PRACTICE HINTS

1. All states have certain statutes that are relevant to competent mediation practice and with which mediators ought to be familiar. Those laws provide some general guidance as to legal entitlements. Those most important include:

    a. The divorce code regarding the legal process for filing a (divorce) dissolution petition, property division, custody requirements, child support and maintenance

    b. The child abuse reporting law setting out mandated discretionary reporters

    c. Child support guidelines and forms for calculation

    d. Statutes providing for the appointment and qualifications of mediators and confidentiality in both civil and family matters

    Specifically, with regard to mediation, many states have in recent years enacted laws or Court Rules that apply to mediators or affect the development of mediation practice. Those laws enable or direct the establishment of Court-connected or related mediation programs and sometimes set qualifications for the mediators involve. No state presently licenses, regulates or certifies mediators in private practice. As well, many states have Uniform Arbitration Codes that purport to include mediation and Conciliation and have provisions that may be useful to mediation practice (See 15.4).

2. Local judicial traditions: notwithstanding the state law, each county and each judge within counties have their own idiosyncrasies and nuances of interpretation of state law. It is important to develop resources (consultant attorneys) to gain some sense of a local court's special requirements or quirks (e.g., the "magic" words and format of agreements). That enhances your credibility as a mediator with the parties and may save them time and energy. (See #5 below.)

3. Legal information vs. legal advice: One need not be an attorney to give legal information, including copies of the law. However, as a mediator, it is never appropriate to give advice or predictions about what a court might do. This is easily avoided by referring clients to consult with their own attorney.

4. Court Rules and Orders regarding mediation: The court's order to mediate needs to be carefully reviewed by the mediator to insure it does not intrude or constrict the mediation process. The order may determine which party or parties will pay for mediation or limit the ability of the mediator to include attorneys or other experts in the process or limit the issues subject to mediation. (See 15.4.)

5. Remember, the law is a factor in negotiations, but it is not determinative of the issues. However, most people will operate with the "Myth of Justice" and "Myth of Rationality" — they will believe that the law is clear and controls their decisions. Even if the law is clear, and it seldom is, the mediator's job is to pierce the operative mythology (create dissonance) in their thinking. There are a number of approaches:

a. Examine with the parties if the law is as clear as they believe it to be: ask if both parties and their attorneys believe the law to be clear (often the attorneys will disagree).

b. Ask the parties to consider if they wish the law to be their guide or standard of fairness. If the law is arguably clear and favorable to a party on one issue, it may be unfavorable on another issue.

c. Consider the transaction costs. Even if the law is clear, the ultimate arbiter of the law is a court decision. How long will it take for the court to decide? How much will it cost? What other favorable agreements might you lose if court action is pursued?

The law and legal entitlements are seldom clear-cut. Consider with the parties how laws are written interpreted and applied in the real world.

- Who makes the law and how is it written:

  The legislative process is typically political and laws are the product of countless compromises; often the law is not clearly written and cannot cover every circumstances or fact situation.

- How is the law interpreted and applied to the facts by lawyers/judges?

  The "reading" of the laws' meaning will likely vary from state to state, county to county, judge to judge and case to case.

- How is the law enforced?

  When the law is applied, enforcement may still be difficult.

- How is the laws understood or misunderstood by the public?

MEDIATORS AS PEACEMAKERS: THE "REVENGE EFFECT"

By Robert D. Benjamin

This is a revised version of an article that was previously published in "Peripheral Visions," Mediation News, Vol.18, No.32, Summer 1999. Academy of Family Mediators.

The recent events in Littleton, Colorado are chilling, disturbing in the extreme, incomprehensible...there aren't the words to describe the shock of the event, let alone begin to understand it. Our understandable human response to such catastrophic events, especially in our techno-rationalist culture, is the need we have to rationally understand-to establish the cause and place responsibility. Sometimes those efforts to understand are laced with our moral and political beliefs, and deteriorate into blame-setting (thinly disguised as rational deliberation). In any event, what underlies the pursuit is the well-intentioned desire to assure that such an event never happens again. In our culture we have a need to believe that with sufficient analysis and planning, risk can be reduced to zero.

The belief in rational analysis is frequently coupled with a preference for action over inaction. Feeling at a loss to help, we want to do something in a crisis, even if we don't know quite what. The adages: "don't just sit there, do something"; and, "if you are not part of the solution, you are part of the problem," suggest our commitment to direct, aggressive, action-oriented problem solving. The hardest thing to do is nothing. Thus, the professionals and other commentators all have explanations ready; most remarks start with, "Here's what I've been saying for years, this happened because...." Suggestions include: Parents don't take responsibility for their children; divorce and drugs have corrupted our value system; the school does not maintain enough discipline; gangs and cults seize children's minds; the relativist thinking of the 60's has corrupted our thinking; God has been taken out of the schools; there is too much violence in the media; and so on.

With the causes fixed in mind, remedies, cures and preventive measures abound: Enforce "zero tolerance" policies in schools; ban cliques, cults and gangs; use psychological profiling to identify and treat "at risk" children; install more security gates and metal detectors; pass parental responsibility and gun control laws; censor violent movies, books, television programs and the internet; keep all potential conflicts under tight control in the schools; and teach children anger management and mediation. Each of the suggestions has a certain rational appeal that is hard to argue with, and working toward the implementation of one or all of them allows us to feel we are doing something constructive.

Our faith in science and technology encourages us to believe the problem can be eradicated. We may not really believe that, but we act as though we do. Perhaps the belief is only a "noble lie"-one worthy of belief even if it is not really true. What could be wrong with that? At least we are doing something.

Professionals, steeped in the study and analysis of child development, education, and conflict management, feel especially obligated to offer their services-in the past weeks there has been a steady stream of recommendations for programs, policies and laws to thwart school violence. In all likelihood, the money will be out there in the coming months and it will be hard to resist the urge to seek it. Proposals for everything from psychological testing, grief counseling, and security guards, to anger control and conflict management programs, will be offered.

Certainly it is laudable and rational to want a peaceful, non-violent, safe community. Yet, what is often not discussed is the prospect that all of our rational efforts often make matters worse. For every action, law, policy and program adopted to solve conflict, no matter how well intended, there is the very real risk of unintended consequences-the "revenge effect." The revenge effect is not merely a side effect or trade off. Edward Tenner suggests: "Revenge effects happen because new structures, devices, and organisms react with real people in real situations in ways we could not foresee." (Why Things Bite Back: Technology And The Revenge of Unintended Consequences). Our society is a

complex, tightly interlocked system-components have multiple links that can affect each other unexpectedly, complexity makes it impossible to fully understand how the system might act, and the tight coupling can quickly spread the problem.

Thus, efforts to make things safer may result in making them more dangerous. Specifically, programs and procedures designed to protect students and teachers, can encourage a false sense of security. In addition, if programs, policies and laws are designed or, in result, act to suppress and squelch the expression of conflict, then even more intense and explosive situations may develop. Determined efforts to insure safety may backfire-rules and policies designed to contain conflict may exacerbate the problem. Those seemingly rational solutions undermine our reliance on our own common sense. Columbine High School had security guards, a "zero tolerance" for violence rule and a mediation program already in place; maybe more rules, policies and programs will work-then again....

The revenge effect holds special potency and poignancy for mediators. If a mediator presumes to teach nonviolence and purports to seek peace, then if peace and nonviolence do not come about, the result may be an intensified sense of despair and more conflict. The point is not that mediators should stay out of schools, but rather, it is the importance of remembering a mediator's function and that words create reality. For the mediator to present what he or she does in the terms "peace" and "conflict resolution" is likely to set up unrealistic expectations that cannot be fulfilled. That failure can make the situation worse. It is not the mediator's function to make schools, or for that matter, the world, more peaceful and to resolve conflict; their purpose is more circumspect and limited-to manage conflict and allow parties to survive. As mediators, we need to be careful what we promise-mediation cannot and should not be oversold and even inadvertently allowed to be understood as a panacea. We offer choices, not guarantees.

In our rationalist culture there is an underlying belief that every problem has a solution. That can too easily lead to the utopian notion that there can be peace, nonviolence and justice in the world-"that the lion will lie down with the lamb." Those notions are seductive and risky, especially for mediators. While a mediator's work can be helpful in managing difficult conflicts, if allowed to work freely, he or she cannot afford the luxury or risk of such utopian visions.

Tragic events like those in Littleton, have happened before and will happen again. That is not to suggest nothing can or should be done differently. However, if mediators are to be effective at all, then they have a higher responsibility to recognize the limits of rationality; to understand that there are no clear answers to preventing those events. Mediators have a duty to remain available to manage conflict and not to succumb to the lure of seeking solutions. Ironically, if our society is to be transformed at all, it will not be because mediators have joined in an endgame pursuit of a peaceful, nonviolent and just society. It will be because we have remained available to moderate and manage the conflicts that will inevitably continue to arise while others pursue their belief in rational planning and right answers.

15.1

LESSONS FROM FROGS:
THE PLACE OF MEDIATION IN OUR CULTURAL ECOLOGY

From: MEDIATION NEWS: PERIPHERAL VISIONS, September 20, 2000.

Robert D. Benjamin

Frogs have been a sentinel species from biblical times through the present. At first glance, deceptively benign, they may foreshadow the coming of cataclysmic events. The second of the ten plagues, The Book of Exodus recounts that frogs were sent as a warning to the early Egyptians of God's intention to free the Isrealites from the bonds of slavery. In recent years, environmental ecologists have taken then increased frequency of observed anatomical mutations and deformities and outright scarcity to be a kind of biological early warning system of trouble in the environment. (See, William Souder, A PLAGUE OF FROGS)

In yet another way as well, frog behavior offers human beings a haunting suggestion of risk and consequences. Specifically, if a frog is placed in a pot of water, and the heat is turned up incrementally, the frog will not attempt to jump out of the pot and will boil to death instead. Consider the metaphoric prospect that we humans may be slowly boiling ourselves to death in the incremental accretion of regulations, rules and policies and laws. While every particular ordinance may have a rational base and make some sense at some time to some, the cumulative effect may be irrational. More poignantly, the accumulation of law may be choking the life out of the exercise of our common sense, personal discretion and choice. Not unlike the frog in hot water, humans as a species find themselves being lulled into a false sense of security by laws which intimate that we will be protected and safe. After all, why risk the ridicule and condemnation of choosing wrong, when the defense of having followed the law seems so much more the safer course of action—even if it does not make sense.

Many people remain afraid to take responsibility for their own lives. We have been led to believe—and wanted or needed to believe—that other know better and can make better decisions for our lives than we can for ourselves. Historically, we trusted shamans and clerics, later, divinely inspired princes and kings. In our current "techno-rational" culture, we tend to place our faith in professionals—doctors, lawyers and other scientifically trained counselors—who have become the "high priests" of the "scientistic" religion. It is a complex dynamic, the professionals have not intentionally misled us—there is not necessarily, as George Bernard Shaw suggested, an outright "conspiracy against the laity" by professionals. Nor have people entirely abdicated personal responsibility—we all retain some measure of free will, after all what choice do we have? Yet, trusting our own judgment seems daunting in light of overwhelming circumstances and a barrage of contradictory information. Seemingly clear laws and rules are most attractive and bring a sense of order to our lives. In fact, say some, the more rules there are, the less controversy and conflict there will be.

Ironically, however, the result may be just the opposite. Few of us want to live by preset formulas or a cookbook of directions written by someone else that does not fit our personal situation. We want to believe we are each unique. Thus, the more laws there are, the more we look for exceptions to the rules. The more we feel pressed into a cookie cutter approach, the more we resist. The result is that while some law is absolutely necessary, too much law may cause more conflict, not less. There is a conflict in the organization. Government agencies are often immobilized by regulations and protocols that defeat their function and purpose. "Zero tolerance" policies in schools are as likely as not to foment more rather than less conflict. Most attorneys will attest to the fact that the volumes of books housing State and Federal law have grown exponentially in the last 20 years, and a

good measure of that legislation is inconsistent or flat out contradictory to previously enacted law. The accumulation of law, regulations and policies has not provided greater clarity, safety or predictability of outcome. For every law passed to redress an observed injustice, it is as likely as not, that law will create three more issues or difficulties as problematic as the original circumstance.

We have reached the limits of rationality. Our rules, laws and regulations, as rational as any particular one may be, have a cumulative effect of being irrational. Like the frog that does not respond to an incremental increase in the water temperature, our culture appears to be oblivious to the impact of over-regulation. This is the unintended consequence of the over-investment in the belief that all problems can be solved rationally and that another law will do the trick. As we enter the new millennium, where every problem, has itself become a significant impediment to effective conflict management with potentially severe consequences. Many serious matters—environmental concerns, public safety, health care—languish as people fiddle with their legislative agendas. Ironically, we pride ourselves on being a nation of laws, and that belief has served us well in the past but could stifle our growth as a society in the future. There need not be so much a wholesale retreat from the belief in the rule of law, but the recognition of other discretionary procedures to manage issues and conflict need to be encouraged and allowed to flourish.

Negotiation and Mediation provide partial antidotes. In these forums, people have the opportunity to seize back some measure of personal discretion and control over their lives. The law, while remaining a factor, no longer becomes determinative. In fact, in some circumstances the law may need to be ignored. Paradoxically, the confusion and chaos of the law can often serve as an incentive to negotiate. But for that to happen, the stranglehold of the cultural mind set that the law is all-controlling and cannot be set aside in some circumstances—a view often held unwittingly or expressly by both people in general and many mediators—must be broken. If mediators serve as mere handmaidens of the existing rules, and believe that not following the law is the same as doing something illegal, then mediators become apologists for the status quo.

As mediation becomes more accepted, pressures are mounting to use the process to simply move cases, or to merely provide a hollow, placebo mechanism for people to gain a false sense of being empowered without granting real and effective authority to negotiate substantive change in circumstance. The new agenda for mediators is the duty to protect the integrity of the mediation process. For, if mediation practice itself becomes overly encrusted with institutional rules and regulation, it runs the risk of being co-opted into just another means of legal administration and social control.

Negotiation and mediation need to be maintained both philosophically and in practice, at least in some measure, as subversive activities that allow people to decide for themselves, outside the bounds of the established order, what makes sense for them. This allowance of private ordering is a safety valve that is essential for our society to continue to function. It must be preserved as part of our culture ecology. Otherwise, like the frog, we may boil to death in our own regulatory juices.