

Family Mediators Should Know the Law
By Frank Garfield
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When it comes to family mediation, a threshold issue is whether the mediator needs to know the law that applies and how the legal system works. There are those who argue that substantive knowledge (let alone expertise) is irrelevant, that mediators can operate effectively without it. They may also believe that clarifying questions asked by a mediator without substantive knowledge may further the mediation process. I am not among them.

There are many talented nonattorney mediators who lack substantive knowledge. This circumstance does not doom the mediation to failure. But it is not a plus:

An attorney mediator who has substantive knowledge is likely to have a higher level of credibility, and thus be more effective. This raises the issue of what the parties are looking for in a mediator.

Take a typical couple: Their marriage has broken up. They may be angry, hurt, sad, and fearful. While both parties are likely to have an emotional perspective on their situation, it is rare that the parties' emotional perspectives coincide. To the contrary, they are usually in conflict.

They do not come to a mediator for marriage counseling. There are marriage counselors for that.

They do not come to a mediator for therapy. There are social workers, psychologists, and psychiatrists for that.

They do not come to a mediator for empathy or emotional support. They have friends and family for that.

They do not come to a mediator to transform their relationship or themselves. There is organized religion, meditation, and yoga for that.

The parties come to a mediator to take care of the business of dissolving their marriage. They are looking for someone who is knowledgeable and experienced to guide them through the process, preferably someone who can help normalize their situation. A family law attorney who has handled hundreds of cases can do that. A nonattorney cannot.

This issue goes to the essence of one's mediation philosophy: The nonattorney mediator is more likely to value concepts such as empowerment, self-determination, communication, and closure. Those are the products nonattorney mediators want to sell. The attorney mediator is more likely to emphasize identifying and resolving the issues involved in the legal process of getting a divorce. Those are the products most divorcing couples want to buy.

An attorney mediator has a higher level of credibility with the parties because the parties are there for what the attorney mediator offers. If you have any doubt, ask the parties: Are you here to transform your relationship? To empower yourselves? To improve your communication skills? To obtain closure? Or are you here to take care of business, get a divorce, and move on with your lives?

Nonattorney mediators attempt to get around the insurmountable problem of their limited capabilities by defining the mediator's job as "facilitating the negotiations." The problem is supposedly solved by referring the parties to lawyers, accountants, mental health professionals, and others, as if money is no object, and even the simplest divorce requires a team approach. According to this theory, expanding the pie for mediators means expanding the pie for everyone. While everyone may love the idea of expanding the pie, *someone* has to pay for a team of high-priced professionals. Does anyone really believe that divorcing couples want a mediator whose *sole function* is to manage the conflict?

A mediator with substantive knowledge is more likely to help the parties avoid making mistakes. This is especially true if the *parties* lack substantive knowledge. Nonattorney mediators usually take one of two somewhat contradictory positions: Some of them believe that they can master the details of California family law as well as any lawyer, and that having a law degree is no guarantee of substantive expertise. Others contend that substantive expertise or even knowledge is irrelevant, and that a good mediator can get the job done without knowing anything.

Which is it? To me, it is sophistry for nonattorney mediators to say: I know just as much about the law as you do, and even if I don't, I don't have to know anything about the law anyway. An attorney is a more qualified mediator than a nonattorney because of experience, not because of a law degree. (This is not to say that all attorney mediators are equally talented or even competent.)

Put yourself in the place of prospective mediation clients: The attorney mediator can identify the issues, provide the parties with legal information, and do all the paperwork. The nonattorney mediator may not be able to do any of those things, and may be practicing law without a license even if he or she can. With no reason to believe that a nonattorney mediator is a more skillful conflict manager or facilitator, the majority of prospective mediation clients would not choose a mediator who is unable to perform three out of four essential tasks.

The conviction on the part of nonattorney mediators that family law mediation is not about the law will be of little solace to clients who discover that they have not complied with the requirements for ensuring that spousal support is deductible, or who have run afoul of the front-loading rules, or who are unfamiliar with *Ostler-Smith* orders, or who do not understand the issues raised by the *Hall* case, or who are unclear on the interplay between guideline child support, mandatory and discretionary add-ons, and extraordinary expenses. The question to ask yourself if you are doing family mediation is whether you know these issues backwards and forwards (along with the dozens of other issues that commonly arise in these cases). An experienced family lawyer not only knows these issues, but also understands why it is the mediator's responsibility to bring them up and help the parties resolve them.

Most mediation clients prefer a mediator who knows what he or she is talking about to one who doesn't. When you think about it, in few areas of human endeavor is ignorance an advantage, let alone exalted over substantive knowledge.

What's wrong with just helping the parties resolve the issues they present? Why should a mediator point out additional issues, even if he or she knows they exist? Some argue that a mediator should not raise

issues under any circumstances, and certainly has no responsibility to do so. Once again, I disagree.

To begin with, if the parties reach a tentative agreement using a nonattorney mediator, and then consult attorneys, the attorneys will tell them about other issues. The parties will rightly feel that their agreement is incomplete. They will wonder why the mediator didn't mention those other issues. In short, the parties will be dissatisfied because they will be starting a new round of negotiations instead of documenting a comprehensive deal.

This problem will be compounded if they do *not* consult attorneys. What if they take the agreement the mediator helped them negotiate to an outfit that specializes in helping do-it-yourselfers with the paperwork? This is especially likely if the parties have great confidence in the mediator, and believe that he or she has helped them reach full agreement on all essential issues. If they have so much confidence that they don't consult attorneys, and the mediator doesn't identify issues the parties may be overlooking, they won't know they've got a problem until the problem materializes. By that time, it may be too late to do much about it.

There is also a practical aspect to this: The parties may be satisfied with an agreement on any number of issues that sounds good in theory but won't work for some legal or practical reason. A nonattorney mediator will consider the job done when agreement is reached. An attorney mediator will point out the problems in the name of getting the job done right.

I doubt that nonattorney mediators who are mediating family law cases tell their clients at the outset that they will help them resolve only the issues they present, that the parties may overlook other issues of importance, that the mediator may not know if they do, and that the mediator will not alert them to other issues even if he or she knows they have been overlooked.

These observations relate directly to whether attorneys or nonattorneys (or both) should be doing family mediation. The debate has been exacerbated by the Los Angeles Superior Court's recent decision to exclude nonattorneys from its panel of volunteer mediators.

The Court's Family Law Mediation Pilot Project is an effort to expand the Court's ongoing efforts to resolve cases short of trial. The purpose of the mediation program is not to help build the mediation profession or to help mediators earn a living. As the volunteers who will staff the program are practicing family lawyers, they are willing to give back by helping the Court settle cases. In the Court's opinion (and mine), experienced family lawyers are most likely to accomplish the purpose of the program.

Apart from that issue, the LASC has no obligations to nonattorney mediators or others who believe they have found a better way. The LASC serves those who have chosen the judicial system to resolve their disputes – litigants who are either represented by counsel or are representing themselves. Because of the demands on the system, the Court needs help in settling cases; hence the mediation program.

In the final analysis, all of this is about competition. If nonattorney mediators offer a better product than attorney mediators or the LASC, they will prosper. If not, they won't. However, the services offered by the LASC – including their settlement and mediation programs – are free. Discouraging volunteerism and charging for essential government services are not the ways to build the mediation profession.

Fundamentally, many nonattorney mediators believe that family mediation is not primarily about the parties' legal rights and duties, that their rights and duties are only two of the factors involved, and that there are far more important considerations. They should not waste their time trying to convince judges and lawyers to see it their way. If nonattorney mediators truly believe that the legal issues are only a small piece of the puzzle, and that they offer a service that is preferable to other options, they should be trying instead to convince the public.

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