

SETTLEMENT-FOCUSED PARENTING PLAN CONSULTATIONS: AN EVALUATIVE MEDIATION ALTERNATIVE TO CHILD CUSTODY EVALUATIONS

Daniel B. Pickar and Jeffrey J. Kahn*

The divorce mediation field has recently seen the development of several “hybrid” alternative dispute resolution approaches to child custody disputes. The “settlement-focused parenting plan consultation” (SFPPC) is a form of evaluative mediation, conducted by a “parenting plan consultant” (PPC), who possesses the combined expertise of a mediator and child custody evaluator. This hybrid model is a more expedient and considerably less expensive approach than a child custody evaluation, but preserves the hallmark mediation principle of self-determination. The article describes the theory underlying the SFPPC, delineates the role requirements, procedures, and techniques of the parenting plan consultant, and addresses legal and ethical issues.

Keywords: *child custody evaluations; conflict resolution; divorce mediation; family law; forensic psychology*

I. INTRODUCTION

Finding effective and healthy ways to assist families embroiled in child custody disputes remains one of the great challenges in the family law arena. Parents involved in litigation move from being the decision-makers in matters pertaining to their children, to risking the disempowerment that can occur when a third party decides their children’s future. Apart from judicial decision-making, the last 25 years has seen the development of two primary methods for resolving custody disputes, child custody evaluations, and mediation.

On the litigation end of the continuum, child custody evaluations have increasingly been used by the court system to assist judges in determining the best custodial arrangements for children with parents who cannot reach agreements on their own. Child custody evaluations can yield a number of benefits to families. They are especially helpful when the court needs information regarding the safety of children involved in cases of physical or sexual abuse, domestic violence, severe psychiatric dysfunction or parental substance abuse, or extreme forms of alienation. Criticisms of child custody evaluations abound, including that custody evaluations are often used as vehicles for fault finding and parent bashing. They may also produce unintended, counterproductive consequences, if parents disregard what they do not like in a report, or use it as a potential weapon in a custody battle. In addition, evaluations are intrusive, often focusing on parental deficits, thus reinforcing conflict and increasing animosity (Pearson et al., 2006), and parents may become more polarized as a result of undergoing an evaluation (Silver & Silver, 2008).

At the other end of the continuum is child custody mediation, with its emphasis on parental self-determination. Proponents of mediation point to research findings revealing: higher client satisfaction with mediated than adversarial dispute resolution processes (Kelly, 1996); increased contact and involvement of non-residential parents with children in comparison to non-residential parents who litigated custody; lower co-parenting conflict among parents who mediated than litigated custody; and, increased flexibility in changing custody arrangements in families who mediated versus those who litigated custody (Emery, Laumann-Billings, Waldron, Sbarra, & Dillon, 2001).

Correspondence: dpickar@sbcglobal.net; drjeffk@comcast.net

The last ten years has seen the development of several alternative dispute resolution (ADR) approaches to child custody disputes. These include: collaborative divorce (Tessler & Thompson, 2006), parenting coordination (Coates, Deutsch, Starnes, Sullivan, & Sydlík, 2004), and impasse-directed mediation (Pruett & Johnston, 2004) for especially high-conflict families. Another recent advancement in ADR approaches has been the development of “mixed” or “hybrid processes” of mediation and evaluation, ranging from early neutral evaluation (Pearson, 2006), mediation-arbitration, and mediative evaluations (Shienvold, 2004).

Mediative evaluation, a process by which a child custody evaluator conducts an evaluation and then uses mediation skills to attempt to resolve the case prior to submitting a report, has drawn extensive criticism (Barsky, 2007). For example, Gould and Martindale (2007) caution that once the court orders an evaluation and the evaluator has accepted that assignment, he or she should not be trying to find settlement solutions, as the evaluator would then be departing from his or her assigned role. They raise the question of what would take place if the attempt at settlement fails. Should the evaluator move back into an investigative role? They posit that if settlement fails, the evaluator must essentially withdraw from the case, and a new evaluator should be appointed. Consistent with this warning, the Model Standards of Practice for Child Custody Evaluation (AFCC, 2007) states “evaluators . . . shall refrain from negotiating settlements with the parties and/or their attorneys” (Standard 4.5, p. 78). Thus, shifting roles in midstream from an evaluator to a mediator is fraught with ethical and role-boundary problems (Greenberg & Shuman, 1997).

A less ethically challenged and potentially more effective hybrid ADR procedure, which combines aspects of both mediation and evaluation, is the “Settlement-Focused Parenting Plan Consultation” (SFPPC), which the developers have defined as a form of evaluative mediation (Lowry, 2004). This approach differs from mediative evaluation, as the mediator or “parenting plan consultant” (PPC) does not have decision-making power and does not try to coerce a settlement from the participants. As with traditional mediation, the parenting plan consultant tries to facilitate a settlement through the empowerment of the parties (Shienvold, 2004). We have developed and systematized this particular ADR method, which in all likelihood is already being used in some forms around the country by mental health professionals with both mediation and evaluation experience. However, the underlying theory and methodology of this particular approach, as specifically applied to child custody disputes, has never been formally presented.

Barsky (2007) recently recommended that new forms of ADR in the family law arena should be conceptualized and regulated as separate methods of conflict resolution, with their own set of theory, techniques, training, and ethical standards of conduct. To this end, this article discusses the theory underlying the Settlement-Focused Parenting Plan Consultation and delineates the role requirements, techniques, and procedures of the “parenting plan consultant” (PPC). Also addressed will be ethical and legal issues, which might arise from this role/procedure. Recommendations regarding further development of this approach are also proposed, such as minimal standards of training and experience, and whether this method should ultimately be regulated by its own standards of practice.

II. EVALUATIVE MEDIATION AND THE SETTLEMENT-FOCUSED PARENTING PLAN CONSULTATION

The Settlement-Focused Parenting Plan Consultation (SFPPC) is a form of evaluative mediation that combines traditional facilitative and interest-based mediation, with its emphasis on self-determination and confidentiality, with an evaluative process that provides parents with expertly gathered information to be utilized in devising a parenting plan that meets their children’s best interests. Lowry (2004) defined evaluative mediation as when a mediator makes a judgment about a dispute at hand, and expresses that judgment to the parties.

In Riskin’s (1996) seminal, but controversial article¹ he elucidated the different types of mediation and their attendant strategies and techniques. Riskin noted that the evaluative mediator must have high “subject matter expertise,” because the mediator needs to not only facilitate a mediation process, but

be able to assess the strengths and weaknesses of each party's case, develop and propose options to resolve the case, and predict possible outcomes at trial if a dispute, not settled in mediation, were to be fully litigated. Thus, in the context of evaluative mediation of a child custody dispute, the parenting plan consultant must have high subject matter expertise regarding both applicable child custody laws in his/her jurisdiction of practice and the psychological and developmental needs of children, especially as they relate to child custody and access (Kelly & Emery, 2003). The PPC should also have a detailed understanding of: empirically-based knowledge regarding the effects of separation and divorce on children (Amato, 2005; Clark-Stewart, Vandell, McCartney, Owen, & Booth, 2000; Hetherington & Kelly, 2002); research regarding children's adjustment in various living arrangements following separation and divorce (Kelly, 2007); and, developmentally appropriate parenting plans (Kelly & Lamb, 2000; Pruett, Ebling, & Insabella, 2004). The PPC should also have expertise in assessing, interviewing, and observing children and adults utilizing forensic methods such as those used in child custody evaluations (Gould, 2006). The PPC should have handled enough similar cases to see how various parenting plans may or may not have worked for particular children. He or she must also have an understanding of the courts' views on custody issues. In discussing the role of "subject matter expertise" in evaluative mediation, Lowry (2004) stated, "evaluative mediation embraces that expertise and gives the parties more information with which to work" (p. 77).

Over 80% of child custody mediators do not include children in the process. Therefore, the majority of children have a parenting plan imposed on them without their input (Smart, 2002; Taylor, 2006). The SFPPC, however, includes children in the process. If older than four years of age, such children will be engaged in individual/play interviews. Infants, toddlers, and preschoolers will also typically be included, via parent-child observation conducted either in the office or home. As noted by Kelly (2008), "a large majority of school-age children in separated and divorced families want their voices to be heard and their needs and opinions considered" (p. 153).

Saposnek (2004) outlined several arguments in favor of including children in mediation, including: (1) Children frequently disclose their real feelings to the mediator, whereas they only tell their parents what they believe their parents want to hear; (2) Children feel that someone cares about their needs; and, (3) By gaining firsthand knowledge of the children's needs, the mediator can educate parents about their children's specific developmental needs based on directly knowing the child. McIntosh, Wells, Smyth, & Long (2008), in an empirical outcome study of "child inclusive mediation" versus "child-focused mediation" (in which the child is not directly included), found that there were more positive outcomes when children were included in the mediation. The child-inclusive mediation resulted in improved emotional availability of parents to children and produced custody plans in which parents and children remained more content than in the child-focused group. By including children in mediation, parents and mediators get feedback about what is important to a child, as children will typically be more accepting of an arrangement in which they have had input (Kelly, 2007). Of course, a child should have an option to not express a parenting plan preference, but most children understand the difference between providing input and making decisions (Cashmore & Parkinson, 2008).

Lastly, a major advantage of the SFPPC over a child custody evaluation is that this procedure typically costs less than half the price of a child custody evaluation. In fact, the cost savings are likely much greater to a divorcing family, as this process avoids the additional expenses involved in a traditional litigation and evaluation process, including declarations, depositions, retention of adverse experts, and possible trial. The SFPPC can also usually be completed in 4 to 6 weeks, whereas an evaluation typically takes 3 months to complete, and sometimes much longer.

III. ROLE COMPONENTS OF THE PARENTING PLAN CONSULTANT

The set of skills required to be a competent mediator are different from those required to be a competent child custody evaluator. Additionally, the parenting plan consultant (PPC) provides a

similar set of functions as that of the Child Specialist in collaborative divorce (Tessler & Thompson, 2006). The contributions from these three roles to the highly varied expertise of the PPC will be described next.

A. MEDIATOR

Facilitative mediation, with its emphasis on improving communication, helping parties move from their fixed bargaining positions to common “underlying interests,” and assisting parties at arriving at integrative solutions (Mayer, 2004), is a crucial skill for the PPC. Interest-based negotiation skills are essential for this role. Fisher and Ury (1981) noted in their classic text, “when the focus is shifted from positions to interests, areas of agreement may be seen more readily and creative solutions often become more apparent as well” (p. 156). The PPC should also be skilled in rapport building, be familiar with option-generation and brainstorming techniques (Barsky, 2000), and be familiar with strategies for managing impasses (Benjamin, 2004). The PPC would also benefit from knowledge and experience with strategic approaches to child custody mediation (Saposnek, 1998), as well as with concepts and techniques from narrative forms of mediation (Winslade & Monk, 2000), which are being increasingly integrated into contemporary mediation and collaborative practice. The narrative techniques of externalizing conversations and restorying practices, in which the mediator assists the parties to begin to co-author a new story of cooperation, can be tremendously useful in the work of the PPC.

B. CHILD CUSTODY EVALUATOR

Because there is an evaluative component to the SFPPC, the information-gathering process should be consistent with many of the current standards of practice for child custody evaluators (AFCC, 2007; APA, 2009), and it should be conducted in a manner that follows the scientifically-informed approach to custody evaluations (Gould, 2006; Gould & Martindale, 2007). For example, the Model Standards of Practice for Child Custody Evaluation (AFCC, 2007) states, “Child custody evaluators strive to use multiple data gathering methods in order to increase accuracy and objectivity” (Standard 5.4, page 79), a standard that would certainly apply to the methodology of the PPC. The PPC not only conducts interviews with parents, but also utilizes scientifically-based interviewing strategies with children (Kuehnle, Greenberg, & Gottlieb, 2004), obtains information from collateral sources to corroborate or disconfirm assertions by parents, and to provide an independent data source (Kirkland, McMillan, & Kirkland, 2005), and reviews relevant historical and current records (Austin & Kirkpatrick, 2004).

Additionally, any psychological tests utilized should be reliable, valid, and based upon empirically-based methods (Flens, 2005). The PPC should also use a balanced process of equal time spent with each parent to increase objectivity and create a sense of fairness for the participants in how the process was conducted, a method also required of child custody evaluators (AFCC, 2007).

C. CHILD SPECIALIST IN COLLABORATIVE DIVORCE

The SFPPC borrows from aspects of collaborative practice (Conner & Anderson, 2008; Tessler & Thompson, 2006), particularly the role of the child specialist. In collaborative practice, a neutral child specialist is often part of the collaborative team, along with attorneys and coaches. The child specialist’s role is to provide insight into how the child or children are coping with the divorce and to offer options for time-sharing arrangements, which may be in their best interests. The child specialist can act as a spokesperson to help younger children’s feelings be known to their parents and can help older children articulate their feelings about the divorce and possibly their wishes for a time-sharing arrangement. In the collaborative process, a child specialist typically not only meets with parents, but also has individual meetings with children, may conduct parent-child observations and home visits,

and may even conduct psychological testing with children, depending upon the needs and desires of the family. Lastly, the joint feedback meeting with parents and attorneys in the SFPPC is similar to the five-way meeting that the child specialist has with the parents and their respective coaches (the attorneys might also attend), in order to assist the parents in developing a parenting plan. Essentially, the child specialist helps the parents focus on the children's needs and allows children to have a voice in the process of devising parenting plan arrangements that may affect them for the rest of their lives.

IV. STRUCTURE OF THE SETTLEMENT-FOCUSED PARENTING PLAN CONSULTATION

The PPC assists parents in deciding upon an appropriate time-sharing plan for their children. To achieve this goal, the PPC conducts a series of interviews with all family members and may also gather additional information from reviewing records, interviews with collateral sources, and possibly even psychological testing or home visits, if requested by the parents. After this process is completed, the PPC engages with the parents and their attorneys in a five-way settlement meeting, with the primary goal being that of settlement and agreement to a parenting plan. When parents or attorneys inquire about the SFPPC, a packet of information is sent describing the process, along with an informed consent agreement and a model stipulation and order.² Following are both standard procedures and optional methods that may be utilized in conducting the consultation.

A. STANDARD PROCEDURES

1. *Joint conference call with attorneys.* The purpose is for the attorneys to specify the issues, which they hope will be resolved in the consultation process. The attorneys and PPC will agree upon the records/documents that will be provided to the consultant for review. Following the joint conference call, there will typically be no communication with the attorneys during the information-gathering process, with the exception of scheduling the five-way settlement meeting.
2. *Joint meeting with both parents.* The purpose of the meeting is to reach an agreement about consultation procedures, sign consent forms for collateral contacts, and to obtain some brief marital history. The parents can also discuss their concerns about their children's functioning in light of the separation or divorce, as well as offer input regarding possible parenting plans. In this meeting, rapport building is crucial. The PPC highlights common underlying interests and attempts to elicit a shared vision the parents might have regarding their respective involvement in their children's lives in the future.
3. *Individual interviews with each parent.* There are three purposes for these individual interviews. First, the PPC elicits greater detail regarding each parent's concerns about their children's needs. Secondly, the PPC identifies any concerns a parent might have about the other parent's parental functioning which might need to be addressed prior to that parent being willing to agree to a settlement. Finally, the PPC further explores parenting plan options. It is important that the PPC understand whether either parent has an entrenched or rigid position regarding a preferred parenting plan; if this is the case, the PPC will need to work skillfully with parents, to determine if they can consider other, more flexible options. Similar to a child custody evaluator, the PPC should ask the same standardized questions to each parent to reduce bias and insure fairness and validity of the information collected, whether it pertains to gathering information about either parent's personal history, or to questions related to parenting (i.e., discipline, structure in the home, bedtime routines, involvement in the children's activities, support of peer relationships).
4. *Individual interviews with the children.* The purpose of these meetings are: 1) to assess the children's functioning in the context of the separation or divorce; 2) to understand the

children's views of each parent's parenting skills; 3) to assess the children's sense of security with each parent; and, 4) depending upon the age of the child, to explore either directly or indirectly, parenting plan options, including listening to the child's time-sharing preferences. It is recommended that the child(ren) be seen for two meetings, in which each parent brings the child(ren) to one of the sessions. This is important not only to create a sense of balance, but it also increases the validity of the information gathered, as the PPC can determine whether a child's comments may bear any relationship to which parent brought them to a session. If there is more than one child, each child is interviewed separately.

5. *Collateral contacts.* Parents may want the PPC to speak with the children's present teachers, childcare providers, or mental health professionals currently providing care to any family members.
6. *Five-way feedback/settlement meeting with parents and attorneys.*³ Feedback to parents and their counsel is given regarding how the children are handling the divorce. The PPC also provides education regarding factors, known from the children of divorce research literature, which have been found to enhance children's adjustment to divorce (i.e., Kelly & Emery, 2003; Kelly, 2007). Parenting plan options preferred by each parent are presented, along with commentary by the PPC regarding the relative advantages and disadvantages of these plans. The PPC may also present alternative parenting plans for consideration, along with the advantages these plans may have over those suggested by the parents. However, a recommendation for a specific parenting plan by the PPC might first be withheld, in favor of parents reaching their own agreement if they are able. Thus, the PPC assists the parents and their counsel in mediating a settlement regarding a parenting plan. If parents have difficulty reaching a firm agreement, a tentative agreement of a parenting plan might be reached, to be instituted on a trial basis, with a review in the future in order to learn how the children have adjusted to the schedule.
7. *Written parenting plan.* In this mediative approach, there is no report describing the data collected with custody recommendations. Rather, if an agreement has been reached, the parents can jointly opt for the PPC to complete a written parenting plan, which can serve as the basis for a stipulated agreement to be adopted as a court order. A written parenting plan will only be completed at the joint agreement of the parents, so that if an agreement is not reached, such a document cannot be used as a litigation tool.
8. *Optional procedures.* Additional procedures can be utilized if agreed upon by both parents at the initial joint meeting. Such procedures might include home visits or in-office parent-child observations, psychological testing of parents or children, or drug or alcohol abuse assessments if there is substantive evidence of such a problem. While child custody evaluations contain the procedural rule that both parents are subject to the same procedures, in the SFPPC, parents may agree that only one parent needs psychological testing or a drug screening. The guiding principle in evaluative mediation is that both parents have to ultimately agree to what procedures are utilized, and with whom.

V. ETHICAL, LEGAL, AND PROFESSIONAL PRACTICE ISSUES

Mental health professionals serving as PPC's should abide by the ethical principles of their profession. For psychologists (APA, 2002), this entails following the ethical standards of providing informed consent, refraining from engaging in multiple relationships or dual roles, and basing judgments upon established scientific and professional knowledge of the discipline. The APA Ethics Code also requires that psychologists provide services within the boundaries of their competence and discuss the limits of confidentiality with clients. The Association of Family and Conciliation Courts has also developed specific model standards of practice for both mediators (AFCC, 2000) and child custody evaluators (AFCC, 2007). Given that the PPC is a new hybrid role, there are no specific model standards of practice to guide this procedure as yet. However, because the SFPPC

is defined as a form of mediation, albeit evaluative mediation, the PPC should be following all of the Model Standards of Practice for Divorce and Family Mediators (AFCC, 2000), as these standards apply in their entirety to the work of the PPC. The evaluative component of this role should also be guided and informed by portions of the Model Standards of Practice for Child Custody Evaluation (AFCC, 2007). Below are some suggested key ethical and professional practice standards to follow in conducting a SFPPC.

A. STIPULATION AND ORDER

It is recommended that professionals serving as a PPC do so only upon stipulation of the parents and a formal order of the court, so as to be accorded quasi-judicial immunity. Sullivan (2004), in discussing parenting coordination, described the malpractice risk that exists when serving in hybrid roles in the legal arena, given the specialized training required to function in a legal/psychological role, as well as the risks inherent in working with high-conflict cases where individuals may be apt to sue or file complaints if the process does not go the way they hoped. The role of the PPC, given its hybrid nature, carries similar risks, and while quasi-judicial immunity will not protect a mental health professional against a licensing board complaint, it will likely protect against a malpractice suit (Kirkland, Kirkland, King, & Renfro, 2006).⁴ Given that the SFPPC is a form of mediation, the stipulated order should also specify the confidential nature of the process. For example, in California, the stipulated order specifies that the process is protected by Evidence Code Section 119, which guarantees confidentiality to all information obtained in mediation. As with traditional mediation, the guarantee of confidentiality is paramount, as it allows the parents to focus their efforts on designing the best possible parenting plan, without anxiety about the information being used in litigation.

B. INFORMED CONSENT AGREEMENT

Ensuring full understanding of the SFPPC process is critical for a successful intervention. The provision of informed consent is an ethical obligation of all mental health professionals, while also being a model standard for mediators (AFCC, 2000). The informed consent agreement, to be signed by the parties, should not only specify the consultation procedures and fee arrangements, but should also specify that information gathered during the process shall remain confidential unless the PPC is asked to reveal information at the joint, written agreement of the parties, or is required by law (i.e., evidence of child abuse or neglect, Tarasoff warning,⁵ etc.).

C. AVOIDANCE OF DUAL ROLES AND MAINTAINING IMPARTIALITY

Both the Model Standards of Practice for Divorce and Family Mediators (AFCC, 2000) and Model Standards of Practice for Child Custody Evaluation (AFCC, 2007) specify that professionals must maintain objectivity and avoid multiple relationships or dual roles. In order to avoid dual-role conflicts or other perceived sources of bias, the best scenario is that the PPC should not have had prior contact with either parent or immediate family members who will be involved in the consultation. Likewise, in order to avoid a dual role and not contaminate the SFPPC process, an informed consent agreement should also specify that if parents do not reach a settlement based upon the consultation and wish to pursue a child custody evaluation, the PPC would not be able to serve as the evaluator. This is similar to the Guidelines for Parenting Coordinators (AFCC, 2006), which specify that the parenting coordinator should not serve in a dual sequential role. The Model Standards of Practice for Divorce and Family Mediators (AFCC, 2000) also specify that the mediator must disclose any potential source of prejudice or bias that could impact the mediator.

Mixed or hybrid ADR methods such as the SFPPC may be subject to criticism by those who believe that ADR approaches should be pure (Love, 1997) or that combining processes may represent a dual role by the practitioner. Sheinvoid (2004) argues that there really may be no "pure" processes, as even

facilitative mediation might be viewed as a mixed process that combines non-directive psychotherapeutic skills that are more the province of psychotherapy than mediation. Riskin's mediation grid (1996) was, in fact, an attempt to characterize the diverse forms that mediation often takes in the real world. Hybrid roles should be differentiated from the type of dual roles cautioned against by the various model standards of practice which guide child custody evaluators, mediators, and parenting coordinators. These standards and guidelines (AFCC, 2000; AFCC, 2006; AFCC, 2007) advise against serving in dual sequential roles, such as becoming a mediator for a family after having first served as a child custody evaluator (or vice versa), an approach which has been ably critiqued by Barsky (2007). Instead of the SFPPC being a dual role, a far more accurate way to characterize this process is that it consists of an integrated set of strategies, drawn from both mediation and child custody evaluation, which is geared towards assisting parents reach a voluntary resolution of their child custody dispute.

Because there is an evaluative component to this process, the PPC must also avoid confirmatory bias (Martindale, 2005), or the tendency to come to conclusions too quickly in the process based upon initial impressions, and then only look to data which confirm these initial impressions. Finally, given the extreme pain and suffering frequently experienced by divorcing individuals, the mediation process can also generate intense countertransference reactions on the part of the PPC, which could potentially lead to bias. The PPC must therefore attempt to identify the warning signs of countertransference in order to manage these reactions, as not to impede his or her impartial judgment and objectivity (Pickar, 2007).

D. GUIDELINES INFORMING THE EVALUATIVE COMPONENT OF THE PPC ROLE

The Model Standards of Practice for Divorce and Family Mediators (AFCC, 2000) states, "The mediator should facilitate the parties' acquisition and development of information about the needs of the children so that the parties can make informed parenting decisions" (Standard 7B, p. 116). However, the mediation standards do not specify any methodology by which that information is to be gathered. Therefore, given there is an evaluative component to this form of mediation, the Model Standards of Practice for Child Custody Evaluation (AFCC, 2007) specifies such methods, and should be utilized by the PPC in guiding his/her contact with the children. For example, in Standard 9.1 regarding "Critical Factors in Child Interviewing" (p. 86), the standards indicate that when meeting with children, interview strategies should be based upon published research addressing the effect upon children's responses of various forms of questioning. These standards also call for using diverse methods of information gathering to increase accuracy, objectivity, and validity. Any psychological tests given to children (or adults) should be based upon valid and reliable methods. Therefore, the use of diverse methods with children in the SFPPC entails not only obtaining information from children in direct interviews, but also the use of other methods such as obtaining collateral information from teachers or therapists, home or parent-child observations, and possibly psychological testing, if the parents jointly request this procedure.

If the PPC conducts either home visits or office-based parent-child observations, the Model Standards of Practice for Child Custody Evaluation (AFCC, 2007) provide guidance for these procedures. For example, the standards specify that in conducting parent-child observations, evaluators should be attentive to signs of reciprocal connection and attention, communication skills, disciplinary approach, and parental expectations for developmentally appropriate behavior (Standard 10.2 B, page 86–87).

Lastly, the Model Standards of Practice for Child Custody Evaluation (AFCC, 2007) also emphasize the "use of a balanced process" to "increase objectivity, fairness, and independence" (Standard 5.5, p. 80), which should also guide the work of the PPC. For example, the PPC should meet with each parent for essentially the same amount of time, except in circumstances where the parents agree to a departure from this approach. This might be the case if there was an agreement that only one parent should have psychological testing due to a known psychiatric disorder, or a chemical dependency

assessment if only one parent has a possible substance abuse problem. The parents might agree to this more unbalanced procedure, if the completion of these procedures were essential to eventually reaching an agreement.

E. TRAINING REQUIREMENTS

Due to the highly specialized hybrid nature of the PPC role, education and training in both mediation and child custody evaluation are necessary. Thus, the PPC should have specialized training and experience in family mediation, be knowledgeable about family law, and be familiar with the applicable legal standards and laws which govern child custody determinations in their particular state or jurisdiction. Following the Model Standards of Practice for Divorce and Family Mediators (AFCC, 2000), the PPC should have specific training in family dynamics during separation and divorce, as well in the psychological impact of family conflict on parents and children. Additionally, the PPC should have training in working with high-conflict parents and domestic violence.

Consistent with the Model Standards of Practice for Child Custody Evaluation (AFCC, 2007), the PPC should have training and experience in interview and assessment procedures with children, teenagers, and adults, and be thoroughly familiar with the psychological and developmental needs of children, especially as they relate to post-divorce adjustment. Given that the SFPPC is a form of evaluative mediation, the PPC's "subject matter expertise" (Riskin, 1996) enhances the consultant's ability to settle a case. The PPC's experience with the court system and knowledge about what parents might expect if they were to litigate, rather than mediate their custody dispute, is often a powerful tool in helping parents reach a settlement.

There is no doubt that serving as a PPC requires a very comprehensive and perhaps daunting set of skills. There is a precedent for using mental health professionals in increasingly highly specialized roles in the family law arena, which can be found in the role of the parenting coordinator. Sullivan (2008) described that the parenting coordinator needs specialized training in the areas of mediation, child custody evaluation, legal procedures in family law, and the psychological dynamics of high-conflict divorce. The presence of increasing hybrid roles stems from the need to assist a diverse range of divorcing parents and their children in effective yet cost-efficient ways, thereby helping them stay out of an already overburdened court system.

F. CONTRAINDICATIONS

This form of evaluative mediation may not be appropriate for clients with significant histories of domestic violence, particularly if the PPC cannot insure a safe and fair process (Milne, 2004). Lowry (2004) noted that evaluative mediation may work better at some times than others. For example, if one of the parents has a hidden agenda and does not really wish to settle the dispute at this point in time (i.e., such as a parent who opposed the end of the marriage and is still quite angry), such an individual may oppose any reasonable parenting arrangement or the opinion of a third party. Lastly, the parent who is not willing to reach a compromise under any condition would not be a good candidate for any form of mediation and would likely require a court-ordered child custody evaluation and/or judicial decision-making.

VI. DIRECTIONS FOR THE FUTURE

The settlement-focused parenting plan consultation is an ADR method that functions on the interface between mediation and child custody evaluation. Barsky (2007) recommended that hybrid ADR methods in family law should be conceptualized and regulated as separate methods of conflict resolution, as distinct from pure mediation or evaluation. Thus, if this method becomes more widely used, it perhaps should have its own model standards that incorporate and synthesize aspects of both

the model standards for mediators and child custody evaluators. While the authors have successfully utilized this approach with a small sample of cases over the last two years⁶ (i.e., “success” is narrowly operationally defined as, the SFPPC led to a settlement of the custody issues), this method will need to be further refined. If utilized more frequently on a national level, empirical outcome research examining the approach’s effectiveness will need to be conducted, similar to recent calls for child custody evaluations to be subject to empirical scrutiny and outcomes assessment (Kelly & Ramsey, 2009).

Several writers have urged that professional mediators should be expansive in their consideration of techniques that lead to settlement. For example, Shienvold (2004) emphasized that “mixed processes have evolved in the resolution of family disputes because there has been a need for them” (p. 126). The goal of the SFPPC is to bring about a more expedient and less expensive resolution to a child custody conflict by utilizing the combined expertise of a mediator and child custody evaluator. This ADR procedure also preserves the mediation principles of self-determination and voluntary resolution of family disputes, while allowing parents to experience a greater degree of empowerment than is typically encountered in the court system.

NOTES

* The authors would like to thank Catherine Conner, J.D., for her inspirational assistance in designing the settlement-focused parenting plan consultation, and to Alan Barsky, MSW, JD, Ph.D., for consultation in the preparation of this article.

1. Riskin’s (1996) article and mediation grid sparked considerable debate. For example, Love (1997) contends that mediators should not evaluate, and that the true role of the mediator is to facilitate communication between disputants, to enable the parties to reach their own agreement. Based upon this critique and other challenges to Riskin’s mediation grid (Alfini, 1996; Kovach & Love, 1996), Riskin revised his original grid (Riskin, 2003), subsequently relabeling the former dimensions of “evaluative versus facilitative mediation” to “directive versus elicitive mediation.” Ultimately Riskin (2005) recommended against using the revised grid, as he believed the new grid failed to distinguish other important aspects of the mediation process, such as the mediator’s behavior and the role and influence of the parties.

Regarding this controversy, we are in agreement with the analysis provided by Lowry (2004), in which he enumerates multiple examples of the benefits of evaluative mediation. For example, Lowry notes that evaluative mediation represents the integration into the mediation process, expertise not available among the parties or their advocates. Lowry also contends that evaluative mediation can be more efficient and effective than facilitative mediation, as a quality analysis and subsequent advice given by the mediator gives the parties an excuse to agree and moves the mediation more quickly towards settlement. Thus, we retain the term “evaluative mediation” as the best descriptor of the SFPPC process, as it best characterizes the two distinct roles being combined in this new hybrid, ADR process.

2. Sample copies of the document “Settlement-Focused Parenting Plan Consultations: Summary of the Process,” as well as the informed consent agreement and stipulation and order are available from the first author at dpickar@sbcglobal.net.

The process summary describes several “selling points” of the SFPPC, as compared to mediation or child custody evaluation, including: 1) SFPPC is an approach that utilizes the skills of an experienced child custody evaluator, also trained and experienced in mediation, to assist parents in mediating child custody issues, in order to arrive at a mutually acceptable time-sharing plan for their children; 2) The SFPPC typically costs less than half the price of a child custody evaluation. The process can also usually be completed within 4 to 6 weeks, whereas a child custody evaluation typically takes a minimum of 10 to 16 weeks.

It is more difficult to specify the comparative costs of the SFPPC with mediation, given that a complete divorce mediation might include not only child custody issues, but also a host of financial and property matters. However, given that mental health professionals charge less than attorney-mediators, we believe the costs for the SFPPC are likely to be considerably less than that of attorney-conducted child custody mediation.

3. The SFPPC can also serve as an adjunct to a traditional mediation process, in which the PPC would be contracted as a consultant to the mediation, specifically to assist the parents and mediator in the development of a parenting plan.

4. One of the reviewers of this article took exception to our recommendation that the PPC obtain a stipulation and order so as to have “quasi-judicial immunity.” This reviewer also contended that the SFPPC constituted the delivery of a “mental health service,” and as such, claimed that the Health Insurance Portability and Accountability Act (HIPAA) should apply to the work of the PPC. The reviewer further reasoned that if one must be a mental health professional to perform a SFPPC, then it should not be considered mediation, but falls under the definition of “healthcare” in the HIPAA rules and should be subject to these regulations. This thoughtful challenge was appreciated and further clarification is warranted regarding why we respectfully disagree with this reviewer.

The PPC, as is the case with child custody evaluators, parenting coordinators, and even mental health professionals serving as mediators, are not treating mental health problems, nor providing diagnostic or assessment services for the purpose of health

care (or mental health care), as defined in the HIPAA regulations. Rather, in these forensic roles, mental health professionals are applying their psychological expertise to help parents and the court resolve legal disputes. As stated by Connell and Koocher (2003), “forensic services do not constitute health services, as they are intended to serve a legal purpose, often in response to a court order or mandate, and are not recognized for payment purposes by third party health insurers” (p. 16). These authors conclude that the HIPAA privacy rules do not apply to forensic assessment, as they are not for therapeutic services and do not constitute health care. As described in this article, there is an evaluative component to the role of the PPC, similar to that of a child custody evaluator. Gould and Martindale (2007), in discussing child custody evaluations, similarly noted, “The sessions that evaluators conduct with individuals they are evaluating are not psychotherapy sessions, and to record them as such would be fraudulent” (p. 65).

In sum, both the evaluative and mediative components of the SFPPC are to assist parties in resolving a legal dispute (which the parents are attempting to resolve outside of court) regarding a parenting plan that is in their child’s best interests. As stated in the Model Standards of Practice for Child Custody Evaluation (AFCC, 2007), “The application of the knowledge and skills of the mental health professions to the resolution of legal matters is, by definition, a forensic endeavor” (p.71). Because the PPC is working to resolve legal disputes with many high-conflict individuals, who may be apt to file complaints if the process doesn’t go their way, we recommend that mental health professionals serving as PPC’s seek the protection of quasi-judicial immunity by requiring a stipulation and court order.

5. The Tarasoff Statute in California (California Civil Code 43.92) states that if a patient has communicated to the psychotherapist a serious threat of physical violence against a reasonably identified victim or victims, the psychotherapist’s duty is to make a reasonable effort to communicate the threat to the victim or victims and to a law enforcement agency (Wittenberg, 2005).

6. Based upon presentations conducted by the authors and a slow but steadily increasing number of referrals of families to undergo the SFPPC, this method has been enthusiastically received by judges and mediation-oriented attorneys. While some litigation-oriented attorneys have been skeptical (i.e., one attorney asked, “Are you trying to do away with litigation by this approach?”), it has been successfully conducted with parents represented by family law attorneys who are known for being litigators. Several judges in our jurisdiction have actually recommended this approach to parents and their counsel from the bench.

REFERENCES

- Alfani, M. C. (1996). Evaluative versus facilitative mediation: A discussion. *Florida State University Law Review*, *24*, 919–925.
- Amato, P. R. (2005). The impact of family formation change on the cognitive, social, and emotional well-being of the next generation. *Future of Children*, *52*, 75–96.
- American Psychological Association. (2002). Ethical principles of psychologists and code of conduct. *American Psychologist*, *57*, 1060–1073.
- American Psychological Association. (2009). In *Guidelines for child custody evaluations in family law proceedings*. Washington, DC: Author.
- Association of Family and Conciliation Courts. (2000). Model standards of practice for divorce and family mediators. *Family and Conciliation Courts Review*, *38*, 110–122.
- Association of Family and Conciliation Courts. (2007). Model standards of practice for child custody evaluation. *Family Court Review*, *45*, 70–90.
- Association of Family and Conciliation Courts Task Force on Parenting Coordination. (2006). Guidelines for parenting coordinators (originally published in 2005). *Family Court Review*, *44*, 246–262.
- Austin, W. G., & Kirkpatrick, H. D. (2004). The investigation component in forensic mental health evaluations: Considerations in the case of parenting time evaluations. *Journal of Child Custody*, *1*, 23–43.
- Barsky, A. E. (2000). *Conflict resolution for the helping professions*. Scarborough, Ontario: Brooks/Cole.
- Barsky, A. E. (2007). Mediative evaluations: The pros and perils of blending roles. *Family Court Review*, *45*, 560–572.
- Benjamin, R. D. (2004). Strategies for managing impasses. In J. Folberg, A. L. Milne, & P. Salem (Eds.). *Divorce and family mediation: Models, techniques, and applications* (pp. 248–279). New York: Guilford.
- Cashmore, J., & Parkinson, P. (2008). Children’s participation and parent’s perceptions on children’s participation in decision making after parental separation and divorce. *Family Court Review*, *46*, 91–104.
- Clarke-Stewart, K. A., Vandell, D. L., McCartney, K., Owen, M. T., & Booth, C. (2000). Effects of parental separation and divorce on very young children. *Journal of Family Psychology*, *14*, 304–326.
- Coates, C. A., Deutsch, R., Starnes, H., Sullivan, M. J., & Sydlik, B. (2004). Parenting coordination for high-conflict families. *Family Court Review*, *42*, 242–262.
- Connell, M. A., & Koocher, G. P. (2003). HIPAA in forensic practice. *American Psychology-Law Society News*, *23*, 16–19.
- Conner, C. A., & Anderson, M. L. (2008). *Collaborative practice materials: A resource manual for collaborative professionals and clients*. (Available from Collaborative Practice Center, 829 Sonoma Avenue, Santa Rosa, CA 95404).
- Emery, R. E., Laumann-Billings, L., Waldron, M. C., Sbarra, D. A., & Dillon, P. (2001). Child custody mediation and litigation: Custody, contact, and co-parenting 12 years after initial dispute resolution. *Journal of Consulting and Clinical Psychology*, *69*, 323–332.

- Fisher, R., & Ury, W. (1981). *Getting to yes*. Boston: Houghton Mifflin.
- Flens, J. R. (2005). Psychological testing in child custody evaluation. In J. Flens & L. Drozd (Eds.), *Psychological testing in child custody evaluations* (pp. 3–30). New York: Haworth Press.
- Gould, J. W. (2006). *Conducting scientifically crafted child custody evaluations*. Sarasota, FL: Professional Resource Press.
- Gould, J. W., & Martindale, D. A. (2007). *The art and science of child custody evaluations*. New York: Guilford.
- Greenberg, S. A., & Shuman, D. W. (1997). Irreconcilable conflict between therapeutic and forensic roles. *Professional Psychology: Research and Practice*, 28, 50–57.
- Hetherington, E. M., & Kelly, J. (2002). *For better or worse*. New York: Norton.
- Kelly, J. B. (1996). A decade of divorce mediation research: Some answers and questions. *Family and Conciliation Courts Review*, 34, 373–385.
- Kelly, J. B. (2007). Children's living arrangements following separation and divorce: Insights from empirical and clinical research. *Family Process*, 46, 35–52.
- Kelly, J. B. (2008). Preparing for the parenting coordination role: Training needs for mental health and legal professionals. *Journal of Child Custody*, 5, 140–159.
- Kelly, J. B., & Emery, R. E. (2003). Children's adjustment following divorce: Risk and resilience perspectives. *Family Relations*, 52, 352–362.
- Kelly, J. B., & Lamb, M. E. (2000). Using child development research to make appropriate custody and access decisions for young children. *Family and Conciliation Courts Review*, 38, 297–311.
- Kelly, R. F., & Ramsey, S. H. (2009). Child custody evaluations: The need for systems level outcome assessments. *Family Court Review*, 47, 286–303.
- Kirkland, K., Kirkland, K. E., King, G. D., & Renfro, G. J. (2006). Quasi-judicial immunity for forensic mental health professionals in court-appointed roles. *Journal of Child Custody*, 3, 1–22.
- Kirkland, K., McMillan, E. L., & Kirkland, K. L. (2005). Use of collateral contacts in child custody evaluations. *Journal of Child Custody*, 2, 95–110.
- Kovach, K. K., & Love, L. P. (1996). "Evaluative" mediation is an oxymoron. *Alternatives to the High Cost of Litigation*, 14, 31–32.
- Kuehnle, K., Greenberg, L. R., & Gottlieb, M. C. (2004). Incorporating the principles of scientifically based child interviews into family law cases. *Journal of Child Custody*, 1, 97–114.
- Love, L. P. (1997). The top ten reasons why mediators should not evaluate. *Florida State University Law Review*, 24, 937–948.
- Lowry, L. R. (2004). Evaluative mediation. In J. Folberg, A. L. Milne, & P. Salem (Eds.), *Divorce and family mediation: Models, techniques, and applications* (pp. 72–91). New York: Guilford.
- Martindale, D. A. (2005). Confirmatory bias and confirmatory distortion. *Journal of Child Custody*, 2, 31–48.
- Mayer, B. (2004). Facilitative mediation. In J. Folberg, A. L. Milne, & P. Salem (Eds.), *Divorce and family mediation: Models, techniques, and applications* (pp. 29–52). New York: Guilford.
- McIntosh, J. E., Wells, Y. D., Smyth, B. M., & Long, C. M. (2008). Child-focused and child-inclusive divorce mediation: Comparative outcomes from a prospective study of postseparation adjustment. *Family Court Review*, 46, 105–124.
- Milne, A. L. (2004). Mediation and domestic abuse. In J. Folberg, A. L. Milne, & P. Salem (Eds.), *Divorce and family mediation: Models, techniques, and applications* (pp. 304–335). New York: Guilford.
- Pearson, Y., Bankovics, G., Baumann, M., Darcy, N., DeVries, S., Goetz, J., et al. (2006). Early neutral evaluations, Applications to custody and parenting time cases program development and implementation in Hennepin County, Minnesota. *Family Court Review*, 44, 672–682.
- Pickar, D. B. (2007). Countertransference bias in the child custody evaluator. *Journal of Child Custody*, 4, 45–67.
- Pruett, M. K., Ebling, R., & Insabella, G. (2004). Critical aspects of parenting plans for young children. *Family Court Review*, 42, 39–59.
- Pruett, M. K., & Johnston, J. R. (2004). Therapeutic mediation with high-conflict parents: Effective models and strategies. In J. Folberg, A. L. Milne, & P. Salem (Eds.), *Divorce and family mediation: Models, techniques, and applications* (pp. 92–111). New York: Guilford.
- Riskin, L. L. (1996). Understanding mediators' orientations, strategies, and techniques: A grid for the perplexed. *Harvard Negotiation Law Review*, 1, 7–51.
- Riskin, L. L. (2003). Decision making in mediation: The new old grid and the new grid system. *Notre Dame Law Review*, 79, 1–23.
- Riskin, L. L. (2005). Replacing the mediator orientation grids, again: Proposing a "new new grid system." *Alternatives to the High Cost of Litigation*, 23, 127–132.
- Saposnek, D. T. (1998). *Mediating child custody disputes*. San Francisco: Jossey-Bass.
- Saposnek, D. T. (2004). Working with children in mediation. In J. Folberg, A. L. Milne, & P. Salem (Eds.), *Divorce and family mediation: Models, techniques, and applications* (pp. 155–179). New York: Guilford.
- Shienvold, A. (2004). Hybrid processes. In J. Folberg, A. L. Milne, & P. Salem (Eds.), *Divorce and family mediation: Models, techniques, and applications* (pp. 112–126). New York: Guilford.
- Silver, R. B., & Silver, D. C. (2008). Child custody evaluations: Help or hindrance? *Journal of Forensic Psychology Practice*, 8, 300–308.
- Smart, C. (2002). From children's shoes to children's voices. *Family Court Review*, 40, 307–319.

- Sullivan, M. J. (2004). Ethical, legal, and professional practice issues involved in acting as a parent coordinator in child custody cases. *Family Court Review, 42*, 576–582.
- Sullivan, M. J. (2008). Coparenting and the parenting coordinator process. *Journal of Child Custody, 5*, 4–24.
- Taylor, N. (2006). What do we know about involving children and young people in family law decision making?: A research update. *Australian Journal of Family Law, 20*, 154–178.
- Tessler, P. H., & Thompson, P. (2006). *Collaborative divorce: The revolutionary new way to restructure your family, resolve legal issues, and move on with your life*. New York: Collins.
- Winslade, J., & Monk, G. (2000). *Narrative mediation: A new approach to conflict resolution*. San Francisco: Jossey-Bass.
- Wittenberg, G. (2005). Tarasoff revisited . . . and expanded? *California Psychologist, 25*, 22–23.

Daniel B. Pickar, Ph.D., ABPP, is a Diplomate in Clinical Psychology, American Board of Professional Psychology. He has maintained a private practice in clinical and forensic psychology for the last 20 years, where he conducts child custody evaluations, co-parent counseling, and serves as a child specialist and coach in collaborative practice. He has also published in the areas of child custody evaluations and the training of child psychologists. In addition, he has been a child psychologist at Kaiser Permanente in Santa Rosa, California for the last 22 years, where he also served as Division Chief of Child and Family Psychiatric Services and Director of Psychology Training.

Jeffrey Kahn, Ph.D. is a licensed psychologist, who has been in private practice for 30 years. He specializes in providing family law and divorce-related psychological services, including child custody evaluations, co-parent counseling, mediation, and collaborative practice. He is also a staff psychologist in the Adult Psychiatry Department at Kaiser Permanente Medical Center in Santa Rosa, California, where he conducts individual and group psychotherapy, psychological assessment, and training of post-doctoral residents.