

MCFM

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The Massachusetts Council On Family Mediation is a nonprofit corporation established in 1982 by family mediators interested in sharing knowledge and setting guidelines for mediation. MCFM is the oldest professional organization in Massachusetts devoted exclusively to family mediation.



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## From The President: Laurie S. Udell

One of a mediator's foremost jobs is to draft the Separation Agreement (or a Memorandum of Understanding for a non-attorney mediator) that the parties will bring to court. What topics the mediator brings up can be controversial. One example would be whether the mediator should raise the issue of cohabitation with reference to when alimony might stop. Another example would be whether a mediator merely mentioning that inherited property may be divided by a court is sufficient, without explaining the various factors a court often looks at in deciding whether the inheritance will remain with one party, or be divided between the parties.

In addition, the choice of words a mediator uses to effectuate the couple's wishes can be harrowing; the challenge for the mediator is to use "neutral" language that favors neither party. This is often harder than it might at first glance appear.

However, an even bigger issue for the mediator is — should the mediator merely put into words what the couple is agreeing to — no matter how "unfair." Or is it the mediator's responsibility to draft a "fair" agreement? We know that a judge must approve the agreement as being "fair and reasonable" but should a mediator try to ensure that the Separation Agreement be approved, or take a chance that it won't. Certainly, there's a range of what is "fair" and we can never be positive what a judge will approve of; however, what if the agreement is clearly unfair? An obvious example of being clearly unfair might be if the couple had a long-term marriage with two minor children where the husband is a high wage earner and the wife is a stay-at-home mom with only a high school degree and no chance of inheritance, and minimal assets to divide. If, in such a case, the wife chose to forego alimony, past, present and future, and the agreement survived, that would be a wholly unacceptable provision.

Should a mediator have his or her name attached to such a document? I would emphatically answer "No" even if that is what the parties have agreed to (the mediator having explained the role of alimony as well as the possible or likely outcomes in a courtroom). In my opinion, a mediator has a responsibility to make sure that the agreement meets a minimum standard of fairness, and although the mediator cannot guarantee that a judge will ultimately approve the agreement, there should be a good likelihood of that occurring, or the mediator has not done his or her job properly.



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## IN PURSUIT OF JUSTICE Lawyers and Mediators Negotiating Identity

By David B. River

As mediation becomes mainstream, there is a growing conflict between legal professionals, who traditionally resolve disputes, and mediators, who are bringing mediation to conflict areas that were previously handled by attorneys. The growing dispute is evidenced by an increasing number of lawsuits brought against mediators by state bar associations on grounds of unauthorized practice of law ("UPL").

The popular reasons given for the conflict only partially explain its causes. Rubin and Levinger point out that "conflict over one set of issues is often confounded with, or obscured by, conflict over issues at a different level" (1995, pp. 15-16) and in the case of mediators and attorneys, the most visible level of discussion is to define what is and isn't the practice of law, and who is entitled to discuss the law with people in conflict. Mediators claim that lawyers bring these lawsuits against mediators in order to protect their business interests, and lawyers claim that mediators step into legal territory without legal training or ethics to guide them, leaving people with unjust or otherwise negative outcomes.

A much richer understanding of this struggle for definition is possible through the lens of identity and resource competition. The advent of mediation as a tool addressing conflicts that were previously handled by attorneys has blurred the distinctions of who is capable of addressing conflict, broadened

the models for dispute resolution, and called into question the idea that adversarial approaches lead to the best outcomes for people in conflict. The success of mediation, drawing people who might otherwise have hired attorneys, is forcing attorneys to look at the assumptions about who they are, what their work accomplishes, and, in some cases, to transform.

On the other hand, mediators form a new profession with many different ideas, styles, practices and ethical codes. Under threat of lawsuits from the legal profession, mediators keep silent about how they discuss legal issues with clients, what forms best practices, and what

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distinguishes a cooperative approach to the law rather than a competitive one.

The tendency of identity conflict to escalate and define who is "in," who is "out," and therefore who is in an advantaged position with respect to resources hampers the development of both professions and keeps the focus away from the kinds of questions and research that would allow both professions to advance.

**Resource Conflict: Fuel for the Fire** In a recent law review on the subject,

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Jacqueline M. Nolan-Haley points out that "the organized opposition [by lawyers] to

for attorneys such as small claims, have not been the target of any UPL lawsuits.

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One can surmise that the identity conflict is an issue because

the unauthorized practice of law began in 1930 . . . when lawyers, along with almost everyone else, were struggling to protect their livelihood from competition and economic catastrophe" (2002). Whereas 20 years ago few people had any knowledge of what mediation was, today there is a great demand. Mediators market their services as a "lower cost" and "less stressful" alternative to lawyers and court battles, and the message has been very successful. As a divorce mediator, I speak to several people a day who are seeking mediation services based on economics and a desire to remain amicable.

lawyers perceive a threat to their ability to gain clients. Martha Minow suggests that negotiation of and between different identities "is nested within a pattern of social, political, economic, and cultural practices through which people relate" (1997, p.52). Underneath the questions of what is the law and who is entitled to practice it is a struggle for a larger identity — who is considered a legitimate dispute resolution professional in society.

Competition for perceived scarce resources fuels the current lawyer/mediator identity conflict. This is evidenced by the fact that most of the UPL lawsuits have been brought against divorce mediators. This is significant

because attorneys commonly bill \$10,000 to \$100,000 for a single divorcing client. In comparison, volunteer mediation programs, which focus on providing services to low income people and/or people involved in traditionally low-profit-generating disputes

**The Role of Identity** While mediators seek to define their identity within the bounds of a relatively new profession, attorneys may have a larger challenge as they seek to maintain a clear sense of

## **While mediators seek to define their identity within the bounds of a relatively new profession, attorneys may have a larger challenge as they seek to maintain a clear sense of relevance within a tradition-bound profession.**

relevance within a tradition-bound profession. Morton Deutsch (1982) points out that "It is important for the participants in a particular social relationship to know "what's going on here," i.e., to know the actors, the roles they are to perform, the



relations among the different roles, the props and

## Up until the last few decades, lawyers were the sole, rightful and legitimate owners of dispute resolution processes in civil society.

settings, the scenes, and the themes of the social interaction" (p.25). ADR questions the foundations of what attorneys know to be true and, therefore, their role and position within society. In return, attorneys challenge ADR practitioners to be mindful of issues of fairness and power without practicing law in disguise.

**Lawyer Identity** After centuries of development, the legal profession has created extensive ethical codes, rules of conduct, procedures, and educational systems that help lawyers maintain an identity distinguished by a high level of training, education, power and professionalism. Whether or not this image matches reality, lawyers rank with doctors in terms of social esteem and power. Up until the last few decades, lawyers were the sole, rightful and legitimate owners of dispute resolution processes in civil society.

On one hand, the professional identity of a lawyer is clear. To become an attorney, one goes to law school and then takes the bar exam for the state or states in which s/he wishes to practice law. However, ADR research has called into question whether finding a "good lawyer" to zealously fight for your interests might actually harm more than help the person in conflict because of lost value and damaged relationships. The success of ADR practitioners has blurred and obscured the social understanding that when you have a problem with someone, you need to find a good lawyer.

The legal profession is based upon justice principles that have been established over centuries. "The adversarial system attempts to determine truth, preserve rights, determine right and wrong, and punish the wrongdoer" (Kovach, 2001). Lawyers seek justice based on the most favorable interpretation of the law for their client and fight for their client's interests against the opposing side. For an example, the Massachusetts Rules of Professional Conduct states that "A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf" (cited by Reynolds and Tennant, 2001, p.4).

The use of mediation in lawyer-dominated areas is quite recent, and grew out the broader field of ADR, which held that "conflicts often could be restructured and reframed so that partisans would regard the conflict as a shared problem that had mutually acceptable solutions" (Kreisburg, 2001, p. 411). Through conceptual models such as the prisoner's dilemma and game theory, developed in the 1960s and 1970s, researchers studied the possible value that could be generated from a cooperative approach to conflict rather than a competitive or adversarial approach. In addition, "mediators could . . . manage and settle disputes in ways that would enhance the adversaries' relationships" (Kreisburg, p. 411)

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ADR has, in effect, asked attorneys whether their work and approach to conflict is truly in the best interests of their clients — which creates a moral and ethical dilemma for attorneys. Deutsch suggests that "The need for self-esteem involves the need to have a sense of the worthiness of one's goals and a sense of confidence in one's ability to fulfill one's intentions" (1984, p. 29). If people are, in some cases, harmed by your intervention, then how do

## **The success of ADR practitioners has blurred and obscured the social understanding that when you have a problem with someone, you need to find a good lawyer.**

you hold your head up and know that your work is worthy? Kimberlee Kovach points out that "Many of the very rules that establish parameters or guidelines for lawyers' behavior were written by lawyers who advocated individual liberties and rights, regardless of morality issues" (Kovach, 2001). The utility and morality of the cutthroat lawyer, zealously fighting to win the legal contest is in question now more than ever.

**Mediator Identity** As a new profession, ADR practitioners, including mediators, are in the beginning stages of developing a cohesive identity. Mediators come from a great variety of backgrounds, including law, psychology, social sciences, social work and education. The ethics and professional standards of mediators from these various disciplines shape those mediators and in turn the mediation profession. Efforts to define a "Uniform

Mediation Act" have produced a document that, by design, "addresses only those areas (such as confidentiality) where uniformity is required," ... "reflects an understanding of the diversity of mediation styles and range of disputes mediated", and yet "preserves mediation as a process that is separate and distinct from the practice of law, arbitration, and judicial proceedings" (Firestone & Sharp, 2001). To allow for a diversity of professional backgrounds, mediation styles,

practice areas and practitioner models (community volunteer to private practice) and still create a distinct profession is clearly still a work in progress.

Among the challenges by attorneys to the developing mediation profession is whether mediators can help people reach fair settlements while remaining "impartial." As Louis Kreisberg states, "Some observers argue that the dominant party and a conflict may use [conflict resolution] as an instrument of control. Without taking sides in this debate we must then concede that insofar as parties are unequal in status, in power, or other resources, the weaker party tends to give up more and mediated or negotiated agreement" (2001, p.417). An attorney is a professional advocate, helping people who may or may not be knowledgeable or savvy in negotiations. Attorneys can be viewed as professionals who, thereby, equalize the power of the clients. The mediation profession has a much less developed sense of how to respond to power imbalance.



**UPL lawsuits have a profound effect on the non-lawyer mediation community.** A lawsuit not only threatens to ruin the reputation of the mediator it is brought against, it creates a precedent harmful to the entire mediation community. Therefore, it is not hard to understand that the mediation community has largely responded to the issue of how mediators should approach the law with "inaction," which is defined by Rubin & Levinger as "when one side deliberately does nothing in the hope that the passage of time will favorably change the situation" (1995, p.15). Though there is much discussion within legal journals, there is little discussion within the mediation community about this issue.

Going back and forth about what is and isn't the practice of law could be understood as a displaced conflict (Deutsch, 1973), which distracts lawyers and mediators alike from more important goals. The ADR field "was intended to be flexible, make the world a better place, and encourage different models of problem solving — not only adversarial ones. Yet appropriate dispute resolution is now becoming as complex, law-laden and law-ridden as the traditional practice of law" (Menkel-Meadow, 2001). The mediation profession, in order to realize a successful identity in legalistic and/or high power conflict areas, must seek a way to reconcile with the law without losing sight of the important distinctions ADR brings to the resolution of conflict.

**Multiple and Shifting Identities** Beneath the conversation of lawyer/mediator identity lies the reality that mediators and attorneys are not distinct identity groups who are fighting over clearly incompatible interests. As Martha Minow posits, "...Identities are not stable, fixed, innate, essential, singular or clearly bounded. Neither are they entirely mutable at the wishes of anyone" (Minow, 1997, p. 52). The lawyer/mediator identity conflict, fueled by a perceived incompatibility of interests, drives lawyer and mediators alike to seek the definitions and bounds of their respective practices. However, it is arguable that there is no such definition in the reality of the daily practices of attorneys and mediators.

Whether inspired by the moral arguments or the need to stay economically advantaged, many attorneys are being trained in mediation and many mediators

**In language that could easily be an advertisement for mediation, collaborative lawyers espouse "Changing the role of the lawyer from strategist for winning against an adversary to intentional settlement worker...."**

are going to law school and being trained in law. In addition, there are lawyers who have a poor understanding of the law and non-attorney mediators who have a sophisticated understanding of the law.

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## The mediator's sense of fairness and understanding of statute and case law will inevitably impact the negotiations.

Therefore, it is important to note "how group-based descriptions are approximate or probabilistic, not absolute and consistent" (Minow, 1997, p.49).

In addition to becoming mediators, lawyers are blurring the lawyer/mediator boundaries in other ways. There have been significant discussions within the legal field as to whether lawyers can ethically employ problem-solving approaches to conflict rather than adversarial approaches. Collaborative law is one such outgrowth, in which the attorneys vow not to resort to litigation and to withdraw from the case if the clients decide to litigate. In language that could easily be an advertisement for mediation, collaborative lawyers espouse "Changing the role of the lawyer from strategist for winning against an adversary to intentional settlement worker . . . [which] changes the purpose and focus of all inquiry, thought and discussion: 1) from past to future; 2) from facts to relationships; 3) from faultfinding to restructuring relationships; and 4) from positions to interests" (Reynolds & Tennant, 2001).

Thus the lawyer/mediator identity conflict is occurring against a complex and constantly shifting landscape of goals, interests, and intersecting identities. As Martha Minow suggests, "The idea of individual membership in multiple, intersecting groups implies a more profound challenge to identity politics....

Perhaps for strategic purposes we may choose to affiliate along one or a few lines of group membership, but these lines may shift as our strategies and goals change" (Minow, 1997, p.39).

**Facilitative/Evaluative Distinction** One area of discussion related to the issue of mediators and the law is the difference between "facilitative" and "evaluative" mediation. The aim of facilitative mediation "is solely to assist the parties in reaching a negotiated settlement" without offering analysis of legal merits or probable outcomes in the judicial process (Schwartz, 1999). Evaluative mediators, however, offer such analysis in order to help the parties understand, among other things, their best alternative to a negotiated agreement (BATNA) and whether a particular settlement would be legally sound if tested in the future. Many attorneys suggest that "...only lawyers should be permitted to practice evaluative mediation" (Schwartz, 1999).

However, it is unclear whether purely "facilitative" mediation is even a theoretical possibility. Simply seeking understanding of the interests of one person on one point rather than another "places the mediator in the position of selecting some options from many and thus can be considered an implicit form of evaluation" of appropriate options (Nolan-Haley, 2002). In other words, a mediator impacts the negotiation in explicit and subtle ways by using traditional and widely accepted mediator skills as innocuous as active



listening. The mediator's sense of fairness and understanding of statute and case law will inevitably impact the negotiations.

**The Shadow of the Law** There is wide agreement that "The [mediation] process is one that is focused on discovering the underlying interests of the parties and on solving a problem rather than one concentrated on obtaining a settlement based upon what the law may be or what it declares the parties' respective rights to be" (Kovach, 2001). And yet, in many conflicts, the legal system is another party to the conflict that cannot be ignored. If mediators do not know the law or can not discuss the law with disputants, they "will be deprived of information that could assist them in making educated and informed decisions in the mediation process" (Nolan-Haley, 2002).

If both parties in a conflict are knowledgeable about their rights within the larger legal system, a mediator has no problem; as mediators are specifically trained to address the dynamics of conflict, negotiation and impasse. However, agreements are formed within the shadow of the law. They either need to be reviewed and approved by a judge or withstand legal scrutiny if the agreement is contested at some time in the future. If parties to a legal dispute are not knowledgeable about their rights, a mediator must help them understand. If mediators did not discuss the law, mediation would be a "crapshoot and parties may achieve results that are neither

fair nor just" (Nolan-Haley, 2002). A larger question may be how to acknowledge the parties' sense of justice while being responsible to the justice rules espoused in the society's laws.

**The Reality of Practice** The reality is that mediators, including non-attorney mediators, discuss the law during mediation. They do their best to insure that agreements will be approved in court and will hold up if legally challenged in the future. Some writers suggest that to be able to move forward as a profession, mediators need to be more honest about how they discuss the law during mediation in order to ensure and develop good practices. "Rather than engage in the considerable semantic gymnastics that are required to separate particular mediator behaviors from the practice of law, we should plainly identify mediator behaviors" (Nolan-Haley, 2002).

**Future Directions** The lawyer/mediator conflict could result in an exciting time of development within the legal and

## **If mediators did not discuss the law, mediation would be a "crapshoot and parties may achieve results that are neither fair nor just"**

mediation professions, as well as the larger justice system. "Conflict has many positive functions. It prevents stagnation, it stimulates interest and curiosity, it is the medium which problems can be aired and solutions arrived at, it is the root of personal and social change" (Deutsch, 1973, p.8). Whether the conflict simply

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narrows the bounds of each profession and redefines which professional is entitled to what portion of the "dispute market" or, alternately, realizes positive benefits, will depend on whether lawyers and mediators can refocus on the goals of their work. As Carrie Menkel-Meadow says, "Competition between lawyers and non-lawyers for clients and fees has blurred our professional vision. As a result, debates about the boundaries of law practice and mediation have occurred largely at a distance from the parties being served and from the goals of justice and fairness" (2002).

Non-attorney mediators would be well-served to be proactive in these conversations rather than doing mediation behind closed doors and the security of confidentiality statutes, hoping that they will not be challenged. If "The goal [of UPL lawsuits] is to protect the public from injury caused by laymen practicing law" (Schwartz, 1999), therefore, the question that should be asked is what level of knowledge an expertise is necessary to protect the public? Mediators should take this concern from the legal profession seriously and start developing legal training that discusses the law and how non-lawyer mediators should use it.

A shift in focus away from "who is entitled" to "what are our goals" could open up an exciting realm of discussion and research. What would it mean for people to be "fully informed" about their legal rights and options? How do people use knowledge about the law and their rights in negotiation and mediation? What would define a cooperative approach to the law rather than a competitive one? Is there a

way mediators could be trained in law that would be distinct from attorneys?

**Conclusion** The competition between lawyers and mediators tends to focus attention on protecting turf and seeking to define who is "in" and who is "out" with regard to professional practice. As Morton Deutsch says, "We are 'for' one another or 'against' one another; we are linked together so that we both gain or lose together or we are linked together so that if one gains, the other loses." (Deutsch, 1984, p.27). The moral basis for the legal and mediation professions is to look "for the most appropriate way to try to resolve disputes, plan transactions, solve international crises, and deal with community and individual human problems" (Menkel-Meadow, 2001). Refocusing on the big picture issues will soften the need to seek identity distinction as a primary concern and open the door to cooperative and creative ways for both professions to move forward.

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**David B. River, MA** has been a full-time mediator, trainer and researcher since 1995 in the areas of divorce, public policy, workplace, schools and juvenile justice. While earning his Masters Degree in Dispute Resolution from the University of Massachusetts, he was a Director of MCFM. David now lives in Santa Fe, NM, where he is a partner in River & Cadiz Mediation Services. He can be contacted at [<david@rivercadiz.com>](mailto:david@rivercadiz.com)



**"Marriage has universally  
fallen into disrepute."**

**Martin Luther, On the Estate of Marriage (1522)**