

SURREPLY

Hon. Leonard Edwards, Steve Baron, and George Ferrick

This is a follow-up to our previous “Comment” responding to an article by William How and Hugh McIsaac.

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We appreciate the “Response” from our colleagues William Howe and Hugh McIsaac. It provides an opportunity to reflect on their reasoning and to respond, hopefully in a useful fashion. We also thank the AFCC for making this dialogue possible, believing, as we do, that mediation is losing rather than gaining ground around the country (including in California) due, in part, to the type of position taken by our colleagues.

It is clear from their “Response” that Howe and McIsaac have not been moved by our comments. They defend and reinforce their position throughout their “Response”. At first they rely upon their “many years of experience in this field.” Their experience is approximately the same as ours with only one difference—ours includes a judge’s perspective (Edwards) as well as two mediators (Baron and Ferrick).

The remainder of the “Response” focuses upon the weaknesses of mediation in certain types of cases and the strengths of litigation. We take issue with both of their positions and believe that their approach is one of the reasons mediation struggles to survive in many courts across the country.

Making the highly improbable assumption that the court system can accurately identify cases in which there are issues “where both significant domestic violence and mental health issues are present,” Howe and McIsaac conclude that this situation “often precludes the level of rational negotiation necessary to successfully mediate these matters.” By inference, they agree that, in some of these cases, successful mediation can be accomplished. We would point out that there is a safety valve in all cases sent to mediation. If the mediation is not successful, if the mediator believes that no rational negotiation is possible, if the mediator concludes that there is an unfair power imbalance that cannot be remedied through the mediation process, or if the mediator believes that the parties should go through the adversarial process, the mediator can end the session and refer the parties back to the courts. What has been lost in this process? Nothing. What has been gained is the opportunity for self-determination and planning for the future, something the adversarial process cannot offer.

Howe and McIsaac go on to state that the results of a mediated agreement in those cases “where both significant domestic violence and mental health issues are present” can be unfair and unworkable, even dangerous. Guess what? The results of many mediated agreements can be unfair and unworkable just as many court orders can be unfair and unworkable. That is because no one in the court system will ever know all of the facts. Moreover, it is less likely that the judge in the short court hearing will ever know as much

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as the mediator in a mediation session. The real question is whether there is value in having an experienced mediator listen carefully to each parent (perhaps separately), ask questions, and help the parents try to figure out some resolution to the issues, and then, if that is not possible, to move onto the litigation path or, as our colleagues suggest, to jump directly to litigation and not give discussion an opportunity. We choose to try mediation first. We recognize the mediator's role as that of an engaged contributor to the process, constructively engaged with the parties to address issues and work toward a resolution in their children's best interests. The mediator carries an overarching concern for the safety issues relating to the parties as well as the children.

Howe and McIsaac seem to believe that all will be well so long as each party has an experienced attorney. Perhaps. Realistically, the great majority of litigants are self-represented. They may learn a little about the court system on their own, from orientation classes, and from friends. They come into the system with questions. They want to tell their story to someone and have a satisfactory resolution. The litigation process offers little time or opportunity to do any of this. As we pointed out in our "Comment", litigation is a crude process where court orders are fashioned without the nuances and subtleties that make them effective. Mediation offers the client much more. From a practical standpoint, mediation gives the clients what they need, an opportunity to be heard, to ask questions, to get feedback, and to write agreements that meet the needs of both parties and their children.

One disappointing aspect of Howe and McIsaac's "Response" is their reliance upon the fact that most mediation programs are underfunded. Thus, they say, mediators are insufficiently trained and there is not enough time (one hour "frequently") for mediators to complete their work. We agree that mediation is underfunded, that some mediators are less than adequately trained, and that many mediation programs limit the time a mediator can spend with clients. On occasion it is less than an hour. Yet we don't give up on mediation because it is underfunded. We take the position that mediation should be valued and supported by the court system so that the excuse for not using mediation is not that it is poorly resourced. Howe and McIsaac may be agreeing with us in one sense—they may be saying that if mediation were fully funded, their problem cases could be referred to mediation because the risks would be less. So why do we have to say that for them?

We pointed out in our "Comment" that clients prefer mediation to litigation, that the results of mediation are agreements that are more nuanced and are longer lasting than those reached in litigation, and that the court process benefits in time saved by mediation. Then why not build a stronger mediation program? It is because judges and lawyers often believe that litigation is preferable to mediation, because they are able to be in control of court proceedings, and that mediation is a waste of time. When experienced mediators such as Howe and McIsaac tell judges and lawyers that certain cases should not be referred to mediation, this only encourages their negative attitudes toward the process.

Howe and McIsaac rely upon two articles regarding the dangers of mediating when domestic violence is present. They could have mentioned many more. AFCC readers are familiar with the debate concerning mediating when domestic violence has occurred. However, practice has gone far beyond those concerns as indicated in the more recent articles cited in our "Comment." Consider the sophisticated court rules (CRC 5.210¹ and 5.215²) developed by the California court over the past twenty-five years that address procedures and safety issues in mediation.

Ultimately, this is a discussion on the value of parental self-determination regarding their children. Each state has established a legal system that contesting parents can turn to in

order to resolve their disagreements. Our position is that facilitated discussion should be given a chance in every case before traditional legal procedures are employed. Safeguards have been developed over the past twenty-five years that make such discussion safe. If that discussion/mediation proves unsuccessful *or* if the mediator believes that the process will not work to serve the best interests of the child, the case can be referred to the adversarial process.

But to jump immediately to the adversarial process with a questionable assessment, with self-represented parents, and a long docket (five minutes per case) is placing confidence in another underresourced system, one that clients find much less helpful than mediation and one that could be safely avoided in the majority of cases.

NOTES

1. CAL. R. CT. 5.210, *available at* <http://www.courtinfo.ca.gov/rules/index.cfm?title=five&linked=rule5.210>.
2. CAL. R. CT. 5.215, *available at* <http://www.courtinfo.ca.gov/rules/index.cfm?title=five&linkid=rule5.215>.