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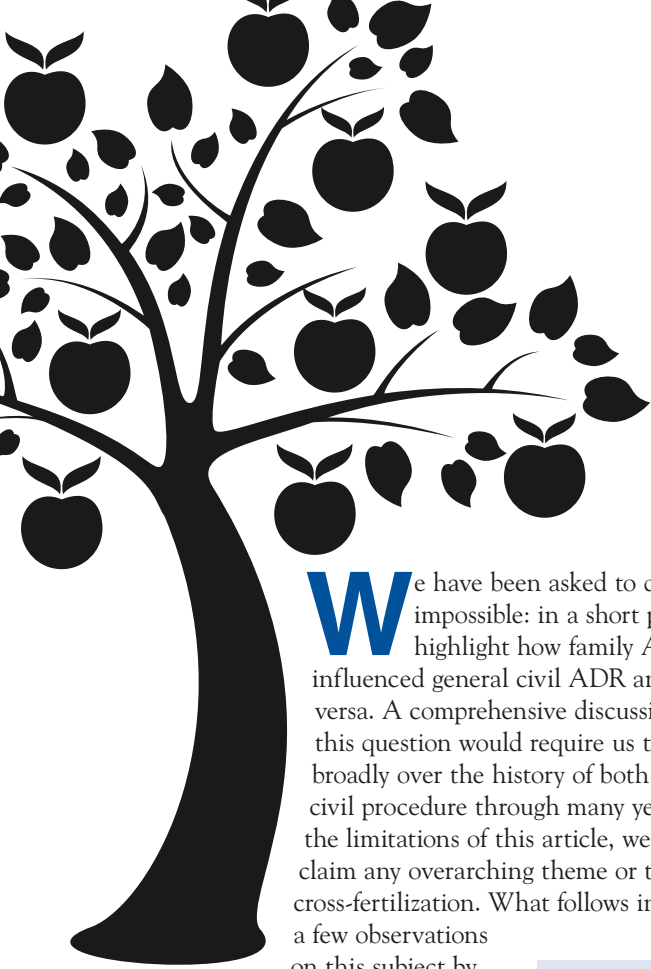
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Cross-Fertilization: Family ADR to Civil ADR

By Sharon Press
and Andrew Schepard

We have been asked to do the impossible: in a short piece, highlight how family ADR has influenced general civil ADR and vice versa. A comprehensive discussion of this question would require us to range broadly over the history of both ADR and civil procedure through many years. Given the limitations of this article, we thus disclaim any overarching theme or theory of cross-fertilization. What follows instead are a few observations on this subject by

two academic practitioners and public policy advocates who have participated in the development of family and civil ADR practices over the past several decades. We will focus our comments on substantive areas of civil law that exhibit many of the characteristics of family law, making implementation of ADR appropriate; and examples of past and present cross-fertilization of processes between civil and family ADR.

Civil Cases Have Family Law Elements

The first problem in discussing the cross-fertilization between family and civil ADR is defining terms. What is a family case, and what is a civil case?

We do not attempt a comprehensive definition of either. We simply note that in most court systems, family cases are civil, as opposed to criminal, cases. Divorce, parenting, abuse and neglect, many aspects of domestic violence, and child support are classified as “civil,” even though they arise out of family dynamics and relationships. We nonetheless think of them as different from traditional civil cases because the family relationships they arise from are often emotionally complex and volatile. Furthermore, family members will likely have continuing relationships with each other even after they leave the courthouse.

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The traditional paradigm for a civil case, in contrast, is that it arises from a one-time transaction in which the parties intend to have no future relationship, and the only issue at stake is how much money will change hands. The prototypical civil case in this paradigm is one in which an injured driver seeks compensation from the other driver’s insurer and the parties will have no further relationship once the case is over.

These polarized paradigms are oversimplified. Some areas of law, although categorized as civil cases, have more in common with traditional “family” law cases than typical civil cases. Indeed, they might be called “quasi-family” cases and often involve family members – such as cases in the areas of elder law, guardianship, and probate. The interpersonal dynamics in these cases also often involve high emotions among people who had a previous relationship and are likely to have a relationship in the future. The resolutions in these cases demand emotional sensitivity, creativity, and careful thought

as to how to manage future modifications, much as more “traditional” family cases do.

In addition, a range of civil cases, such as business and employment disputes and medical malpractice, have dynamics similar to those in “family” cases. The dissolution of a small business or a partnership, for example, is often like the dissolution of a marriage. There are hurt feelings, guilt, and the need to figure out how to split up assets and debts. Future relationships are often inevitable. Even “traditional” business disputes often involve some type of relationship that the parties may have an interest in preserving, or at least ending, on terms that allow both sides to “save face,” so while the monetary issues are important, the relationship issues also need to be addressed. In employment disputes, plaintiffs often are more interested in keeping their jobs and reconciling with their employer than receiving money and severing

the relationship. Even in medical malpractice cases, some research suggests that many plaintiffs want an apology and an understanding of what happened as much as (or maybe even more than) monetary compensation.

Feelings can matter more than money.

Cross Fertilization – Mediation

Origins

Thus, many types of cases call for ADR, with its emphasis on consensual decision-making. As noted in the article by Yates and Salem that starts on page 4 of this issue, family cases were among the first in which judges experimented with their inherent authority to manage their caseloads by using alternative processes, especially mediation.

In the early days, most mediators were publicly funded court staff. In California (and eventually other states), the cases initially came in through the “conciliation program,” in which the court personnel would attempt to help the parties reconcile. Recognizing that reconciliation was not possible or optimal for all parties, staff members began to experiment with a process that had a new goal: assisting the parties in dissolving their marriage.

As a result of this connection to conciliation programs, cases got to mediation much earlier in the process, often before the parties were clear about whether they would be reconciling or dissolving their marriage. The mediations were generally conducted over a period of time, to give the parties an opportunity to try out various “custody” and “visitation” plans (the terminology of the time) and become comfortable with the changes that would come with the dissolution of their marriage. The mediators came from a variety of backgrounds, including social work, mental health, psychology, and, to a more limited extent, law.

Family ADR practitioners thus gained experience dealing with all the issues that these cases embody – strong emotions, feelings of blame and guilt, need for creativity, cultural issues, and power imbalances. The recent attention being paid to neuroscience and psychological issues reflects an understanding of what family practitioners have always known: Resolving conflict involves more than interest-based bargaining.

Parents generally responded well to mediation in family disputes. Research demonstrated that they generally preferred it to litigation. Mediation offered parents a voice and some measure of dignity, and it saved time and money. Courts found their family dockets reduced by parent participation in mediation.

Given the positive impact of family mediation on court calendars, many judges, court administrators, and legislators were willing to experiment with it in other kinds of cases. In the late 1980s, Texas and Florida became the first states to adopt comprehensive statutes

that allowed the trial judge to order a wide range of civil cases to mediation. Over the next decade, state and federal courts throughout the country followed suit, and today it is hard to imagine the civil justice system without a strong mediation component.

Family Mediation Adapts Civil Mediation Practices

In the same way that family practices have influenced civil practices, civil practices have had an effect in the family area. As the civil practice of mediation grew, courts experimented with new paradigms. Instead of being handled by court-annexed mediation services, today civil cases generally are mediated by private mediators paid for by the parties with limited (or no)

administrative support from the courts. Civil cases are often referred to mediation late in the process – often on the eve of trial. With late referrals, inevitably, there is little or no time for multiple sessions. In fact, the norm for civil cases is half-day or

full-day mediations. Finally, the mediators in civil cases often are attorneys, and attorney representatives tend to play a prominent role in the mediation.

While one can debate the pros and cons of these characteristics of civil case mediation, in recent years, family mediation has incorporated many of them, though often involuntarily. After a trajectory of growth of court-annexed family mediation programs in the 1970s and 1980s, over the last several years we have seen the diminution of court staff and court programs nationwide. Once private-sector services for mediation became available, making the case for public-sector funding for family mediation was a difficult task. As family mediation spread to the private sector, an increasing number of attorneys started serving as mediators in family cases and brought with them many of their civil practices, including scheduling mediations late in the process for a single, long session.

One of us (Sharon) used to be responsible for the mediator grievance process in Florida that allows parties to submit ethical complaints about mediators. In a significant percentage of the grievances, the grievant described feeling that she or he could no longer exercise self-determination or make a rational decision because of physical and mental exhaustion after being in mediation for four to 10 hours.

Referral to mediation late in the process also removed the possibility of multiple sessions, requiring parties to make life-altering

Feelings can matter
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decisions about their families without any opportunity to experiment with options.

Finally, the shortened mediation process generally includes attorneys appearing with their clients as representatives. Depending on the attorney's philosophy, this could be a welcome addition, freeing the mediator from worrying about a party not understanding his or her legal rights and responsibilities. Or the attorney's participation can be an obstacle, such as when the attorney demands caucus-only mediation or does not allow a client to participate meaningfully in the process.

Civil and Family ADR Cross-Fertilization – Beyond Mediation

The cross-fertilization between family ADR and general civil ADR extends beyond mediation. In a time of decreasing resources for courts and court-based ADR programs, increasing costs for litigants, increasing cases involving intimate partner violence, and increasing numbers of self-represented litigants, courts have recognized that litigants need more options than facilitative mediation alone.¹ (See Kelly Browne Olson's article on Intimate Partner Violence, page 25, and Julie Macfarlane's article on self-represented litigants, page 14). A few examples of developing areas of cross-fertilization follow:

Court-Appointed Experts

Family courts routinely appoint mental health professionals to serve as neutral evaluators in parenting disputes.² These evaluators are responsible to the court and not to either party. Nonetheless, in many cases the parties pay the fee for the neutral evaluator. The views of the neutral evaluator give the court a better basis for fact-finding about the child's best interests than the input of psychologists engaged by the parties alone. The evaluator's report, however, is also a major influence on settlement. Parents think twice about the cost and expense of contesting an unfavorable court evaluation report, so such a report gives counsel a powerful tool to advocate for settlement.

While we have no comparative statistics, we suspect that child custody evaluators are the single biggest use of court-appointed witnesses in civil litigation in the United States. In the federal courts, there are instances of judges

appointing court experts to great effect, to help them assess scientific evidence. Federal judges, for example, appointed panels of experts to help evaluate conflicting scientific testimony regarding causation of injuries by silicone breast implants.³ Federal Rule of Evidence 706 provides a broad authorization for a federal court to appoint its own expert on its own motion. In other civil cases in the state and federal courts, experts are used to resolve valuation disputes, intellectual property questions, and discovery disputes. However, we do not think that the practice of using court-appointed experts (rather than party-paid and selected experts) has become anywhere near as routine in most civil cases as it is in parenting disputes in family cases.

Given the increasing costs of general civil litigation, we expect the practice of appointing a single expert in civil cases to increase. One can imagine a day, for example, when it becomes routine for courts to appoint one expert to assess medical malpractice claims or complex damages claims in business cases rather than relying on dueling experts hired by the parties. While the work

of neutral evaluators in parenting cases has its controversies, their increasing use has led to the development of ethical standards and protocols to guide their work. This experience can be of great use in defining the role of court-appointed experts in all civil cases.

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Early Neutral Evaluation⁴

The family law dispute resolution world has gradually recognized that some parents need more evaluative mechanisms to help them resolve their parenting disputes than those provided by traditional facilitative mediation. For example, family courts are experimenting with potentially promising dispute resolution programs such as Early Neutral Evaluation (ENE). In general terms, ENE is a nonbinding form of ADR designed to give parties a realistic view of their case, identify issues, speed up discovery, and encourage settlement.

As discussed in the Yates and Salem article in this issue, Hennepin County Family Court Services and the Minnesota Fourth Judicial District Family Court use the ENE process in child custody disputes. Parties are referred by the court to a male/female team of experienced neutral evaluators for early feedback on the probable outcome of a full evaluation and an opportunity to negotiate a settlement. The determination is then conveyed in the form of a recommendation to the parties. Following the recommendation, the ENE team meets with both sides to shape an agreement that is tailored to meet the needs of the parties and their families.

Approximately 70 percent of cases are reported to settle. Research indicates the program reduces the stress and expense of custody disputes for clients, expedites judicial case management, maximizes Family Court Services staff efficiency, and focuses subsequent evaluations on critical issues.⁵

General civil cases also use ENE. A Northern District of California federal court program, for example, requires parties in certain cases to attend an ENE session.⁶ The protocol of the session itself is very structured. If no settlement is produced, the evaluators may help the parties develop an efficient approach to case management.

Special Masters and Parent Coordinators

In another area, ADR practices in general civil cases are migrating to family law. Rule 53(a) (1) (C) of the Federal Rules of Civil Procedure allows the court to appoint a master (a term often used with the word “special” before it) to “address pretrial and posttrial matters that cannot be effectively and timely addressed by an available ... judge or ... magistrate.” Numerous federal courts have appointed special masters to investigate complex facts, supervise time-consuming discovery disputes, implement remedies, or calculate damages that would take inordinate amounts of court time and resources.

The family law world has adapted the special master for its own needs in the concept of “parent coordinator.” Parent coordinators are generally used in high-conflict custody litigation. A parent coordinator provides education, mediation, and as a last resort, decision-making for high-conflict parents.⁷ While not identical to a special master, a parent coordinator performs a similar role in the sense that he or she manages ongoing complex interactions within the scope of a court order or appointment. Early empirical results are positive – parent coordinators reduce repetitive litigation by parents. In both civil and family cases, the appointment of a master or parent coordinator saves the court time and effort that can be used for other cases.

Conclusion

Past cross-fertilization between family and civil cases has been significant and has led to the development of mediation as the basic process of alternative dispute resolution. Civil ADR needs to continue to learn from family ADR, and vice versa. But practitioners need to be more sophisticated and thoughtful about the lessons they draw from other areas of practice. If we are careful about our learning, future cross-fertilization can lead to even more innovation and attentiveness to the needs of litigants. ♦

Endnotes

1 Nancy A. Welsh, *You’ve Got Your Mother’s Laugh: What Bankruptcy Mediation Can Learn from the Her/Her Story of Divorce and Child Custody Mediation*, 17 ABI L. REV. 427, 454-58 (2009).

2 The terminology for mental health professionals serving as neutral evaluators varies by jurisdiction. Common terms include “child custody evaluator,” “neutral forensic evaluator,” and “neutral forensic investigator.”

3 Hall v. Baxter Healthcare Corp. 947 F. Supp. 1387 (D. Or. 1996); In re Silicone Gel Breast Implants Products Liability Litigation, 793 F. Supp. 1098 (J.P.M.L. 1992).

4 The material on Early Neutral Evaluation is adapted from Rebecca Love Kourlis, Melinda Taylor, Andrew Schepard & Marsha Kline Pruett, *IAALS’ Honoring Families*

Initiative: Courts and Communities Helping Families in Transition Arising from Divorce or Separation, 51 FAM. CT. REV. 351, 364-365 (2013)(publication forthcoming) (footnotes and quotation marks omitted).

5 Id.

6 For more information about the Northern District of California program, see WAYNE BRAZIL, *EARLY NEUTRAL EVALUATION* (2013); and Robert Rack, *Book Review: Early Neutral Evaluation*, DISP. RESOL. MAG., Summer 2013, at 15.

7 ASSOCIATION OF FAMILY AND CONCILIATION COURTS, *GUIDELINES FOR PARENTING COORDINATION 2* (2005).

One can imagine a day ...
when it becomes routine
for courts to appoint one
expert to assess medical
malpractice claims or
complex damages claims in
business cases rather than
relying on dueling experts
hired by the parties.



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