The Development and Organization of Domestic Relations Mediation in a Multi-Function Mediation Center in Kentucky

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BY GARY W PAQUIN*

INTRODUCTION

Mediation, the use of neutral third persons to help parties in a dispute reach an agreement between themselves, is a particularly attractive alternative in domestic relations cases. Cost, delay, and the escalation of conflict have been sources of dissatisfaction with the traditional litigation system in divorce and child custody actions. Domestic relations mediation represents an attempt to resolve complex, personal issues that courts have limited time or resources to adjudicate.

This personal attention is particularly important when the parties are parents and will continue to remain in contact even after adjudication. Children of mediated divorces appear to adjust better to the divorce, and their parents are less hostile toward each other. If divorce mediation helps the parents reduce their conflict and communicate in a more friendly manner, the child will better adjust to the divorce. For these reasons, a growing number of jurisdictions are mandating mediation when child custody and visitation issues are raised.

One of the greatest challenges confronting the founders of the Mediation Center of Kentucky, Inc. was the development of a domestic relations mediation program. This Article examines the evolution of that

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program, salient related issues and problems, and resulting innovations such as pre-mediation case screening and the use of co-mediators.

I. BACKGROUND AND CONTEXT OF DOMESTIC RELATIONS MEDIATION PROGRAM

When, in 1991, a Task Force appointed by Chief Justice Robert Stephens set about the task of establishing a model program for out-of-court mediation of disputes—an effort which resulted in the founding of the Mediation Center of Kentucky, Inc.—domestic relations was high on the reform agenda. This resulted in part from the sheer volume of divorce and child custody matters crowding the Fayette County Circuit Court, the Court's awareness of the impact of conflict on the children of divorce, and local and regional experiments with domestic relations mediation.

A. The Domestic Relations Caseload

In recent years, the problems of divorce and its aftermath have placed an increasing burden on the court system. In Fayette County, the site of the Mediation Center of Kentucky, domestic relations actions comprised more than fifty percent of the Circuit Court docket. Any effort to economize court time and streamline the judicial system through the use of mediation would require coming to terms with the domestic relations caseload.

More importantly, judicial supporters and other members of the Task Force recognized the opportunity mediation afforded for improving the quality of dispute resolution in domestic relations cases, particularly those involving child custody. The Circuit Court was well aware of the emotional impact of divorce on children and had sponsored a parent education program using mental health professionals to teach parents about the impact of divorce on children. An important part of this program involved teaching how parental conflict affects children throughout the divorce process. In addition, there was a modest but growing body of experience with mediation in local and regional programs.

B. Existing or Evolving Domestic Relations Mediation Programs

1. U.K. College of Medicine Program

For several years prior to the founding of the Mediation Center, some local judges referred child custody cases to a mediation program
sponsored by the University of Kentucky College of Medicine. The program, which was used as a training experience for psychiatric residents and graduate-level social work students, was headed by a psychiatry professor at the University with substantial experience as a court-appointed evaluator of child custody cases. As the process evolved, mediation was initiated by the neutral prior to formal custody evaluation. If, after up to six mediation conferences, the parties failed to resolve child custody issues in a mutually satisfactory fashion, the mediating neutral would assume the role of evaluator, and prepare a formal recommendation regarding child custody to the court.

Estimates of the effectiveness of the College of Medicine program in helping couples reach an agreement vary from fifty to seventy percent, depending on whether non-mediated agreements prior to trial are included. However, this program was able to handle only a small percentage of the domestic relations cases in the circuit court, was specifically targeted at child custody and visitation issues, and was expensive for most parties.

In addition, perspectives vary on the appropriateness of mediators assuming the quasi-judicial role of evaluator. On the one hand, mediation by the would-be evaluator is more likely to be child-focused in that, in accordance with the standards imposed on the evaluation, the best interests of the child may be examined more fully. Combining the functions of mediator and evaluator in a single individual also may save time and money in those instances where mediation is unsuccessful, since the neutral is already well-acquainted with the parties and the case. On the other hand, some have raised serious concerns regarding the success or value of agreements reached through a process where the confidentiality of communications made in mediation is not assured, since the mediator may end up reporting to the court, and the role of neutral go-between is forsaken for that of decisionmaker.

2. Louisville Family Court

Another, more recent, effort toward mediation of domestic relations disputes is the Louisville Family Court project. In that jurisdiction, a new
rule mandates mediation of child visitation and custody issues.10 The rule provides for court referral of cases to private mediators, who provide the mediation services to the parties for a fee.11 Although the Family Court approach was examined by the Task Force during the course of developing the program for the Mediation Center of Kentucky, the former was still in the planning stages during the months leading up to the opening of the Center.

II. EVOLUTION OF THE DOMESTIC RELATIONS MEDIATION PROGRAM

A. SETTLING ON THE VOLUNTEER MODEL

There are three commonly used models for delivery of domestic relations mediation services: programs involving referral to professional mediators; programs involving mediation by court employees; and, referral to independent volunteer mediation programs.

Court-sponsored or publicly funded mediation programs sometimes establish mediation referral lists and send couples to private mediators.12 Such programs may establish their own criteria for mediator qualifications, or depend upon professional credentials (such as clinical membership in the Family Mediation Association) in selecting mediators. In our case, this model had some initial attraction because it would leave the thorny field of domestic relations mediation in the hands of professional mediators and avoid major outlays for training and supervision. There were, however, two significant drawbacks. First, there was not a cadre of trained professional domestic relations mediators in the region. Second, there was uncertainty whether a system of paid professionals could provide low-cost mediation services to indigent parties. Additionally, an opportunity to educate, through volunteer commitment, the legal and mental health communities regarding the strengths and limitations of divorce mediation would be lost. The importance of a clear understanding of the mediation process by these groups was considered mandatory if the Center was to be effective. Such goodwill might become an important collateral benefit.

Another model is that of the in-court professional who mediates as a court employee.13 This is an attractive alternative for courts that have a

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10 Although mediation is mandatory, a party may easily opt out of the mediation process by claiming that domestic violence is involved in the case. See id. at 1113.
11 Id. at 1112.
13 Id. at 41.
substantial divorce investigation staff and can retrain and reassign already existing employees. Such a model can ensure a professional service with relatively little scheduling, training, and staff turn-over problems, assuming a steady source of funding for the service can be secured. A problem with this model is the lack of trust the local bar, and consequently the parties, may have in the confidentiality of the mediation when the mediator is a court employee. Moreover, this model typically focuses solely on child custody and visitation issues.

The third model, in which domestic relations mediation is conducted as part of a more comprehensive volunteer mediation program, was consistent with the philosophy and goals of the Task Force which established the Mediation Center. The volunteer approach was seen as a mechanism for keeping the costs of mediation to a minimum, and for revealing the advantages of mediation to a broad spectrum of individuals inside and outside the organized bar. In the community and region where domestic relations mediation, like mediation in general, was little known and little understood, this approach seemed a logical starting point.

Of course, such a program would require adequate training, scheduling, supervising, screening, and maintaining a substantial volunteer force. As time went on, the special concerns and special needs of domestic relations mediation impressed itself upon those charged with setting the course for the Mediation Center.

B. Recognition of Domestic Relations as an Area of Unique Concern

Initially, some members of the Task Force charged with establishing a domestic relations mediation program viewed domestic relations as being little different from any other area of civil litigation. Others saw it as a minefield of controversy which should be approached with great care—perhaps as a second, or even third-stage effort—after other elements of the mediation program were in place. Another concern was that the sheer weight of the domestic relations caseload, once transferred from enthusiastic courts (or referred by legal services programs) would prove a crushing burden for a fledgling mediation center.

As it happened, the Center responded to the perceived need for domestic relations mediation services covering all divorce related issues—child custody, visitation, property division, maintenance and

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14 Id. at 43.
15 Since the parties’ attorneys are often present during the mediation sessions at this type of center, low cost has been very important, as the representation during mediation in and of itself is a substantial expense.
support—from the earliest days of its existence. With the cooperation of the court, domestic referrals were kept to manageable limits. On the other hand, domestic relations mediation has proven to be the most controversial and most challenging of the Center’s tasks, and the history of this program is one of continuous education and refinement.

III. DEVELOPMENT OF A TRAINING PROGRAM

A. Establishment of Domestic Relations Committee

Shortly after the Mediation Center of Kentucky was incorporated in late 1991, proposed policies and procedures were adopted by the board. Among these were guidelines for selection and training of mediators.

For the general run of referred civil circuit court cases, mediators were required by the proposal to be an attorney with mediation training or a non-attorney with mediation training who was either approved by the court or by the parties. Comprised primarily of members of the bench and bar, the board tended to view the skills of legal counsel in negotiating these matters and presenting them to the court as significant advantages. At the same time, the board was eventually persuaded by all of the evidence that the door should be open to qualified non-attorney mediators, and primary emphasis should be placed on training provided by the Center (or equivalent training in other recognized programs such as the Academy of Family Mediators courses).

Given the initial lack of consensus as to whether domestic relations mediators required special training, the board deferred the issue pending further study by a committee. When a Recruitment and Training Committee was established to develop general training for all volunteer mediators, therefore, a Domestic Relations Subcommittee was set up to focus solely on this area. In the process of researching and designing the training program, a number of issues regarding domestic relations were brought to the Center board for discussion and decision. The importance of these issues was reflected in the subcommittee’s elevation to committee status and the active involvement of the Center’s Director in this area.

More and more, it became clear to Center decisionmakers that domestic relations involved unique policy considerations and warranted special administrative attention. Due to the emotional intensity parties bring to the table—the possibility of violence, the ethical imperative to consider the best interests of the child, and the complexity of budgeting, property settlement, pension division and support—this area is rife with opportunities for error.
Domestic relations mediation also brings together two disciplines with different knowledge bases, viewpoints, ethics and values—the mental health and legal professions. Some attorneys are uncomfortable having mental health professionals, such as psychologists and social workers, work with a client’s financial issues, which they believe require intimate knowledge of the law. Some mental health professionals, on the other hand, object to having attorneys mediate child custody issues without sufficient knowledge of child development and skills in interviewing. Reflecting the concerns of their counterparts, both types of professionals tend to feel discomfort in what they perceived as the other profession’s terrain and feared that their training may be inadequate in these areas.

Increasingly, therefore, domestic policymaking and the evolution of domestic relations mediator training procedures involved integration of these professional viewpoints. Such integration, beginning with joint training of attorneys and mental health professionals, has been advantageous to all concerned. As one legal scholar notes:

Both types of professionals should receive the same training in mediation. It is not unreasonable to assume, however, that some legal practitioners have gradually developed the view that adversarial litigation may be inappropriate in some divorce cases and through their practice have gained some awareness of, and sensitivity to, the psychological dimension of their clients’ disputes. By the same token, confidence in rationality as a means of treating matrimonial discord and other family disorders cannot ignore that emotional conflicts and their resolution often have serious practical implications affecting legal rights and social interests. By definition, a competent therapist should not fail to acknowledge and appreciate that aspect of patients’ problems. Having lawyerly skills function in the context of a more humanistic dispute resolution framework and extending the influence of therapy to the more material concerns of individuals should have nearly universal appeal.¹⁶

Mediation should help confirm the knowledge each profession possesses.¹⁷

¹⁶ Thomas P. Carbonneau, Alternative Dispute Resolution: Melting the Lances and Dismounting the Steeds 176 (1989).

¹⁷ The continued involvement of non-legal professionals during the inception of the Mediation Center of Kentucky may have been helpful. Without the overriding legal influence of the Task Force, the Center may have developed somewhat differently than it did. Legal professionals are naturally more likely than lay persons to view disputes in a legal framework. Raymond Shonholtz argues that the de-legalization and community ownership of disputes should be the primary focus of community mediation programs. Shonholtz, Neighborhood Justice Systems: Work, Structure, and Guiding Principles, 1 Mediation Q. 13-16 (1984). However, it is also possible that without some
B. Qualifications and Screening

The Domestic Relations Committee developed criteria to screen volunteers for the Mediation Center's divorce mediation training program. Initially, the full training committee sought to establish qualifications and screening procedures, including an individual interview, for all potential mediators. Given the difficulty of screening the large number of volunteers, the pressure to open the Center as soon as possible, and the enormous commitment required of an already overworked volunteer committee, screening of fitness was instead performed by evaluating participants during their training. Thus, a skill-based rather than interview-based evaluation was implemented. The prevailing viewpoint in the dispute resolution community is that performance-based qualification is the most useful.18

Qualifications for the domestic relations trainees were different from mediators in other areas. To be accepted for training by the Center, domestic relations mediators had to either have a graduate degree in human services or be a licensed attorney. These minimum requirements were based on a concern that, at least initially, the use of trained professionals would give the program legitimacy in the eyes of users and their own professional advisers.

C. Training Procedures

With the guidance of the Domestic Relations Committee, the board established a two-step training program for domestic relations mediation. In this effort, the Committee compiled a number of articles that addressed significant issues in the area19 and relied heavily on the experiences of those members of formal training.

homogeneity of membership at the outset, excessive internal conflict would have made it virtually impossible to formulate any policy that could actually be implemented. In addition, the success of any multi-function dispute resolution program requires the strong support of both the local bar and the judiciary. The participation of these groups as founders of the center has been critical to its success. Arguably, court-connected mediation programs are the most viable.

Criminologist Leslie Kennedy notes that the number of centers is increasing rapidly and the majority of those being developed are financed by state or local governments. LESLIE W. KENNEDY, ON THE BORDERS OF CRIME, CONFLICT MANAGEMENT AND CRIMINOLOGY 74 (1990). See also Peter B. Edelman, Institutionalizing Dispute Resolution Alternatives, 9 JUST. SYS. J. 134, 137 (1984).

18 Commission on Qualifications of the Soc. of Professionals in Dispute Resolution, Qualifying Neutrals: The Basic Principles, 3 DISP. RESOL. F. 4 (May 1989).

As the development of a training format progressed, a number of questions had to be addressed by the Task Force regarding the form that domestic relations mediation would take at the Center. In addition to the structure discussed above, the Task Force decided that all issues in a divorce case would be subject to mediation, not just child custody. Domestic violence would be a reason for rejecting a case, and allegations of child abuse and substance abuse would be considered as bases for rejecting a case on a case-by-case basis. These decisions required an extended training program covering a variety of different areas and the establishment of a case screening procedure.

The Committee's decision to mediate the entire divorce was based on several rationales. The first is that attorneys must negotiate and present arguments for all these issues, and since the program was largely dominated by the legal community, a division of issues seemed spurious. There was also concern among women's advocates that restricting mediation to child custody would be unfair to women, because it would detach their strongest position from their weakest and leave them vulnerable. Women would be required to negotiate away child care, where they have their greatest bargaining strength, while leaving their weakest position, support and property, to other forums. Furthermore, the splitting of child custody and visitation from all other issues may make the give-and-take of negotiation more difficult to achieve, and would serve to artificially separate interlocking issues.

In establishing training procedures, the Committee examined several possible models of divorce mediation, including therapeutic mediation, labor/management-style mediation or structured mediation. Therapeutic mediation attempts, through the settlement process, to assist the couple in resolving the emotional trauma that accompanies the divorce. A therapeutic approach tends to be focused on the interests of children of the relationship. Labor/management-style mediation assists the parties in developing their interests and bargaining positions and focuses on the concrete issues to be resolved in the divorce. The mediator protects the integrity of the process and this process becomes smoother and more efficient over successive bargaining. Structured mediation, on the other hand, attempts to use a complex set of rules and procedures to guide a rational process of

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*See Singer, supra note 12, at 42.*

*See id.*

*O.J. Coogler, Structured Mediation in Divorce Settlement 22 (1978).*

*Penny L. Willnch, Resolving the Legal Problems of the Poor: A Focus on Mediation in Domestic Relations Cases, 22 CLEARINGHOUSE Rev. 1373, 1377 (Apr. 1989).*

*Emily Brown, Models of Mediation, in DIVORCE AND FAMILY MEDIATION 48 (James C. Hansen & Sarah Childs Grebe eds., 1985).*

*Id. at 57.*
problem-solving. Consistent with its overall policy of training mediators in techniques for use with a wide variety of disputes, as well as responding to the availability of trainers and the time constraints of Center personnel, training was geared toward the labor/management model; however, this approach has been tempered somewhat in the domestic arena through additional training.

Domestic relations mediators must participate in two training programs—the basic mediation training program which teaches the skills necessary for mediators to function in the labor/management mediation model (now encompassing four days of lecture, discussion, and role-playing), and a further two days of special training in domestic relations mediation. The two-day domestic relations mediation training also involves therapeutic mediation techniques which modify the labor-management approach to enable it to properly function in divorce situations. The interpersonal dynamics of divorce are more complex than most civil cases and will typically involve two unsophisticated negotiators who may have low self-esteem. Due to such vulnerabilities, the mediator must be careful not to use more directly manipulative or heavy-handed tactics in the divorce mediation.\textsuperscript{26} The specialized training seeks to adapt what was learned in the general mediation training to domestic relations cases.

Over time, the training committee developed a curriculum with the help of volunteers from the region and the University of Kentucky. The course of instruction covered the following areas: impact of divorce on children, development of family law in Kentucky, demonstration of techniques in custody mediation, the divorce process, domestic violence, and the use of budgeting forms. Faculty from the Colleges of Law, Medicine and Social Work of the University of Kentucky, as well as two professionally trained mediators, performed the initial two-day training program. Nine individuals received training. The informal evaluation of this training was positive.

\textbf{D. Co-Mediation}

Given the general inexperience of all the volunteers, it was decided early that a co-mediation model would be used in all domestic relations cases. Having two mediators in each session serves as a device to correct and minimize errors or omissions, particularly when they involve bias, prejudice or procedural error.\textsuperscript{27} It also allows colleagues the opportunity to examine together the mediation process of the particular session (what worked and did

\footnotesize{\textsuperscript{26} Id. at 58.}

\footnotesize{\textsuperscript{27} Martin A. Kranitz, \textit{Co-Mediation: Pros and Cons}, in \textit{Divorce and Family Mediation}, supra note 24, at 75.}
not work) as a further learning device. An effort is made to assign a male and female mediator as a team to facilitate gender-balancing. Also, a mental health professional or social worker was assigned with an attorney. This ensured that the different perspectives of each profession would be shared and that confidence in handling a wide variety of issues would be developed.

E. Continuing Education; Peer Review

The knowledge essential to performing divorce mediation cannot be covered in a weekend of training. Continuing education is necessary to continually invest in the skills of the Center's volunteers. Therefore, in addition to the initial training, evening or weekend workshops have been provided for Mediation Center volunteers, addressing such topics as male-female communication. When possible, continuing legal education credits are provided for attorney volunteers.

A monthly peer review session was also established to enable mediators to come for hour and a half sessions to discuss troublesome aspects of their cases in a confidential setting with other mediators. This format serves as a vehicle for continued practice-based education through group processing and mutual sharing, and will help monitor policy issues that arise in individual cases. The Domestic Relations Committee, which was established to focus on policy, often becomes involved in these very issues. As a result, it is hoped that a separate session to "clinic" cases will streamline the policy function of

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28 Kranitz notes:

Co-mediation is an excellent procedure for training new mediators and providing experience to those who have not previously been directly involved in the mediation process. Many individuals feel that, by virtue of their previous professional training (e.g. in law, mental health, or negotiation), they have the skills in personal interaction and the experience necessary to conduct a mediation immediately. Mediation requires different skills, or skills in addition to those that the lawyer, therapist or negotiator may have used before. Through the use of co-mediation, a less experienced mediator can observe first-hand and participate first-hand in a co-mediation process without jeopardizing the outcome of the couple because of the mediator's lack of experience. Even when no supervisor or experienced co-mediator is available, a newly trained mediator may join with another novice mediator, again to learn by mutual experience, and to provide checks, balances, and support that co-mediation offers.

Id. at 76.

29 The University of Iowa developed a divorce mediation training program using joint teams of law and social work students for this reason. Senna Stier & Nina Hamilton, Teaching Divorce Mediation: Creating a Better Fit Between the Family System and the Legal System, 48 ALB. L. REV. 693, 701 (1984).

30 The importance of peer support groups in this area is discussed in Edward Blumstein & Patricia B. Wisch, Who Nurtures the Nurturers? A Model for Peer Support Groups, 9 MEDIATION Q. 267, 267 (1992) (describing the success of a monthly peer support group for mediators at the Family Mediation Association of Delaware Valley (Pennsylvania)).
the Committee, allowing it to focus solely on policy issues rather than clinical ones. There is every reason to believe that continuing the effort to provide education to the volunteers will encourage longer commitments and allow them to maintain their mediation skills.

IV PROCEEDURES

A. Screening Procedures

The Center conducts domestic relations mediation in a manner similar to other types of mediation. However, in light of special concerns regarding mediation of domestic relations cases (including the presence of abuse in the family relationship) a procedure has been instituted where the parties are requested to come in for an intake session before mediation is initiated. This innovative procedure is intended (1) to focus the parties on the issues, including the welfare of the parties' children; (2) to educate the parties regarding the nature and advantages of mediation; (3) to make certain that necessary documentation, including appropriate property schedules and custody evaluations, have been developed; and, (4) finally and most importantly, to determine whether or not the case is appropriate for mediation.

The intake worker, who will not be a mediator on the case, seeks through individual interviews with each of the disputants (without their attorneys, unless presence of counsel is specifically requested) to determine whether such factors as serious spouse abuse, mental illness, alcoholism, drug abuse, fraud, or cognitive disability render the case unsuitable for face-to-face negotiations. In the event the Center deems the case inappropriate for mediation, court-referred cases are referred back to the court with the general notation that the case cannot be accepted for mediation. Should the case go forward, the Center Director or her assistant contacts all the parties through their attorneys and assigns two mediators to the case.

B. The Participation of Attorneys in Mediation

The participation of parties' counsel in mediation was a topic of considerable discussion during meetings of the Domestic Relations Committee. Attorney participation often increases the costs to the parties, making court-ordered mediation a substantial additional expense in some cases. Some of this cost is offset by having the benefit of legal advice at the mediation and by allowing for the immediate signing of documents with little continued haggling over language after the mediation takes
place. Preliminary data from the state of Maine indicates that the inclusion of attorneys in mediation sessions effectively diminished the impact of mediator errors, helped weak clients and buffered intense emotions. Attorney participation also increases the likelihood of acceptance by the bar. Of course, substantial savings of legal fees may result if the case is settled more promptly than it otherwise would have been.

On the other hand, some are skeptical of the benefits attorneys bring to mediation. One author observes:

Having attorneys interact with the divorce mediation process in their usual adversarial capacity is perilous and, in fact, threatens to compromise the viability of the process. Unless they espouse the dispute resolution values embodied in the divorce mediation, lawyers are likely to become a dysfunctional element in the process, not only jealous of its intrusion into their domain of competence, but also unable to adapt professionally to a situation of controlled and defused, rather than polarized and contentious, conflict.

The Mediation Center's experience with attorney participation has been mixed. The Domestic Relations Committee has viewed those situations where attorneys have become adversarial and disrupted the mediation as the result of a lack of understanding regarding the most useful role of attorneys in the session. The Center is taking steps to make certain that counsel clearly understand their functions before, during, and after mediation. Mediators are encouraged to set clear parameters in their introductory remarks to parties and their attorneys concerning the role of the attorney in mediation.

C. Other Concerns in Domestic Relations Mediation

1. Preparation for Mediation

One problem which occasionally arose in domestic relations mediation was that participating parties had not prepared sufficiently to

31 Interview with Dr. Craig A. McEwen, Professor of Sociology, Bowdoin College (Feb. 17, 1993).
33 Center staff and advisers recently conducted a continuing legal education seminar on this specific subject for local bar members.
34 See M. Dee Samuels & Joel A. Shawn, The Role of the Lawyer Outside the Mediation Process, 1 MEDIATION Q. 13, 13 (1983) (discussing the attorney's role during various stages of mediation).
engage in a meaningful negotiation of settlement terms. In some cases parties did not bring supporting documentation (i.e., financial affidavits, tax returns, property evaluations) to the mediation, thereby making mediation difficult to conduct with respect to financial issues. Parties are now requested, when first contacted by Center staff, to bring these documents to the first mediation session. During case screening, moreover, the intake worker is instructed to inquire regarding the preparation of pertinent documents or evaluations.

2. Length of Hearings

The emotional weight and complexity of domestic relations disputes has often necessitated multiple hearings; occasionally, these sessions are lengthy. The first domestic relations mediation that the Center handled continued for six hours one day, and six more on another. The long duration of these mediation sessions was due in part to the fact that one of the parties lived 1000 miles away, and partly to the mediators’ decision to work for an agreement until they reached an impasse rather than set regularly timed appointments for methodically handling certain issues, similar to what is done in structured mediation.35

A norm of open-ended sessions has been established. In this way volunteers can commit a whole day if necessary to the mediation and if continued contact between the parties and the Center after the session would be unlikely. If a settlement is not reached, a minimal delay is experienced by the parties as they proceed toward litigation. The difficulty of scheduling multiple sessions with two parties and two attorneys is also avoided. In terms of mediation strategy, long sessions may also break down the parties’ resistance to settle, although such conduct may raise an ethical issue of coercion when applied to divorce mediation. In general, mediators have a desire to “strike while the iron is hot” and obtain an agreement in one session.

On the other hand, in cases where deliberation and access to documentation is essential, as in many divorce mediation cases, shorter weekly meetings may be more effective. The shorter sessions, between which clients could consult with their attorneys, could also reduce the cost of mediation because the attorneys are not required to attend the session. However, the attorneys are still able to supervise and advise their clients in reaching a settlement. There was also a concern that the longer, high intensity sessions might “burn out” the volunteers faster than would

shorter, more frequent sessions. The committee has therefore recommended to mediators that they establish two-hour time limits for each session unless there were compelling reasons for departing from this practice.

3. Confidentiality; Limited Role of Mediator

The provision in the court rule for confidentiality and privilege of communications made during mediation was another subject of debate. As previously discussed, a mediation/evaluation program was already in place before the establishment of the Task Force. On one hand, combining mediation and evaluation was cost effective and ensured that the children were seen and their preferences made known. This information is important if the mediator is to fulfill the duty to uphold the best interests of the child.36

On the other hand, confidentiality in mediation is seen as essential for candor, fairness, and neutrality.37 It was felt that getting parties to disclose their motivations and feelings about the dispute was difficult enough under most circumstances and informing the parties that such information could be used in court would destroy any trust that might develop. If mediators could send extensive reports to the court, the local bar might resist the mediation alternative since mediators would be able to report the refusal of parties to compromise and therefore potentially prejudice those parties in subsequent proceedings. Disclosure of mediation proceedings to the court would also likely lead to the subpoena of mediators to explain their opinions to the court. Since the Task Force was interested in developing a program staffed by volunteers, the prospect of being subpoenaed to court, potentially during work hours, would be a detriment in recruiting and maintaining good mediators.

For these reasons, the Task Force decided to press for confidentiality in the mediation setting and the rules reflect this concern. The court rule makes the communications and documents produced during mediation privileged and confidential except where child or spouse abuse is concerned or where crime or fraud is revealed during the session.38

36 The American Bar Association's Family Law Section has developed Standards of Practice for Family Mediators, which state: "The mediator has the duty to promote the best interest of the child." Gary Paquin, Protecting the Interests of Children in Divorce Mediation, 26 J. Fam. L. 279, 309-11 (1988).


38 See Stipanowich, supra note 4, at 894. See also Graham, supra note 9, at 1124 (discussing Jefferson Family Ct. R. 612, which contains a similar confidentiality provision).
Confidentiality was believed to be important to encourage candor, ensure fairness to legally naive parties, ensure the neutrality of mediators, protect volunteers from having to testify, and encourage parties to voluntarily choose mediation.\(^9\) A report to the court will be made only to inform it that the mediation was successful or unsuccessful or that a party did not appear. No further information may be given to the court without the consent of the parties.

V Spouse Abuse and the Mediation Center

A major legal and policy issue that the Center has faced regarding domestic relations mediation is the handling of domestic violence. The possibility of placing victims of domestic violence at greater risk of further abuse or exploitation through mediation is a subject of considerable debate.\(^40\) This issue has triggered the fiercest opposition to divorce mediation and any mediation center must endeavor to address the concerns of domestic violence victims.

There was some initial reluctance on the part of the court to eliminate mediation as an alternative where spouse abuse was alleged. This reluctance was based on the concern that violence was such a frequent occurrence in divorce that a substantial proportion of the family law cases would be excluded from possible mediation. A study from the Hawaii mediation center supports this conclusion, concluding that twenty-three percent of the couples who voluntarily sought mediation reported some history of violence.\(^41\) In fact, four of the first nine cases screened at the Center were rejected on the grounds of spouse abuse.

The Mediation Center held several meetings with representatives from area spouse abuse services. Also, a police officer who formerly had been in charge of domestic violence cases was on the Committee. While some centers do conduct divorce mediation when domestic violence is involved in the case,\(^42\) generally such processes require at least ten to twelve

\(^{39}\) See Stipanowich, supra note 4, at 893.


\(^{41}\) Chandler, supra note 1, at 339.

hours of special training in domestic violence. At this time in the Center's development, such training would place too many additional demands on the Center and its volunteers, some of whom were reluctant to adopt screening for domestic violence as part of the mediation regardless of the time and demands involved.

Instead, the Center established a pre-mediation procedure to screen cases for the presence of, among other things, domestic violence. Selected volunteers received special training in using a structured screening device. The parties have separate appointments and are seen separately. The intake interview allows the Center to explain the process of mediation to parties individually, and explain that confidentiality is limited pursuant to abuse reporting statutes. The intake procedure also alerts the mediator to the types of issues in the case and current child rearing arrangements. The interviewer then methodically questions the person on how arguments have been handled in the past by the couple—whether arguments have turned violent, whether there have been any threats of bodily harm or suicide, whether protection orders have been sought and issued, or whether emotional abuse has occurred. The types of questions asked are those recommended by Girdner, who suggests asking about patterns of decision making, conflict management, and anger expression.

Using Girdner's criteria as a foundation, the Center has decided to reject a case for mediation if any one of the following conditions is present:

a. There have been two or more hitting incidents during the last year or hitting incidents in the past, which cause the victim to still be in fear—For the purposes of this policy, hitting will also include: slapping, punching, kicking, biting, or striking with objects or throwing objects at the person in such a way as to put them in danger of injury.

b. There has been one incident where the victim has been injured to the point of requiring medical attention within the last year, or some incident in the past that causes the victim to be in fear.

c. The spouse has made serious threats to injure the victim or has threatened to commit suicide within the past six months.

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44 See KY. REV. STAT. ANN. § 620.030 (Michue/Bobbs-Merrill 1990) (mandatory reporting of child abuse); id. § 209.030 (mandatory reporting of adult abuse).
45 Linda K. Girdner, Mediation Triage: Screening for Spouse Abuse in Divorce Mediation, 7 MEDIATION Q. 365, 365 (Summer 1990).
46 POLICY WITH REGARD TO DOMESTIC VIOLENCE, MEDIATION CENTER OF KENTUCKY (1993) (on file with author).
When any of these conditions is found to exist, the court and the parties are sent a memorandum simply stating that the case is unacceptable for mediation. No further description of the reason for rejection is provided.

Kentucky is unusual in that it is the only state that requires the reporting of domestic violence.\(^{47}\) There was an initial reluctance to report under the conditions of confidentiality as set forth in the court rule. Additionally, attorneys, unlike mental health workers, are not required to report the suspected spouse abuse of their clients. Consequently, they were concerned about this shifting of roles.\(^{48}\) The issue of reporting spouse abuse has become another arena for distinguishing between the roles of attorney and mediator. All spouse abuse cases are reported to the Cabinet for Human Services.

As the policy change in this area has been new for the Center, the results cannot yet be evaluated. However, the procedures the Center has put into place should serve to screen out most of the cases of spouse abuse that normally would have been mediated, possibly to the detriment of the spouse abuse victim.

In the process of eliminating cases involving spouse abuse, Center decision makers realized that some couples will be denied the benefit of mediated settlement. One option was to send the families that had abuse problems to the local domestic violence services for evaluation. If safeguards were provided, then the couple could return for mediation. A similar arrangement has been developed in Hawaii and many of the couples do in fact return for mediation.\(^{49}\) The representatives of the local domestic violence services, already strapped for resources, felt that they could not provide such evaluation services at this time.

\(^{47}\) KY. REV. STAT. ANN. § 209.030 (Michie/Bobbs-Merrill 1990) states in part:

(2) Any person, including, but not limited to, physician, law enforcement officer, nurse, social worker, department personnel, having reasonable cause to suspect that an adult has suffered abuse, neglect or exploitation, shall report or cause reports to be made in accordance with the provisions of this chapter.

KY. REV. STAT. ANN. § 209.020 (Michie/Bobbs-Merrill 1990) states in part:

(4) “Adult” means a person eighteen (18) years of age or older or a married person without regard to age, who is the victim of abuse or neglect inflicted by a spouse, is unable to manage his own resources, carry out the activities of daily living, or protect himself from neglect, hazardous or abusive situations without assistance from others and may be in need of protective services;

(7) “Abuse or neglect” means a situation in which a person inflicts physical pain or injury upon a spouse or deprives a spouse of reasonable services necessary to maintain the health and welfare of his spouse.

\(^{48}\) 83 Op. Att’y Gen. 367 (1983) holds that the adult protection legislation does not require or permit attorneys to report spouse abuse against their clients if the victim does not wish it to be reported.

\(^{49}\) See Hawaii: Presumptive Mediation, 3 ADR REPORT (BNA) 336, 336 (Sept. 29, 1989).
VI. ISSUES IN WORKING WITH VOLUNTEER MEDIATORS

Several issues regarding mediator behavior have arisen during peer review meetings of Center mediators. They have pointed to several general problems that can be addressed through additional training. The first is fear of conflict. Some volunteers, overwhelmed by the intensity of the emotion that such sessions at times engender, tend to lose control of the mediation process. In many cases, parties' attorneys have been helpful in diminishing this level of hostility. Having co-mediators also helps the mediators stay in control by fostering joint efforts.

Second, some volunteers, on the basis of background or training, are very authoritarian and controlling, so much so that effective airing of issues, feelings and solutions may be stifled. Both of these problems involve control. Control must be steadfast but moderated for mediation to be effective and produce long-lasting, non-coerced agreements.

Another issue that is a likely hazard when using professionals as volunteer mediators is the problem of mediators giving advice, be it legal or mental health. Surprisingly, the presence of the parties' attorneys does not necessarily diminish this problem. When the case comes before the mediator, particularly when it is early in the divorce and adequate discovery has not taken place, parties' attorneys may rely on mediators for expertise and as a result mediators may be trapped into providing such advice. This problem will likely surface when a program establishes criteria that requires divorce mediators to have certain professional backgrounds, yet paradoxically requires them to refrain from utilizing that background in the ways they are most comfortable. Thus, despite the mediator's expertise in a certain area, she must not clinically evaluate a child, advise a parent, evaluate a pension, predict the outcome of an issue at trial or give advice on the impact of interstate custody issues. A volunteer's professional role may "bleed" into the mediator role, where the concept of professional identity is not as clearly established.50 Another problem arises when mediators become so intent on reaching agreement that they fail to examine the process of how they achieved that agreement. These issues all point to the need for greater supervision and education to instill and refine the volunteers' sense of professional identity as a mediator.

VII. RELATIONS WITH DOMESTIC RELATIONS BAR

Since the promulgation of a local court rule specifically authorizing judges to direct mediation of cases and the opening of the Mediation
Center, some domestic relations attorneys have expressed concerns regarding the process, particularly given its mandatory aspect. To some extent such concerns are natural and reasonable in the face of great change, and it is the policy of the Mediation Center to field their concerns and, where appropriate, specifically address them.

The Task Force and Mediation Center board of directors was largely made up of members of the local bar, and the majority of mediators doing domestic relations work are attorneys. Parties' attorneys are offered the opportunity to attend all mediation sessions with their clients, and many have accepted the opportunity. Prominent members of the local domestic relations bar, a circuit court judge, and representatives of the medical school and spouse abuse services were invited to and attended a meeting of Center personnel, to discuss the development of policies involving domestic violence and divorce mediation. In addition, the Director of the Center (a local bar member) has addressed the Domestic Relations bar and has arranged for continued formal contact with that sector to ensure that their concerns are addressed within the Center. Support by the bench and bar support of the Center is critical to its success.51

**CONCLUSION**

For the past year, the Mediation Center of Kentucky has provided a laboratory for evolution of a volunteer domestic relations mediation program within a multi-purpose mediation center. Thus far, the program has demonstrated that successful domestic relations mediation can be run by volunteers at a minimal cost to parties. Over time, moreover, the program has proven responsive to the specific concerns of mediating parties and other participants; a most innovative result of this process is the intake and screening procedure developed for domestic relations cases.

The early success of the Mediation Center of Kentucky and the rapid evolution of its domestic relations mediation program are due in part to the extraordinary support of various sectors of the community. The local judiciary was an enthusiastic participant in the process, in terms of time, energy and finances. Further, the University of Kentucky provided interested faculty who worked on the project in various capacities, and on

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51 Mastrofski noted that attorneys receive several benefits from supporting mediation: they gain contact with the judges, become more aware of the inner workings of the court, and receive information even if the mediation fails. Jennifer Adams Mastrofski, *Reexamination of the Bar: Reasons to Support Custody Mediation*, 9 MEDIATION Q. 377, 377 (1991).
occasion, provided space and services. The university also served as a source of student volunteers and interns. In addition, Lexington, Kentucky, is a medium-sized community in which members of the local bar often have personal relationships with each other. This enabled the Center to more easily garner bar support, especially since many of the mediators are attorneys. Local law firms are also major financial supporters of the Center. In addition, through the work of an active community worker on the board, the Center has been able to gain the support of the local religious institutions, which have also supplied volunteers. It has been the experience of the Center that the concept of mediation has proven an exciting one to many different groups in the community, whose support has been critical to the Center's existence and success.