

Day 3 : full day

- \* Group discussions on demonstration;
- \* Student mock mediations;
- \* Personal problems for student mediators.

3. WISCONSIN

(a) Ann Milne provides a basic 4 day program (28 hours) in two segments of 2 days, primarily for those people who will be involved in mandated mediation, for example in the courts, or for those going into private practice mediation. The participants pay \$200 per person for the training. The structure of the program is as follows :-

Day 1 :

- \* Nature of disputes and background of conflict (Thomas Kilman);
- \* Ways that society sanctions for resolving disputes;
- \* Definition of mediation, and its link with negotiation and arbitration;
- \* Conflict styles;
- \* Emotional aspects of divorce;
- \* The grieving process (Kubler-Ross);
- \* The effect of emotional stage on disputant's ability to negotiate in mediation;
- \* Decision theory of divorce (unilateral or mutual).

Day 2 :

- \* Four stage mediation model (setting the stage, defining the issues, processing the issues, resolution)
- \* Identifying tasks to be done at each stage;
- \* Use of theory in mediation exercises;
- \* Role-plays.

Day 3 :

- \* More time on processing and resolving issues;
- \* Conflict wheel (Chris Moore);
- \* Types of dispute : relationship, needs or interest-based, structural or based on values.
- \* Use of videos to explain issues.

Day 4 :

- \* Professional issues and special circumstances;
- \* Confidentiality and neutrality;
- \* Conflict of interest;
- \* Mediation in cases of domestic abuse;
- \* Mediation with impaired client.

(b) **Dane County Family Court** in Wisconsin employs mediators who mostly have educational backgrounds in social work or counselling. The training they receive is in the form of short courses and presentations on mediation. These rely largely on the perspectives of Janet Johnson and Linda Campbell and consist of structured workshops over 2 days and some reliance on role-play and videotapes of mediation. There is not much emphasis on skill-building. The general feeling is that experience is the best teacher and difficulties can best be ironed out during support group discussions.

#### 4. FLORIDA

(a) A program called **Prosecution Alternatives for Youth (PAY)** in Seminole County, Florida, trains about 20 volunteers once a year. The course is fairly comprehensive and runs for 30 hours (10 x 3 hour sessions). Emphasis is on the processes to be used in the program. The training includes the observation of Hearings, the conduct of a Hearing under the guidance of a Senior Hearing Officer and supervision for a few Hearings when they start. They do not use role-plays or simulations. The training I observed was conducted by a psychologist Dr. Bob Tango and focused on a "structured experience" designed to bring out the participants' own feelings and perceptions in relation to the problems they would have to deal with as Hearing Officers.

(b) To be a family mediator in Florida, you need to be a qualified lawyer or counsellor/psychologist and also to be certified by the Chief Judge of the Judicial Circuit. To become certified, the normal process is to complete a Dispute Resolution course of at least 40 hours training. The **Center for Dispute Settlement** and the **Lemmon Institute** offer such training.

#### 5. WASHINGTON D. C.

(a) At the **Superior Court Multi-Door Dispute Resolution Division**, the volunteer mediators undergo a 40 hour training in mediation to enable them to deal with small claims disputes. If they wish to mediate in the Domestic Relations Program they need to undertake another 40 hours training. The basic model for mediating in these two kinds of dispute is the same, allowing for differences in the timing of the sessions, the use of caucus, and so on. The Domestic Relations course includes specific information and skills needed for these mediations.

(b) Linda Singer of the **Center for Dispute Settlement** trains mediators for **DC Mediation Service**. She agrees that different types of disputes can use the same basic model of the mediation process, though people are more comfortable in working in areas in which they have already had practice.

The basic interpersonal mediation training that the Center offers is of 40 hours initially, followed by an apprenticeship during which the trainee co-mediate at least 5 cases with a mentor. After one year, s/he can be considered for other kinds of mediating, for which additional training (half to one full day) is required. The

objective of the training program, even in more specialised fields, is to give the mediator a sense of context and to increase their *comfort level* - it is not to make them substantive experts in any field.

The Center charges for the training given : \$600 per person for a 3 and one half day course, including materials and manuals. About 30 persons can be trained at one time, using 3 trainers who rotate between the groups of 10, giving a variety of presentation and styles.

The Center also provides a basic training course of one week in family mediation. It is used by private organisations and government agencies for skills training.

## 6. COLORADO

CDR Associates, led by Chris Moore, provide a structured 5-day training course stretching over 40 hours for a fee of \$700, excluding materials. The manual that has to be purchased is far more comprehensive than the course can be, and is an excellent resource.

An additional 3 days training is available if mediators wish to do family mediations as is a specialist commercial mediation course. Getting to Yes is required reading for all trainees. Three presenters are used for any 40 hour course with different presenters doing different segments on each program. Extensive use is made of simulated mediations during training. In addition, 10 coaches, working in groups of 4 are used during the group session.

The following is an outline of the Divorce and Child Custody Mediation Training Program :

### Day 1 :

- \* Overview of Conflict (Exercise and Presentation);
- \* What people bring to the Dispute Resolution process;
- \* How people negotiate;
- \* Introduction to mediation;
- \* Mediator checklist;
- \* Mediation demonstration;
- \* Discussion of demonstration.

### Day 2 :

- \* Mediation Checklist and stages of Mediation/Opening statements;
- \* Mediation simulation I;
- \* Discuss Mediation simulation I in Plenary;
- \* Communication and conciliation (Part I)
- \* States of Mediation (Part II);
- \* Conflict analysis;

- \* Mediation simulation II;
- \* Communication and conciliation (Part II);

Day 3 :

- \* The Caucus (Demonstration and Presentation);
- \* Property issues in divorce mediation;
- \* Mediation simulation III;
- \* Legal aspects of child custody and divorce;
- \* Visitation and custody - issues for mediators;
- \* Mediation simulation IV.

Day 4 :

- \* Psychological stages of divorce;
- \* Long distance parenting;
- \* Mediation simulation V;
- \* Use of power in mediation - strategic and ethical considerations;
- \* Mediating spousal and child support
- \* Mediation simulation VI;
- \* Group discussion of Simulation VI;
- \* Domestic violence - issues for mediators.

Day 5 :

- \* Response of children to divorce;
- \* Working with children in mediation (Demonstration and presentation);
- \* Writing agreements;
- \* Writing sample settlement (Exercise);
- \* Co-mediation techniques;
- \* Co-Mediation Simulation VII;
- \* Nuts and bolts of a mediation practice;
- \* Ethical considerations in mediation.

**7. NEW JERSEY**

(a) New Jersey has an extensive system of mediation and mediation training that mirrors the diversity of its complementary dispute resolution court program. All probation officers attached to the courts have to undergo a basic 36 hours orientation program within the first 12 months of their appointment. Parts of an 18 hour mediation skills course that is generally available for court people is included in this orientation program.

If persons are working in the court mediation program, they are encouraged to take the basic 18 hour course and advanced courses on custody mediation skills. Lawyer-volunteers who often mediate economic settlement disputes are not obliged to do the basic 18 hour course, though some of them have done so. Law clerks who mediate

special civil cases and small claims do a 2 day course, though it is felt that this is too brief. The preference of the trainers is for 3 straight days of training, but the course is offered in different ways - 1 day a week for 3 weeks, in 3 hour blocks over 6 nights and condensed into 2 days.

The same generic mediation training is given to everyone. It concentrates on :

- \* Becoming managers of conflict;
- \* Being comfortable with conflict;
- \* Recognizing types of prejudice in the mediator;
- \* Important qualities for a mediator;
- \* Techniques of resolving an impasse;
- \* The stages of a session.

After the theory, each trainee gets a chance to act in 4 roles in role-plays - as mediator, as disputant, as the other disputant and as an observer. Everything is videotaped so that they can watch themselves and all other groups afterwards.

Some training is available for judges through the Judicial College and a Settlement Program. However, since judges who attempt to settle a case often finish up trialling the same matter, the scope of judges' involvement in settlement is limited.

A "Train the Trainer" course also operates. The course consists of 3 days training - one day of educational philosophy and two days on training techniques.

(b) In Essex County, New Jersey, the **Community Dispute Resolution Project**, trains volunteers to assist in minor disputes and petty offences. One training session of 12 hours is held annually and is free of charge. Initially it was only offered to attorneys, but is now available for non-attorneys as well.

In the **Special Civil** part of the program where mediation is only done by attorneys, the training is clearly directed at pre-settlement conferences, with more emphasis on negotiation and less on interpersonal communication. The content of the training course is

- \* Mediation and arbitration
- \* Philosophy of mediation
- \* Building on what is being done
- \* No concern for who is right and who is wrong
- \* Facilitation rather than decision-making;
- \* Handling difficult issues.

Thereafter, the course moves to role-plays and observation of real-life mediation.

## 8. NEW YORK

(a) The Institute of Mediation and Conflict Resolution (IMCR) offers training to volunteers free of charge, generally over a 5 day period. Two or three trainers are involved in the basic course which stretches over 35 hours. During the basic course, use is made of lectures, role-play, film, videos, reading exercises. The emphasis is on the correct language for the situation and the role of the mediator as expert in the process.

The last 2 days of the training course is a full 2 day module in which a dispute is enacted by a cadre of professional trainers and the trainees have to help the parties come up with an agreement that is acceptable to them. At the end, each trainee gets a personalised, though public, assessment on how s/he did, what s/he needs to focus on further, his/her strengths and weaknesses. The feedback comes from the role-players who are skilled role-players and trainers and mediators.

In addition to the basic training, a further 20 hours on-the-job-training with an experienced mediator is required. This involves acting as an observer for 5 cases and a co-mediator for another 5 cases. Continuing training of 1 hour per month, on specific mediation skills, is given.

### Outside Training :

The IMCR offer a consultancy service to organisations and institutions. They undertake a *needs* assessment, and develop individualised components of training specially tailored to the needs of the organisation and to the level of the individuals participating in the training. Core material is utilised and built upon depending on the organisation seeking their services. They generally use two trainers and sometimes three, depending on numbers. Mediators who have become trainers are paid a *per diem* of around \$300.

The charge per trainee is around \$700 per day.

(b) Training for volunteers in the PINS program is done over a 24 hour period, once a year for about 30 people. The training is free of charge and a manual is supplied.

## 9. MASSACHUSETTS

(a) The National Association for Mediation in Education (NAME) hopes that a National Training Institute, sponsoring a national training team will evolve shortly. At present NAME gets involved directly in the training of staff - administrators, teachers, guidance counsellors, school psychologists and children, in a program of bringing conflict resolution to schools in a comprehensive way. A trained mediator needs 12 - 15 hours training, but most of the staff need to be familiar with the process so that they can use the skills informally in the classroom. The students' program needs a minimum of 18 hours, during school time. For the students, the

program for elementary and high school is different though the same basic principles of mediation are used. In training teachers, there is need for an overview of conflict resolution, communication skills, role modelling and the mediation process. Role-plays are used where conflicts between students and staff are resolved. The focus is on the art of negotiation and mediation, and techniques for resolving conflicts.

Training runs for 20 hours divided into 1 whole day followed by 2 hours on each of 2 days for 2 weeks; three trainers are used, each taking responsibility for a section.

- \* Purpose of mediation emphasised;
- \* Role-plays used extensively to reinforce concepts;
- \* Lots of physical exercises interspersed with program material;
- \* Very little lecturing;
- \* Checklist of the mediation process very helpful during training

NAME also provides training in parent/adolescent mediation. The training extends over 40 hours, the normal generic training being supplemented by work on adolescent development, the family life cycle, the difficulty the mediator has in handling his/her own prejudices within the process.

## APPENDIX E

### DOMESTIC VIOLENCE AND MEDIATION

#### 1. INTRODUCTION

I have included this appendix because of the frequent reference in the interviews I conducted to the question of mediation between couples where there was an indication of domestic violence. Views were expressed that covered the whole spectrum from "domestic violence is not considered to be a major factor to be taken into account by mediators" to "mediation cannot be used in cases where domestic violence is an issue". As I do not consider this report the vehicle for an analysis of this complex issue, I simply detail some of the responses I got from interviewees.

#### 2. HAWAII

2.1 At the **Neighbourhood Justice Center (NJC)** if there is disclosure or evidence of violence during a session, the mediators do not proceed. The parties are referred for counselling at the **Family Peace Center** (a name chosen for its positive approach to the phenomenon of domestic violence, rather than a term such as the *Sexual Abuse Center*). After counselling, the mediation is rescheduled, and if the woman feels she needs support at the session someone from the Center would attend, but wait outside. The **Family Peace Center** however, never talks with the **NJC** about the dispute and vice versa.

2.2 The **Hawaii Program on ADR** (run through The Judiciary) is working with the **NJC**, the **Family Peace Center** and the Court on a scheme to send to mediation those cases of domestic violence where **Temporary Restraining Orders** (lodged through the **Small Claims Court**) have been taken out. The scheme will work on empowering the women before mediation (through counselling at the **Family Peace Center**) and the mediation sessions will then be undertaken by a team of two or three (including people other than **NJC** mediators).

#### 3. RUTGERS UNIVERSITY

The **CR Department** has created a protocol to train police officers who deal on site with family issues and domestic violence especially. Many police officers find it difficult to distinguish between a *family dispute* and the crime of *domestic violence*.

Mediation, according to **Linda Stammato** of the Department, should be able to be used in domestic violence cases, provided there is a limiting structure and mediators are properly trained in the implementation of mediation in such cases.

#### 4. MADISON, WISCONSIN

4.1 While in Madison, I attended a meeting of a **Peer Support Group** of mediators from both private practice and the courts. The discussion was about "battered women and mediation". Women from a Refuge program attested to the fact that many battered women had had bad experiences of mediation. Where there is mandatory mediation of family-related disputes, the woman's fear of negotiating with a man she fears, can lead to a fear of mediation itself. In spite of this, the feeling among refuge workers is still that battered women might fare better with mediation than with the courts, provided the process is handled correctly and experienced and skilled mediators are used.

4.2 Ann Milne, a private practitioner, outlined her method of handling the issue where domestic violence is discovered during a mediation process. The mediation does not automatically stop, but the parties are told that their *special relationship* provides mediators with particular concerns relating to the dynamics between them. She negotiates with the couple as to whether or not mediation is the most appropriate process for them. The decision as to whether mediation can help them resolve some of the other ongoing issues will depend on how comfortable they are with the *rules of the road* :

- \* not mediating when someone can be abused;
- \* not mediating on the removal of a court order.

4.3 **Dane County Family Court** do not generally mediate custody/access issues in cases of domestic violence. This is because if it is clear that there has been spousal abuse, that party can ask for a waiver of mediation and go straight to Court for the divorce settlement. If parties want mediation they are seen separately. The Family Court mediators do not see their responsibility as being the woman's advocate, but the child's.

#### 5. LOS ANGELES

5.1 At the **Dispute Resolution Services**, the staff are trained to find out as early as possible whether domestic violence is an issue or not. If its presence is only discovered during a mediation session, the session is ended and the matter referred back to other staff who will interview the parties to find out the extent of the violence. Generally both parties are then referred for counselling and no mediation will continue until the counsellors report that the parties are ready to continue with mediation.

5.2 At the **Family Court Services** in the Los Angeles County Superior Court, a task force has developed a protocol, resources and a training plan for the mediation of domestic violence cases. The intake procedures include 5 questions designed to bring issues of domestic violence to the surface and to assess whether its incidence is episodic or chronic. State law requires that the parties are seen separately; all sessions take place at court and there is no contact between the

parties. The mediators suggest safe places like police stations and the YWCA to collect the children for access. The approach of the Court is that violence disempowers everyone; thus a mediator is neutral if s/he creates an environment where no violence occurs.

Appendix S : Policy Statement on Domestic Violence of the Los Angeles County Bar Association Dispute Resolution Services.

## 6. SAN FRANCISCO

Professor Jay Folberg, Dean of Law at the University of San Francisco Law School believes that there is general agreement in the United States that you cannot mediate domestic violence because it is a criminal offence. In fact, he believes that some clients (men) find mediation attractive precisely because of its private nature and this privacy means that the incidence of violence does not become public knowledge.

The **Community Boards Program** (San Francisco) mediators will not take on a case where it is felt that participation could endanger either party, particularly if the violence is a recent occurrence. If the abuse happened in the distant past, if no party to the mediation is afraid and all agree that mediation is desirable and appropriate, then it can be used.

## 7. FLORIDA

The Orange County Circuit Court does not refer cases involving spousal abuse to mediation; this is by Florida statute and an administrative order of the Court. So these cases go straight to the Court.

## APPENDIX F

### REPORT ON THE ACADEMY OF FAMILY MEDIATORS CONFERENCE

#### EXPANDING FAMILY MEDIATION: TECHNIQUE AND BEYOND

DANVERS, MASSACHUSETTS July 22 - 28, 1990

The original study tour was extended by one week to enable me to attend this conference. This was a privilege and I would like to record my thanks to Paul Wahrhaftig of the Conflict Resolution Center International in Pennsylvania for arranging that I participate as presenter in two of the sessions. I found it exciting and energising to be there with participants from across America and from many places overseas. I was amazed that although the focus of the conference was on *family mediation*, there was a wealth of diversity in the institutes, workshops and plenary sessions. It was also refreshing to see the encouragement and active participation given to the Academy of Family Mediators by the Association of Family Conciliation Courts : there seems to be far more collaboration and co-operation from mediator groups than we find in Australia, where competition is often the keynote.

Among the sessions I attended, the following stand out :

#### 1. TECHNIQUES FOR MANAGING RELIGIOUS, RACIAL AND CULTURAL DIVERSITY IN FAMILY DISPUTES

**Presenters :** Clarence Kramer of Arizona;  
Margaret Huber of Canada;  
Kate Lewis of Northern Ireland; and  
Susan Zaidel of Israel.

The workshop examined techniques for managing religious, racial and cultural differences and their impact on the broader community.

**Dr Susan Zaidel** presented a personal reaction as a mediator in Israel dealing with religious and non-religious people. She put forward the view that notions of neutrality and credibility are linked to culture and religion. She talked about the fact that religion and religious practice can be used as a ploy in custody battles over children, where the conflict centres on a religious issue. She said that the more religiously observant can be favoured in a rabbinical court; however, she questioned

whether mediation is an appropriate alternative mechanism for disputes involving extremely orthodox persons (of any religion) because they show no flexibility, no ability to compromise, and little respect for the spouse who does not share the same religious views or beliefs.

Dr Zaidel also discussed the role of the *kibbutz* (a collective) as an entity in dealing with finances and the economics of divorce between a couple, in dealing with property, and even in sorting out suitable parenting arrangements :

- \* Disputes over property in this context are different to the norm; they would generally be limited to the contents of the residence, the couple's personal room or rooms, since all the buildings are the property of the *kibbutz*;
- \* The need for a parenting plan would depend on whether the *kibbutz* had retained the original kibbutz system of separate children's houses for both day and night care, or whether it had adapted a family sleeping pattern for young children. For *kibbutz* families, shared parenting is the norm, and childcare is seen as a collective responsibility. Thus, while both separated parents work, the children are cared for by other *kibbutz* workers.
- \* Child support would not be an issue as long as the couple remain on the *kibbutz*. That is because all expenses are handled collectively, and generally each *kibbutz* member gets a yearly budget for personal expenses. The situation would be more complicated, however, if either of them wished to leave. In that case, maintenance payments would need to be arranged with the *kibbutz* management, rather than with the parent who remained. For example, if the husband left, he would have to contract to pay the *kibbutz* (not his wife) for the monthly cost of providing for his children. If the wife and children left and the husband remained, the *kibbutz* has the responsibility for payment of child support to the wife. In either event, the *kibbutz* is a full partner in the negotiation process, and the final settlement that is worked out.

Dr. Zaidel summed up by saying that culture affects the context of what comes to mediation, but that intervention techniques are no different; that is, that the process is not affected.

**Margaret Huber's** presentation was very much a personal response to the challenge of developing a mediation model suitable for native Indian cultures. She worked for some months (in her own time and at her own expense) on the model, and stressed that consultation was the key; in any undertaking such as this one, it is imperative to include natives in the design of any model. For the Indians (Aboriginal people as they call themselves), culture is a way of life, to them it means everything. Thus, one must pull the model from the culture, not change the model to suit the culture.

From the book The Sacred Tree (Four Winds Development Press, 1984) Ms Huber found the inspiration for her model. She based it on the concept of the medicine wheel, an ancient symbol used by almost all the native people in North and South America; she chose it because it contains four quadrants that can be used to represent relationships that can be expressed in sets of four.

In this model, because Natives view life as holistic, the mediation process moves in a circular fashion around the wheel rather than being a linear progression. It starts in the east, which represents the spiritual; it moves to the south, representing the emotional; then moves to the west, the physical, and then to the north or intellectual. It finishes in the centre. From her consultations with natives from many different tribes, Ms Huber realised that for the model to be acceptable to the natives, it was imperative to include a spiritual component : thus every mediation begins with a prayer and ends with a prayer. The other quadrants conceptually fit the standard parts of a mediation process : the emotional corresponds to the "telling of each person's story"; the physical corresponds to "exploring the issues"; the intellectual corresponds to "negotiating and coming to an agreement".

Ms Huber explained that there are still some areas to be explored or further developed. For instance:

- \* In native cultures, the elders play a vital role; although she has consulted them in the development of the model, she feels there is a place for them in the actual process, which is still to be worked out;
- \* Although Ms Huber sees mediation as a *healing process*, it is evident that many of the natives coming to mediation would be damaged emotionally and physically (mainly because of alcohol) and be unable to utilise what it offered. Counselling or other *healing* may be needed before mediation takes place;
- \* There is no specific place for *agenda setting* in the model and the mediator(s) need to pull out issues from what can be very long and rambling stories - it is considered very rude to interrupt anyone who is speaking; sometimes it is difficult to get clear what is in dispute;
- \* Because of the very many different tribes, it will be difficult to provide mediators that always match disputants. It is too early to know whether this lack of specific matching will cause problems.

I was extremely impressed with the simplicity and elegance of the concept Ms Huber presented, and consider that it has enormous application for Australia.

lodging is arranged with families there.

Unfortunately for us, the *tyranny of distance* prevails; we are too far away to be part of what is an exciting and invigorating application of our work.

### 3. CONFLICT RESOLUTION SYSTEMS: VARIETIES OF APPLICATION

William Ury of Massachusetts, co-author of Getting to Yes, used the following questions as the framework to his session.

- \* Should mediators just settle one dispute a family presents? Or, should mediators deal with the stream of disputes that occur naturally within the family?

He presented the principles of dispute systems design to help parties handle conflicts effectively on an ongoing basis. According to him, such a model needs to :

1. Focus on interests;
2. Build in *loop backs* to negotiation;
3. Provide low-cost rights and power back-ups;
4. Build in consultation before, and feedback after;
5. Arrange procedures in a low-to-high-cost sequence;
6. Provide the necessary motivation, skills, resources.

He made the point that conflict in relationships equals conflict between individuals; conflict in an individual is conflict between various parts of that individual.

William Ury went on to talk about a Dispute Systems Design for the Middle East, which he sees as an intractable ethnic conflict. He maintained that the usual question "How do we resolve the Middle East conflict?" was not the important question, because even if the conflict was to be resolved, differences remain that need addressing. The need, therefore, is to design a *winning* system away from *power* and towards *rights*; this would have to be one that focused on "agreements and norms and interests and problem solving". According to William Ury's analysis - and it makes sense - neither side can *win* the conflict. So the need is for them to live together; although they may not live in friendship they must resolve conflicts as they arise in order to enable coexistence.

An interesting analogy he drew was that in any war - either a civil war or a family war, a *dialogue of the deaf* goes on; thus the process used for resolution does not

She said that the way in which the mediator finds out about the homosexuality makes a difference to the mediation. For example, if it is disclosed by the gay person, the mediation is easier because there is less emotional upheaval; generally, both people then know and "share the secret". However, this is rare. Generally, the homosexuality is implied in the mediation, and this makes it harder to mediate. The *straight* spouse may use the gayness of the other as leverage to get what s/he wants - for instance, by threats of public disclosure.

According to Diane Neumann, the most contested issue is lesbian custody. It is clear that mothers often lose custody of their children because of their perceived "lack of fitness". She posed this question :

- \* If a straight spouse has that much power over the other person, there is a dilemma for the mediator ; How does one balance the power? And possibly, should one balance the power?

The workshop went on to look at mediating with couples, both of whom were lesbian/gay. Issues in these mediations include :

- \* Identification as lesbians/gays;
- \* Lifestyle - these issues are different to those of heterosexual couples (married or not).

Diane Newmann made the point that endings of gay and lesbian relationships are different to those of straight ones. Uncoupling is far more difficult, intense and protracted than heterosexual ones. One must remember that people have a history together and believe they have a future together. It is not easy to pick up another relationship; it is harder to talk to friends and colleagues (at work and so on) about what is happening. People do not generally have compassion and there is no public acknowledgment. Thus it is difficult to transcend emotional issues. In addition, there is no legal system to support what happens, not even custom or consistency. The court looks at the relationship as a business partnership; generally there is no issue of alimony and no legal or political relief. Michael Lang's comment here was that because laws are hostile, the use of mediation by gays and lesbians will only increase.

Diane Neumann tried to dispel what she thought were some *myths* of homosexuality, by sharing some research that had been done on lesbian and gay couples.

1. 70% of lesbian couples make joint decisions.  
There is generally no written agreement between them.  
Women do not generally take on roles in the relationship, that is, of "women" or "men".  
They often have children living with them.  
They are very monogamous.  
The more powerful partner is usually the one to leave the relationship, which is different to what happens if the couple is heterosexual.

2. 88% of gay couples make joint decisions.  
 They do often have written contracts.  
 They do not typically want to take on roles.  
 They like masculinity in their partners and value it in themselves.  
 Usually both partners work full time.  
 The less powerful partner is more apt to leave.  
 They tend not to have children living with them.

She made the further point that, contrary to heterosexual relationships, society does not help make lesbian and gay relationships work; these relationships need a higher personal commitment to make them work.

Michael Lang cautioned mediators on two counts. Firstly, that they need to be sensitive to their language in mediation, and to their own attitudes. For example, one should ask : "How do you see yourself?" " How do you both prefer to call this relationship?" - for example, marriage? primary relationship? One should always ask; not assume. Secondly, because laws are very different for lesbians and gays, mediators need to find out what they are so they can give the right information. For example, if a couple has a child from a male donor, who gets the child when the mother dies? Or in the case of divorce?

## 5. WHAT THE MOST CURRENT RESEARCH SAYS ABOUT MEDIATION

Bob Emery of Virginia.

Bob Emery outlined his research into agreements made in divorce mediation. He focused on the issue of custody, and compared mediation with the adversary system.

1. The research found, not surprisingly, that mediation saved both time and cost.
2. Agreements reached were similar : they look *traditional* (the mothers generally got physical custody, and the fathers had visiting rights). Although differences were found in joint legal custody arrangements, there were no differences in joint physical custody.
3. No differences were found between mediation and the adversary system in the psychological adjustment of both parties on the variables :
  - \* depression
  - \* attachment or yearning for marriage
  - \* generalised conflict post divorce.

From the research, it was clear that men wanted and were yearning for the marriage more than were the women. This is a clinical issue that needs to be addressed in mediation if recognised - it cannot be addressed in a court hearing.

4. The main differences were found in relation to satisfaction with the process. Fathers in mediation were more satisfied than those in the adversary system. Although there were no significant differences for the mothers, there were

dramatic differences for the fathers. Bob Emery said that an explanation for this phenomenon may be that in divorce, whether by an adversary system or by mediation, mothers are happier than fathers with the outcome - they generally gain custody. Men who go to court and lose the custody battle are not satisfied; men who go to mediation and sign traditional agreements are satisfied.

The same pattern is seen in answer to the question : "Have you settled your problems with your spouse?" Fathers again, are unhappy with the Court. The question "Do you feel your rights were protected?" evokes the same responses. However, a different pattern emerges with the question : "Did the process have a good effect on the children?" Both mothers and fathers were more satisfied with mediation. There was a significant difference on the question : "Did you win what you wanted?" Women in the adversary system felt they had won more in court.

Bob Emery maintained that mediation gives fathers a feeling of having a voice, a say, even if traditional agreements prevail and primary custody prevails. Mediation makes women, on the other hand, give up something in which they generally have power.

Despite the comment of Janet Walker (a noted researcher from Newcastle University In England and a co-panelist with Bob Emery) that "researchers are people who answer questions that no-one asks", this research is important. It confirms with data what many mediators have long suspected, and has implications for the development of a more *user-friendly* model, which addresses the concerns of women in divorce.

## 6. METAPHOR IN MEDIATION

John Haynes of New York

This session focused on the use of two forms of metaphor - the metaphorical story as a way of communicating alternative ideas, and the metaphor in everyday language.

John Haynes illustrated his ideas with a video of a mediation session, in which he built up momentum by describing everything that each party does or offers to do as "steps on a journey to move towards the future". Thus, for instance, he asked one of the parties : "What's the smallest step you could ask her/him to do to help resolve the conflict?" and "What can you do to help repair the damage?" He was careful not to ask ; "What should he/she do?" or "What have you done?"

John Haynes stressed the need for care in language, and that it was necessary to get parties away from the metaphor of war (for example "winning the battle for the children") to positive future journey metaphors, from the negative to the positive. He advocates the use of injury and spiral metaphors (see above) to describe the past for them, and their own conduct and situation. John Haynes emphasised that parties can be helped visualise where they are by the use of mediator language.

## 7. CROSS CULTURAL ASPECTS OF METAPHOR IN MEDIATION

Michael Williams of Ireland

Michael Williams, who must surely have kissed the Blarney Stone in his native Ireland, presented an interesting workshop of the universality of metaphor - which fitted in well with the plenary session run by John Haynes. Like John, he says there is use for metaphor in mediation : in joint sessions, with clients privately, or between sessions in trying to think of how to move clients.

He often uses metaphors from music in describing the breakdown in a relationship, for instance : ther terms *discord*, *tension*, *resolution* and *harmony*. He tells his clients that sometimes there is no resolution to the discord, and that sometimes the tensions created by discord need to be resolved to some degree of harmony - especially if children are involved. He uses the term *limited harmony* rather than *reconciliation*.

At the beginning of a session Michael Williams may use an extended metaphor such as :

"The two of you are as branches of a tree. You need sun and rain to develop well. You may need to move apart to do this. On the other hand, if the branches need to be together, I don't want to pull them apart".

He said it was important to use our hands to illustrate the point, and to watch the body language and the reaction of both of them, to give ourselves a direction on whether to steer them together or apart.

When describing what happens to a couple whose relationship has deteriorated to the point where they spend all the session fighting, Michael Williams often uses the following : "It's like you are sitting in a dentist's chair and a drill hits a nerve and you leap; you can't do anything else".

Like John Haynes, Michael Williams also uses the concept of the "journey". Sometimes he describes mediation as being on a "train" with "stops on the way". He tells the parties that "At the end, you will get out of the train on different sides of the same station and walk in different directions".

Also in talking to his clients about the mediation process he uses the following : "You may think that life is like chess, the better you get the more you win. But it isn't; it's more like snakes and ladders and sometimes when the die is thrown, you fall. That's how you both feel coming here".

At this stage he will pause and allow for the effect of his words. He has used a mutualising metaphor, which takes blame away from each of them; both share the misfortune.

Then he continues : "But the game goes on. You're going to throw another die, and who knows - you hava a chance of getting good luck ..."

Deliberately, he builds in a forward focus.

Michael Williams recommended building ambivalence into positions people have taken up before they come to mediation, and he took up the moral issue of whether it is right to do so. According to him, people who come to mediation are full of fear - fear for mediation, for the future, for leaving the miserable security they already have. If their problems are caused by fear, he maintains that it is legitimate to use that to help them move from their positions. Thus, he would use an extended metaphor, such as :

"You feel as though you've been living in a darkened room with the shutters closed and the light off. Now you want to fling open the shutters and let the light in. You may perhaps, because you've been living in the dark for so long, need to let the light in slowly, to get used to being in the light".

He recommends the use of fables, metaphors, parables, allegories and stories. He maintains that these things are remembered, the way ordinary speech is not; they resonate longer than words do by imagery. All metaphors, according to Michael Williams, resonate - it is a matter of degree. So, what he suggests that mediators do is :

- \* try and *suss out* metaphors that would be appropriate for **that couple**;
- \* don't use metaphors that relate to one party's specified line of work;
- \* look at education, life experience, interests if known;
- \* start using metaphors the sooner the better - early in the process - to achieve dissonance and look at moving positions.

He made the important point that metaphors expressed to one person are heard by the other as well; they are never misunderstood, though they may be ignored.

Michael Williams finished his presentation with the following quote from Bonnie and Clyde :

Q: Where are you heading to?

A: Nowhere, we're heading from ...

In other words, they had a **past** but no future. As practitioners, said Michael Williams, we want mediation to be **heading to**.

## APPENDIX G

### BEYOND DIVORCE : USING MEDIATION FOR OTHER FAMILY AND COMMUNITY DISPUTES

Paper presented by Linda Fisher at the Academy of Family Mediators Conference, Danvers, MA. 22 - 28th July 1990

As you saw from our video Mediation can Change the World the CJC community mediation model is effective in dealing with a whole range of disputes - neighbourhood, separating and separated spouses, adolescent/parent.

CJCs intake around 3500 cases yearly, and mediate around 1500 cases. In addition, they conciliate some 500. Of these, approximately 65% are neighbour disputes, 10% are family disputes involving spouses (partners) and 4% are generation conflict; 5% are other types of family disputes. So *family disputes* collectively account for a consistent 20% of our caseload. That's around 560 cases yearly, and growing. Disputes involving adolescent/parent (*generation conflict*, often with the clash of cultural backgrounds) is CJC's biggest growth area.

Although the video was fairly comprehensive in illustrating the CJC process, it did not show you the use of caucus - that is, separate sessions held by the mediators with each party individually - which is mandatory in our CJC mediation model, and which occurs at the end of what we call *exploring the issues*. Caucus gives the mediators the opportunity to assess whether each party is happy with what is happening and is able to negotiate adequately on their own behalf; it also gives the party not in caucus the opportunity to have time out to reflect on the session so far, and what they hope to achieve from it. Incidentally, in the CJC model, caucus is confidential to each party. The mediators do not contract to disclose or not disclose anything to the other party. As well as the obvious safeguards a confidential caucus has, such as ensuring that the mediators do not slip up and disclose something that they have contracted not to disclose, it has an educative function : the mediators are thereby encouraging the parties to take responsibility for their own actions.

This use of caucus has been extended to form the basis of what CJCs call their *mutant model* for dealing with serious parent/adolescent disputes. The process had been developed in consultation with one of the children's courts in a region outside Sydney which has a high migrant population and a high parent/adolescent caseload. The conflict is generally about the adolescent's residence in the family home and revolves around issues of independence/dependence, and freedom/protection. Conflict has often escalated to the point of violence or serious rebellion involving

criminal behaviour. By the time these cases are referred to CJs, the parties have usually had involvement with police, courts, school counsellors and the Department of Family and Community Services.

In conflicts of this kind, there is usually an imbalance of power. CJs consider that the model they offer these parties equalises power by *lopping off* from one party rather than by *adding* power to the one perceived as less powerful. *Power* is generally perceived as physical strength, size, aggression, violent behaviour and fear, or economic power. But as you know, often a seemingly powerless person, by that definition, can exert a more powerful influence either through reason and articulateness or through emotional power such as guilt, worry, or threat to self-esteem. The mediation process teaches disputants how to communicate and resolve differences without the imposition of any of these usual sources of power such as violence, aggression and fear. Furthermore, the process itself imposes a degree of equality within the session.

CJs experience in parent/adolescent mediations has taught them that it is important to recognise :

- \* That the young person will be passive, and that this needs to be addressed;
- \* That the parents will focus almost entirely on the young person and that in their eyes the young person is always at fault;
- \* That there will be a very high level of distress;
- \* that the juvenile will be very suspicious of any *adult process*;
- \* That both parties will feel powerless;
- \* That in fact the parties are both powerless and powerful.

I would like to talk now about the specifics of mediating these court-referred cases.

1. CJs begin their process with lengthy intake sessions with each party privately. We prefer to talk to the young person face-to-face; we have found that if we do not, the *no show* rate at the mediation session increases. At this pre-mediation session (or *preparation for mediation*) the intake worker will stress the principles of neutrality, confidentiality and equality; s/he explains the process and emphasises that the mediators will remain in control of the session. In describing mediation, the intake worker is careful not to personalise it; s/he uses examples of neighbourhood disputes to illustrate how the process will work.

There is an explanation given of what mediation is, and what it is not (that is, it is not connected to court, to Probation and Parole, to the police, to Family and Community Services, and so on).

The intake worker will also begin to explore the issues that are important for the young person, in order to encourage him/her to clarify what needs to be addressed if the dispute or problem with his/her parents is to be resolved. In sum, at intake we ask them to work really hard on identifying all the issues

that are important for them, all the many things they may want to discuss with the parent or guardian, and we reassure them that they will have the chance to say what they think and feel about those issues without threats or interruption.

An important point for a successful intake with the young person is to make sure that the worker's level of language is the same as the young person's; adolescents do not want to be *talked down to*.

2. The interview with the parents is more likely to be a *normal* CJC intake interview. The parents' perception is likely to focus on the young person as being the whole problem and always having been disruptive. CJs do not attempt to deal with this perception at intake; rather we emphasise that mediation gives the parents the opportunity to say what they feel to the young person, and that everyone will be treated as equal.
3. Contrary to CJC's usual practice, the mediators are given a thorough briefing before the session. The rationale behind this is that the mediators need to be familiar with the issues the young person has already indicated are important, in case s/he becomes silent and uncommunicative at the session.

Now, to explain the session itself :

4. After some fairly short introductory remarks, the parties are separated. CJs have found that an effective way of encouraging the young person to participate is to begin with a short caucus with each party - of about 5 minutes each. This is to establish the communication pattern needed : that is, direct communication from the start between mediators and the disputants.
5. The caucus session with the young person and the mediators is needed to continue the pattern established by the intake worker, and to reassure the young person of their genuineness. At this caucus, the mediators stress that although they will remain in control of the process, the young person has control over what s/he says, and must make decisions about that. The mediators cannot take responsibility for that. They emphasise to the young person that, beyond the session, it is the parties who have to take responsibility for their own lives.
6. The caucus session with the parents is for the mediators to establish rapport, and to stress neutrality, control of the process and equality. These concepts often contradict what the parents have thought was the role of the mediators - which is either *like the court* and therefore on their side, or *like the welfare* and therefore on the young person's side.
7. When the parties come together, the process is again explained. The young person is asked for his or her statement first, then the parents. If the young person is sullen or uncommunicative, the mediators may need to do some

sensitive prompting from their briefing notes.

8. From this point on, CJC mediators would follow their *standard* process; the communication is directed so that the parties are talking directly to each other, and another caucus is included so that the mediators can make sure the issues are being fully discussed. After this caucus, the mediators will begin the process of focusing on resolution. There is a great deal of reality testing and the emphasis at this point is on the future, away from the mediation. The parties are encouraged to take responsibility for their future actions.

This is just a brief explanation of how things are done *down under*. I'll be interested to see how it compares with what is being done here in America.

Thank you for your attention.

## APPENDIX H

### RECORD OF CONCILIATION SESSION IN FAMILY COURT, LOS ANGELES

Conciliator : Renée Lehr  
Works 3 days as Mediator/Conciliator  
2 days as private therapist.

Case in question : De facto couple; 2 year relationship.  
1 child - 4 months. Male party 25 years; female party 20 years old.

#### MODEL USED

1. Intake : Parties complete Intake form
2. Orientation : In this case, 1 couple only
  - (a) Explanation of what conciliation is. It is stressed that is is **not** reconciliation. Explained as a transition period from one kind of relationship to another. Mediation is described as a *private ordering* and an opportunity for the couple to sort something out for themselves.
  - (b) Only custody issues to be discussed.
  - (c) Order can be modified in the future. The couple can phone Conciliation Court and return for another session.
  - (d) Session is confidential. The conciliator will not be allowed to go to court as a proponent for either party. There will be no court reporter present and no feedback will be given to the relevant attorneys unless requested by the parties.
  - (e) Couple is shown the film "You're still Mum and Dad" ; Family Courts of New Zealand (Auckland) Ltd. by Northern TV Ltd.
3. Mediation session
  - 3.1 Opening : Conciliator begins by ensuring that the couple understands the process :-
    1. Mandatory for any couple separating;
    2. Role of neutral mediator is to assist parties work out a parenting plan. (N.B. The vocabulary change : parenting plan instead of custody and visitation).
    3. Possible outcome

Agreement : If it is reached, it is drawn up in detail and reviewed for errors. It is signed by the parties, then by the

judge and becomes an Order of the Court.

No agreement : Judge will determine the parenting plan.

4. Confidentiality : Absolute except where child abuse or gross neglect becomes apparent.

3.2 Parent questionnaire

Conciliator expresses thanks to parties for filling it in. This gives information about parenting style of the other party as perceived by one filling it in, as well as about what that party wants.

3.3 Details of time available for parenting

- \* Any regular days off work;
- \* Is the party working/not working;
- \* How long have they lived together?

3.4 Each party was asked to describe, in his/her own words, what kind of parenting plan he/she would like to see implemented.

Any arguments about the importance of this plan or any other were countered by focusing on the needs of the child, for consistency in parental care and for the need of the child to spend some time with each parent.

3.5 Holidays : This was dwelt upon in some detail and specific options were put under the searchlight. When the suggestion was put that days like Thanksgiving or Christmas might be split, the conciliator used the opportunity to do some reality testing :

- \* What might be the reaction of the baby?
- \* Might it not be disorienting?

She then put other suggestions :

- \* What parents will often do is this : One parent will have the child on Christmas Eve and up to 11 a.m.; the other for lunch and dinner OR
- \* Something you can do is alternate annually; OR
- \* How about doing it Mom's way one year and Dad's way the next?

N.B. Again the use of chosen vocabulary : The conciliator called them Mom and Dad to reinforce their bond with the child.

As the agreement was not reached on the split up of holidays, the conciliator suggested a date in October be set for working out a holiday schedule. As 4th July and Labor Day fell in the interim, she put it to them that they should decide whether to split the days between them.