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PERSPECTIVES ON INTER-PROFESSIONAL COLLABORATION: MEDIATION

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ABSTRACT

This study which used semi-structured interviews with five social workers and five attorneys seeks to explore ways in which mediation as a process of inter-professional collaboration could be better exploited. Access was gained to the respondents by using the non-probability snowball sampling method to access social workers and attorneys who would consider divorce as an area of specialisation or expertise. The researcher was unable to access any member of either profession who held *mediation* as central to their strategy for divorces. Most of those interviewed indicated they used mediation skills when working with their clients but also that they did not formally encourage or engage in a full mediation process.

The study found that the family advocate could be a key in encouraging increased use of mediation and that the possibility of providing legislation for mandatory mediation should not be too readily dismissed. Co-mediation may enhance the capacity of the professions to work together and may address some of the role or territory disputes that work against mediation. The study also found that the two professions do not have a good working knowledge of each other and that the relationship is characterised by mistrust and uncertainty.

PERSPECTIVES ON INTER-PROFESSIONAL COLLABORATION: MEDIATION

The continuous search for alternatives in dealing with custody and access of minor children in divorcing families has resulted in innovative legislation such as the Mediation in Certain Divorce Matters Act (1987) and in the Family Advocates functions. While there appears to be increasing use of the family advocate to protect the rights of minor children in custody disputes this work is still often embedded in a relationship of conflict between the parties concerned which permeates the relationships in the families and increases the stress of the divorce process for all involved. Mediation has been viewed as one workable alternative to this conflictual model but it has not been implemented as widely as had been envisaged (Goldberg, 1996, Robinson & Parkinson, 1995). In some centres mediation services are well established – in others, including large urban cities such as the one in which this study was done, it is almost entirely absent as an option for divorcing couples.

This study which used semi-structured interviews with five social workers and five attorneys seeks to explore ways in which mediation as a process of inter-professional collaboration could be better exploited. Access was gained to the respondents by using the non-probability snowball sampling method to access social workers and attorneys who would consider divorce as an area of specialisation or expertise. All the social workers and attorneys involved have had extensive experience in family law and all are senior professionals with at least six years experience. The range of custody dispute cases in which the social workers had been involved ranged from three to 45 although none had formally been involved in mediation. Only one of the attorneys formally practised mediation. All of the professionals in the sample (social work and law) had done work for the family advocates office and all listed divorce and custody as an area of specialisation or

expertise. The researcher was unable to access any member of either profession who held *mediation* as central to their strategy for divorces. Most of those interviewed indicated they used mediation skills when working with their clients but also that they did not formally encourage or engage in a full mediation process.

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While the Mediation in Certain Divorce Matters Act (24/87) does not define mediation it is taken to be a decision-making process in which the parties are assisted by a third party, the mediator, to improve the process of decision-making and to assist the parties to reach an agreement to which each of them can assent (Boulle & Rycroft, 1997:3). Mediation is not a substitute for legal advice or an alternative to legal representation and it is not a form of counselling. In many respects the process of mediation is defined, through personal and professional preference, by the professional involved (Hoffman, 1991:11). However, common to any mediation process is the effort to come to agreements about issues that are in dispute in a divorce in such a way that both parties benefit and that as constructive a relationship as possible is maintained. Intervention by attorneys or social workers can be complementary if mediation is viewed in this way. Clients, who are distressed, insecure and uncertain as to their objectives in a divorce often consult attorneys who are to a significant extent only able to operate within a legal framework. Clients who consult social workers are often not able to get the legal advice they need. Thus it becomes tempting from the perspective of the legal profession to proceed with the divorce logistics before the client has had time to reflect on the course of action she or he wishes to pursue. In such a case, no alternatives to litigation are considered (Davis & Roberts, 1988:30). This process would compound the negative effect that divorce has on the parties – especially the children (Pretorius, 1993:13). It is because of increasing recognition of the value of alternatives to litigation where the interests of minors are concerned (Hoffman, 1991:12; Schafer 1993:129) that mediation is so often associated with the settlement of custody disputes. While this particular focus is essential it is not the only role that a mediation process for divorcing couples could, or should, fulfil.

However, as custody was the issue that the respondents kept returning to in their discussions of mediation this focus should not be ignored. Both professions acknowledged that, even with a full family advocate's assessment, report and recommendation, many couples do not accept the final judgement of the divorce court and tend to continue using the children to maintain a hold on the non-custodian parent and to exert pressure on the children by involving them in the parental dispute. Of concern to the professionals interviewed and reflected in the literature (Schafer, 1993:14) is the common phenomenon that in situations of ongoing conflict the non-custodian parent often decreases contact with the children in order to avoid the conflict with the other parent. This heightens the trauma of the process for the children involved (Schafer, 1993:17).

The study thus wanted to find out why the professionals most involved in divorce (social work and law) did not use mediation – given that both professions indicated that there were many unsatisfactory outcomes for divorce based solely on litigation and negotiation through attorneys it becomes imperative to understand why other options are not being tried.

Although the social workers and attorneys interviewed are aware of mediation as a concept, none of them has seriously considered promoting its use or given serious thought to mediation as an alternative to litigation. The reasons they gave for this varied:

- Lack of funds in the relevant government departments to start a mediation service.

- Mediation as an alternative dispute resolution method is unknown amongst professionals and the communities at large.
- There might be resistance to change because social workers and attorneys are working in ways which are comfortable for them.
- Many attorneys and social workers dealing in divorce matters do not consider alternatives such as mediation when making recommendations on the settlements of divorce cases.
- Social workers are not trained to do mediation and attorneys do not have enough information about mediation to offer the service or advise clients about the option of mediation.
- No private mediation service is available because nobody has thought about starting such a service.
- Some of the divorce cases are not suitable for mediation and the litigation procedure can prevent the use of mediation.

The concern that it may not work is prevalent in their responses and is in line with recent studies (Boulle *et al.* 1997:74-75; Roberts, 1997:129-130) which have suggested that mediation is unlikely to succeed where a referral is unsuitable. There has to be an actual or anticipated dispute between the parties, which cannot be reconciled by the normal processes of decision-making and the dispute must be capable of being negotiated. Whether or not these conditions apply to a particular couple should surely be tested against a mediation process before a decision is reached that mediation will not work?

While the above reasons were shared by the two professions there were profession specific justifications given for not using mediation which reflect more on the professions themselves than they do on mediation as a concept and process. The attorneys for instance argued that financial considerations mitigate against mediation as an option for some attorneys. Early settlement of divorces would impact on their fees. Some even argued, in line with the literature (Haynes, 1994:2; Johnston & Campbell, 1988:39-47), that some attorneys (especially inexperienced ones) encourage their clients to litigate.

The respondents also acknowledged that the series of maneuvers and strategies employed by attorneys as they formulate their client's positions and engage in tactical warfare with other attorneys, further encourages their clients to litigate.

The additional reasons given by the social workers were quite different. They indicated that although communities have been exposed to mediation in community affairs and labour issues they have not been educated about the possible uses of mediation to resolve disputes arising from divorce. According to these social workers the high caseloads of social workers mitigate against the time it would take to effectively practise mediation and there is a shortage of available trained social workers. (These responses appear to ignore the fact that the time used for mediation could be viewed as an investment in not needing to offer other services to families later where disputes have not been resolved.)

The ten respondents then related their above general comments to the strategies they personally employ to try to ensure that their clients' divorces are settled. All five attorneys indicated that they attempt to convince clients to come to a settlement to avoid taking cases to trial. Cases are discussed and negotiated with the opposing attorney to facilitate a settlement. Many of the cases where the parties cannot reach an agreement about the custody of minor children are referred to

the family advocate for an investigation. All five social workers agree that attorneys refer cases where custody and access is disputed, to the family advocate in terms of the Mediation in Certain Divorce Matters Act, 1987. It is at this level that social workers get involved in the divorce process. Some, such as those employed in non governmental organisations like FAMSA, get involved earlier but more often than not social work contact with divorce is centred around the disputes referred to the family advocate. A family counsellor, who is usually a social worker, assists the family advocate to investigate the case and to make a recommendation to the court about what is in the best interest of the minor children involved. This recommendation is usually contained in a report compiled by social workers on completion of an investigation into a particular case.

Both social workers and attorneys are mindful of the important role of the family advocate whose powers revolve around instituting an inquiry to make recommendations on any matter concerning the welfare of minor or dependant children. However, while attorneys may seek referral to the family advocate, only one of those interviewed indicated that he referred his clients for counselling – his referrals were to a religious counsellor and not to another professional such as a social worker or psychologist. This was explained by one attorney (who does not refer clients for counselling) as being because of the stigma associated with seeing a social worker. Nevertheless, three of the five attorneys interviewed indicated that the failure on the part of a client to seek counselling was associated with clients rejecting the outcomes of the divorce process and in them sabotaging the decision-making process (Roberts, 1997:129-130; Boule *et al*, 1997:74-75) even if it was to involve mediation.

The social workers agree that the majority of the cases are settled by means of an agreement drawn up by the respective attorneys acting for the parties. Both professions agree that it is very rare for disputing couples to settle the issues of the divorce without consulting an attorney. Litigation is however avoided wherever possible. Both professions agreed that it may be easier to avoid litigation if mediation was used but the attorneys were concerned about mediation when it comes to the division of property and disclosure of assets. One attorney argued that full disclosure could weaken the attorney's case when mediation proves to be unsuccessful and the case has to go court. If parties change their minds about mediation, the attorney has exposed his case because the other party will know everything about the case. Haynes, (1994:3-7) disagrees and argues that the mediator insists on full disclosure of all issues and facts to all participants as part of a power balancing process. Unequal information sharing is avoided by clear specification of what data is pertinent to the issues being mediated.

The issue here seems to be about the possibility of mediation failing and the possibility of the client needing someone to make decisions for them. The attorneys all argued that it is the responsibility of the attorney to ensure a favourable outcome for their clients and that other counsellors are not qualified to decide on the division of property and assets. Proponents of the empowering possibilities of mediation have argued that this argument implies that the parties are not in a position to make their own choices and is fundamentally disrespectful of clients (Bosman-Swanepoel, Fick & Strydom, 1998:101). While most of those interviewed recognised that mediation may at times prevent a divorce there was agreement that this is not its aim but that for mediation to have any positive effect separating, divorced or divorcing couples need to voluntarily involve themselves in the mediation process (Roberts, 1997:128). One of the attorneys believed that this involvement is only possible if the clients are sufficiently educated to understand mediation.

The same territorial boundaries emerged in response to the questions about who should practise mediation. Most of the social workers feel that social workers are the ideal persons to act as mediators as long as they are suitably qualified. Only one suggested other professions including

psychology and law. Attorneys questioned whether social workers – or any other profession – would have sufficient legal knowledge to render an appropriate service. Both professions are very far from the more inclusive view inherent in the concept of mediation which sees it as a function that could be community based and offered by trained community leaders (Lombard, 1992:60). The social workers and attorneys further agree that the main role for the attorney in mediation is advising on legal matters and attending to the redistribution of property and assets to achieve a fair settlement. The attorney also submits the final agreement to court to bring the divorce process to finality. The main role for social workers, in the view of the attorneys, is to mediate where custody is concerned but two felt that attorneys could do this just as successfully as could social workers. The social workers, while accepting custody disputes as central to their role, would prefer their role to be defined more broadly and one indicated that co-mediation would allow both the social workers and the attorneys to bring their respective strengths to the mediation process. Boule and others (1997:105) have argued that co-mediation brings greater skills resources to the mediation context, allows for division of labour, matches parties and mediators better and increases things such as accountability, positive modelling of constructive communication and stabilises the dynamics in the relationships. Many of these benefits are dependent on the commitment and skills of the mediators and co-mediation could just as easily result in negative modelling, additional expense and a waste of time and other resources.

Both professions recognise the need for development of their own services in order to effectively offer mediation. Social workers for instance need to be able to differentiate between their emotional support roles and their roles as mediators and attorneys need to differentiate between advice giving and mediation (Radford & Glaser, cited in Pretorius, 1993:77). There are questions about whether or not either profession is ready for this role diversity. For instance, four of the five social workers interviewed noted the ventilation of feelings as a very important part of the value of the mediation process. Studies have shown that while mediation should allow for some ventilation of feelings this should be controlled – excessive or prolonged expression of feelings may seriously impede rational exchange and lead to a deterioration of relations, rather than any improvement (Roberts, 1997:25-26, Hauser, 1995:71).

Thus while the social workers were concerned about general community misconceptions about the profession's ability to engage in activities such as mediation the profession itself does not present a clear understanding of how the mediation role differs from more traditional social work. Mediation is not a substitute for counselling or for legal advice and until this is recognised very little progress will be made.

Both professions recognise that mediation is important. Some of the reasons they give are:

- Mediation can be the best way to resolve what can be financially crippling to the couple. The sooner the case is finalised, the less it will cost.
- The parties reach their own agreement and are more likely to adhere to the terms agreed upon after the divorce.
- Mediation is quicker than a litigated case and the couple can carry on with their lives without the added frustration of a lengthy court battle.
- Mediation will assist the parties to accept the divorce and to move on. Non-acceptance of a divorce can heighten the emotional trauma for the parents and the children and according to Schafer (1993:14-18) the unfortunate child becomes the focus of parental wrath when parents feel that they have unresolved battles to fight.

- The parties can still communicate with each other and they can be referred for counselling to assist them with the adjustment after the divorce. The need for revenge is minimised by constructive engagement of each other.
- Mediation will take the extreme pressure off children when they are pressurised by their parents to choose between the them.
- The children do not have to go through the trauma of court attendance.
- Children can stay in contact with both parents without feeling guilty about their loyalty to their parents.

Mediation can be beneficial in maintenance cases – it could prevent the non-custodian parent from becoming estranged from his family if he tries to avoid conflict with the custodian parent. In addition it is in the interests of the children concerned to witness their parents resolving their differences in a mature way (Moore, 1996:66-67).

It is clear that both social workers and attorneys are conversant with the advantages of mediation but, at least in this city, neither profession has initiated or promoted mediation as an alternative method of dispute resolution for divorcing couples. While it was generally agreed that there is an important role for mediation there was less certainty about from where the service should be offered. Four attorneys and four social workers feel that mediation should be based within the justice system, in the family advocate's office as the air of authority of the legal system would make it more effective. In a submission to the South African Law Commission (Discussion Paper 1999:87), the family advocate stated that she believed that the present court structure of dividing and fragmenting family disputes should be abolished in favour of an all-inclusive family court. A family court should be based on more informal processes, specifically mediation. In contrast Boulle and others (1997:16) have argued that there can never be genuine mediation in a court context. Both social workers and attorneys see the State as the main funder of mediation services as they argue that if the state does not bear the cost of the service it will remain inaccessible to disadvantaged and rural communities. The attorneys, as a result of their experience with the Legal Aid Board, noted the difficulties in getting the state to pay for services it had agreed to offer.

Only one attorney and one social worker were in favour of private mediators and non-government organizations providing the service. They argued that private mediators and non-governmental organisations are able to charge for the service which would provide an incentive for the mediator and the disputing couple to use the process effectively. This raises the issue of mandatory mediation which was supported by three of the five attorneys on the grounds that it would not be used if it was not mandatory. All five social workers were opposed to mandatory mediation which has been argued against by authors who suggest that making it mandatory decreases the real commitment of parties and that mandatory mediation is a contradiction in conceptual terms (Boullé *et al.* 1997:16). Others have argued that mediation should be mandatory (Goldberg, 1996:370).

Whether or not mediation is made mandatory, it will only work if the two centrally involved professions work together. The gap between the professions (at least to the extent that they are represented by this small sample) is considerable. Four of the five attorneys interviewed have not, or have infrequently, initiated contact with social workers – as these are senior practitioners in the divorce field this can be taken to be indicative of a sense in which there is no perceived need for this contact. The one attorney who does have regular contact uses it to ensure that cases can be settled more quickly by sharing information. However, while this attorney believes that social workers working for the family advocate should contact the attorney it was conceded that

opposing attorneys could view this contact differently and thus that if it was to be made it had to be made with both attorneys. The question that remains for the authors is about the nature of the contact and the information shared and the importance of ensuring that client rights are not violated in this process. All five of the social workers have contact with attorneys with four of the five experiencing this contact as beneficial for the clients. Social workers would like to see themselves as a "preferred service provider" for referrals from attorneys for mediation services as it is clear that many clients will approach attorneys before any other profession when considering a divorce. The attorneys argue that an attorney has the responsibility to give clients the best advice and to consider all options before entering into litigation which includes the option of mediation.

The attorneys and social workers agree that it is possible for them to co-operate to assist divorcing couples. Four social workers suggested that the two professions need to bridge the gap that is prevalent between them. These four social workers attribute the gap between the professions to the following:

- Social workers are more concerned with the human side while the attorney only sees the facts about a case.
- The attorney has only one party as his client, while the social worker deals with the whole family. Attorneys act on the instructions of their clients while social workers do not have the same restriction on their work.
- Social workers and attorneys do not communicate effectively.

Attorneys were no less stylised in their responses. According to them they would be willing to refer clients if they could be sure that clients would get the services they require. There appears to be a power struggle between some social workers and some attorneys with the attorneys arguing that some social workers do not execute their work efficiently, that they are uncooperative in seeking speedy finalisation of cases and that they do not keep the attorneys informed of their progress. The attorneys experience social workers as being unable or unwilling to explain the reasons for their recommendations and that this impacts on the attorneys ability to work with their clients. Three of the attorneys felt that social work reports do not always reflect an unbiased recommendation and that the time taken to write a report (up to three months) places undue strain on the divorcing couple and the attorney.

It is clearly evident that the two professions have room for improvement in terms of their understanding of each other. Suggested solutions appear to centre around clear communication of roles and responsibilities and the responsible and professional sharing of information in the interests of clients. The social worker could assist the attorneys to make sense of the custody disputes and the impact of these on all involved while the attorneys could assist in generating client co-operation with court ruled investigations. One of the key challenges appears to be that the role of the attorney is normally clearly one in which she or he has taken the "side" of a particular party. The social worker is expected to be more objective but is seen more negatively by parties against whom negative recommendations are being made. As social workers involved in custody disputes are dealing with the most sensitive of interpersonal issues it is not surprising that the parties involved would be cautious. Many have suggested that conscious efforts to remain neutral are vital for successful social work involvement in mediation and custody disputes (Barsky, 1984:10; Cohen in Pretorius, 1993:78) but this is not a simple request.

What this study has done is highlight the fact that the success of any new way of working – in this case, mediation – is dependent on the willingness of those involved to change. Where more than one profession is involved it is also expected that there will be a willingness to trust the "other".

This study suggests that there is still some way to go in this process in the case of offering effective mediation services to clients.

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