
Psychology and Family Law

The Superiority of Mediation in Divorce Disputes

By Mark Baer, Esq.



At the July luncheon, CPA President Douglas Haldeman reminded us that “the mission of APA is to advance the creation, communication and application of psychological knowledge to benefit society and improve people’s lives.” He also noted CPA’s mission statement, which is, “CPA supports our members’ professional interests, promotes and protects the science and practice of psychology, and advocates for the health and welfare of all Californians.” One point he made very clear is that psychologists whose faith-based beliefs take precedence over scientific and social science research should be practicing as pastoral counselors, not mental health providers.

As an attorney and mediator who takes a facilitative approach, I maintain that a similar argument can and should be made with regard to psychologists and other licensed mental health care professionals who disregard the social science research pertaining to the manner in which divorce and other family law related matters are handled.

How many psychologists and other licensed mental health care professionals are unaware that social science research supports a facilitative approach—i.e., professional mediation—with regard to family law related disputes? How many such professionals instead believe that they are protecting their clients by referring them to litigators who will “fight for their rights”?

The following is an excerpt from an article titled, *Mediation: Negotiating a More Satisfactory Divorce*, published by Harvard Law School’s Program on Negotiation, on March 27, 2017: “Study participants whose mediator or lawyer took a facilitative approach to the negotiation, as measured by their tendency to engage in problem-solving behaviors and help their clients focus on interests, generally reported high-quality outcomes. Overall, the results suggest that *couples would be wise to be aided by professionals who believe that reducing conflict and encouraging an open dialogue are more likely to promote a satisfactory divorce* than a straightforward competitive approach would.” (Italics added.)

It also bears mentioning that the 2012 study upon which that article was based was one of at least nine studies—all of which came to the same conclusion. In fact, in one of them, an article titled, *Family Mediation Research: Is there Empirical Support for the Field?*, clinical child psychologist and researcher Joan B. Kelly stated:

“Based on a variety of methodologies, measures and samples, the nine studies described suggested strong support for the use of [facilitative] mediation in family disputes. Mediation has given evidence of its power to settle complex, highly emotional disputes and reach agreements that are generally durable.... Settlement rates in custody, comprehensive divorce and child protection mediations generally ranged between 50 and 90 percent, with the exception of the most difficult child protection cases involving parental termination. Contrary to some expectations, *mediation worked with angry and high conflict clients and sometimes for those with serious psychological and family problems*. What was necessary were well-trained and experienced mediators....” (Italics added.)

Those who used custody mediation were substantially more satisfied than parents using other court processes. Repeatedly, clients indicated that they felt heard, respected, given a chance to say what was important, and not pressured to reach agreements. They reported that mediation helped them to work together as parents, and felt that their agreements would be good for their children. Mediation clients in the private sector were significantly more satisfied on almost all measures of process and outcome than were those using adversarial divorce processes.”

Notice that Kelly referred to “well-trained and experienced mediators.” What mediation training do you believe retired judges have received, by virtue of their time on the bench, that makes them “well trained and experienced mediators?” This is an important question to answer because most family law litigators use retired judges to mediate their cases—assuming they even bother utilizing mediation.

If you understand that the field of law tends to attract highly competitive people, and that law schools train such competitive people to practice within our adversarial legal system, this shouldn’t be the least bit surprising. However, acknowledging the social science and empirical evidence, lawyers, lawyer mediators and retired judge mediators require a radical paradigm shift to take a facilitative approach. Moreover, they require comprehensive training in facilitative mediation, and that they be psychologically-minded.

Rather than helping their clients find those lawyers who will *fight the hardest* for their client’s rights—regardless of whether or not they are currently involved in an apparently high conflict divorce—shouldn’t psychologists and other licensed mental health professionals help their clients to assess how best to shift the direction of the case from a competitive to a facilitative approach? And shouldn’t referrals be made to facilitative mediators rather than to pugnacious attorneys?

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