THE FEMINIST DILEMMA IN MEDIATION

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INTRODUCTION

Some feminist writers have criticized the use of mediation in family law because they believe males will continue their domination of female partners within the mediation process.¹ One criticism of mediation is that, as long as there is a sexist culture, mediation will be yet another process that will be shaped to forward patriarchal goals. Also, because the mediation process is private, there is no real way to assess how much male domination is practiced, either by the male partner, or by a nonfeminist mediator, and this lack of monitoring can result in great harm to the women who participate in mediation. Some feminists argue, therefore, that mediation should be avoided. Instead, the court should decide these cases, so that there is public access to monitor and pressure judges to act fairly.

The other side of this dilemma, however, is the recognition that mediation is a process that is compatible with female values, whereas litigation follows male values. Litigation pits the opponents against each other in a “winner take all” battle plan. The adversarial and hierarchical nature of litigation clearly defines it as a patriarchal institution. Mediation, on the other hand, is a process that women practice on a daily basis. The goal of mediation is to meet...
individual needs by identifying interests and finding compatible solutions to meet these interests and needs. Consequently, it is not surprising that large numbers of women are training to be mediators and are advocating the use of mediation, particularly within the family law context.

The purpose of this paper is to examine whether mediation will perpetuate gender bias within family law, or whether it can be a process that reinforces and validates female models of conflict resolution to the benefit of both participants. In particular, the paper will examine feminists' willingness to excuse the litigation model's shortcomings in their critique of mediation. This paper ends by calling on feminists to refocus their energies to mold and shape mediation rather than abandon mediation for conflict resolution styles that are inherently at odds with traditional female values.

**MEDIATION AS A FEMALE MODEL OF CONFLICT RESOLUTION**

The mediation process involves a conflict resolution style that can be easily recognized as compatible with female values and goals. This is particularly apparent when mediation is compared with litigation, which incorporates predominantly male conflict resolution behavior. Gilligan's theory on gender differences in dealing with conflict supports this dichotomy. The male "abstracts the moral (or legal) problem from the interpersonal situation, finding in the logic of fairness an objective way to decide who will win the dispute" (Gilligan, 1982: 32). The male perspective looks at conflict resolution by applying rights in a hierarchy and by abstracting the issues (Gilligan, 1982: 26-63). For females, however, the "world is a world of relationships and psychological truths where an awareness of the connection between people gives rise to a recognition of responsibility for one another, a perspective of the need for response" (1982: 30). The disputants are not seen as "opponents in a contest of rights but as members of a network of relationships on whose continuation they all depend ... Consequently her solution to the dilemma lies in activating the network [of interpersonal relationships] by communicating, securing ... inclusion ... by strengthening rather than severing connections" (1982: 30-31).

This description of female values in dealing with conflict mirrors the goals of mediation. The mediation adopts the female values of supporting, maintaining, and enhancing communication between the disputants. The mediator tries to find areas of compromise and reduce any misunderstandings that may block the discussion between the participants. The goal of the mediator is to create an optimum atmosphere for the parties to reach an agreement in hopes of "strengthening rather than severing connections" (Gilligan, 1982: 30-31). This is particularly important in the field of family law.
mediation, in which the participants are in the same family and will have ongoing interactions with each other.

If mediation models female conflict resolution styles, one might assume that feminists would support the use of mediation (Rifkin, 1984), particularly because there is great agreement that litigation fosters male conflict resolution styles. The majority of feminist articles on mediation, and in particular, family law mediation, however, have severely criticized mediation and have warned that mediation will disadvantage female participants (Ellis, 1990; Girdner, 1989; Hill, 1990; Shaffer, 1988; Woods, 1985).

**FEMINIST CRITICISM OF FAMILY LAW MEDIATION**

**Unequal Bargaining Power**

One of the main criticisms of family law mediation is that mediation does not take into consideration the reality of the power imbalances that occur in negotiations between a male and a female, particularly, a male and a female in an intimate and economic relationship. Because the participants in mediation do their own negotiating, unequal bargaining power will disadvantage the weaker party. The female is perceived as having unequal bargaining power for several reasons.

Most often, because the structure of our society and our social norms and values have been shaped by centuries of patriarchy, women find themselves in a disadvantaged position vis-à-vis men. Most women do not have the earning power men enjoy, nor, as a result of their socialization, do they have the same negotiating experience as men. Unlike men, women may also have difficulty isolating their own needs from those of their children, making mediation a less effective process for them. This may be especially true for women who derive their primary source of identity from their mothering role (Shaffer, 1988: 181).

In coupling a female's lowered earning capacity with her identity as a mother, the danger for women in negotiating for themselves in mediation is that they may give up economic security for residential custody of their children.

Shaffer also points out that Mnookin's factors for unequal bargaining power support the disadvantaged position of females involved in family mediation.

Bargaining inequality may result from the combination of five factors: legal endowments, which may provide the parties with unequal "bargaining chips"; individual preferences with respect to evaluating alternative outcomes; risk preferences; each party's emotional and economic ability to withstand transaction costs; and each party's ability to engage in strategic behavior (Shaffer, 1988: 179).

Shaffer points out that if males have higher paying jobs, they are more able to withstand the transactional costs involved in mediation (1988: 179). Also,
Shaffer cites Ricci's observations that not only do women have a socialized aversion to risk taking, but females exhibit two self-defeating behaviors in mediation. One behavior is when the female adopts a self-sacrificing posture of caretaker, placing the needs of others ahead of her own needs. The second behavior is one of fault-finding, which is exhibited by a woman who attributes the breakup of the marriage to her husband. Her anger and rejection do not make it possible for her to grasp clearly her needs and negotiate from a position of meeting those needs (Ricci, 1985).

Because "[m]any women leave marriages because they do not want to continue relationships with men who are domineering, controlling, and/or abusive" (Girdner, 1989: 138), the unequal bargaining position of these women is especially obvious. "Mediation thus fails to help women who are involved in situations of inequality of power because mediation does not prevent such inequality outside the mediation session from affecting the procedures and results in the mediation session" (Hill, 1990: 353). Perhaps the most important concern of feminists involving the power imbalances between males and females is mediation with couples when there is, or has been, physical abuse. 4 Many of the nationally known family law mediators do not specifically mention in their writings the real possibility of unequal bargaining power between males and females (Shaffer, 1988: 178-184). This is particularly distressing to feminists because some studies have estimated that one out of every three women is battered by her partner (Germane, Johnson, and Lemon, 1986: 176). Because the mediator has not been trained to be aware of the possibility of abuse, the mediator is not conscious that he or she is dealing with individuals who have unequal bargaining power.5 "It is grossly unrealistic to assume that women who have been subjected to a pattern of repeated abuse will suddenly be able to articulate their needs and defend their positions in a face-to-face confrontation with their abuser" (Shaffer, 1988: 182).6

Another factor contributing to the power imbalance in mediation between males and females is that they may adopt different negotiating styles. Hill identifies the two main models of negotiating as the "competitive approach" and the "cooperative approach" (Hill, 1990: 344). In the competitive approach the negotiator begins by making high demands, then makes few and small concessions while maintaining these high demands, and has high expectations of meeting these demands. This "stylized linear ritual of struggle" (Menkel-Meadow, 1984: 764-765) is played out by the negotiators beginning in polar positions and, if an agreement is reached, the agreement will be somewhere in between these positions. The competitive negotiator negotiates in a debate format, using arguments and justifying positions rather than seeking new information and creating different options. Competitive negotiators never "show their hand," but, rather, hope to pressure the other side into agreement. "The tactics for accomplishing this include commitments, threats, extreme positions and offers, lying, exaggeration, ridicule, accusations, bluffs, moral
language, and power tactics. Competitive negotiators create tension and pressure for their opponents. They are motivated by the desire to win, to outmaneuver their opponents and to maximize payoff" (Hill, 1990: 345).

Although the successful competitive negotiator may walk away with a bigger piece of the pie, there is a great risk that the negotiations may fail because the negotiation style breeds tension, misunderstandings, and distrust, all of which can seriously injure an ongoing relationship. The competitive approach is easily recognizable as predominantly male in its characteristics. "According to Carol Gilligan's theory, the ideal of competition between poles fits into the male perspective of weighing abstract rights" (Hill, 1990: 342), which is the negotiating posture of the competitive negotiator. The negotiator's goal is to maximize gain, at the expense of the other party in the negotiation.

The cooperative approach, however, starts from a very different perspective. The negotiator seeks cooperation from the other side so that they can both work toward a common goal. A cooperative negotiator tries to understand the other side's perceptions to avoid misunderstandings and deals with the emotions to gain a better grasp of the other party's needs. Discovering the other party's needs is essential to the negotiations, because these needs dictate the process of the negotiations and the solution to the conflict is trying to meet these needs. The parties also base the decisions they make and the results of the negotiations on external criteria, so that the parties avoid pressuring each other and they feel the resulting agreement is based on objective standards (Hill, 1990: 347-349).

Cooperative negotiation is effective in obtaining common goals and it has less risk of damaging the parties' relationship. Because the cooperative negotiator looks at the parties' needs and tries to maintain their relationship, this approach is more likely the model of conflict resolution that women would use. According to Hill (1990: 342), "[t]he female perspective prefers reconciliation of different positions, rather than a choice between them. The female perspective prefers to look between and behind the positions" in searching for a solution. Unfortunately, "[t]he most serious limitation [of the cooperative approach] is its vulnerability to exploitation by competitive negotiators. Competitive negotiators may be unwilling to cooperate and may see cooperative behavior as a sign of weakness that can be used to their own advantage" (1990: 349). If men are more apt to use the competitive approach and women are more likely to use the cooperative approach, the negotiations in mediation may not benefit women because "[c]ompetitive negotiation seems to overwhelm cooperative negotiations" (Hill, 1990: 350). Consequently, mediation in which the parties negotiate for themselves may result in women getting less than they would have gotten if they had used some other form of conflict resolution.
Mediator Neutrality

There are several concerns about mediator neutrality in the articles that criticize the use of family law mediation. The first concern is related to the power imbalance issue. If the mediator is neutral, then there is no protection for the weaker party in the mediation and the more competitive negotiator in the mediation will overpower the other party.10 Also, if the only goal of the mediation is to achieve a settlement, the neutral mediator does not have an obligation to review the agreement for overreaching because the parties have achieved the mediation goal of reaching the agreement. When the male is using the competitive negotiating style and the female is accommodating to his demands, the mediator neutrality will result in the man overpowering the woman. This is particularly true if the relationship is an abusive one or there has been a history of the male dominating the female. Consequently, mediator neutrality will not protect the interests of women involved in mediation.11

Another feminist criticism about mediator neutrality is that neutrality simply does not exist and it is misleading to the public to characterize the mediator as a neutral facilitator of the mediation process. The fallacy of mediator neutrality has two different facets. First, one of the most important contributions of critical legal theorists, and feminist legal theorists in particular, is exposing “objective” and “neutral” positions as being, in reality, the positions of the established value-laden power structure.12 According to Shaffer (1988: 185):

[Neutralitv will tend to reflect the prevailing norms and values of the surrounding society, which themselves have been shaped by society’s powerful groups. In the patriarchal society we have inherited, it has been men who have wielded the power to mold society’s institutions and the belief structure that supports them. Neutrality in divorce mediation will therefore have the effect of reproducing the existing power relationship between the sexes, namely, the dominance of men.

Therefore, if there is no neutrality, but rather a blind application of mediation concepts that foster male values, or at best, mediators who do not question the “objective” criteria for reaching an agreement, the mediation process will reinforce male domination.13

Not only is there a danger of mediation having the appearance of neutrality when in fact it is perpetuating the status quo, but the interactions between the mediator and the participants may be based on societal gender expectations and result in discounting the female’s perspective as irrational or illegitimate.14

The second criticism of mediator neutrality is that mediators make conscious decisions that breach their neutral position. Dingwall and Greatbatch (1991: 294) conducted a study of mediation in England and found that the mediators studied “routinely exerted pressure in favor of some options and against others.” Their data suggested that
it is misleading to think of mediators as pure facilitators or of the outcomes of mediation as the simple product of negotiations between the divorcing couple. By a variety of direct and indirect means, mediators exercise considerable influence over the shape of any agreement and, indeed, of at least some of the failures to agree (1991: 296).

Girdner’s review of some of the divorce mediation books supports the findings in Dingwall and Greatbatch’s study. Girdner points out that many mediators have a bias for joint custody and these mediators steer clients away from agreements that do not incorporate joint custody of the children (Girdner, 1989: 142-147). However, Girdner points out that joint custody has not benefitted women because there has been little movement toward equal sharing of child care. The mothers are still left with the primary care of the children, but without the rights of sole custody to make the decisions about what is in the children’s best interest.

Joint legal custody maintains the father’s control over the mother, while she continues to be the one who is responsible for raising the children … Parenting is not shared, children are not spending substantially more time with their fathers, and mothers are not being relieved from the almost total responsibilities of childrearing. Joint legal custody without joint physical custody actually allows the father to have more control with no more responsibility and puts mothers in the position of having virtually all the responsibility of the day-to-day care without the autonomy to make important decisions (Girdner, 1989: 138).

Consequently, mediators who do not allow the parties to craft their own custody agreement but, rather, consciously direct the parties to joint custody, are not neutral. To present themselves as neutral facilitators, then, misrepresents the process and does not allow the parties to assess whether they want to participate in a process that will be slanted toward a particular result. This lack of neutrality can be extremely detrimental if the mediator is engaging in tactics that are calculated to confuse or disarm a participant in order for the mediator to obtain a particular result. For example, Girdner is especially critical of Saposnek’s (1986-1987) tactics in dealing with a “reluctant” mediation participant. “Many of his strategies are used to make a parent feel ‘off balance and vulnerable’ and ‘disoriented and disarmed’ or to establish ‘sources of leverage’ for the mediator to lead the parties in the direction he wants them to go” (Girdner, 1989: 145). Therefore, if Saposnek is faced with a woman who wants sole custody of her children, she will be labeled as not acting in the best interest of the children and tactics will be used to confuse her and set her off-balance, in order for the mediator to pressure her into agreeing to joint custody. As Girdner points out (1989: 145) this may account for the findings of Pearson and Thoennes’ (1985: 468) research on divorce mediation in which some women reported “that they never really felt comfortable expressing their feelings, that the mediation was tense and
unpleasant, that they felt angry during many of the sessions and that the mediators were very directive and essentially dictated the terms of the agreement.”

Dingwall and Greatbatch’s research supports Girdner’s fears that mediators may use tactics to maneuver the parents where the mediator wants them to go through the use of the “best interests of the children.” According to their findings, “[r]efferences to children’s interest almost invariably arose in the context of mediators pressing for or against particular options. In other words, these references are used as a means of applying moral pressure rather than urging parents to consider their children’s well-being in an objective fashion” (Dingwall and Greatbatch, 1991: 297).15

In summary, feminists criticize the concept of mediator neutrality because “neutrality” is merely objectifying male values and mediators do not, in fact, act in a neutral fashion, but attempt to persuade the participants to reach agreements the mediators prefer.

Privatization of Family Law

A third criticism of family law mediation is that because mediation is confidential, it prevents public scrutiny of the decisions that the parties make to resolve the dispute, and it prevents an examination of any biases the mediator may have used to mold the agreement. Unlike mediation, adjudication allows public access, making it possible to evaluate whether a judge is deciding cases in a manner that is consistently detrimental to women.16 Consequently, the private nature of the decision making does not make mediators accountable for shepherding agreements that are not in women’s best interests.17

Another concern about removing family law cases from the courts is that it prevents the development of case law and short circuits any advances women may make in litigating family law issues.18 According to Woods:

[w]omen’s advocates have made many gains over the years [including protection from abuse, child support enforcement, redefining marital property], but they feel that, with the advent of the growing trend in this country to use mediation in family law disputes, their gains may be dissipated. Mediation seeks to privatize family law problems once again, denying women the opportunity to enforce and consolidate their victories and to empower themselves further through the development of new rights in the legislatures and the courts (1985: 431).

In a similar vein, Abel believes there is a danger in using informal dispute resolution techniques because it sends a message to the participants and the public that the issues involved are individual problems, rather than looking at the problems as having their roots in societal injustices. By individualizing the issues involved in family law cases, there is never an opportunity to get a broader picture of patterns of inequality that need to be addressed on a societal level (Abel, 1982: 307).
Menkel-Meadow also advises against informalizing conflict resolution. She states “the time when we expose the institutional weaknesses of our courts is not the time to abandon courts in preference for other institutions whose sexism and racism may not yet be known. We must try to define feminist modes of adjudication before we conclude that adjudication must be abandoned” (Menkel-Meadow, 1988: 1942).

Another concern is that the mediation process does not have the mechanisms to protect the participants. There are no methods to force discovery of assets or to discover dissipation of assets. There also is no requirement that the parties be informed of the law or the practices within the local courts concerning the issues the participants are negotiating. The parties are reaching decisions without knowing what they might receive from the court if the case were litigated (Woods, 1985: 435-436).

Finally, mediation is seen as a way to trivialize family law issues. “It diminishes the public perception of the relative importance of laws addressing women’s and children’s rights in the family by placing these rights outside society’s key institutional system of dispute resolution—the legal system” (Woods, 1985: 435). Consequently, mediation obscures the importance of the issues of child custody and visitation, spousal and child support, property division, and prevention of spousal abuse because these issues are not brought before the public in litigation.

A COMPARISON OF THE FEMINIST CRITIQUE OF MEDIATION WITH TRADITIONAL ADJUDICATION MODELS

In order to assess the feminist criticism of mediation, it is necessary to compare mediation with attorney negotiation and litigation, which are the present alternatives to mediation. Mediation should be discarded only if attorney negotiation and litigation have protected, or will continue to protect, the interest of women to a greater extent than mediation.

Unequal Bargaining Power

The feminist concerns about unequal bargaining power may be alleviated to some extent through the protection of an attorney, who does the bargaining for the parties. The reality has been, however, that the factors listed by Mnookin (1984) as affecting unequal bargaining power in mediation sessions also may apply to the attorney negotiations. For example, a party’s emotional and economic ability to withstand the transactional costs will be similar in both situations. If the female does not have the funds to engage in long, drawn-out negotiations and a litigation battle, she may be tempted to settle earlier in the negotiation; her attorney may not encourage her to hold out for a better settlement or to try the case because the attorney may question whether the
client is able to pay the attorney fees the battle could generate. Also, the aversion of many women to risk-taking also will color whether they are willing to accept the male's attorney's offered settlement or whether they will litigate. The woman may opt for the offered settlement rather than litigate in order to avoid the uncertainty of a trial. This is particularly true in cases in which the male's attorney is willing to drop the father's request for custody in return for the mother accepting a lower financial settlement. Because attorneys admit to using this tactic successfully against mothers (Neely, 1985: 20), it is obvious that the attorneys representing mothers have not been able to protect them from the adverse economic results of this negotiation strategy. Additionally, this tactic works because there is no guarantee that the mothers will win the custody battle if there is custody litigation. An analysis of almost any state's appellate custody decisions will show that fathers are much more likely to get custody through litigation than through attorney negotiated settlements.

Like the mediator, an attorney may not know there is spousal abuse if the female is not willing to disclose that information. Even with this knowledge, and even if there is a protection order issued, the female may be sufficiently intimidated so that she will settle for substantially less than her fair share to avoid “angering” her partner. On the other hand, litigation of the abuse issue, through the criminal system, has provided the proper mechanism to protect females from battering, if the court treats the battering as a serious criminal offense and incarcerates the batterer, with the requirement that he receive counseling. But, if the court does not take the battering seriously, then the female is left without legal protection from this criminal conduct. Consequently, the adversarial model and attorney negotiation may not produce a better result for the female than mediation.

In addition, attorney negotiation and litigation may not alleviate the problem of the power imbalance in mediation that may result from different negotiation styles of males and females. Although the male and female would not be doing their own negotiations in the adversarial model, the attorneys representing the parties may not be in equal bargaining positions, either. For example, if there is unequal earning power between the spouses, the male may be able to hire a more successful divorce attorney whose reputation is that of a good negotiator and litigator. The female, on the other hand, may not be able to hire a high priced attorney. She may have to settle for a less successful negotiator and litigator. Additionally, if both attorneys adopt the competitive negotiation style, in which neither is looking at the interest of the parties but rather is trying to “win,” there is a greater chance that the negotiations will be unsuccessful. This breakdown will result in litigation and increased expenses to the parties. If litigation is the result of the competitive bargaining, the more skilled litigator will have the upper hand in the courtroom. To avoid the uncertainty of trial and the possible inability of the female to bear the costs of litigation, the female's attorney may pressure her into settling for terms the female does not want.
Ellis compares the neutrality of the mediator with the role of the attorney negotiator by stating:

sexist biases, when combined with a professionally enjoined neutral stance, may help produce mediation agreements which are a greater economic disaster for women than the negotiated agreements produced by lawyers, whose sexist biases may be muted by the economic and personal biases of the clients who pay them (1990: 330).

This statement makes two assumptions that may not be accurate. The first assumption is that the female client can afford to pay the attorney. The second assumption is that the female will recognize her attorney's sexist biases and be assertive with her attorney in counteracting these biases. For example, the attorney may believe that it will be difficult to obtain sole custody for the mother if the court favors joint custody. The attorney may persuade the female to avoid litigating this issue and settle for a joint custody arrangement, because this arrangement is the best the female can expect the court to order. The female is now faced with making a decision based on the biases of the attorney and the biases of the judge. These biases are no different than the biases of the mediator because the attorney and judge also are products of the same sexist culture that created the biases in the mediator.

Therefore, just as there is no neutrality in the mediation context, there is no neutrality in the judicial context. The most important piece of evidence that the traditional adversarial model of attorney negotiation and litigation has failed to protect the interests of women is the Weitzman (1981) study of divorces in California under the no-fault system. Weitzman's study showed that there had been a reduction in property and maintenance awards to women under the no-fault system. Although women had expected the no-fault system to benefit their interests, the end result was the feminization of poverty. Consequently, the application of the "neutral" concept of no-fault divorce resulted in harm to women. That is not to say that the "neutral" application of mediation concepts within a sexist culture may not have the same potential for harming women. It is quite another thing, however, to say that litigation and attorney negotiation will protect the interests of women. The evidence is simply not there to support this position.

Privatization of Family Law

Feminists prefer litigation to mediation because the decisions of the judge are readily available for public scrutiny, and one can determine whether the judge is applying sexist biases in family law cases. In addition, litigation forces the parties to disclose assets and sets out rules and procedures to protect the
parties’ rights within the litigation. In reality, however, most cases are not litigated, but are the result of the negotiations between the parties’ attorneys (Ange, 1985: 8). Consequently, it is equally difficult to determine whether the negotiated agreement between the attorneys is free from undue pressure on the female client to settle or is the result of sexist biases, as it is to determine whether the mediated agreement is the result of unequal bargaining power or mediator bias. Also, if the attorneys do not engage in discovery or do not discover undisclosed assets, then lawyer negotiation is no better than mediation at protecting the female’s economic position.

On the other hand, because the court must approve all agreements, regardless of whether they are the result of mediation or lawyer negotiations, the judge screens these agreements with the same scrutiny for fairness. Consequently, attorney negotiated agreements receive the same judicial review as mediated agreements.

Another safeguard to mediation in divorce cases is that the agreements are incorporated into the final decree and become a public record. Therefore, the mediated agreements will receive the same public scrutiny as the lawyer negotiated agreements and litigated cases. These final decrees can become the data for research, just as the California decrees became the data for the Weitzman article on no-fault divorce. As a result, researchers have available data to determine whether mediated agreements are as harmful to women to the same extent as in cases that are litigated or have lawyer negotiated final judgments.

It also should be recognized that mediation does not, in and of itself, prevent the growth of case law in the family law area. The parties can reject mediation after initial attempts at mediation have failed, even in jurisdictions that have mandated mediation. The parties continue to have the option to litigate the case, because a court decree is necessary in divorce cases. Therefore, there never can be true privatization of family law cases if the parties have access to the court to litigate. In addition, the present conservative make-up of the U.S. Supreme Court does not bode well for women’s rights, and the time does not seem ripe for expanding and protecting these rights by litigating cases.

In summary, litigation and attorney negotiation do not guarantee that the female’s interests are better served than in mediation. Litigation and attorney negotiation have not only maintained the control of the patriarchy, but in the last two decades, have furthered the feminization of poverty. It is not surprising that mediation also may become a tool of female oppression if it develops and functions within the patriarchal structure. But fear that mediation may have sexist application does not mean that feminists should adopt an accommodating attitude about litigation, which has been steeped in centuries of adversarial and hierarchical values. To cling to litigation is similar to a battered woman returning home to the batterer, because at least the routine is familiar. It is necessary for feminists to realize that the values behind
mediation are consistent with the female model of conflict resolution and that now is the time to rescue it from being molded by the patriarchy as just one more tool to further its goals.

THE FEMINIST MODEL OF MEDIATION

Although it is important for feminists to be skeptical of mediation and to warn of the abuses it can foster against women, mediation is too important to be cast off and discarded. Mediation is the only form of conflict resolution that has as its underlying principles the values associated with the female traditions of staying connected, fostering relationships, and meeting needs rather than enforcing rights. The other models of conflict resolution, such as litigation, linear lawyer negotiation, and arbitration are not models that foster female values. Consequently, feminist energy is better spent in molding and protecting mediation from patriarchal corruption than trying to infuse feminist values in conflict resolution models that are inherently incompatible with these values. Therefore, feminist activism should take on the role of developing mediation techniques and models that serve the interest of all the participants of the mediation rather than hoping to make a silk purse out of a pig’s ear.

To achieve this goal, feminists need to develop mediation texts that directly address the power imbalance between the participants, based on gender, as well as individual roles within that relationship. Training of mediators would include techniques for recognizing this imbalance and methods to protect the weaker party.

For example, mediators should recognize self-defeating behaviors in females, such as care-taking or blaming, that interfere with the ability to address real needs. Mediators who have been adequately trained can assist these participants in refocusing their energies in a realistic and constructive way. Mediators also could balance the competitive negotiation with the cooperative model, discouraging the parties from adopting positions and, instead, encouraging them to look behind positions to address the parties’ needs. In addition, the training should alert the mediator to situations in which domination or abuse require the mediator to terminate the mediation.

Mediation texts and training also need to address the fallacy of mediator neutrality. Feminist theory can inform the mediators of the self-deception involved in adopting a “neutral” or “objective” posture. Mediators also should explore the assumptions they may have about gender roles and the practical ramifications of their own personal biases, such as a preference for joint custody. Once mediators realize true neutrality is not possible and can identify their own biases, this information must be disclosed to the mediation participants, who should have the option of finding a different mediator or refusing to continue the mediation process.
Finally, it is important to realize that mediation will not hinder the opportunity to further feminist principles in other arenas. Feminist researchers can continue to monitor family law cases, regardless of the whether these cases are resolved through mediation, litigation, or attorney negotiation, by collecting data from final decrees. This data will inform activists of litigation or legislation that is necessary to further female interests in family law.

CONCLUSION

Mediation has too much to offer as a female-based conflict resolution model to be rejected in favor of the male model of litigation. This paper is a call to feminists to go beyond criticizing mediation, to embrace the process, to educate and train mediators, and to infuse the process with feminist values and goals. Feminist mediation creates a process in which the parties’ voices can be heard, their needs addressed, and their personalized agreements fostered.

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NOTES

1. Writers of color and members of the Critical Legal Studies also have criticized informal dispute resolution processes for many of the same reasons that feminists have attacked mediation, for example, see Delgado et al. (1985) and Williams (1987).

2. “Mediation is a process in which a third party, the mediator, encourages the disputants to find a mutually agreeable settlement by helping them to identify the issues, reduce misunderstandings, vent emotions, clarify priorities, find points of agreement, and explore new areas of compromise and possible solutions” Pearson and Thoennes (1984: 498).

Folberg (Folberg and Taylor, 1984: 7) defines mediation as “the process by which the participants, together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual agreement that will accommodate their needs.”

3. The terms “female” and “male” are used as generalizations. Identifying a perspective as female or male does not necessarily mean that all females or males agree with this perspective, but that, in general, most females or males would identify with this perspective.

4. Feminists are particularly opposed to mediating criminal charges of abuse.

Mediation [of criminal abuse cases] not only fails to protect battered women, but it is dangerous because it functions to perpetuate the violence. This diversion [of criminal abuse cases] to mediation signals to the victim and the batterer that this type of violence is not a crime. The batterer is not required to admit his guilt, and he escapes the stigma of being a criminal. Furthermore, mediation offers no incentive for the abuser to cease his violence.
Diversion to mediation thus permits and encourages further violence, encourages privatization of the violence, and ignores the fact that battery is permitted to exist because the legal system condones it (Woods, 1985: 433).

5. "[Mediation] fails to provide full protection for individual family members because, in encouraging agreement between the parties, it may force the weaker party to accept a resolution that gives her far less than she would be entitled to in a formal adjudication. Women who try to deal with battering husbands through [an informal] system may well find themselves the victims of continued battering. Thus, although the aim of deformalization is altruism and family solidarity, the actual result is too often the perpetuation of hierarchy and domination" (Olsen, 1983: 1542).

6. See also Ellis (1990: 331):

Men usually earn more money and possess more property than the women from whom they are separating or whom they are divorcing. These economic inequalities characterize the majority of couples served by mediators. In addition to inequalities in economic resources, one may have to consider inequalities in fear (of the other spouse or of the process) and in apparent "ignorance" of family finances. As Walker, [Walker 1983] among others, has pointed out, husbands who dominate their wives or who use or threaten to use force as a tool of coercion are far more likely than other husbands to induce low self-esteem and a sense of helplessness in their wives. It is not unreasonable to suggest that these women would find it especially difficult to sit face-to-face as equals with their ex-partners in mediation sessions.


8. "The cooperative approach is consistent with the female perspective's emphasis on direct, open communication and relationships" (Hill, 1990: 372).

9. "When men negotiate, they generally endeavor to maximize their return, while women are inclined to emphasize the maintenance of relationships. The phenomenon may explain why women tend to employ more accommodating strategies than men in resolving conflicts. One might expect that the tendency of men to seek maximum results and the inclination of women to resort to accommodating behavior would provide men with an advantage during bargaining transactions" (Cravers, 1990: 1-18).

10. "All too frequently ... spouses are not equal in their persuasive strengths. When combined with the neutrality of mediators, the greater persuasive strength of the husbands gives them freer rein to obtain the kind of agreement they want" (Ellis, 1990: 333).

11. "A neutral mediator, who does not help to empower women to help themselves rectify existing or future inequalities, makes an indirect contribution to women abuse by helping to feminize poverty among separating and divorcing women" (Ellis, 1990: 332).

12. Hill (1990: 356-357) states as follows:

Catherine MacKinnon has attempted to create a feminist theory of the state and the law. One central principle of her theory is the idea that the objective perspective is really a male perspective. MacKinnon's theory is based on the fact that males have historically created and controlled our society. This controlling position has given males the power to define "reality" according to men's subjective experience and to impose that definition of reality on the world... The male perspective has thus become the standard against which women and the world are measured; that is, the male subjectivity has become the "objective," the only, standard, while the female subjective perspective has been discounted because of its subjectivity.
13. "If neutrality, an important feature of being a mediator, masks the same 'objectivist' paradigm of law, then mediation, like legalism, reinforces the ideology fundamental to the state as male and further institutionalizes male power" (Rifkin, 1984: 26).

14. This discounting of the female's perceptions was observed by a supervisor of a family therapist trainee. The trainee interviewed the husband and wife and accepted the husband's assessment of the issues in the marriage. The trainee had determined that the husband was just a "sweet" guy. If the trainee had been skeptical of the husband's account of the problems in the marriage and asked more probing questions, she would have discovered that he had suffered from serious depression and the wife had been the sole wage earner during the depression (Bogard, 1990: 58).

15. The authors go on to note that some of the American tapes of mediation sessions "suggest it is possible to develop styles of mediation which place a greater emphasis on explicitly educating parents about the likely impact of divorce on their children, leaving more decision-making space for them. However, we found nothing comparable in our English data" (1991: 297).

16. "[While the [patriarchal] values that may be present in mediation may also be present in adjudication, the existence of a record permits examination of the judge's stated beliefs" (Shaffer, 1988: 199).

17. "[Anne] Bottomley argues that the removal of family law from the public forum of the judiciary to the closed doors of the mediator's office amounts to a privatization of the family" (Shaffer (1988: 197) citing Bottomley (1985)).

18. Fiss (1984: 1085) criticizes alternative dispute resolution techniques in a general way by stating adjudication has a much broader function than merely resolving disputes.

Adjudication uses public resources, and employs not strangers chosen by the parties but public officials chosen by a process in which the public participates. These officials, like members of the legislative and executive branches, possess a power that has been defined and conferred by public law, not by private agreement. Their job is not to maximize the ends of the private parties, nor simply to secure peace, but to explicate and give force to the values in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality in accord with them. This duty is not discharged when the parties settle.

19. See text at pages 69-70.

20. See text at pages 70-71.

21. "Men experience a 42% improvement in their postdivorce standard of living, while women experience a 73% loss" (Weitzman, 1981: 1251).

22. Woods (1985: 435) argues that mediation is inappropriate for family law cases because of the economic inequality between the man and the woman. She cites a 1980 study that shows the dissolution of the family as "one of the major causes of the feminization of poverty." She then states that women can be protected by attorney negotiation and litigation because "[t]he legal process seeks to ensure a just and equitable result that is enforceable based on law." The feminization of poverty in 1980, however, has been the direct result of attorney negotiation and litigation, not the result of mediation, which was not used extensively prior to 1980.

23. See text at page 74.

REFERENCES


