A RESPONSE TO PETER SALEM’S ARTICLE
“THE EMERGENCE OF TRIAGE IN FAMILY COURT SERVICES: BEGINNING OF THE END FOR MANDATORY MEDIATION”

Hugh McIsaac

Stewart and I have lived through the legal, adversary system and we know what havoc it could have wrought on our family. . . . We were totally nuts, we were crazy. We were one of your average psychotic, divorcing parents. . . . What you do not see is we get well. We bailed out of the adversary court system because we could see it was no help to us. We were the lucky ones . . . there are thousands like us who could use your help before the war gets started.1

Thirty years ago, almost to the day, in the midst of a similar economic downturn the Conciliation Court was threatened with extinction. Half the staff was laid off, including me. The service was threatened due to cutbacks in the court and probably would be eliminated in the next round of budget cuts.

Those who worked for the court knew the confidential mediation process we were pioneering was a far superior way to resolve most custody conflicts. It saved time, it saved money and more importantly, it saved families who were being reorganized through the process of divorce. Eighty percent of referred matters resolved their dispute through mediation in the Conciliation Court. Family satisfaction was high. Attorneys, who at first were dubious, began to support the program.

High-profile cases who did not want their lives torn up in open court were directed by their attorneys to the mediation process. One high profile case set for seventeen days of trial settled in six hours of mediation. Judging from a recent documentary, this family has done extremely well. The child in question, then nine, has graduated from college and has his own career. This family would have been seen as “very dysfunctional” according to Peter’s definition. There was the use of drugs and extreme family conflict. Yet, they survived and probably because of mediation, found a better way to be in the world. One of the provisions in the mediated agreement was a referral to an extremely competent family therapist who helped this family over time find a better way. This mediation also served a triage function as a part of the mediation process. Over ninety percent of families were very satisfied by their experience in this confidential mediation,2 and similar outcomes were documented in various studies, also cited by Peter.

In the shadow of these bad economic times and with the knowledge of the value of our program we began an effort to fund our work through increases in the divorce filing and marriage license fees.3 Later, based upon the success of the program, California enacted SB

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mandating mediation state wide. Working through the political process we were able to preserve the service and strengthen it through developing a statewide Office of Family Court Services attached to the Office of the Administrative Office of the Court.\textsuperscript{4} Over the years with an excellent staff, they have provided annual conferences, regional training, coordination, consultation, and most importantly, evaluations of programs.

Now, under similar dire financial circumstances, Peter’s article arrives proposing the possible end of mandatory mediation and substituting an administrative process—“triaging” to ease the real burdens experienced by family court services. The tiered service model, which Peter proposes replacing with “triage,” is successfully working in California, Oregon, and many other jurisdictions. According to Peter, tiered services are seen as “too expensive.” Peter attributes the current problems faced by many Family Court Services to changes in family systems bringing dysfunctional families into the court process. Peter’s article states that mediation in the 80s and 90s worked because families then were more functional and now the caseloads have increased.

I am not sure cases are more dysfunctional. Working up until 2004 in two rural Oregon Courts, we had our share of dysfunctional families. Also, my experience and that of the other mediators in Los Angeles mediating disputes with high profile Hollywood families could also be described as “working with dysfunctional families.” Yet, these disputes were successfully mediated not only saving days of court time, but also resulting in far better resolutions than could be obtained through a formal court process, and saving these families from the damage created by too much media attention.

The tier system is working in Oregon where it is the foundation for the Oregon Family Law Reforms.\textsuperscript{5}

The tier system, or any system, works when caseloads are reasonable and mediation is given time to resolve issues. One hour of mediation will not give enough time to resolve these complex issues although this hour can be used to triage the conflict and route the family to the appropriate forum for its resolution. In Tillamook and Clatsop counties in Oregon, mediators are paid for up to four hours of mediation and six hours with court approval, funded through divorce filing and marriage license fees. Over seventy percent of these matters were resolved through mediation following a three hour education session.

Tier systems work best when the role of mediation and evaluation are kept separate. When staff is assigned both mediation and evaluations at the same time, too often short shrift is given to mediation. Reporting, non-confidential mediation services are particularly stressed. Requiring mediators to also function as evaluators through separate assignment of cases, or making recommendations to the court on cases they have mediated, contaminates the mediation process and almost guarantees mediation will be given short shrift.

Family law is not the typical civil matter. The issues are more complex and the litigants will need to cooperate as parents long after the court is no longer involved. The divorce is in the spousal, not in the parental role.

When administrators of family court services see some families in mediation or evaluation, there is a better understanding of the process. I have always felt family court services should function more like a clinic. Administrators who work alongside their staff understand the issues better and improve staff morale, not unlike the Israeli Army where officers live and work with their troops. As the director of the largest family court services in the country, I always carried a small caseload, and I felt I was more effective for doing so.

Mediation requires particular listening skills and the ability to identify, analyze and process polycentric disputes involving parents, stepparents, children, and other relatives. These qualities need to be honed through training and supervision. Not everyone can perform...
these tasks. In Los Angeles, out of over a hundred applicants for a mediation position, one or two would be selected. Mediator turnover in Los Angeles was extremely low.

Family court services who collaborate with outside agencies, the bar associations, client groups, and professional associations can call on these entities for support when confronted with the kind of economic shortfalls currently faced. In Los Angeles we began co-sponsoring an annual colloquium with the Los Angeles County Bar Association in 1978. This colloquium continues.

Finally, mediation also serves a “triage” function. Eliminating mandatory mediation and interposing “triage” substitutes another unnecessary administrative layer without the benefit of having the family resolve their own dispute. Triage ignores the fact families are in transition. The family you see at the point of triage most likely will not be the family you see months later after the anger and denial phase of the divorce process has passed. Divorce is a process, not an event.

The tier system begins with well-developed education/orientation given for all families at the beginning of the family’s entry into the divorce process helps them understand the system, their emotions, the needs of their children based upon ages of development and the kind of parenting plan best suited to their family. These sessions need to be no longer than two or three hours and can be given at hours when families can attend. In Oregon, many orientations are given in the evening and are self-supporting, thus requiring no public funds since they are funded out of a portion of the divorce filing fee.

A more thoughtful, non-adversarial language of divorce strengthens the whole process. The language “custody,” “visitation,” “petitioner-defendant,” or “respondent” frames the dispute in binary, hostile terms. In Oregon we began reforming the language by changing the language: “parenting plan,” “parenting,” and the use of other terms less tied to the old adversarial ways of resolving these disputes when children were seen as property. Divorce is not the end of the family; it is a reorganization.

However, let me answer the question why mediation and the tier system is a superior way to resolve one of life’s most painful experiences:

The tier system gives the family the first opportunity to resolve their dispute. The family has the most to gain from a successful resolution. Collectively they know more about their needs and what will work for them than anyone else. They are the ones who will have to implement the postdissolution plan. They can begin to develop the best plan for them following the parent education session on the needs of their children.

If they cannot reach a solution on their own, mediation provides a proactive place where parents can begin developing the parenting plan. Mediation emphasizes self-determination, reserving to the parents the task of structuring their lives in ways making sense to them. Mediation provides a safe environment where the family can begin to heal and communicate as parents, focusing on the future rather than the past.

Mediation is a flexible forum where a skilled mediator can interview various members of the family with the goal of developing a comprehensive and appropriate parenting plan in the best interest of the children.

Mediation promotes communication and understanding of the parties. It is a forum which the parties can return to when problems occur. If the mediation has been successful, the parties usually can resolve some of the inevitable misunderstanding with as little as a telephone conference.

Mediation functions like a “meet and confer” requirement in labor disputes.

Mediation can also be used following a Parenting Plan Evaluation. In Oregon we developed a Non-adversarial Parenting Plan process. The evaluation consisted of:
(1) an analysis of the children’s needs based upon their ages and stages of development, 
(2) the parents history and capacity to parent and (3) a recommended parenting plan 
aligning parental history and capacities with the needs of the children. The Parenting 
Plan Evaluation concluded with the family meeting with a mediator; their attorneys, if 
represented; and the evaluator to develop a parenting plan in the best interest of the 
children.

Of the over 200 such evaluations completed by the staff of the Oregon Family Institute, 
only five cases resulted in a court hearing. The rest settled at a considerable savings to the 
court and to the families.

The triage process inserts an administrative intervention at a particular point of time in 
the trajectory of the family as it transits the divorce process. In the name of efficiency, triage 
short circuits the opportunity of the family to develop their own parenting plan. Triage 
places a most difficult burden upon the triage worker to predict in the future whether or not 
the family can successfully mediate, and thrusts the family into the maw and uncertainty of 
the formal court process.

Finally, triage proponents assume the mediation process does not have a triage compo-
nent. The mediator can quickly recognize if the family will not be able to use the mediation 
process effectively and refer the family for an evaluation or other appropriate action 
without an extended mediation.

Triage is another bureaucratic step inserted unnecessarily into the parenting plan deter-
mination process in the name of “court efficiency.” It will be seen by attorneys and parents 
as another step to “game” to “win.” It places the person performing triage in the very 
difficult position of predicting the future at a time of great stress for the parents and the 
children while possibly denying the opportunity for the family to work out its own solution. 
It places an administrative process between the family and the court relying upon personnel 
not subject to review. It is what Laura Nader termed a “micro-legal process” without 
safeguards and places enormous power into the hands of a single individual.7

Already, in California some courts contaminate the confidential mediation process with 
reporting to the court and are experiencing a loss of trust and accusations of bias.8 No doubt 
the triage system will face similar accusations—some founded and some unfounded. In my 
view, the triage system poses as serious a procedural threat as non-confidential, reporting 
mediation.9

Having worked for over thirty years in Los Angeles and Oregon in large urban courts 
and in small rural ones, the tier system has worked well for the families and children as they 
transit one of life’s most painful events. The tier system is cost efficient and respectful of 
the human condition and the need for self-determination. It has been validated by 25 years 
of client evaluations conducted by the California Statewide Office of Family Court Services 
of the Center for Families and the Court through several snapshot studies of client percep-
tions of service over the years.

The triage system awaits such a rigorous review.

Peter has been an excellent administrator of the Association of Family Courts. He has 
done wonders in developing the AFCC and creating a “non-place community” where 
professionals from all over the world can gather to discuss issues related to families and the 
courts. As someone who joined AFCC in its infancy and served as its President and Editor 
of this Review, I cannot say enough about Peter’s contribution to AFCC and its growth.

However, I cannot say I “enjoyed” reading Peter’s article. He obviously spent a great 
deal of time developing it, consulting with many who agree with him. The problem I have 
with the article is not keeping mediation a central part of the process. Inserting triage may
create an unnecessary administrative step without review or procedural safeguards in the illusion of efficiency.

However, I am certain his article will stimulate debate and discussion, resulting in a better understanding of what is needed to help families and children in our courts.

My final comment is, “Give Peace a Chance.”

NOTES


Mayor of Manzanita, 2005 to 2007; Director, the Oregon Family Institute, 1997 to 2003; member of the Clatsop and Tillamook mediation panels on the Oregon Coast 1998 to 2005. Director of Family Court Services in Portland, Oregon, 1993–1998; Director of Family Court Services for the Los Angeles County Superior Court in Los Angeles, 1977–1993; Editor Family and Conciliation Courts Review, 1986–1998; Fulbright lecturer New Zealand, 1986—assisted in implementing New Zealand’s family court reforms; President, Association of Family and Conciliation Courts, 1988; Conducted training in mediation of custody disputes for Barnardo’s Home for Children in England, Family Mediation Scotland, and the Danish Amstadin in Fredicksburg, Denmark, 1989. Participated in the development of the mandatory mediation and dependency mediation statutes in California; Consultant to the California State legislature, the Florida, Vermont, Ohio and New York Courts; Member of the State Justice Institute’s National Mediation Standards Committee 1989–91; Secretary to the Oregon Task Force on Family Law, 1994–1998. Member of the State Family Law Advisory Committee from 1998 to present; Co-author, Futures Report Oregon State Family Law Advisory Committee; Recipient of the 2008 Wallace Carson Award from the Oregon Supreme Court for contributions to Oregon’s Family Law Reforms.

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