makes itself felt throughout the system. Understanding individual behavior patterns in relation to the family may assist in determining whether mediation is an appropriate alternative.

Family conflict and disputes exist when the parties are involved in competition to meet objectives that are perceived as, or actually are, incompatible. In the domestic relations setting, however, conflict frequently goes beyond competitive behavior and acquires the additional component of inflicting physical or psychological damage on an opponent. Proponents of mediation in family law matters tend to want to wave a magic wand to make the conflict productive for each party.

The final focus of this article is on whether legal services advocates can empower clients to lay aside distrust and animosity for their opponent in order to work out solutions that will satisfy the interest of the clients. The challenge, then, is whether mediation can be used as a useful alternative to dispute resolution for legal services clients.

II. Understanding Mediation

In the last 20 years, a quiet revolution has occurred in the United States as mediation programs of all sorts have developed. Family mediation in divorce cases has been offered as an alternative to the adversarial system. It is not supposed to be competitive. It is not supposed to be conflictual. It is not supposed to be authoritarian, coercive, alienating, or traumatizing. It is not supposed to be expensive, lengthy, or disempowering. Of course, what mediation is not hardly enlightens us about what it is.

However, before we begin an in-depth discussion of what mediation is as an alternative dispute resolution mechanism, we should examine its historical development. Family mediation is not a new phenomenon for conflict resolution in our society and in fact has been practiced for at least two
Family mediation is not a new phenomenon for conflict resolution in our society and in fact has been practiced for at least two millennia, having originated in the Eastern nations—China, Japan, Korea, and Ceylon—under the influence of Confucianism.

From these roots, family mediation established branches in the United States, in organizations such as the Jewish Conciliation Board (established in 1920) and the Chinese Benevolent Society, which were dedicated to peaceful resolution of family and community disputes. Moreover, the early Quakers relied upon mediation for similar purposes, occasionally including marital problems. Parallel developments in the mediation of labor-management disputes helped create a climate receptive to alternative means of dispute resolution. In 1913, the United States Department of Labor was organized. By 1939, the Los Angeles County Conciliation Court had been established and was originally dedicated to marital reconciliation. In 1947, the Federal Mediation and Conciliation Service in Washington, D.C., was created. In 1969, the American Arbitration Association was established. In 1973, the Society of Professionals in Dispute Resolution was founded.

The acknowledged patriarch of private family mediation is O.J. Coogler, who, in 1974, established the Family Mediation Association in Atlanta. He wrote a number of articles on family mediation and taught this model of mediation to other professionals. After his death in 1982, the Academy of Family Mediators was established to carry on Coogler's legacy and training.

Mediation has been defined as the "intercession or friendly intervention for settling differences between persons, nations, etc." In the family law context, it is a process by which the parties to a family dispute are assisted by an impartial, professional third person in reaching an agreement on such matters as division of property, alimony, the custody of children, visitation, spousal maintenance, and child support.

Mediation is an alternative to the conventional method of adversary litigation before a court in dealing with family disputes and mediation is the most popular concept of alternative dispute resolution for family conflict. However, there are two "cousins" to mediation that must be described in order to understand the full impact of using mediation in family law. These "cousins" are conciliation and arbitration. Though they are ostensibly different devices, their similarities often beget similar results. Conciliation's primary goal is reuniting the parties, while arbitration acts to force the parties to an agreement through a third party who makes the decisions.

Approximately one half of the states now have statutes creating some form of court-related conciliation procedure. The statutes vary in form and substance: some of them make the process entirely voluntary; others place pressure on the parties to participate by staying the divorce action or ordering the parties to attend the counseling session. In some states, the success of conciliation is measured by a written agreement. The procedure is either free of charge, or the costs are shared by the parties or incorporated into the filing fees. Several statutes provide that information coming out in the course of conciliation conferences shall be confidential and shall not be revealed in later litigation.

Although the idea of court-related conciliation has been in existence for several decades, there is a scarcity of reliable information about its effects. The height of this procedure's popularity was in the 1960s, when published information was positive, yet the process has not been shown to have had a significant impact upon the number of divorces filed for each year. It seems reasonable to conclude that when parties have reached the point of seriously considering divorce and actual filing, it is usually too late for conciliation services that are aimed at maintaining harmony in the marital relationship.

Arbitration is another technique being considered by many jurisdictions for use in family disputes. Arbitration offers the advantages of saving time and money when one faces long court delays. Compared to litigation in the public courts, arbitration offers informal procedures and privacy. Arbitration awards are final and may be confirmed and enforced by the entry of judgments, with few grounds for set aside or modification.

Arbitration is distinguished from conciliation or mediation in that the arbitrator decides disputes based upon the presentation of facts and evidence as a substitute for actual litigation. The conciliator or mediator advises or recommends specific action or exercises influence to induce the parties to come to an agreement. 17 These difficulties arise out of the relationship between the arbitration process and the substantive domestic relations law. For example, arbitrators in commercial settings are often allowed to take into consideration their experience in business, customs of the trade, and the equities of the case. 18 This is an assumed advantage of arbitration that enables cases to be decided sensibly without hindrance from the hypertechnical rules of law. The law of domestic relations often reflects public policies that are extremely important to decisions as applied to intimate human relationships.

Suppose that as a legal services advocate you encouraged your client to agree to arbitration as a means of quickly disposing of the issues, and a joint custody award results. Several months later, your client returns alleging that the couple’s child was molested while he or she was in the other parent’s care or perhaps the other parent is seriously frustrating the joint custody arrangement. One party has asked for arbitration of the issue to resolve the difficulty. Certain questions then arise. Is this modification action arbitrable? Has arbitration removed the parents’ power of the court? If arbitrable, would either party be entitled to a de novo determination by the court?

Courts have expressed a variety of opinions on the subject, but the majority view is that custody, visitation disputes, and child support are arbitrable, but are also subject to a court review on the merits. 19 The obvious consequence is that the parties and the court may be burdened with the expense and time of two proceedings when the purpose of arbitration is to save time and money. It is incumbent upon advocates to analyze fully the consequences of an arbitration clause in a settlement agreement. The advocate should insist that the arbitrator be familiar with and bound by the substantive law.

Mediation is distinguishable from both conciliation and arbitration. Mediation’s major purpose is to aid in the procurement of the settlement agreement and to end the relationship as the parties desire, without the hostility and the psychological and material costs imposed by adversary litigation. Mediation does not seek to achieve reconciliation of the parties as in conciliation. In theory, mediation is further distinguishable from arbitration in that the arbitrator makes decisions for the parties while the mediator facilitates the parties in making the decisions themselves.

During the 1980s the commentary on mediation has been extensive, often emphasizing the assumed benefits without substantial analytical data. Proponents of mediation claim that mediation gives the parties responsibility for their own divorce settlement and reduces the hostility and destructive behavior associated with the proceedings. Supposedly, this element of responsibility leads to a greater tendency to comply with the agreements arrived at, improved postdivorce relations, and the fostering of custody-visitor arrangements that are more beneficial to the children. Proponents believe that the lawyer’s role in mediation should be minimal. Many of the articles on mediation characterize divorce lawyers as rashly aggressive people who litigate every case with disregard for the broader, long-term interests of the client. 20

The publicity given to mediation has led some states to provide for it as part of the divorce procedure. 21 Some of these statutes require mandatory mediation in all disputed custody cases. 22 Others authorize the court to order mediation in certain circumstances. 23 The court may authorize mediation at the request of the parties. 24 Some statutes require any pending divorce proceeding stayed until mediation is concluded. 25

Some people turn to mediation because they think it is the only alternative to a knock-down-drag-out court fight, despite empirical data showing that most family disputes never reach the courts and are settled instead by lawyer-negotiated agreements.

III. Advantages vs. Disadvantages

Mediation is designed to be a participatory and consensual process in which a third party (the mediator) encourages the disputants to find a mutually agreeable settlement by helping them to identify the issues, reduce misunderstandings, vent emotions, clarify priorities, find points of agreement, explore new areas of compromise, and ultimately negotiate an agreement.

Proponents feel that mediation is the answer to court congestion and believe that the adversarial system is inappropriate when applied to marital disputes. Accordingly, they have accused the adversarial system of increasing trauma and escalating conflict, 26 of not being in the best interest of the child because it encourages a “dog and cat” fight, 27 and of involving poorly trained lawyers who are unable to deal with the psycho-

22. See Oregon and California statutes, supra note 21.
23. See Alaska, Louisiana, and Maine statutes, supra note 21.
logical effects of divorce. Proponents of mediation also feel that courts do not address unresolved emotional feelings, fail to enhance the cooperation and communication of the parties, and foster low commitment to the eventual order of the court.

Proponents believe that, compared to the adversarial system, mediation is more expeditious, inexpensive, private, procedurally reasonable, and amenable to truth-finding and the complete airing of grievances. It can deal with the basis of problems and reduce the alienation of the parties. Mediation leads to the development of satisfying agreements that are perceived as fair and acceptable over time. It appeals to the parties' better nature to resolve their differences in a cooperative rather than a competitive manner. Supporters further contend that mediation enhances the adjustment of children following separation and divorce by promoting parental cooperation, reinforcing parent-child bonds, and encouraging visitation. Finally, mediation proponents contend that the process will improve the child support payment performance of the noncustodial parent.

As a result of the growth in popularity of the nonadversarial approach to marital dispute resolution, some court-sanctioned mediation or conciliation services have been established. Private mediation services exist across the country, with judges, lawyers, and mental health professionals becoming interested in this new—albeit, lucrative—area of practice. Though popular, few studies have empirically documented the success of mediation programs.

It is not easy to criticize a system that has been heralded as the "litigation alternative" of the future, especially considering the popularity and wide acceptance of mediation. However, a closer look must be taken at the roles played by lawyers and the inherent problems faced by the lawyer-mediator. It is necessary to analyze the role that mediation plays in domestic disputes that contain a history of domestic violence, as do so many of the cases affecting legal services clients, as well as to reveal the inconsistencies in the law between and within the states.

The lawyer-turned-mediator faces glaring ethical problems. Model Code violations, malpractice liability, and exploitation of unsuspecting clients are just a few of the potential hotspots. Lawyers play a variety of roles in the mediation setting—as mediators, postmediation advisors, drafters, and postmediation representatives. State and local bar associations have issued opinions on mediation and dual representation. They have generally offered opinions on a narrow class of cases in which mediation would be ethically safe. A typically safe case might be one in which the parties have relatively few issues to resolve and have agreed to allow the lawyer to facilitate the negotiation.

Mediation's major purpose is to aid in the procurement of the settlement agreement and to end the relationship as the parties desire, without the hostility and the psychological and material costs imposed by adversary litigation.

Mediation is often advertised as a money saving device. However, most mediation services, unless run by the court, tend to be quite expensive and add one more layer to the already expensive and confusing process. When one disputant becomes overbearing, overreaching, or oppressive, is the lawyer-mediator to be impartial, neutral, or fair? Neutrality and fairness have not been defined, but it would seem that the mediator has a duty to prevent the execution of an agreement that is not fair. Most authorities agree that a lawyer should not mediate a case where one disputant is a former client, and after mediation, the lawyer should not represent either of the parties in the court proceeding. The authorities also agree that the lawyer-mediator should step in and "empower" the less effective disputant or somehow balance power. Yet, it is difficult for a lawyer-mediator to do so without representing the interests of the disadvantaged party. This creates the potential for serious conflict of interest for lawyers who participate in mediation. Furthermore, if the lawyer participates on a team or with a mediation center, he or she may be assisting the unauthorized practice of law or engaging in the solicitation of clients in violation of the Ethical Canons.

Regulations and pronouncements of the state bar associations vary from state to state, contain internal inconsistencies, and generally grant conditional approval to lawyers involved in the mediation process. The Model Code does permit a lawyer to act as an "impartial arbitrator or impartial mediator" in matters involving present or former clients, if the lawyer discloses the relationship. It can also be argued that in mediation, no one—lawyer or nonlawyer—is practicing law.

In the domestic violence situation, mediation has been deemed dangerous for the battered woman, because neither good faith nor equality of bargaining power exists in a battering relationship. When a woman has been physically abused by her husband, she is seeking help at a point of crisis in her life. Advocates who have fought for protection of battered women argue that mediation takes the criminal element out of wife beating—especially mediation exercised by the police officers who answer the calls—in essence telling society that this type of violence is not a crime. Others say that it is the perfect opportunity for both parties to vent their feelings. However, a woman who has been victimized for years may not be able to participate as an equal party in a discussion with an abuser whom she fears.

Behavioral experts state that the burden on the battered woman must be weighed against the abuser’s willingness to take responsibility for his actions. It is characteristic of batterers to deny responsibility for their abusive behavior and to be unwilling to seek help. Mediation is not a substitute for criminal prosecution nor is it a substitute for therapy. However, mediation may be one mechanism to facilitate a change in the current pattern of behavior—i.e., the violence.

In addition to situations of domestic violence, legal services advocates indicate that a person’s poverty may make him or her vulnerable to the drawbacks of mediation. Advocates have criticized mediation statutes for their failure to protect poor clients, failure to exempt spouse or child abuse cases, and failure to provide procedural safeguards. In these statutes there are no provisions of waiver for vulnerable, poor, or undereducated clients. There are no entitlements to the appointment of counsel for legal advice before, during, or after mediation. Furthermore, poor clients may not seek representation, advice, or information prior to mediation and may willingly proceed to mediation under the belief that they have no alternative.

Needless to say, uniformity is certainly lacking from a procedural perspective. Some states mandate mediation; others make it purely voluntary. Colorado provides free mandatory mediation of postdecelre disputes about custody and visitation, and North Dakota has passed a law that provides for mediation. And to open the lines of communication. Structured mediation has been developed in 1974 by O.J. Coogler, who, through mediation, combined transactional analysis and family systems training. "Structured mediation," or Coogler’s model, attempts to eliminate unnecessary suffering in marital disputes, to promote cooperative problem solving, and to open the lines of communication. Structured mediation relies heavily on a set of rules and procedures to guide rationality, foster cooperation, and reduce pain.

The three most popular forms of mediation are therapeutic mediation, labor-management mediation, and structured mediation. The most frequently used form of mediation in court-connected services is the therapeutic model, which requires mediators to be familiar with family system theories, child psychology, and child development. Proponents of this model agree that mediation is not therapy but that it has a therapeutic effect ranging from reducing spousal violence to increasing individual self-determination and self-worth. The two most prominent features of the therapeutic model are that the mediator insists that the couple resolve the emotional issues before they deal with the substantive issues of divorce and that the mediator combines mediation with parent training and counseling.

The labor-management model is used primarily in labor-management negotiations, civil rights, and employment matters. Because of its long history, this form of mediation has been adopted by many private mediation services. In the labor model, the mediator is a facilitator who offers assistance to parties in developing their positions. The mediator’s goal is to help the parties reach a resolution or written agreement. The mediator is an advocate of the process and, though concerned about the balance of power, fashions the mediation so that the process of negotiation produces a fair settlement.

The structured mediation model was developed in 1974 by O.J. Coogler, who, through mediation, combined transactional analysis and family systems training. “Structured mediation,” or Coogler’s model, attempts to eliminate unnecessary suffering in marital disputes, to promote cooperative problem solving, and to open the lines of communication. Structured mediation relies heavily on a set of rules and procedures to guide rationality, foster cooperation, and reduce pain.
In structured mediation a minimum of ten sessions is required and the disputants must agree that if they are unable to resolve an issue after a certain length of time, they will submit that issue to arbitration. Each party must sign a contract confirming that he or she understands the rules, roles, and definitions, before beginning the process. The structured method attempts to equalize the power before the process begins, rather than during the mediation sessions. The rules require the mediator to establish a written set of goals and objectives that identify the issues and positions of the parties. The rules require each of the parties to recognize the rights of any children of the marital relationship and, where necessary, the need for intervention of a third party to represent the children’s concerns. The rules require that the parties submit their memorandum of understanding to an advisory attorney (who represents neither party) for review of the legal implications and recommendations.

The structured mediation model takes into account a mediator’s limited knowledge of the law. It also attempts to resolve the unequal bargaining power that often exists between men and women by requiring the party with more extensive knowledge of the financial holdings or assets to produce written documentation. It minimizes the greater bargaining experience that men tend to have over women and places emphasis on the importance of homemaker tasks, such as being the primary caretaker to children.

Each model of mediation requires some sophistication on the part of the mediator to predict behavior, to be sensitive to the nuances of language, to interpret body language, and to communicate on a level that is understandable by both parties. For example, the type of language used describes a person’s experiences of what is taking place through seeing, hearing, feeling, smelling, and tasting. Thus, a person either “sees what you mean,” “hears what you mean,” or feels that “I am in touch with you.” Therefore, the mediator must develop some sense of how the parties communicate with each other. After learning the communication process, the mediator must be able to interpret the information and apply it to the goals and objectives set by the parties.

V. Conclusion: The Role of Legal Services Advocates

From what we know about mediation, court-run mediation programs present the most palatable option, because they offer a guarantee that the mediators have been trained. There is also a greater opportunity for input into court-operated programs by legal services advocates. We know that the structured mediation model offers at least a formalized system that requires some measure of commitment on the part of the mediators and the parties. We also know that an alcoholic, a mentally ill person, or an abuser needs therapy and not mediation.

As advocates we must resolve our basic mistrust of the process. We know that mediation is a growing field of practice and little can be done to dismantle it. We recognize the need for stabilization, uniformity, regulation, and training. Although mediation is most difficult with persons who are immature, poorly educated, and often unable to keep their personal feelings separate, there is data that in some circumstances mediation is an appropriate alternative.

As legal services advocates we should be on the forefront of change. Can we accept mediation as an alternative mechanism for dispute resolution? In a time when monies cannot even support the legal services programs in place and court dockets are extremely crowded, it is especially important that we provide our clients alternative methods of resolving disputes. The theory of empowering the client community includes offering our clients a choice. It means being able to recognize the shortcomings of the system and the lack of sophistication of our clients. It means using all available mechanisms to prevent domestic violence. It means obtaining the necessary training on the subject of mediation to fill our gap of knowledge. It means associating with the policymakers by involving ourselves on the various committees and boards where decisions are made. It means a willingness to let go of some of the power that we feel when we negotiate on behalf of a client who can achieve the same result. It means serving more of the client community.

Mediation did not sneak up on us; it has been around for years. If you are an advocate in a state where there is a conciliation system in place, you should determine whether any of the following circumstances exist before your client participates in mediation:

1. Determine whether mediation is voluntary or mandatory (court order or statute);
2. Determine whether your client understands the process—i.e., talk with the mediator prior to the session for adequate description;
3. Determine whether your client is the primary caretaker of the children and will he or she continue to be so;
4. Determine whether there is a significant disparity in income, earning capacity, or career opportunities between the parties;
5. Determine whether your client is less informed about financial holdings or assets of the relationship;
6. Determine whether your client is afraid or intimidated by the opposing party; and
7. Determine whether your client or the children have been victims of domestic violence or abuse.

The answers to these questions should allow you to determine whether you need to request from the court a waiver of mediation, prevent the prosecutor from using mediation as a dumping ground, and develop data on the appropriateness of mediation in domestic relations cases.

As part of this article, a sample agreement has been included to illustrate the type of agreement that might result from negotiation through mediation. The sample agreement attempts to address issues that would arise from a dispute over custody of the children and certainly should not be used as a model agreement.

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46. O. COOGLER, supra note 30.
Family Law and Mediation
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Appendix A

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Appendix B
Sample Mediation Agreement

1. Both parents agree that Mother shall retain sole legal custody of their children, Scott and Janet.

2. During the school year, the children will reside at Mother's house and will be with Father every other weekend, from Friday after school until Sunday at 8:00 p.m. Also, the children will be with Father on alternate Saturday afternoons, from 1 p.m. until 5 p.m. Father agrees to give mother 24-hour notice of the intent to take the children out of the state and will provide an address and phone number to the Mother.

3. During the summers and holidays, Father agrees to make direct plans with the children on event-by-event basis. The children will make every effort possible to spend a significant amount of available time with Father, and Mother agrees not to interfere with these plans, either by making counter plans or by discouraging the plans already made.

4. Mother agrees to send certain children's clothing (with an itemized list) to Father's house, which will remain at Father's house after the children return to Mother's house, for the children to use upon their subsequent stays at Father's house.

5. Both parents agree to place written communications to each other that pertain to an issue of dispute between them in a sealed envelope, before transferring the note to the other parent.

6. Both parents agree to ask the children about where they would like to keep any gifts they receive and the children's desires will be respected.

7. Both parents agree to inform each other whenever either of the children has an illness or doctor's appointment.

8. Mother agrees to sign and file a permission slip for Father to receive any information about the educational and medical status and condition of the children at any time he wishes.

9. Father agrees to issue health insurance identification cards to each of the children.

10. Mother agrees to indicate in writing that Father is designated "next of kin" on the children's school records.

11. Father agrees to have the children in bed by 10 p.m. on the nights when they are with him.

12. Both parents agree to refrain from bad-mouthing each other and their extended family members in the presence of the children.

13. Both parents agree to discuss between themselves small issues that may come up regarding the children. These discussions will take place when transferring the children. If one parent feels the need for more lengthy discussion, it will take place during a designated phone call. If this still is not satisfactory, then a face-to-face meeting on neutral ground, away from the children, will be arranged by the parents to resolve the matter.

14. Each parent agrees to refrain from any behavior that threatens, intimidates, assaults, harasses, or otherwise violates the domestic violence statutes of this state.

15. In the event of any future dispute regarding the children that the parents are unable to resolve between themselves, both parents agree to seek mediation before legal action. If legal action is necessary, either party may use this agreement as evidence of a contractual agreement between them.

_________________________  ____________________________
Mother                                      Date

_________________________  ____________________________
Father                                      Mediator

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