Mediation: A Favorable Resolution to Family Dispute Settlement

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I. INTRODUCTION

Inherent in every aspect of living is the coming to blows of disparate, concurrent interests. Where dispute and conflict arise, there has to be a simultaneous or subsequent mechanism of striking a balance or a satisfaction of the wants and claims of each side. The existence of various interests is the one constant in scores of circumstances. Depending on the outcome of how compromises come to fore, the resolution of the sources of divergence is primarily hinged on the parties' acknowledgement and acceptance of what they deem just and appropriate. The same scenario of dispute and settlement is not merely a contention, but a reality that has been recognized since time immemorial.

The mechanisms have evolved, and among the many probable processes, *mediation* has proved to be a useful tool. From different branches of law, the application of which cannot be discounted, more particularly its appropriateness and effectiveness in settling family related disputes. Mediation in Family Law has gained worldwide acceptance and is particularly being propagated as a primary tool in this jurisdiction. An examination of mediation and its correlation to the family, the issues arising therewith, and the harmonious ideal end result will be the focal point of this Paper.

II. BACKGROUND AND HISTORY OF MEDIATION

The advent of any innovation in law, or that falling under its penumbra, deserves utmost recognition. The birth of particular laws arises from the need to regulate or arrange situations in their proper order. There is always a need to which the birth of a law intends to cater. Mediation, as the main concern herein, is found to have emerged from the familiarity of each individual and the community at large with the inevitability of dispute.

What is mediation? It is a "negotiation carried out with the assistance of a third party."[1] But while a third person's assistance is necessary, it is the parties themselves who come up with the agreement. The mediator, so to speak, facilitates the mediation. In arbitration on the other hand, it is the arbitrator (third person) who reaches a decision or agreement for the parties.

Mediation, thus, turns useful as a primary mode for dispute resolution where, for the purpose of persuasion, the following may be directions of resort:

> encourage exchanges of information, provide new information, help the parties to understand each other's views, let them know that their concerns are understood, promote a productive level of emotional expression, deal with differences in perceptions and interests between negotiators and constituents, help negotiators realistically assess alternatives to settlement, encourage flexibility, shift the focus from the past to the future, stimulate

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1. STEPHEN B. GOLDBERG, ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION AND OTHER PROCESSES 103 (2d 1992 ed).

> the parties to suggest creative settlements, learn about these interests the parties are reluctant to disclose to each other, and invent solutions that meet the fundamental interests of all parties.[2]

Mediation thus stands as a buffer of the very essence of the family, flexing its muscles to protect its sanctity which the Constitution itself upholds.

The existence and utilization of mediation as a tool goes far back in time. Shakespearean character Menenius in the tragedy *Coriolanus* took upon the noble role of a people's officer in his attempt to seek a compromise between the tribunals of Rome and Coriolanus.[3] Menenius, as the Senator of Rome, attempted to calm the rioters who were particularly mad at Roman General Caius Martius Coriolanus whom they blame for the stores of grain withheld from ordinary citizens. Beyond individuals, even nations have been pushed to mediate, as shown by the mediation between Leo the Great and Atilla the Hun, which forestalled the invasion of Italy.[4] Pope Leo I or Leo the Great successfully convinced Atilla the Hun to turn back from the gates of Rome during a military campaign. Even secular leaders have established a reputation as mediators. Prime minister Otto von Bismarck in the creation of the New German Empire as he paved the way for the unification of German states towards a more conservative, Prussian-dominated German state. Theodore Roosevelt in the peace accords formulation that ended the Japanese-Russian war as well as the efforts of Henry Kissinger, Jimmy Carter, and Philip Habib to contain the conflagrations in the Middle East.[5]

Bringing the concept to the domestic sphere, it can be gleaned that one of the enduring features of social organizations, such as the tribes that founded the republic, seems to be the very institution of mediation. The *mangi-ugual* of *Kalinga* and the *monkalun* of *Ifugao*[6] act as mediators that settle dispute arising over property, death, and dowries. In this regard, the conciliatory efforts in resolving particular disputes serve to reinforce the norms and the structure of local society that unresolved conflict threatens to disrupt.[7]

2. *Id.*

3. DEBORAH M. KOLB, THE MEDIATORS 1 (1985 ed).

4. *Id.*

5. *Id.* at 2.

6. The *Kalinga* and the *Ifugao* are one of the earlier tribes of the Philippines pre-Spanish colonization.

7. KOLB, *supra* note 3, at 2 ("[a]nthropologists have shown a keen interest in the societal mechanisms by which order and structure are maintained in a culture. Mediators are viewed as a kind of complement to the formal structural fabric of the society, and indeed, their actions are essential to its maintenance.").

Since the nineteenth century, mediation has also played a great role in labor relations and its institutional framework. In this vein, mediation is a policy instrument intended to further the cause of industrial peace, the goal to which it pertains.[8] Much like Shakespeare, the Huns, the Kalingas and Ifugaos, mediators serve as well to channel the form of disputes, to restrain the power of competing interests, and to preserve the very fabric of the institutional systems.[9]

Mediation though seemingly an evolution, has in fact pervaded through the ancient times. It has been honed to adapt to the particularity at bay on what needs and interests come about, but ultimately, it serves the same function as an instrument towards conflict resolution, from the macro application in nations, to the microcosm of communities, and down to the most basic and vital unit — the family. Thus, mediation moved from the macrocosms of society to a microcosm — the family.

The importance of mediation having a worldwide scope means looking, not only into the domestic situation, but also into the foreign developments to which it relates. The United States of America, being one of the prime movers of the concept, deserve some merit, with regard to the current state of mediation in that jurisdiction, as well as the expert analysis on the matter, being a dynamic initiative undergoing much growth and development. Thus, mediation flourished and developed in the international arena and is currently gaining acceptance in the domestic scene. As such, these particular movements shall also be dealt with in this Paper.

III. MEDIATION AND THE LAW

Looking at the entire legal landscape of the country, mediation plays an especially significant role in family relations. The family being constitutionally protected, the subsequent laws connected therewith, serve to uphold what the Constitution proclaims. In this jurisdiction, more particularly in Family Law cases, the Philippine Constitution in its Declaration of Principles and State Policies provides:

> [t]he State recognizes the sanctity of family life and shall protect and strengthen *the family as a basic autonomous and social institution*. It shall equally protect the life of the mother and the life of the unborn from conception. The natural and primary right and duty of parents in the rearing of the youth for civic efficiency and the development of moral character shall receive the support of the government. [10]

8. *Id.*

9. *Id.* at 3.

10. PHIL. CONST. art II, § 12 (emphasis supplied).

The Constitution regards the family with primacy for its fundamental role as the societal bulwark. On the success of every family, despite its private cloak of interests, lies national development. The family is thus an institution in itself — a basic autonomous and social institution. Gleaned from such ladder of thought is the notion of *citizenship*, that the development of the individual supports the betterment of the society as a whole. Every mover in the family then carries the responsibility to protect it from attacks of dispersal and to strengthen the ropes holding the institution in union. "The State recognizes *the Filipino family as the foundation of the nation*. Accordingly, it shall strengthen its solidarity and actively promote its total development;"[11] and in turn, "[m]arriage, as an inviolable social institution, is the foundation of the family and shall be protected by the State.[12]

The vital importance and protection the Constitution accords the family in relation to mediation and Family Law can be viewed in two aspects. One is restrictive and the other is permissive. Restrictive is the fact that there are matters in Family Law that cannot be subject to agreement or compromise: "(1) civil status of persons; (2) validity of a marriage or legal separation; (3) any ground for legal separation; (4) future support; (5) the jurisdiction of courts."[13] On the other hand, it is permissive as mediation is allowed in custody of minors, issues of visitation or access, support and settlement of properties.[14]

Elucidating on the permissive aspect, resorting to a mode most efficient in sheltering the interests of a family in line with the basic tenets embodied in the Constitution then proves to be reasonable.

This is further strengthened by the 1997 Rules of Civil Procedure, as it makes pre-trial mandatory,[15] contemplated therein is the possibility of amicable settlement, or to the submission to alternative modes of dispute resolution:

> The pre-trial is mandatory. The court shall consider:
>
> (a). The possibility of an amicable settlement or of submission to alternative modes of dispute resolution;[16]
>
> x x x

11. PHIL. CONST. art XV, § 1 (emphasis supplied).

12. PHIL. CONST. art XV, § 2.

13. An Act to Ordain and Institute the Civil Code of the Philippines [NEW CIVIL CODE] art. 2035.

14. Judge Nimfa Vilches, *Mediation: Reaching its Potential in Family Law Cases*, http://www.mediate.com/articles/vilchesN1.cfm (last accessed Dec. 31, 2006).

15. Revised Rules of Court in the Philippines, Rule 18.

16. *Id.*, Rule 18, § 2 (a).

The rule of thumb is the application of the medium closest to the achievement of a resolution in view of solidarity and total development of the family.

These sources of law have paved the way for a more particular application of mediation in Family Law cases. In reference, the Rule on Declaration of Absolute Nullity of Void Marriages and Annulment of Voidable Marriages states:

> At the pre-trial conference, the court:
>
> (a) May refer the issues to a mediator who shall assist the parties in reaching an agreement on matters not prohibited by law.
>
> The mediator shall render a report within one month from referral which, for good reasons, the court may extend for a period not exceeding one month.
>
> (b) In case mediation is not availed of or where it fails, the court shall proceed with the pre-trial conference, on which occasion it shall consider the advisability of receiving expert testimony and such other matters as may aid in the prompt disposition of the petition. [17]

Another court procedure in Family Law cases wherein mediation can be found is in the Rule on Custody of Minors[18] stating that at the pre-trial, the agreement on the custody of the minor may be referred to a mediator first and in the case of failure to resolve the matter with the mediator, the parties may subsequently proceed with the pre-trial conference.[19] Taking into valuable consideration the best interest of the child, a mediator may also be directed by the Court to help effect a peaceful agreement on child custody.

The focal point projected by the law through the Constitution and, in a more detailed respect, the court procedures in family cases, is the welfare and protection of the family and the interests concurrent therewith. The vision of the preservation of the family thus explains the serious consideration to dispute resolution tools such as mediation.

17. Rule on Declaration of Absolute Nullity of Void Marriages and Annulment of Voidable Marriages, A.M. No. 02-11-20-SC, § 14 (a) & (b) (2003).

18. Rule on Custody of Minors and Writ of Habeas Corpus in Relation to Custody of Minors, A.M. No. 03-04-04-SC (2003).

19. *Id.* § 12:

> At the pre-trial, the parties may agree on the custody of the minor. If the parties fail to agree, the court may refer the matter to a mediator who shall have five (5) days to effect an agreement between the parties. If the issue is not settled through mediation, the court shall proceed with the pre-trial conference, on which occasion it shall consider such other matters as may aid in the prompt disposition of the petition.

The current state of the law on mediation in relation to Family Law gives the parties a chance to settle issues before proceeding to trial. In this context alone, it can be safely deduced that meditation in Family Law is both a pre-emptive and a preventive measure. Pre-emptive in the sense that it allows for settlement without court intervention, and preventive as it prevents a protracted litigation.

IV. THE MEDIATION PROCESS

The main focus of this discussion is the process of mediation, and more specifically that which is utilized in Family Law cases. The importance of the family and protecting the welfare of each party play significant roles in arriving at an appropriate process, particularly in the family courts in Philippine jurisdiction.

Most family disputes are resolved within the family by negotiation, mediation, and sometimes private adjudication. Principles of family autonomy vis-à-vis the state underscore the desirability of such indigenous procedures, unless the protection of family members from serious harm warrant outside intervention.[20] In many situations, however, the family itself seeks outside help because family members are unable to resolve their own disputes. It is these disputes — between parents or between parents and children — that are the primary thrust of this discussion.[21]

As a preventive measure to a protracted litigation, mediation is a form of dispute resolution, with the help of a third person standing on neutral grounds. It has been said to be a process wherein there exists a pending case, and the parties to which are directed by the court to submit their dispute to a mediator, who will work towards settling the controversy in consonance with the parties. In a way, the mediator acts as a facilitator for the parties to arrive at a mutually acceptable agreement, which may also serve as the basis for the court to render a judgment based on a compromise.[22]

Expert's View

For an elucidation on Philippine mediation, it is important to take note of the viewpoints of an expert in the subject. Judge Nimfa Vilches is one of the country's authorities in Family Law. She is a family court judge, a member of the Philippine Judicial Academy (PHILJA), and also a member of

20. GOLDBERG, ET AL., *supra* note 1, at 299.

21. *Id.*

22. Philippine Mediation Center, PHILJA Judicial Journal, Jan.-Mar. 2002, at 1 *cited in* MELENCIO S. STA MARIA, JR., COURT PROCEDURES IN FAMILY LAW CASES 28 &124 (2004).

the Supreme Court team that developed a family mediation module with support from the National Judicial Institute of Canada. She is also a lecturer on various issues relating to children, women, and families.

Family Law case mediation, according to her is a form of alternative dispute resolution in a private forum before a case is filed in court whereby an impartial person, a professional, or a judge in a two-court system helps parties define issues and have a plan to deal with them. A mediator in a family dispute or case, sits down with people to discuss options and develop proposals towards a resolution. The mediator does not take sides. Every party attends the process and all the decisions are made by them as well.[23] After issues are resolved through mediation, the case is no longer heard in court. But in case of failure in the process, the case goes to trial before a regular judge who decides its merits usually without information as to the matters taken up during mediation.[24]

The process in the United States and that in this jurisdiction are very similar, if not almost identical, both serving the purpose of preventing a protracted trial, and wanting to expedite the process, with the family in mind. She shares that the court-based or court-supervised feature of family mediation in the country contributes to the effectiveness of the process.[25]

Although mediation has challenged the adversarial approach in court litigation with its collaborative approach, court support still proves to be elemental in the success of the process. The mere presence of the court casts a shadow of its established adjudicatory authority, which perhaps reinforces the credibility of mediation. Thus, a court-based or court-supervised process yields favorable results.

Other details of mediation briefly discussed by Judge Vilches are those of its application, parties involved, venue and schedule. In Philippine jurisdiction, the applicability of the process is enumerated:

> Common instances when family mediation is held are: when parties are separating or when parties are already separated but desire to negotiate own terms of meeting their needs and interests. The parties thus decide what is

23. Vilches, *supra* note 14.

24. *Id.*

25. *Id.*

> It is the experience of family mediation professionals that the program works best when court-based or court-supervised. And when newly adopted, a mediation mechanism that has a strong court and widespread multidisciplinary support forestalls initial opposition and dithering. While mediation can be voluntary, once ordered by the court, it may become mandatory.
>
> *Id.*

> best for them. However, in legal separation cases where the marital bond is not severed, counseling, not mediation is appropriate.
>
> Among the matters referred for family mediation are custody of minor children and visitation or access; support as well as matters relating to properties of the parties. The law, however, does not allow a compromise on status, future support, ground for legal separation, legitime, jurisdiction, domestic violence and other crimes.[26]

The parties involved are the following:

> [H]usband and wife in declaration of nullity or annulment of marriage or in legal separation cases; common law partners; former spouses when tackling change in custody and visitation of minor children or amount of support; new partners; parents; grandparents; and age-appropriate children as to questions affecting them to promote their best interests. While children over seven (7) years of age may choose their custodial parent, discernment on their part is required.[27]

Also present are third-party aides:

> In attendance during family mediation are the parties; mediator or co-mediator; lawyers to assist parties as to legalities or to draft a compromise agreement (lawyer participation is encouraged as to property division or amount of support but need not be present as regards parenting issues); child development experts; assigned case worker, service providers for children and families; accountants; property evaluators: and interpreters. For moral support, the persons allowed in mediation proceedings are parents; guardians; other relatives with legal standing to the case; friends, colleagues; counselors; and other support persons.[28]

She furthers that since gender issues are inherent and the participants are many, a male-female co-mediation is quite popular.[29] It is considered as a more creative and productive technique with parties less intimidated by their facilitators and having a better sense of balance.[30] Co-mediation then generates the propensity to yield positive results.

She also sketches a physical and temporal illustration of the process.

> Mediations are usually held at mediator's offices, courthouse mediation units or centers, lawyer's offices, in a forum generally seen as a sufficiently neutral ground, or any other place agreed upon by the parties where people feel comfortable.

26. *Id.*
27. *Id.*
28. *Id.*
29. Vilches, *supra* note 14.
30. *Id.*

> Parties may be mediated before they separate or after; before conclusion of an agreement or after; before litigation; before pre-trial conference; during litigation; and after litigation particularly to deal with changed situations or to clarify court orders. Parties may as well choose mediation when they are ready, are interdependent and can rely on mutual cooperation. Mediation is effective when there is *no other appropriate or accepted structured venue where dialogue can take place or when parties are not comfortable in confronting each other without the presence of a neutral person*; or when there is a disagreement over data. When parties are interested in change for the future than about punishment, revenge or being publicly vindicated, mediation works.[31]

Even with venue, impartiality takes a focal point. Whether it be in the mediator's office, courthouse mediation unit, or in the place agreed upon, greatly regarded as determinative is that the venue hints neutrality facilitating the tidying of clogged communication lines. The proper timing for mediation likewise occurs "when parties are not comfortable in confronting each other without the presence of a neutral person."[32] Its periodicity in Philippine setting was also explained:

> Family mediations may be by single session set up where parties expect to meet and work out a settlement in one session, usually half or full day segment when legal counsels assist the parties. There can also be sequential negotiations or series of shorter meetings lasting [two to four] hours duration as arranged by the parties. The sessions are often followed by the mediator's summary of the minutes of the mediation. By and large, mediation usually takes between two and six sessions.[33]

She also recognizes useful tools recommended in family mediation. These are the symbolic gestures such as handshake, notes of apology or sympathy, flowers, and gift to children. Family mediation is dealing with people first, as the problem may be the people themselves. Since complex matters such as relationships, feelings, trust, comfort, acceptance and rejection are the primary emotional strains in family proceedings, these gestures may just break the anxiety as contending parties often press on each other's duties, responsibilities and obligations; compute costs, expenses, and balances; and then fix schedules and deadlines to meet. A simple gesture amidst these occurrences may well save the compromise, or claim. This of course will only serve as a spring board toward the mediation process itself and soften up the parties.[34]

> In family mediation, there may be aspects that are not sorted out or there can only be partial adjudication that is still good given the outcomes. For things that the mediator cannot attain, it is best, they say, to have a "micro-

31. *Id.* (emphasis supplied).
32. *Id.*
33. *Id.*
34. *Id.*

> BATNA" (best alternative to a negotiated agreement) which is one's safeguard against a losing proposition or a poor choice made.
>
> By all accounts, plans and options have to become binders and commitments. And this is achieved by starting things right, which means that at the beginning the mediator already has an idea what and how the agreement will look like. Then there is closure on the issues and problems with the parties satisfied, feeling fairly-treated, healed, and ready to move forward and even build ties (perhaps for future mediation).
>
> Lastly, when an agreement occurs as a result of family mediation, it is one that is not contrary to law, morals, and public policy so that the court approves the same and orders all parties to comply with the terms and conditions under pain of writ of execution. And then the parties, without having to go through formal, rigid and adversarial court battle (actually among equals), have with them the best decision yet made in their lives.[35]

Lastly, parties resort to the more collaborative approach of mediation with the expected outcome of a consented agreement – both parties to a conflict reach a compromise.

> The expected outcome of family mediation is a written document outlining the details of the parties' agreement, with the mediator finalizing it assisted by the lawyers, the formal deal signed by the parties and thereafter submitted to the court for approval.
>
> For partial or on-going mediation, the mediator sets out agreements so far made and the issues that are still open for negotiation. Parties then continue to get together until a full agreement is reached or mediation itself is terminated.[36]

The projected effect of the mediation therefore is one that is detailed as it would provide guidance for both parties in their relations with regard to issues at hand — a consented agreement that would be respected by parties involved.

V. THE FUNDAMENTAL ADVANTAGES OF MEDIATION

Several factors in the litigation arena crystallize the reasonableness in applying mediation in lieu of court intervention.

In other cases which do not necessarily concern Family Law issues, mediation has been gaining enormous acceptance and support from the litigants themselves. "...[M]ediation is helping litigants financially and

35. Vilches, *supra* note 14.

36. *Id.*

emotionally."[37] In addition people can express and unload themselves in mediation.[38] Thus, people participate actively in resolving their conflicts.[39] Mediation offers no long drawn out trial in court, no aggravation of attending court hearings and resultantly lesser expenses because of a quick resolution of the case.[40] Thus, mediation helps not only litigants but also the judges in ultimately unclogging the court dockets.[41]

In consideration of the sensitivity of the matters raised in Family Law cases, the confidentiality desired by the parties is wanting in court litigation. The protection of reputations, good will, trade secrets, or a good name takes primary consideration, which a mediation process can provide efficiently as opposed to court litigation.[42]

The information that is gathered in the process of mediation is treated with utmost confidentiality, hence, inadmissible in court. The parties are therefore barred from using such information against the other, and in line with this, even the mediator cannot be coerced to reveal the details of the process, as a matter of confidentiality.[43] This is related to what is called the *evidentiary exclusion for compromise discussions*, wherein negotiations concerning a disputed legal claim are not admissible in evidence to prove the claim or its amount.[44] The rule applies whether a mediator is involved in the process of negotiation.

On the other hand, the privilege in mediation is often broader than the abovementioned evidentiary exclusion, as it may even be asserted to block a compelled disclosure, not merely as an admission to evidence. Thus, it often applies to pre-trial, discovery and administrative proceedings not governed by the rules of evidence.[45] This more expansive privilege finds its origin in the aim of the process to protect the parties involved, moreover, in the light of this discussion, the welfare of the family. Another avenue for increasing the confidentiality imbued in the process is the existence of *confidentiality*

37. Ann Lourdes C. Lopez, *Settling Disputes Without a Trial*, THE PHIL. DAILY INQUIRER, Feb. 6, 2007, at A1 (quoting Quirino M. Neri, mediator of the Cagayan de Oro Philippine Mediation Center (PMC) unit).

38. *Id.*

39. *Id.* at A1 (quoting Ernesto G. Malferrari, retired Judge and a Cagayan de Oro mediator).

40. *Id.* at A1 (quoting Rosana Peters, mediator at Davao PMC unit).

41. *Id.* at A13 (quoting Retired Court of Appeals Justice Alfred A. Lagaman).

42. Paula Young, *The "What" of Mediation: When is Mediation the Right Process Choice*, http://www.mediate.com/articles/young18.cfm (last accessed Dec. 31, 2006).

43. *Id.*

44. GOLDBERG, ET AL., *supra* note 1, at 180 (emphasis supplied).

45. *Id.*

agreements and protective orders.[46] Cases in the United States indicate that breaching the confidentiality imbued may result in liability. And if construed by the court to be an agreement to suppress evidence, the mediation confidentiality agreement would then be against public policy. Further, as a non-contract, it is not enforceable against those nonparties to the agreement.[47] In the United States, after the agreement made in mediation is issued, the party seeking the information must convince the court to set aside the protective order as either lacking in justification or serving a purpose outweighed by the need for the information.[48]

Aside from the edge of confidentiality, as opposed to mediation, court litigation presents a rather emotionally and psychologically exhausting experience,[49] which stress might only worsen the already existing conflict. The procedural necessities in court litigation pose strangely in the eyes of the parties. The environment of mediation, on the contrary, in the absence of the pressure that court intervention brings, lends sensitivity in the needs of the parties for a less arduous process. The latter encourages civility and cooperation among the parties and counsel.[50]

The financial burden of litigation likewise compounds the fatigue therein. Thus, the economic factor is brought to fore. For parties who "cannot afford the expense of skillful and higher-paid lawyers, expert witnesses, or other [litigation] representatives"[51] to increase the chances of having a favorable decision, mediation may be the procedure to which the parties should resort. It will radically decrease the necessary expenses for a dispute resolution.

Another relevant point to look into is time. As time is of the essence in dealing with family relations (a shorter length of time in the resolution of disputes promotes the best interest of the parties especially that of the children involved), mediation offers a "quicker resolution of [disputes]"[52] as opposed to court litigation.

Lastly, court litigation being reliant on the stringency of the law proposes a simple win-lose outcome.[53] No compromise that leans both ways

46. *Id.*

47. *Id.*

48. *Id.* at 180-81 (emphasis supplied).

49. Young, *supra* note 42.

50. Darrell Forgey, *The ABC's of Mediation,* http://www.mediate.com//articles/forgeyD1.cfm (last accessed Dec. 31, 2006).

51. Young, *supra* note 42.

52. *Id.*

53. *Id.*

to satisfy (partially if not completely) both parties can be had unlike in mediation. The latter is designed to have the parties to a dispute sail their own ship.

VI. EFFECTIVE MEDIATION CALLS FOR EFFECTIVE MEDIATORS

As long as people have had disputes with each other, mediators have emerged to counsel the use of reason over arms.[54] Pent up emotions having the propensity of turning the status quo to a level more grievous may well be softened through the process of mediation, as with mediators guided by the passion for the rational, mediation allows for the inflow and outflow of views from parties concerned.

Since mediation is negotiation carried out merely with the assistance of a third party who is neither a judge nor an arbitrator, the mediator has no power to impose an outcome on the disputing parties as there is no court intervention.[55] Despite this seeming lack of teeth of this process, the mediator's involvement alters the dynamics of negotiation greatly.[56] The presence of an impartial person, a professional or a judge, with the role of defining relevant issues and laying down a plan for its resolution, improves the chances of achieving a resolution. The highly strategic and neutral disposition of the third-party mediator adds to the possibility of achieving favorable results.

Mediators however receive minimal, if any, formal schooling in the process of mediation, for most part, they learn and refine their techniques by analyzing their own performance given a particular case. [57] As a consequence of the varied experiences, the development of the style and approach of each mediator is always honed by the highly personalized experiences. Each mediator differs from the other, having their own strategies and tactics in attacking a particular scenario. Thus the strategies of mediators vary widely. Some mediators tend to focus on the negotiation phase and on satisfying the parties' interests; others focus on the legal rights involved, sometimes providing a neutral assessment of the outcome in court. Some encourage the participation of both client and lawyer actively; others exclude either or both. Some mediators focus on maintaining a neutral atmosphere, while others become advocates of particular outcomes or protectors parties' interests.[58] Despite the differences in approach or emphasis however the

54. KOLB, *supra* note 3, at 1.

55. GOLDBERG, ET AL., *supra* note 1, at 103.

56. *Id.*

57. KOLB, *supra* note 3, at 4.

58. *Id.* at 104.

more seasoned mediators employ similar practices.[59] Though flexibility in the employment of various styles and strategies is accepted, preferable still are sets of characteristics that would most likely yield positive results.

Realizing that mediators are also human beings equipped with their own temperaments, moods, and their own hierarchy of values, good practice may include the rudimentary understanding that couples in conflict momentarily have their reason fogged by emotions. A family mediator is thus under the obligation to clear communication lines. Whereas with court intervention, the parents are bound by the decision of the judge, in mediation the role of the mediator is *to help parents communicate and determine their own solution* to the parenting of the children — a mutual agreement. A mediator is a specially trained professional usually with expertise in child development, family dynamics, and in helping people communicate. Some mediators will share their opinions and offer suggestions in the interest of the children while others may concentrate mainly on helping the parents communicate.[60]

Fundamental in the process is the setting aside of biases. The mediator should work without any assumption, as this will allow for the analysis to start anew. Stereotyping or victim-blaming will be avoided, which will eventually lead towards a more impartial process. A leveled playing field will let the mediator to have a better grasp of each party's values, gender issues, education, financial ability, social standing, age, culture, religion, and even mood. Having a clear view of the totality of the conflict and the parties creating it is of import; multiple aspects to a conflict may lead to the most efficient solution to take. The use of necessary skills by the family mediator in dealing with the above factors may yield positive results.[61]

Credibility, Communication, and Compromise

A dominant determining factor in the success of mediation is the third-party mediator. Thus the credibility of the mediator is extremely important. The mediator must not only establish his or her own credibility, but the credibility of the mediation process itself. The mediator's personal credibility will depend on his or her familiarity with the mediation process and people skills. Professionals with background in child development, family dynamics, and clearing communication lines, as mentioned earlier, are preferred. An expert shares the following account:

59. GOLDBERG, ET AL., *supra* note 1, at 104.

60. Gary Direnfel, *Are You Thinking of Mediation to Settle a Parenting Dispute?*, *at* http://www.mediate.com/articles/direnfeldG1.cfm (last accessed Dec. 31, 2006).

61. Vilches, *supra* note 14.

> A family mediator has 40 hours of specialized training and 2 months practicum. He or she has child and gender perspective, and whose compensation scheme is determined upon accreditation. Lawyers, former judges, law professors, psychologists, psychiatrists, religious leaders, or social workers make good family mediators. A family mediator is usually assigned to a particular case but may be replaced once trust of the parties is lost.
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> Among the attributes of a family mediator are knowledge of child development; battering cycle; power imbalance among parties; substance abuse; psychopathology (nature, cause and symptoms of mental and behavioral conditions); established legal principles and must not be current employees of protective services for the requisite objectivity. As one might expect, the issues that come at play during family mediation are varied-substantive (entitlements); procedural (case studies); relational (marriage and paternity); psychological (affecting legal capacity as spouse or domestic violence); and in proper cases, jurisdictional (facts of the case for as long as parties have legal representation).[62]

A pillar supporting a mediator's credibility therefore is reliant on his or her educational and professional background.

Aside from expertise in the process, the mediator likewise takes on the task to encourage the parties to take the risks necessary to resolve their dispute. Such requires the parties to trust the mediator — they should be made to understand why they should be open to the third-party-suggested risks. Experts say that "[i]n many cases, the mediation hearing is [also] the first opportunity for the parties to speak candidly with each other and 'to air their differences."[63] The situation already presents two communication barriers: the apprehension to open up to a stranger and the cold conflict between parties. Apart therefore from the coherence of the suggested risk with the goal to provide for the best interest of the child or preserve the sanctity of the family, a dimension towards lending trust is for the mediator to establish good rapport with them. An expert in family mediation shares that holding a "caucus" may be an effective way to build trust.[64]

62. *Id.*

63. *Id.*

64. *Id.*

> Speaking privately to the parties, in "caucus" is also an excellent method of communication. Many mediators conduct a very brief "joint session" and then go right into separate session with the parties and counsel. I call this "shuttle diplomacy." Keeping confidences and gaining the trust of the parties can be achieved in this fashion. Sometimes, a frank discussion just between counsel "refereed" by the mediator can produce significant results and movement.
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> *Id.*

The mediator, in order to clear communication lines and resolve conflict, must first communicate his or her intention to help by informing the participants about the mediation process and making sure they understand how mediation can best serve their individual interests.[65]

Listening by the mediator is of extreme importance here.[66]

> Many times the parties, and especially the plaintiff or plaintiffs feel the need to tell their story and no one has really listened up to that point, including counsel. Not long ago, I had a plaintiff tell me following a successful mediation hearing that "I was the first person who had really listened to her about what had happened." As I recall, we discussed not only the case, but her family, some personal problems and other matters not directly related to the resolution but important enough to the plaintiff to bear discussion.[67]

Understandably, communication is a two-way process. Expectation from the mediator for the parties in conflict to listen to him or her may be reasonably had only when he or she has offered time and patience to do the same.

One of the realities that have to be contemplated in Family Law cases is that it will be packed with emotions, the survival instinct of each being triggered. The difficulty in dealing with such high octane of emotions pervading the forum remains to be one of the greater challenges that mediators encounter. These emotions sometimes dilute reason, and tend to manifest in more ways than one. The mediator, especially in family cases, has to be familiar with all emotions - his or hers and those of the parties. The mediator should thus acknowledge the existence of emotions, allowing each side to let-off steam, listening and not interrupting until the last word is spoken and not reacting but managing emotional outbursts.[68]

Corollary to listening is going beyond the apparent. The mediator has to dig deeper and decipher the hidden intentions of the parties.[69]

65. Darrell Forgey, *The ABC's of Mediation*, http://www.mediate.com//articles/forgeyD1.cfm (last accessed Dec. 31, 2006).

66. Vilches, *supra* note 14.

67. *Id.*

68. *Id.*

69. *Id.*

> Communication may also require "scratching beneath the surface" to see what is really driving the dispute. What do the parties really want? In the commercial context, the parties may have an ongoing business relationship which is being jeopardized by the dispute. Can a remedy be fashioned which satisfies the litigants, but keeps the relationship intact? While not required, I encourage the submission of mediation briefs which may be confidential or shared with the parties as indicated or desired.

It should be noted however that although parties are encouraged to lend their trust in the mediator (as this would pave the way for the efficiency of the process), they should remain vigilant when the mediator crosses the border to controversial subjects of "mediator manipulation and deception"[70] under the guise of self-determination. The mediator's usage of influence in the outcome of the process is an ethical question. Parties to a conflict should be aware of any such possibilities that may occur in the process of mediation. Nevertheless, "[m]ediators can be extremely effective in moving parties towards compromise in a spirit of conciliation"[71] when they do not limit themselves to the surface issues and go beyond the apparent.

The test of an effective communication may depend on the compromises arrived therein. "The compromises involved have been described as the "negotiation dance" which is a series of continually diminishing moves through which parties communicate and, hopefully, arrive at agreement."[72]

The goal of clearing the communication lines is the attainment of an agreement between parties to a conflict, which therefore softens the clash of interests. The result reflects in the more peaceful way in the assertion and grant of rights and other interests.

In projecting a positive aura coupled with the expertise in the field, the mediator establishes procedural credibility that would then allow the clearing of communication barriers through which a compromise agreement may be attained. The credibility of the mediator then aids in calming the strong currents of conflict towards the attainment of compromises in the near horizon. Thus, an effective mediation process calls for effective mediators.

VII. BRIDGING THE GAP BETWEEN DOCTRINE AND REALITY

Experts in the United States have recognized that substantial (even dramatic) changes in the practice of Family Law have transpired in the past two decades, more particularly the infusion of non-legal professionals into the

Id.

71. Vilches, *supra* note 14.

72. *Id.*

> The most important thing to know about the "negotiation dance" is that it cannot be short-circuited. This may be particularly frustrating since it means that the bargaining process may become time consuming and, therefore, more expensive. However, succumbing to the temptation to short-circuit the "dance" can result in settlements that are unsatisfactory on reflection and, more importantly, unworkable in practice.
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> *Id.*

court system. As changes have occurred, however, law school curricula and teaching have remained relatively static. The result, predictably, is that young lawyers entering Family Law practice often find themselves unprepared for what they encounter as litigation is the norm prevalent in the curricula. A substantial and growing gap between Family Law teaching and Family Law practice undermines the best efforts of new Family Law lawyers, and leaves them ill-prepared to assist families and children in separation, divorce, and dependency matters. Today's Family Law lawyers need a thorough understanding of the appropriate (and inappropriate) uses of dispute resolution services, the emotional impact of family conflict, case management processes in the family courts and the rise of, and critique of, unified family courts.[73] Yet the materials from which most Family Law professors teach contain nary a word on any of these topics.

73. J. Herbie Dfonzo & M. O'Connell, *Family Law Education Reform Project Initial Draft of Findings and Recommendations*, *at* http://www.mediate.com (last accessed Dec.31 , 2006).

> "Traditional" Family Law teaching materials emphasize litigated cases, nearly to the exclusion of everything else. What message does this emphasis convey to students? One strong possibility is that students conclude that litigation is the norm in Family Law, with the "good" lawyer being the one who wins cases for her client. The published materials rarely, if ever, describe the tightrope Family Law lawyers walk in an area where the outcomes for all parties and their children are inherently linked. Indeed, a student may study assiduously in most Family Law - courses and never once see the literature documenting the harm children suffer from intractable parental conflict. Discussion of the pervasiveness of domestic violence is also missing from many traditional Family Law materials, as is treatment of the rapidly expanding phenomenon of unrepresented litigants in family court.
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> The reality is that today's family courts incorporate a wide variety of dispute resolution procedures and are populated by professionals from multiple disciplines. Many jurisdictions have unified family courts that group a range of issues — from divorce and custody to juvenile crime to child support — under one roof, with a single judge. Specialized courts for domestic violence, drug abuse, and permanency planning also dispense both mental health and legal services, involving the courts in interventions in the family that are designed to meet therapeutic goals. As a result, family court judges do not serve only as adjudicators. They may also oversee a multi-disciplinary group of service providers all engaged with the children and families whose cases are before the court. This complex mix of professions, skills and roles is still evolving. In addition to lawyers and judges, mediators, custody evaluators, guardian's ad litem, parent educators and parenting coordinators are all powerful actors in today's family courts. Indeed, today's Family Law lawyer works in a world where understanding the work of dispute resolution and mental health professionals may be as essential as knowledge of governing statutes and constitutional doctrine.
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> *Id.*

The disparity of the gap between what is taught and what actually transpires may well be key to understanding and getting a better grasp of family related conflicts, and how to mediate in those instances. Many things are left to the student to learn in practice, an ideal that may often lead to misunderstanding. It is only just that, these scenarios that await in practice be molded into the practitioners, as early as their formative years in the study of law, hence allowing for a better and more cognizant approach to the reality of the matter. The deeper core of Family Law disputes burns in its yearning for a humane comprehension of an apparently cold entanglement. Beneath the procedural surface lies the exposed flesh of human relations that constitute the basic unit of the society. The situation thus calls for an especially careful treatment with the issues therein.

VIII. ANALYSIS: A PARADIGM SHIFT

Mediation, without a doubt, casts the prevalence of a process cloaked in neutrality, in order to thresh-out the ill-feelings and qualms of each party in a case, prior to trial. One can choose to see the nuances of the process in several perspectives, but none as apparent as the fact that it enables all the involved a venue that is less taxing physically and emotionally as that inherent in trials. There is really nothing to prepare an individual to undergo such a process, but utmost preparation, at least mentally may well point the process towards the right direction.

A Paradigm Shift

Paradigm has been defined as "an entire constellation of beliefs, values, techniques and so on shared by the members of a given community."[74] In order to truly understand and appreciate mediation in Family Law, a paradigm shift is required. The shift begins with a critical examination of the adjudicatory model. In the vast majority of instances, the adjudicatory model simply does not meet the conflict resolution needs of couples terminating their marriages. The adjudicatory model is grounded in a system in which evidence is presented to a trier of facts based upon civil rules and rules of evidence. Family Law shares the same basic adjudicatory structure as criminal cases, commercial civil disputes, constitutional challenges and negligence actions, yet family disputes are inherently different. Unlike the plaintiff in a

74. Sherri Gohen Slovin, *The Basics of Collaborative Family Law: A Divorce Paradigm Shift*, The American Journal of Family Law, Summer 2004, http://www.mediate.com//articles/slovinS2.cfm (last accessed Dec. 31, 2006) (citing THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 175 (2d ed. 1970)).

negligence action who sits across a courtroom from a stranger-defendant he will never see again, the plaintiff-father in a divorce action sits across a courtroom from a defendant-mother with whom he will, by necessity continue to have contact, and with whom he will need continued cooperation and good-will in order to effectively parent their children. The court system is by its nature adversarial and contrary to the fostering goodwill and cooperation needed in continuing parenting relationships. Mediation on the other hand is divested of the antagonistic tendencies that are built-in to trials. And to be able to accept such a process would mean understanding how it works and the benefits inherent therewith vis-à-vis, a full-blown court case.[75]

The end result in having a paradigm shift, would not only mean better prepared client, but also, a better equipped mediator who can maximize the advantages of the process, now that the parties are better educated and briefed. The effectiveness therefore of the mediation process itself, namely in family cases, will only go as far as the parties have come with an open mind, not necessarily to giving in or satisfying their claims, but an open mind to the neutrality that the forum presents and the enabling atmosphere that comes concurrently towards a resolution.

IX. CONCLUSION: THE EFFECTIVENESS OF MEDIATION AS PREVENTIVE

Through the years, a trend in the medical field has been towards that of "preventive medicine." The term simply refers to the practice of foresight and pre-emption that seeks to avoid illness before it even transpires. This is achieved through what is called preventive medicine, wherein a newly-born or a toddler is given shots to fight illness. It is pulling out the decayed tooth, instead of waiting for the new tooth to push out the old one. It is the simple taking-in of daily multi-vitamins in order to protect one's health and prevent sickness. Preventive medicine therefore, seeks to do just that, prevent illness before it even comes close to striking. Ultimately, the goal is to avoid complications in the future, which may be more costly both to the pocket and health.

Mediation, being both a preventive and pre-emptive, operates in the same light. It seeks to avoid complications by making things simpler, or if possible, it seeks to avoid going to trial itself, like the illness that is sought to be prevented in the medical field. It seeks to simplify the issues, or better yet, completely flush out or settle the bad blood and come to terms in a forum practically designated for such prevention. Mediation has the same goal of keeping things healthy, moreover, a healthy family relationship, or at least

75. Sherri Gohen Slovin, *The Basics of Collaborative Family Law: A Divorce Paradigm Shift*, The American Journal of Family Law, Summer 2004, http://www.mediate.com//articles/slovinS2.cfm (last accessed Dec. 31, 2006).

one where the parties have agreed and consented mutually on what courses of action to take. The end and effective result, if all goes well, will be protecting the welfare of the primary institution that the Constitution itself is adamant about — family welfare. If in the medical field, the effectiveness of a pill will only be felt if taken at the right time, and not when there is imminent futility; the same is true in family law mediation.