

## **Transformative Mediation for Divorce: Rising Above the Law and the Settlement**

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*Originally published in TRANSFORMATIVE MEDIATION: A SOURCEBOOK – RESOURCES FOR CONFLICT INTERVENTION PRACTITIONERS AND PROGRAMS” (J. P. Folger, R.A.B. Bush, & D. J. Della Noce, eds.), NY: Association for Conflict Resolution & Institute for the Study of Conflict Resolution, 2010. (Order online at [www.transformativemediation.org](http://www.transformativemediation.org))*

Abstaining from providing legal advice and resisting the urge to problem-solve, transformative mediators offer divorcing couples an essential service: providing authentic support for any discussion they choose to have, helping them arrive at greater clarity, and improving their sense of connection with each other. While these conversations often lead to a comprehensive divorce settlement, their primary value extends far beyond the terms of the agreement.

This chapter is organized around the questions that divorcing couples tend to discuss in transformative mediation sessions as they struggle to overcome their feelings of powerlessness and disconnection from each other:

- whether to get divorced,
- how the relationship got to its current state,
- how to manage the divorce process,
- whom to involve in the divorce process,
- how they want their relationship to work now, and
- what the terms of the divorce agreement should be.

I’ll discuss how a settlement-focused mediator’s typical focus on the achievement and the terms of an agreement can interfere with improvements in the couple’s interaction.<sup>1</sup> And I’ll explain how the transformative mediator’s support of the full breadth of the couple’s conversation can lead to genuine improvements in the couple’s interaction. To help illustrate the differences between a settlement-focused approach and a transformative one, I’ll refer to my own experiences as a mediator, as I have

moved more fully to a transformative approach (see Folger, et al, 2010, pp. 31-50).<sup>2</sup>

I realize that my focus on contrasting these two approaches to divorce mediation may strike some readers as problematic and even potentially divisive. I'm well aware that the first edition of *The Promise of Mediation* evoked such reactions when it contrasted the transformative and problem-solving models (see, e.g., Williams, 1997).<sup>3</sup> However, I've found that much can be understood by the methodology of contrast, and all of the comparisons made below are based on my own experience – working with *both* approaches to mediation over the course of my career – and on references in the mediation literature. In any event, my intention is not to use comparisons in order to disparage the settlement approach, which some clients may indeed prefer, but rather to explain in the most practical and concrete way, for those who are interested, how one experienced divorce mediator has found the transformative approach successful in providing clients a very helpful and satisfying experience in the mediation process.

### ***A First Question: Whether to Get Divorced***

I was originally trained as a settlement-focused mediator. When I attended sessions as an intern, the mediator who trained me would begin the sessions by asking each spouse: “*Are you of the opinion that the marriage should end at this time?*” He would pose the question first to the partner who most clearly wanted the divorce, or the “pro-divorce” spouse. The pro-divorce spouse would typically respond, “Yes.” The mediator would then ask the same question of the other spouse. Very often, the answer would reveal some ambivalence. Then the mediator would explain that Minnesota is a “no-fault” divorce state.<sup>4</sup> Therefore, he would explain, if one spouse wants a divorce, there is no need to prove anything about the breakdown of the relationship. In Minnesota, he'd say, you're legally entitled to get a divorce if you want one. In essence, he was telling the pro-divorce spouse that he or

she was going to get the divorce and telling the reluctant spouse, “*This divorce is inevitable; the law supports it; resisting it is futile.*”

If we think of our chief goal as mediators as facilitating a speedy settlement, this opening question makes sense. The mediator who trained me explained that the most bitterly contested cases arise when one spouse doesn’t want the divorce.<sup>5</sup> In the context of litigation, the only way for the reluctant spouse to express his or her reluctance is to fight about the terms of the divorce. The reluctant spouse, by making the divorce difficult, may hope to prove that the divorce is a mistake, to postpone the divorce as long as possible through the legal process, or at least to extract some payment against the spouse who insists on divorce. Since litigation is predictably excruciating and destructive, the mediator in this situation explained to me that his best contribution would be to help the couple avoid that path.<sup>6</sup> By helping the reluctant spouse to see that the divorce was inevitable, he sought to pre-empt that struggle, to prevent litigation, and to move the couple efficiently toward a divorce settlement.

Though I had not heard of transformative mediation at the time, I was troubled in this case and others, by the mediator’s choice to invoke the “no fault” law. First, I believed that as a mediator, I was supposed to be impartial. Telling the couple that the law sided with one of them seemed implicitly to be taking that person’s side (see Bush, 1994, pp. 28-34).<sup>7</sup> Second, I was not sure that a divorce was inevitable. It seemed to me quite possible that the pro-divorce spouse might change his mind (see Senft & Good, 2010, pp. 289-306).<sup>8</sup> Third, and most important, this approach seemed to undermine what I understood to be mediation’s primary value – that of self-determination (see Bush, 2008, 715-20, 737-38).<sup>9</sup>

In divorce cases, the benefits of self-determination are particularly obvious. Most people experience decisions about their children, their personal finances, and their relationship to an ex-spouse as being of ultimate importance. To lose control of these decisions is devastating. Mediation,

in general, is seen as a way to support couples in maintaining control of these decisions rather than deferring to a court to decide them. But the transformative model honors self-determination at an even deeper level. It acknowledges the more subtle ways in which self-determination can be either undermined or supported. According to this broader understanding of self-determination, the possibility of genuinely making our own decisions depends on our having power over the process of arriving at those decisions. In order for us to be genuinely in control of the outcome, we also need to be in control of the process (see Folger, 2001).<sup>10</sup>

Further, when the spouses control the process, it creates greater opportunity for them to improve their interaction. By actively deciding how the conversation should proceed, they experience their power, feel more in control, and feel calmer and less defensive. This clears the way for them to respond more meaningfully to each other. As they work together to create the conversation, their sense of connection grows, along with their sense of strength. In cases where the mediator essentially tells the reluctant spouse, “*You have no choice about this,*” on the contrary, he removes the possibility that the reluctant spouse could experience a growing sense of self-determination, and he removes the possibility that a mutually connecting conversation could emerge.

This message, moreover, doesn’t fit with the truth that the reluctant spouse does, in fact, have numerous options about how to respond to this situation. Spouses in this situation might choose, immediately, to honor the pro-divorce spouse’s request for an efficient divorce. They might make one more heartfelt plea to the pro-divorce spouse to reconsider; they might launch a legal campaign in an attempt to redefine the legal grounds for divorce; or they might take time and come to experience the internal shift necessary to fully embrace the idea of divorce. There are many possibilities, contrary to the mediator’s message that there is no choice.

That initial question, “Are you of the opinion that the marriage should end at this time?” presents another problem. Not only does it explicitly preclude a discussion of whether a divorce will

occur; by its structure and tone, it implicitly reinforces the message that the mediator is in control of the process. He sets the parameters of the conversation, demanding a response to the question that he decides matters at that moment. And the question is phrased to elicit a simple “yes” or “no,” when most likely, either of those answers would be a drastic oversimplification for one or both of the spouses. The formal nature of the question, including the phrase, “*are you of the opinion,*” implies that this is a formal, perhaps archaic and mysterious process, through which the mediator will be the indispensable guide (see Kolb & Kressel, 1994).<sup>11</sup> My sense is that this question and the immediate description of the certainty of the “no fault” law had the impact of making couples – already in a tender, emotional, and uncertain place – feel themselves powerless over the process and more vulnerable. They were in the mediator’s hands.

Now that I’ve adopted the transformative model, I am able to be much more supportive of the couple’s self-determination in these initial conversations. I remain clear from the start that my mission is to support their process in making their own decisions about everything, including, especially, how the present conversation unfolds. I assume their choice to seek my help arose from doubt about their own capacity to address their differences. Given their sense of confusion and disconnectedness, the greatest gift I can give them is the opportunity to experience that they do, in fact, have the capacity to achieve greater clarity and greater mutual understanding (see Bush & Folger, 2010, pp. 51-62).<sup>12</sup> So after engaging in a brief conversation about my fees, my role and my policy of confidentiality, I turn complete control of the agenda over to the couple by saying something simple such as, “*So where would you like to start?*” My own clarity as a transformative mediator that I want to support whatever conversation emerges, has allowed me to participate in conversations where couples have made a wide variety of decisions, including these: to return to couples’ counseling; to end their separation and move back together; to have one spouse move out of the house as they proceed toward divorce; and to gather more information in preparation for another meeting with me where they intend to discuss the

terms of their divorce. Regardless of the topic, these conversations allow both spouses to gain greater clarity about their own desires and about each other, and often seem to give them a sense of renewed hope and connection. And the decisions they reach are entirely their own.

Failure to allow the couple to fully discuss the question of whether to get divorced can make the mediation essentially meaningless, even if divorce is ultimately where they're headed. In a settlement-focused mediation early in my career, Derek and Laurel spent three two-hour sessions with me. They came to agreements on parenting, support, and property division. At the end of that third session, Derek said, "*Okay, Laurel, I guess I'm going to have to hire that lawyer and take you to court.*" I was disturbed, my co-mediator was disappointed, and Laurel was devastated. I heard later from Laurel's lawyer that full-blown litigation had indeed erupted. At the time, I chalked it up to a quirky, unreasonable client. Now I realize that I participated in that tragic outcome. I had remained attached, along with Laurel, to the idea that my job was to get a divorce settlement. Any comments Derek made that reflected his preference to stay married (and there were many such comments) were disregarded, redirected, or reframed. Although he superficially agreed to each term of the divorce, his deeper sense, that this entire process was beside the point for him, was never addressed. He never had the chance to air out his perspective that the divorce should not happen; and Laurel never had the chance to hear him out and perhaps help him understand her decision. Instead, Laurel and I dragged Derek to the outcome – that divorce was inevitable – and he took some power back by fighting vigorously in litigation. My efforts to move efficiently to a settlement, though they seemed effective during the mediation, led to added strife for the couple.

More recently, in an unusually dramatic turnaround even for a transformative mediation, I helped a couple reconsider their intention to divorce and decide to return to counseling. Susan called me wanting advice on how to get her husband prosecuted for tax fraud. This threw me at first, because she had found me through my website, which explains that I provide divorce mediation. In very loud

tones, she told me about the evidence she had against her husband, and against his father, too. I listened and reflected what she said. Then I explained that I would be happy to sit down with her and her husband and help them have a conversation. I said I'd support her in saying whatever she wanted to say about the tax fraud or anything else. Several days later, I met with the two of them in my office. In the first five minutes of the meeting, Susan raised her voice, shouting about the husband's dishonest financial dealings. After about 25 minutes of non-stop shouting, she added "*AND YOU NEVER LOVED ME!!!*"

Quietly, her husband replied: "*Yes I did. . . . and I still do.*"

She continued as if she didn't hear him, "*SINCE YOU MOVED OUT I'VE BEEN GOING THROUGH ALL YOUR PAPERS. I KNOW WHAT YOU'VE BEEN UP TO. I CAN'T BELIEVE YOU LEFT. YOU NEVER LOVED ME!!!*"

Calmly, quietly, he said again, "*Yes I did love you and I still do.*"

This time she heard him and said, "*What?! No you didn't!!*"

For the next hour, they talked about whether he loved her and why they never went to a second meeting they had scheduled with their pastor to talk about their relationship. By the end of the meeting, they had agreed to meet again with their pastor to discuss how to save their marriage. I don't know what became of them, but they never returned to my office to talk about a divorce. I do know that if I'd stuck with my original assumption about my job – that I was there to move people efficiently toward a divorce settlement – I would have interfered with this conversation. I would have tried to put a stop to the shouting. I might have lectured them about the costs of a litigated divorce. I might have encouraged them to problem-solve about how to deal with their debts. Whatever I would have done in a settlement-focused approach would not have led to the unpredictable outcome that resulted from my simply not interfering with their conversation.

Susan and her husband are not typical. More often, my clients arrive only after one of them is

very clear that they want a divorce. But, as the conversation unfolds, the other spouse gains greater acceptance of the divorcing spouse's clarity. I've heard divorce lawyers call this process "the light going on." This describes the shift that occurs when the reluctant spouse reaches greater acceptance that a divorce is happening, and then becomes more focused on the conversation about the terms of the divorce. By supporting all aspects of the conversation, including the reluctant spouse's pleas that the other spouse reconsider, and including the pro-divorce spouse's repetitions about his clarity, I am able to help the light go on, if that's the direction the parties continue to choose to go. Whether a couple decides to work on their marriage or on their divorce, the transformative mediator enhances the conversation. Pure support for the conversation leads to the couple understanding each other better and to each spouse making a more empowered, more compassionate choice about what to do next. The settlement-focused mediator, on the other hand, by assuming that divorce is inevitable, prevents this essential aspect of a constructive conversation from occurring. While the settlement-focused mediator begins by arriving at quick agreement that the relationship is heading toward divorce, the transformative mediator allows couples to discuss that issue – if they choose to – in their own time, opening the possibility that the relationship might not head in that direction.

### ***A Retrospective Question: How the Relationship Got to its Current State***

Assuming a couple's conversation continues down the path toward divorce, the history of the relationship often arises as a subject for discussion. For example, in a discussion where each spouse wants to stay in the jointly owned home, Harvey might say, "*You're the one who wants the divorce, so you should move out,*" and Wendy might respond, "*Well you're the one who had the affair that led to me divorcing you, so you should move out.*" When I practiced as a settlement-focused mediator, I would have immediately tried to redirect the conversation. I would have feared that, left to their own choices, this couple might circle endlessly around the question of whose fault the divorce was. I would

have seen this as a no-win conversation, as opposed to the win-win conversation I aimed to create (see Bush, 2004).<sup>13</sup> I would have assumed that neither of them would budge on their view of the other spouse being at fault. And I would have seen the entire topic as being beside the point, since for me, getting them to a win-win settlement was the overriding goal. No determination of fault was necessary, from my perspective, in order to decide what they would do with their house. I would have seen it as my job to get them to focus on problem-solving: maybe they could “bird-nest,” take turns staying in the house, with the kids always staying there; maybe one of them would agree to move out in exchange for a compromise on some other aspect of the divorce package. I would have stayed focused on the outcome that I thought I had been hired to provide, a settlement that met the needs and interests of both parties (see Miller, 2010).<sup>14</sup>

Now, practicing as a transformative mediator, I assume that what Harvey and Wendy just chose to talk about was something that really mattered, precisely because it’s what they chose to talk about. So I not only would allow them to continue with what they were saying, I would even help them contemplate it further by saying something like, “*So Wendy, you’re saying Harvey’s the one who had the affair that led to you divorcing him, so he’s the one who should move out.*” I’d assume that by essentially repeating or “reflecting” what Wendy had just said, I’d be giving both her and Harvey a helpful opportunity to consider what Wendy had just said and make a choice about what they wanted to say or do next. This moment presents them with a chance to become more aware of their agency – their control over their own situation, including this conversation – and of their ability to decide how to relate to each other in this moment. I see this bit of conversation not as a counterproductive digression, but as a full-fledged decision-point for them. They might decide this is the time to focus very deeply on their disappointment with each other with the hope of getting greater peace around it. Wendy might decide that this is the moment when she lets go of her resentment about the affair once and for all. Harvey might decide that now is the time genuinely to apologize to Wendy for the ways he’s

disappointed her. They both might decide that now is the time to focus on planning about the house. The possibilities are endless, but the important point from the transformative perspective is that these are Harvey's and Wendy's choices to make – and that in making them they will regain a sense of their own strength and control over their lives.

This sort of conversation often leads not only to the empowerment of Harvey and Wendy and greater mutual understanding between them, but also to a plan for the house that both of them are at peace with. In fact, it's unlikely that any solution about the house would have been satisfactory to Harvey and Wendy, unless it arose from a conversation like this one, where they were able to discuss it in the way that made sense to them. Harvey may ultimately agree that Wendy should stay in the house. His thinking is likely to include a variety of rationales, including logistics around the kids, his desire not to prolong the fight with Wendy, his desire for a fresh start in a new place, his desire to contribute to Wendy's peace of mind, his sense that the kids will likely be happier with Wendy in the house, and also, perhaps, his guilt about the affair. The transformative model acknowledges that our clients' motivations are complex and interconnected, and that the way we can most support their decision-making is to allow them to explore their motivations on their own terms. Thoughts and feelings about how the marital relationship developed and how the divorce came about are usually deeply intertwined with the decisions that need to be made around the divorce. And when the parties want to talk about these subjects, that itself shows that they are central to the parties' decision-making process.

### ***A Question of Timing: How to Manage the Divorce Process***

Differences about how to manage the divorce process often arise in transformative mediation sessions. The timing of the divorce arises frequently as a challenging topic. In my experience, both spouses rarely have the same sense of urgency around completing the divorce.<sup>15</sup> Sometimes this

difference is related to different orientations to handling details; other times the difference is connected to each spouse's pace at moving through the grief process; often financial pressures inspire one spouse to want to postpone the process, while causing the other spouse to want to move forward more quickly; quite often spouses alternate being the one who wants to move quickly. In dealing with these variations, settlement-focused mediators tend to have their own sense of efficiency that motivates them to expedite the divorce (see Folberg, et al, 2004).<sup>16</sup> The transformative mediator, in contrast, is able to support the couple as they make their own decisions about pacing.

Bob and Beth both exuded sadness when they first met with me. They had been married for 20 years and had had several periods of separation. Their son had left for college, and their daughter was in her junior year of high school. Neither expressed any doubt that the time had finally come for them to move forward with a divorce. Their main topic of disagreement revolved around when Bob would move out of the house. Bob was in a state of depression. His work as a self-employed consultant was currently very hard for him to complete; and he was overwhelmed by the complications around moving, getting divorced, and completing the couple's taxes for the past several years. The couple was in tight financial circumstances due, as Beth saw it, to Bob's inattention to investing and paying taxes. Beth felt that regardless of the added financial burden, the time had come for Bob to move out of the house. By the end of our first meeting, Bob had committed to a date by which he would move. I planned to meet with them again just before that date, so they could talk about any conflict that arose around the move.

At the next meeting, Bob requested from Beth an extension on the moving date. A pattern emerged, which persisted over the next four years, where Bob had a much slower, more methodical approach to each step of the process than Beth would have preferred.

After Bob moved out, the question became when would Bob move his stuff out of the basement? Then, when would Bob arrange to consolidate all the joint credit card debts? Then, when would Bob make a move toward reconnecting with their daughter?

Generally the same pattern emerged each time: Bob would explain why these things weren't so simple; Beth would insist that he nonetheless move forward; Bob would explain that his depression made that very difficult; Beth said she understood that and that's why she was being so patient; Bob would point out that Beth could handle some of these tasks; Beth would agree to take responsibility for some of them. After four years and about ten 2-hour meetings, they had completed a divorce, and Bob had reestablished a relationship with his daughter. The process had been extremely inexpensive (under \$4,000 in professional fees) considering their challenges, and they were both deeply satisfied with the process and the outcomes. Beth wrote to me: *"I am unable to express in words all the respect and gratitude I feel toward the ways in which you are a guide through such a difficult transition. Your ethics and caring shine bright. . . . you were extraordinarily kind and patient with us."*

I can't imagine that any professional, including myself, would have recommended from the outset that Bob and Beth take four years to finish their divorce. But given who they were, how they interacted, and all they had at stake, it appears that this was the ideal process and the ideal outcome for them. If I had approached their case as a settlement-focused mediator, I suspect I would have been impatient and frustrated, and I may have even encouraged Beth to take legal action to try to expedite the process. My commitment to pure support for the conversation, though, allowed me to stay with them as they made the best of the situation while maintaining their integrity and connection.

### ***A Question about Advice: Who to Involve in the Divorce Process***

Divorcing couples have access to many types of experts who offer services that are meant to help with the divorce process. Lawyers, collaborative lawyers, mediators, parenting consultants,

custody evaluators, vocational evaluators, parenting time expeditors, financial planners, mortgage brokers, accountants, parenting coaches, divorce coaches, and guardians ad litem – all offer some sort of guidance about going through divorce. The demand for their services arises from the sense of uncertainty that couples face around divorce, particularly if there is conflict between the spouses. However, these professionals' approaches often differ greatly from that of the transformative mediator. To the extent that these professionals see themselves as experts, with substantive knowledge that the clients need to understand, they are more prone to offer advice, guidance and direction to the couple. So, from my viewpoint as a transformative mediator, I see that involvement of these other professionals has risks as well as benefits. I have seen how these experts' advice often fits more with one spouse's sensibilities than the other's; that the experts' opinions tend to cause defensiveness in the spouse who disagrees; and that this defensiveness can contribute to a vicious cycle that leads to a deepening sense of weakness and defensiveness for both spouses.

Of all of these experts, I'm especially concerned about the impact of lawyers, since they have the added constraint (and responsibility) of representing only one spouse and being obligated to protect his or her rights against the other spouse. The adversary legal perspective, with its focus on individual rights, can work against a couple's efforts to regain a sense of trust, connection, and mutual contribution.<sup>17</sup> When lawyers have been involved before mediation, clients often describe an ordeal like the following: Wendy was outraged to hear from her lawyer that Harvey's lawyer said that *Harvey* said something, which Harvey now says he never said; but Harvey says that *he* had heard something outrageous that *Wendy* had said through that same lawyer-client chain, only in reverse. This doesn't always happen, by any means, but in this and other cases it seemed clear to me that the lawyers' interventions were interfering with clear communication and escalating the conflict.

My concern about the effects of involving experts, especially lawyers, creates a challenge for me as a transformative mediator. When couples in mediation begin to focus on legal arguments,

discussing whether to continue with mediation, whether to let lawyers take over the negotiation, or how to take a hybrid approach of some kind, my *own* urge to give advice kicks in: I want to steer them away from relying too heavily on lawyers and legal arguments. *But* – and here is the point – this bias of mine has *no place* in my role as a transformative mediator. This is one of the directive impulses that I notice as I monitor myself, but which I must suppress, as in the following example.

The prospect of turning to lawyers often arises in moments of heated discussion. When Harvey is feeling particularly threatened or frustrated he might mention that his lawyer has told him that he has a strong legal point.

Wendy might respond, *“I thought we were keeping the lawyers out of this.”*

And Harvey says, *“We are, I’m just pointing out that I’m willing to be flexible and not go for everything my lawyer tells me I could get.”*

Wendy says, *“Well so am I – my lawyer told me not to let you have joint custody, but I agreed to that.”*

Harvey: *“That’s different – that’s just right for our kids.”*

Wendy: *“I know but I’m just saying. . .”*

This conversation might continue for a few minutes, moving in the direction of having the lawyers themselves take over the negotiation, and triggering my urge to give some advice of my own – that lawyers may make things worse rather than better. By *resisting* that urge, I am able to follow the couple’s conversation, help them feel heard, and help them hear each other, each step of the way – and by doing so, help them regain a sense of calm and clarity. In fact, most often, the unpleasantness around the legal threats, and the couple’s opportunity to experience what it feels like to slip part of the way down the adversary legal spiral, is enough to inspire them to return to talking more constructively. Of course, when constructive conversation surfaces the need for legal information, my job is to

highlight that fact and help the parties make decisions on where and how to get the information they believe is needed.

***A Prospective Question: How the Post-Divorce Relationship Should Work***

Divorcing couples often have ideas about how they hope to interact after the divorce. In one case, a young couple was discussing whether to create a holiday schedule for their 18-month-old son. Harvey said that he preferred not to create a schedule in advance, because he believed that he and Wendy could agree on a plan as each holiday approached. Wendy preferred having something in writing to fall back on, if they couldn't agree. Harvey responded that he feared that the written schedule would create an unpleasant "rights-based" tone to their interactions; he wanted them to work together with the understanding they'd come to an agreement for each holiday, based on what was best for their son; he feared that a written schedule would create the sense that one of them had power over the other, and that they would need to bargain with each other to make changes. Harvey said, in essence, that he wanted his ongoing interactions with Wendy to be relational, rather than transactional.<sup>18</sup> Harvey's insight into how he wanted the ongoing interactions with Wendy to feel went far beyond what any document could create. Harvey's suggestion that the document, by itself, could lower the quality of his and Wendy's interactions, would be hard for a settlement-focused mediator to support – but it was certainly understandable from a transformative perspective.

Settlement-focused mediators get a sense of security from creating a detailed written agreement. They believe that lawyers and a judge will be more comfortable with a detailed document, too (see Erickson & McKnight, 2000).<sup>19</sup> While this preference for detail applies to all aspects of the divorce, creating parenting schedules provides an interesting example, because it is widely understood that some flexibility in the schedule will be necessary, as the inevitable unpredictable events unfold in

life (see Watnik, 2003).<sup>20</sup> So to deal with this tension between predictability and flexibility, settlement-focused mediators often recommend that a detailed default schedule be set up (see Haynes & Charlesworth, 1996).<sup>21</sup> They suggest that that schedule specify precisely what times the children should be with each parent, including exact times for the exchange of the children, even with an explicit window of say 15 minutes, to allow for unpredictable traffic problems or other delays. These mediators suggest that a detailed written schedule minimizes the risk of future disagreements. They remind the couple that they can always change the plan, by mutual agreement, but that if they can't agree on a change, it will be nice to have the original agreement to fall back on.

But these recommendations are rife with assumptions that a transformative mediator would not make. With a micro-focus on the couple's conversation, a transformative mediator supports whatever choice the couple makes about the detail-level of the schedule. This approach acknowledges the possibility that this particular couple might manage beautifully with a different scheme for planning around the children. That scheme might mean postponing the conversation about a schedule till later, never writing a schedule down but remaining in frequent phone contact with each other and adjusting the schedule on the fly, or writing down a detailed schedule now, and then completely disregarding it later. Further, the transformative mediator would not even assume that his job is to help prevent future differences. For all we know, a meaningful conversation in the future, unhindered by the threat of a detailed legally-binding schedule to fall back on, might end up being very important to the couple as they confront the ongoing challenges of parenting. Dependence on a previously-created schedule, by contrast, could be harmful in their ongoing parenting relationship.

What matters to transformative mediators is to help the couple maximize their strength and responsiveness in relation to each other in the moments when we are with them. This, we hope, is what makes it most likely that they'll continue to work with each other constructively in the future.<sup>22</sup> The existence of a detailed, legally-binding plan might be helpful to them, if they choose without our

pushing to create one, but it might also be harmful. The transformative mediator need not have a preference on this question of the specificity of the agreement, but can fully support the conversation, and can allow the couple the empowering and connecting experience of making their own choices, for themselves and about each other.

### ***The “Main” Questions: The Terms of the Divorce***

Finally, many mediated conversations address what are traditionally known as the “terms” of the divorce: agreements about parenting, financial support, and the division of assets and debts. To settlement-focused mediators, agreements about these topics are the whole point of mediation (see Kolb & Kressel, 1994, pp.471-74);<sup>23</sup> to the transformative mediator, these topics might indeed be very important, but only to the extent the couple chooses to focus on them. For the transformative mediator, the conversation – and the opportunities it offers for the spouses to experience their strength and connection – is the point. Agreements about the terms of the divorce often emerge in transformative mediation sessions, but those agreements are generated by the spouses’ choices, made in the mediator-enhanced atmosphere; those agreements are not generated by the mediator’s efforts at getting the spouses to agree.

#### *“Moving from Positions to Needs and Interests”*

One way that settlement-focused mediators try to lead a couple to agreement is to encourage the spouses to let go of their positions in favor of more frank and open description of their interests. As a transformative mediator I, too, see that open discussions about what each person wants and needs appear more constructive. But the interesting question for me is how the spouses arrive at the frame of mind that allows them to speak more openly and more clearly. That is, rigid attachment to a position often arises from a spouse’s sense of weakness and self-absorption. Demanding a certain outcome may be the result of not having had the chance to “think through” their situation, or it may be an

attempt at defending themselves from the threat posed by the other party. In a productive transformative mediation session, the “positional” spouse can gain a greater sense of clarity, control and calm, and may then be able to engage in problem-solving based on a more open, more detailed discussion of her needs. Thus, while I share with the settlement-focused mediator an appreciation that the quality of the conversation improves when spouses are able to talk about their interests, I do not see it as my job to push a spouse to “move from positions to interests.” I see it is far more important that the change in the conversation arise, if at all, out of the spouses’ growing sense of control and connection.

### *The Question of Parenting*

Although the benefits of transformative mediation extend to situations where the parties will not interact in the future, divorcing parents epitomize the situation where improved ongoing interaction will be valuable.<sup>24</sup> They also epitomize the situation where legalistic and problem-solving interventions can be counterproductive. When a divorcing couple’s conversation has become focused on legal matters like “physical custody” or “legal custody”, their advocates intervene by supporting each spouse’s position. In such a case, settlement-focused mediators intervene by pushing for a compromise based on interests instead of positions. The transformative mediator, in contrast, is able to remain supportive of the spouses themselves, as they work through their fear, uncertainty and anger, and as they move toward greater clarity and responsiveness. When the parents have achieved a level of interaction characterized by strength and responsiveness, the importance of legal labels tends to diminish greatly. The transformative conversation nurtures this potential to rise above both the legal battle and the defeated compromise.

When couples are not able to shift their interaction toward greater strength and responsiveness, professionally offered advice may actually make things worse. It is natural for professionals to have opinions about the ideal outcome of parenting questions.<sup>25</sup> These opinions include such sensible ideas

as: the parents should stop fighting; the parents shouldn't use the children as pawns in their game with each other; the parent who has primarily cared for the children should continue to do so; the better parent should have control of the parenting; both parents should continue to be meaningfully involved in the children's lives; a parent's gender shouldn't necessarily diminish his role; what's best for the children should govern.<sup>26</sup> These are all sensible outcomes, but professionals' attempts to achieve them are often counter-productive. Outside opinions expressed by the opposing lawyer, a custody evaluator, a parenting consultant, or a settlement-focused mediator all threaten the couple's confidence that their own perspective will be honored. This doubt about their own ability to have a voice naturally contributes to the vicious cycle of the couple's destructive conflict. That is, both parties tend to continue to feel threatened, weakened, and less able to respond constructively to each other.

Of all the couples I see, the post-divorce couples who had extensive professional involvement in their divorce, but who are still in conflict around parenting, are the ones who seem to be in the greatest distress. While many of the involved professionals felt they were being helpful by trying to push the couple efficiently toward a suitable settlement, and while they succeeded in causing a settlement, they had a negative effect on the couple's strength and responsiveness. Settlements in themselves do not lead to constructive interaction.<sup>27</sup> To the extent the parties are resigned to their parenting relationship being defined by their settlement documentation, their ability to manage the inevitable new issues has been undermined. They want the other spouse to follow that document, and they want their own violations of that document to be forgiven. They have not regained a sense that they themselves are in control and that their spouse is a human being with whom they can interact constructively. The legal interventions can do harm to the couple's ability to interact. The settlement-focused mediator can also do harm to the couple's ability to interact. The transformative mediator, committed to focusing purely on their interaction, is in a position to support the most meaningful progress on this level.

Progress toward more constructive interaction between the parents is the greatest gift a mediator can provide to the children. It is widely understood that the greatest potential threat to children's well-being in a divorce, is destructive conflict between the parents (see Folberg, et al, 2004, p.131).<sup>28</sup> If the parents are able to manage the divorce and the post-divorce relationship with strength and responsiveness toward each other, the children are protected from this greatest potential harm. So the transformative mediator, as with discussions around other issues, supports the spouse's choices about what to talk about and how to talk about it. Such conversations allow the couple to regain a nuanced understanding of their own and each other's fears, hopes, and needs, to so see each other as less threatening, and more human, and to achieve a harmonious co-parenting relationship – through whatever kind of framework they design for addressing parenting questions.

#### *The Question of Financial Support*

A legalistic approach to deciding about financial support reveals an interesting paradox about the law: Child support law can lead to worsened interaction between the parties because of its apparent *clarity*, while spousal maintenance law can damage the interaction because of its utter *ambiguity*! Either way, the introduction of the legal criteria for financial support often undermines constructive interaction between the parties. When mediators see a couple arguing about child support, they're often tempted to refer them to statutory guidelines, or to lawyers who they imagine will apply these guidelines. The mediator assumes that the guidelines, because they contain apparently simple formulas, will easily resolve the dispute. In some cases that might be true. But a formula's inability to consider the complexities of real life, along with the underlying dynamics that motivate parents' conflicts, often combine to prevent the statutes from leading to simple answers.

To illustrate this point to my mediation trainees, I refer to the Minnesota Statutes Annotated, which includes a small percentage of the appellate cases that have addressed child support questions.<sup>29</sup> That small percentage of appellate cases takes up over 100 pages, with about 30 cases cited per page.

In order for a case to make it into that book: first, the child support issue was not resolved when the parents consulted with lawyers about it; second, it wasn't resolved when the lawyers negotiated about it; third it wasn't resolved after a trial and a ruling by a judge; fourth, the appellate court decided that the case was worthy of being heard; and fifth, the editors of the book decided that this particular case was significant enough to be published. Further, even the cases in this book were usually not resolved by the appellate court, but were remanded to the trial court for further findings. And it seems likely that after all this legal fighting, these cases were never resolved to either party's satisfaction. What's more, a change of circumstances, such as a bankruptcy arising from large legal fees, allows for a fresh legal challenge.<sup>30</sup> Although any litigation is likely to worsen a couple's interaction, my experience is that child support disputes, because the guidelines appear so clear cut, are especially frustrating for the parents. They find it especially offensive that their co-parent refuses to comply with something that the law purports so clearly to require. So, though some couples might refer to the statute and come to an agreement, the statute can also be the focus of long-term, expensive, destructive conflict.

Referring to the law of spousal maintenance can also lead to destructive conflict, in this instance because of the law's *lack* of certainty. It is widely understood by lawyers that spousal maintenance is determined on a case-by-case basis, by a weighing of numerous factors.<sup>31</sup> Lawyers understand that when spousal maintenance cases are argued before a judge, the result is unpredictable, and depends largely on who the judge is. Because the law is so uncertain, lawyers attempt to advance their clients' interests by taking extreme positions in negotiation or mediation. These extreme positions frighten the spouses, add to their distrust, and damage their interaction. Thus, whether the law is clear or unclear, referring to it tends to escalate the conflict, and it tends not to lead efficiently to an agreement.

If referring to the law does not necessarily lead to agreement, that is one rationale for not pointing spouses in that direction to resolve financial support questions, whether child or spousal

support. However, from the transformative perspective, the *primary* rationale for taking a purely supportive role in the couple's conversation about financial support, with and without reference to legal "rules" as they see fit, is that it provides yet another opportunity for them to improve their interaction. When each spouse gets clearer about his or her views, feels that his or her perspective is being heard and understood, and has the opportunity to hear and understand the other, they are far less likely to let their differences degenerate into an adversarial or legal battle. Conversely, they are far more likely to successfully address financial support questions through a constructive conversation, one that can set the tone for further positive interaction between them going forward.

Because disagreements about child support can escalate and become disagreements about child custody, it is especially important that parents have the opportunity to discuss them in a way that maximizes their sense of control, their clarity and, therefore, their capacity to understand and appreciate each other's perspective. Likewise, the discussion of spousal maintenance, when conducted with the support of a transformative mediator, can lead to a greater sense of strength and connection – as well as an agreement that will hold up in the long run.

#### *The Question of Property Division*

I've heard lawyers, mediators and others complain about how petty divorces seem to get, with spouses arguing over items of as little monetary value as, for example, an ashtray. A settlement-focused mediator might respond to such an argument between the spouses by saying, in effect, "Hey, don't fight over the ashtray; it costs more to fight over it than it's worth." That sort of almost paternalistic intervention may succeed at temporarily suppressing the conflict.<sup>32</sup> But the couple is already aware that the ashtray, itself, is not valuable in the traditional sense. They are fighting for something of fundamental importance to them, to regain a sense of their strength, as well as a sense that they are being treated humanely by the other person. Attempts to prevent the argument about the ashtray will only result in this struggle arising elsewhere. A transformative mediator, by allowing

space for and supporting the conversation about the ashtray, can help the couple address directly the interactional crisis at the center of this fight. Confusingly for the parties, the settlement-focused mediator who tells them not to fight about the ashtray also tends not to support them in talking about deeper issues. So, while telling them not to fight about the ashtray, and while telling them not to go into messy issues about their past or about how they're treating each other now, the settlement-focused mediator is also likely, paradoxically, to eventually say, "Now what do you want to do about the ashtray?" In effect, rather than supporting the couple as they try to rise above the ashtray, the settlement-focused mediator keeps them focused on the ashtray. Of course, I'm using the ashtray here to stand in for any of the tangible items that can become the focus of a settlement-oriented discussion.<sup>33</sup>

The transformative perspective on the argument over an ashtray is to see that the ashtray is not necessarily the whole story, but it definitely represents an important part of the story – otherwise it would not be a subject of discussion at all! The point is that the argument is not about the ashtray, but about how distressed this person is about the interaction he's engaged in with his spouse, before and during mediation, which he sees reflected in the fight over the ashtray.<sup>34</sup> This type of interactional distress calls for a certain type of intervention, and the conversational support given by a transformative mediator is far more likely to provide it than any approach focused on resolving "the question of the ashtray".

A remarkable example of the effectiveness of the transformative approach in addressing questions of property division occurred in the following case: A lawyer called me asking if I was available to mediate a "civil" dispute. He asked how I'd deal with the fact that his client would have a lawyer present, but that the other party was unrepresented. I told him that it's the parties' choice whether they want no lawyers, one lawyer, two lawyers, or more present. I also mentioned that the parties are welcome to bring others as well, if they like. Several weeks later Phil arrived at my office

with his lawyer; and Steve arrived with three family members. Steve said that his family shouldn't participate in the conversation because they hated Phil too much. Phil said he wanted his lawyer there. Steve said that this was between him and Phil, and that Phil's lawyer would put Steve at a disadvantage. Phil's lawyer said that it's his duty to represent his client, so he intended to be there. I mentioned that if we started the conversation with or without the lawyer, we could switch at any time. Steve said that, in that case, we could start with the lawyer present.

I quickly gathered that Steve and Phil had lived together as life-partners, and that the dispute was very much like a divorce, with some disagreements about personal property. The lawyer pulled out the complaint that Steve (back when he had a lawyer) had served on Phil. The lawyer then asked Steve to provide a list of the property in question. Steve pulled out copies of the list for everyone present. The lawyer suggested that we address each item on the list, and see if Steve and Phil agreed on any of the items and check those off. All agreed that that would be fine, and the lawyer started reading the list.

First on the list was: "couch in the basement". Phil said, *"You told me I could have that one."*

*"No I didn't,"* responded Steve.

Phil: *"Yes you did, you said I could have all the stuff we got from Terry and Dave, because they were my friends first."*

Steve: *"They were not your friends first, I knew Terry 20 years ago."*

Phil: *"I know that, but when you moved out you said. . ."*

The lawyer interrupted and said, "OK, let's skip that one. It's still in dispute". I did my best to reflect everything the parties said, and I also reflected the lawyer's comment: *"And you'd prefer to keep working down the list, and see which items are in dispute and which aren't."* The lawyer said, *"Yes, a lawsuit has been filed and we're here because the court has ordered us to go to mediation to resolve the property issues."* I reflected that comment as well. The lawyer then listed another item,

and Phil's and Steve's conversation about the item went right back to their interaction when Steve moved out. It seemed clear from their comments that their hurt around the ending of the relationship was a big part of what was driving them and what led to the lawsuit.

At one point Phil said, *"You sued me! How could you do that?"*

Steve shot back, *"It was your idea! You told me to get a lawyer!"*

Phil: *"Yeah, but I just meant I didn't like how you were demanding all the furniture, I didn't really mean get a lawyer and SUE me!"*

Steve: *"Well what was I supposed to think you meant when you said those words. GET A LAWYER!"*

Phil: *"Well, where is your lawyer anyway?"*

Steve: *"I couldn't afford to pay him anymore."*

Phil: *"So now I have to pay a lawyer, because YOU SUED ME!"*

Steve: *"This was all your idea."*

Phil: *"No it wasn't! You're the one who left!"*

Steve: *"Because YOU told me to!!"*

Phil: *"Oh my God!!! I just want this to be over!!!"*

Steve: *"You know I don't really give a shit about any of this property!!"*

Phil: *"Neither do I...."*

After all this, I summarized the conversation, including the questions about what each person meant in their farewell argument, and including the lawyer's persistent attempts (interposed but not quoted in the above exchange) to bring the focus back to the list. At some point, I reflected a comment from the lawyer: *"So you're saying that if we can get through this list, you'll be willing to back off and let these guys talk about what this is really about."* (I winced after I said this, because I had deviated from my commitment to reflect genuinely, without editorializing – and "what this is really about" was

based on my hearing what the parties had said rather than what the *lawyer* had said.) To my relief, the lawyer said, “*Yes, if we get through this list, I’ll even step out of the room, and then these guys can talk about whatever they want.*”

And that’s how it went. Phil and Steve let the lawyer check items off his list, the lawyer left, and Phil and Steve were then able to have the conversation they wanted to have, which revealed that neither of them was really attached to any of the property, but that they both wanted to wrap up their relationship differently than they had the first time. They both wept and hugged each other. Steve agreed to dismiss his lawsuit. And they both agreed to meet at Phil’s house and sort out the property – forgetting about the list altogether.

Of course, property division is about more than ashtrays and couches. But the practice of a transformative mediator is consistent regardless of the property in question. When lawyers are involved, a variety of questions are likely to come up, including: Is that pre-marital property traceable? What’s the value of that spouse’s sole proprietorship? Doesn’t equity suggest that my client should benefit from the other spouse’s likely future inheritance, given that my client made financial decisions based on that expectation, which has now been now dashed by that spouse’s decision to abandon her? As these questions are debated, a settlement-focused mediator might be tempted to use the relative strength of certain legal claims to help motivate the parties to settle. Or such a mediator might guide the couple to exploring a variety of permutations of property division, with the hope of finding the optimal distribution, where each spouse could put the assets received to the best use.

The transformative mediator will simply and consistently follow the parties and support their conversation, as they discuss their situation from whatever perspective *they* choose to adopt – a legal perspective, a problem-solving perspective, or an utterly unique perspective like Steve and Phil’s. Regardless of the path that the conversation takes, the transformative mediator follows it, reflects parts

of it, summarizes it, and continues to raise opportunities for the parties to decide how they want to relate to each other. For the parties, the impact is usually that their interaction improves – and on that basis property division questions get addressed through what has become a constructive conversation.

### ***Conclusion: The Question of Improving Interaction***

The parties' choices about topic, approach, tone, timing and everything else receive constant support from the transformative mediator. As the transformative mediator acknowledges the choices each spouse makes in the mediated conversation, the parties have the chance to become more aware of the impact of their choices and more aware of their opportunity to make different ones or to continue making similar ones. As they gain awareness of their power and clarity about what they want, they are able to regain a clearer vision of the other person and greater awareness of their connection. The couple's inherent preference to take good care of themselves and each other is allowed to emerge – and it usually does. Helping it to emerge is the role of the transformative divorce mediator, and judging from my clients' experiences, it is an invaluable help to divorcing couples.<sup>35</sup>

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<sup>1</sup> What I call settlement-focused mediation has been described in different ways and under different names, but the descriptions are consistent and reflect a common picture. One research study called this the “settlement-oriented model” of practice and said that in this model the mediator focuses on producing a settlement by gathering information about the problem, developing an idea of what will solve it, and persuading the parties to accept some version of this solution. See Deborah M. Kolb & Kenneth Kressel, *Conclusion: The Realities of Making Talk Work*, in *WHEN TALK WORKS: PROFILES OF MEDIATORS* 470-73 (1994). Many standard texts call this the “facilitative” model, in which the mediator controls the process and leads the parties through a sequence of stages including opening, setting groundrules, gathering information, defining issues, generating options, generating movement, and achieving agreement. See, e.g., JAMES J. ALFINI ET AL., *MEDIATION THEORY AND PRACTICE* 107-40 (2006). “Best practices” within this settlement-focused approach include: focusing parties away from positional bargaining and toward interest-based bargaining; emphasizing “common ground” while deemphasizing disagreement; focusing discussion on future commitments and not past grievances; and limiting emotional expression in order to avoid undermining rational discussion. See *id.* I refer to many of these specific practices in this chapter, in contrasting the approach I take as a transformative mediator. Settlement-focused mediation, as described here, is generally recognized as the most common approach to practice today. See Robert A. Baruch Bush, *Staying in Orbit, or Breaking Free: The Relationship of Mediation to the Courts over Four Decades*, 84 N.D. L. REV. 705, 720-24,

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727-35 (2008). See also Alison Taylor, *A General Theory of Divorce Mediation*, in *DIVORCE MEDIATION: THEORY AND PRACTICE* 61 (1988), for an example of application of the settlement-focused model in divorce disputes.

<sup>2</sup> See Robert A. Baruch Bush & Joseph P. Folger, *Transformative Mediation: Core Practices* (chapter in *Transformative Mediation: A Sourcebook – Resources for Conflict Resolution Practitioners and Programs* (J. P. Folger, R.A.B. Bush, & D. J. Della Noce, eds.), NY: Association for Conflict Resolution & Institute for the Study of Conflict Resolution, 2010)) [concisely describing the key goals and practices of transformative mediation]. See also ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* (2d ed. 2005).

<sup>3</sup> See, e.g., Michael Williams, *Can't I Get No Satisfaction? Thoughts on Promise of Mediation*, 15 *MEDIATION Q.* 143 (1997) (arguing that the transformative theory was wrong to frame choices about different modes of practice in “either-or” terms).

<sup>4</sup> Beginning in the late 1970s, changes in family law led to a movement for “no-fault” divorce. In view of mounting evidence of the devastating effects of fault-based litigation on families and children, courts began to reject the fault requirement and favor “divorce by consent” for “irreconcilable differences.” See ALFINI, *supra* note 1, at 19; Patricia L. Winks, *Divorce Mediation: A Nonadversary Procedure for the No-Fault Divorce*, 19 *J. FAM L.* 615, 615 (1980-81). In Minnesota, a no-fault divorce law was adopted in 1974. Minn. Stat. §518.06, subd. 1 (2008).

<sup>5</sup> I have heard much the same comment from many of my divorce mediator colleagues.

<sup>6</sup> This attitude is common in the divorce mediation field. See, e.g., Anthony J. Salius & Sally Dixon Maruzo, *Mediation of Child-Custody and Visitation Disputes in a Court Setting*, in *DIVORCE MEDIATION*, *supra* note 1, at 164.

<sup>7</sup> See Robert A. Baruch Bush, *The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications*, *J. DISP. RESOL.* 1, 28-34 (1994) (citing mediator concerns about the ethical dilemma of providing what parties will see as “one-sided” information).

<sup>8</sup> See Louise Phipps Senft and Nancy Good, *Marital Mediation: Transforming Marital Conflict through Facilitated Dialogue—Reclaiming Personal Strength and Marital Connectedness* (chapter in *Transformative Mediation: A Sourcebook – Resources for Conflict Resolution Practitioners and Programs* (J. P. Folger, R.A.B. Bush, & D. J. Della Noce, eds.), NY: Association for Conflict Resolution & Institute for the Study of Conflict Resolution, 2010) (discussing how transformative mediation can help couples who want to transform conflict within marriages, rather than address questions at the time of divorce).

<sup>9</sup> See Bush, *supra* note 1, at 715-20, 737-38 (summarizing and referencing the literature on self-determination as a foundational goal and value of mediation).

<sup>10</sup> See Joseph P. Folger, *Who Owns What in Mediation?: Seeing the Link Between Process and Content*, in *DESIGNING MEDIATION: APPROACHES TO TRAINING AND PRACTICE WITHIN A TRANSFORMATIVE FRAMEWORK* 55 (Joseph P. Folger & Robert A. Baruch Bush eds., 2001).

<sup>11</sup> See Kolb & Kressel, *supra* note 1 (describing how settlement-focused mediators take this view of their role and expertise).

<sup>12</sup> See BUSH & FOLGER, *supra* note 2, at 51-62.

<sup>13</sup> See Robert A. Baruch Bush, *One Size Does Not Fit All: A Pluralistic Approach to Mediator Performance Testing and Quality Assurance*, 19 *OHIO ST. J. ON DISP. RESOL.* 965, 968-981 (2004) (summarizing literature on “best practices” in settlement-focused facilitative mediation).

<sup>14</sup> See Jody B. Miller, *Choosing to Change: Transitioning to the Transformative Model – Challenges, Rewards and Successes* (chapter in *Transformative Mediation: A Sourcebook – Resources for Conflict Resolution Practitioners and Programs* (J. P. Folger, R.A.B. Bush, & D. J. Della Noce, eds.), NY: Association for Conflict Resolution & Institute for the Study of Conflict Resolution, 2010) (describing intake processes that help to identify whether clients are more interested in settlement or interactional support); see also BUSH & FOLGER, *supra* note 1, at 262-63 (stressing the need for transparency in informing clients about the nature of the mediator’s model of practice to allow for client choice).

<sup>15</sup> Other divorce mediator colleagues have told me they encounter the same experience in their practice.

<sup>16</sup> See JAY FOLBERG, ANN L. MILNE, & PETER SALEM, *DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES AND APPLICATIONS* 451 (2004) (explaining that the possibility of mediated cases moving faster provides a compelling reason to advocate for mediation).

<sup>17</sup> See Susan Daicoff, *Law as a Healing Profession: the “Comprehensive Law Movement”*, 6 *PEPP. DISP. RESOL. L.J.* 1, 5-8 (describing the negative impacts of traditional, adversarial legal processes, and approaches that are being developed to counteract them). An approach called “collaborative lawyering” has developed among lawyers handling family conflicts, in response to the perceived negative impacts of the adversary legal process. See, e.g., <http://www.collaborativelaw.org/index.cfm/hurl/obj=aboutCollaborativeLaw/aboutCollaborativeLaw.cfm> (describing the work of the Collaborative Law Institute of Minnesota); [http://www.collaborativepractice.com/\\_T.asp?T=FAQs&FAQ=4](http://www.collaborativepractice.com/_T.asp?T=FAQs&FAQ=4) (explaining the difference between collaborative practice and conventional divorce in the adversary process). While this approach is attracting increasing numbers of family lawyers, it has attracted criticism from others. See, e.g., *Is the Turn Toward Collaborative Law a Turn Away from Justice?*, 42 *FAM. CT. REV.* 460 (2005).

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<sup>18</sup> See Bush, *supra* note 1, at 746-47, 756-62; BUSH & FOLGER, *supra* note 1, at 243-47, 250-56. Simply put, “relational interaction” values the interaction of the parties for its own sake, while “transactional interaction” sees the interaction simply as a way to achieve particular desired outcomes.

<sup>19</sup> See STEPHEN K. ERICKSON & MARILYN S. MCKNIGHT, *THE PRACTITIONER’S GUIDE TO MEDIATION: A CLIENT CENTERED APPROACH* 241-54 (2000) (sample mediated “Memorandum of Agreement”, designed by mediators for easy review by lawyers and a judge).

<sup>20</sup> See WEBSTER WATNIK, *CHILD CUSTODY MADE SIMPLE: UNDERSTANDING THE LAW OF CHILD CUSTODY AND CHILD SUPPORT* 191 (2d ed. 2003).

<sup>21</sup> See JOHN M. HAYNES & STEPHANIE CHARLESWORTH, *THE FUNDAMENTALS OF FAMILY MEDIATION* 141 (1996).

<sup>22</sup> See BUSH & FOLGER, *supra* note 1, at 68-69, 92-93, 106-07 (explaining how transformative mediation was adopted in the workplace context for similar reasons, and citing evidence that such “upstream effects” are possible).

<sup>23</sup> See Kolb & Kressel, *supra* note 1, at 471-74.

<sup>24</sup> See Lon Fuller, *Mediation – Its Forms and Functions* 44 S. CAL. L. REV. 305, 325-41 (1971) (explaining in an early and seminal article that family conflicts are the prime example of cases where mediation is needed because “its central quality [is] its capacity to reorient the parties to each other ... by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another.”).

<sup>25</sup> See Kolb & Kressel, *supra* note 1, at 473 (reporting that mediators see themselves as having substantive expertise that should be used to shape good resolutions); Bush, *supra* note 8, at 28-36, 40-45 (describing how mediators are drawn to use professional expertise in shaping outcomes despite the obvious conflict with the principle of party self-determination).

<sup>26</sup> See Haynes, *supra* note 23, at 128-173 (listing a variety of recommended interventions for guiding parents toward outcomes the mediator finds sensible).

<sup>27</sup> See Bush, *supra* note 1, at 746-48 (explaining the link between interactional improvement and sustainable resolution).

<sup>28</sup> See Folberg, *supra* note 16, at 131.

<sup>29</sup> MINN. STAT. ANN. (Thomson/West 2002).

<sup>30</sup> MINN. STAT. §518A.39, subd. 2 (2008).

<sup>31</sup> See MINN. STAT. §518.552 (2008).

<sup>32</sup> See Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1555-76 (1991) (describing and criticizing family mediation practices intended to suppress conflict as suggested in the text).

<sup>33</sup> See Haynes, *supra* note 18, at 99 (describing a 4-step process for mediators to use as they lead parties toward identification, valuation and division of assets).

<sup>34</sup> I suspect that the internal dialogue of someone fighting over an ashtray goes something like this:

*“I’m alone in caring for myself in this conversation. My recent experience with you (my spouse) suggests that you have little regard for me; otherwise, for example, you’d let me have the ashtray. But you’re fighting for the ashtray, too, so you must be highly motivated to be unkind to me, because you can’t possibly care so much about the ashtray itself. Your fight for the ashtray must be coming from vindictiveness, which confirms that I need to take care of myself, that I can’t afford to be concerned about you, because you clearly don’t care about me. If I let you have the ashtray, I would be complicit in your utter disregard of me. What’s more, I’m not happy to find myself being so petty as to be fighting over an ashtray; but I’m so uncertain right now about how to take care of myself, and so distressed by my confusion about who you are and what you’re trying to do to me, the ashtray is one tangible thing I can cling to. Also you must have pushed me to this state, because I’m not normally a petty person; since you are putting me through this, I’m even more sure that your intention is to harm me. Now I really have to look out for myself. And this raises questions about how I’m willing to be victimized by others, besides you. To give you the ashtray now would be to reward your bad behavior, and to encourage you to continue to mistreat me. Now this is about justice; and this is about all the other ways in which you’ve mistreated me; and I now understand the sexism that I’ve heard about, how [men in this state – or women -- in this culture] get mistreated like this, and I won’t be a part of that; I’ll stand up for what’s right.”*

<sup>35</sup> The author of this article gratefully acknowledges the contributions of Alan Dworsky and Katherine G. Simon, both of whom provided encouragement and insightful editorial suggestions.