POWER PLAYS: A SOCIOLINGUISTIC STUDY OF INEQUALITY IN CHILD CUSTODY MEDIATION AND A HEARSAY ANALOG SOLUTION

Randy Frances Kandel[1]

I. INTRODUCTION

This is a study[2] of the strategic deployment of verbal power in child custody mediation. Court sponsored child custody mediation is now an integral part of divorce and family law[3] — yet it remains controversial because its

---

1. Associate Professor of Law, Loyola of Los Angeles Law School; J.D., 1982, New York University School of Law; Ph.D., 1975, City University of New York; B.A. 1966, University of Wisconsin. I wish to thank Scott Altman, Alison Anderson, Ellen Aprill, Catherine Fisk, Deborah Forman, Victor Gold, Charlotte Goldberg, Max Goodman, Lisa Ikemoto, David Leonard, Nancy Press and Peter Tiersma who provided invaluable suggestions on earlier drafts of this article and Leslie Nathan and Karen Powers, for their painstaking transcription of the audiotapes.

2. From February 1991 through January 1993, I observed and audiotaped more than 40 sessions at the Los Angeles County Superior Court, Conciliation Services Division in downtown Los Angeles and its branch office in Pasadena. This research could not have been conducted without the cooperation and endorsement of the Los Angeles County Superior Court, Conciliation Services Division. I especially wish to thank Hugh McIsaac, former Director of Family Court Services, David Kuroda, Division Chief, Mediation and Conciliation, Jane Lefebvre, Administrative Secretary of Conciliation Services, and the senior mediators who for two years tolerated the nuisance of my ever-taping presence at their sessions, and who have become my friends and my colleagues. To ensure the anonymity of the parents whose lives are discussed in this article, I do not mention the mediators' names here; but I can pay no greater compliment to their skills and the important job they do than the months of my life I spent listening, in rapt attention, to their work. My thanks go equally to the many, many families who agreed to participate in this study and who shared with me their intimate thoughts and emotions during a difficult crisis in their lives.

3. See the following court sponsored child custody mediation statutes: ALASKA STAT. § 25.20.080 (1991); CAL. FAM. CODE §§ 3160 -3186 (West Supp. 1994); COLO. REV. STAT. ANN. § 14-10-123.5(4) (West 1987); CONN. GEN. STAT. ANN. § 46b-53a (West Supp. 1994); FLA. STAT. ANN. § 44.1011, 44.102(2)(b) (West 1994); ILL. COMPILED STAT. ANN. ch. 750 § 5/602.1 (West Supp. 1994); IOWA CODE ANN. § 598.41 (West Supp. 1994); KAN. STAT. ANN. §§ 23.601 - 23.606 (1993); LA. REV. STAT. ANN. § 9:332 (West Supp. 1994); ME. REV. STAT. ANN. tit. 19, § 752 (West Supp. 1993); MICH. COMP. LAWS ANN. §§ 552.505, 552.513 (West 1993); MINN. STAT. ANN. § 518.619 (West Supp. 1994); N.M. STAT. ANN. § 40-4-9.1 (Michie 1994); N.C. GEN. STAT. §§ 7A-494 - 7A-495(1993); OR. REV. STAT. §§ 107.179, 107.755,107.765 (1993); UTAH CODE ANN. §§ 30-3-19 - 33-3-31 (1994); WIS. STAT. ANN. § 767.11 (West 1993). Typically, these statutes enable or oblige parents to meet privately with a mediator prior to any court hearing on the merits. By limiting the mediator's

seemingly informal process holds the potential for power abuse. Statutes[4] and professional guidelines[5] obligate mediators to equalize power relationships between the parties. But the guidelines remain abstract because we know little empirically about how power manifests itself through language during mediation sessions or how it may be managed.

This article applies sociolinguistic analysis[6] to the actual texts[7] of three confidential,[8] representative child custody mediation sessions collected during the author's extended field study in the Los Angeles Superior Court

---

jurisdiction exclusively to custody issues, matters concerning the child, are (at least theoretically) insulated from the more adversarial concerns of asset distribution and support.

4. *E.g.*, CAL FAM. CODE § 3162(3) (West Supp. 1994) (requiring, "[t]he conducting of negotiations in such a way as to equalize power relationships between the parties.").

5. *See, e.g*, Code of Ethics, Society of Professionals in Dispute Resolution (SPIDR).

6. The methodology of applying fine-grained sociolinguistic analytical techniques to representative texts collected in legal contexts has a multiple academic ancestry. It has roots in anthropology, *e.g.*, EXPLORATIONS IN THE ETHNOGRAPHY OF SPEAKING (Richard Bauman & Joel Sherzer eds., 2d ed. 1989); Donald Brennis, *Language and Disputing*, 17 ANNUAL REV. ANTHROPOLOGY 221 (1988); Dell Hymes, *Models of the Interaction of Language and Social Life in* DIRECTIONS IN SOCIOLINGUISTICS: THE ETHNOGRAPHY OF COMMUNICATION 35 (Jojn J. Gumperz & Dell Hymes eds., 1972), in ethnomethdology and conversational analysis, *i.e.*, HAROLD GARFINKEL, STUDIES IN ETHNOMETHODOLOGY 221(1967); ERVING GOFFMAN, INTERACTION RITUAL (1967); ERVING GOFFMAN, FORMS OF TALK (1981); Harvey Sacks et al., *A Simplest Systematics for the Organization of Turn-Taking for Conversations*, 50 LANGUAGE 696 (1974); and in linguistics, *i.e.*, LANGUAGE IN THE JUDICIAL PROCESS (Judith N. Levi & Anne Graffam Walker, eds. 1990). For excellent recent retrospective overviews *see* Donald Brennis, *Language and Disputing*, 17 ANNUAL REV. IN ANTHROPOLOGY 221 (1988), for the anthropologist's perspective; Judith N. Levi, *The Study of Language in the Judicial Process, in* LANGUAGE IN THE JUDICIAL PROCESS 3 (Judith N. Levi & Anne Graffam Walker, eds. 1990), for the linguist's perspective, and GREGORY M. MATOESIAN, REPRODUCING RAPE: DOMINATION THROUGH TALK IN THE COURTROOM 23-48 (1993) for the ethnomethodology/conversational analysis perspective.

7. The texts were transcribed from audiotapes. Prior to each session, the mediator introduced me to the parents and explained generally the purposes of my research. Then, each parent signed a consent form. The parents were told that I would be an observer only, and would say nothing during the session. Each session was taped with a portable audio tape recorder which was placed between the parents and not moved during the course of the session. Audio tape was chosen in preference to videotape because I determined that it would be less distracting to the participants. At each session, I sat in a relatively unobtrusive place where I was out of direct eye-contact with the parents. During the course of the study I observed and taped sessions with seven mediators of both sexes and various ethnic backgrounds; between parents born on five continents, of diverse races, classes, and cultures. The choice of sessions taped was somewhat serendipitous. I was interested in taping a number of different mediators with a variety of different styles and backgrounds. Because the taping was done during the course of the regular academic year while I was also teaching at Loyola Law School, taping sessions were scheduled to coincide with days during which I did not teach or have other obligations. On these scheduled days, I would tape, in their entirety, the sessions of whatever parents came in for mediation. Some of these were previously scheduled appointments and others were referrals directly from the family law judges. Some parents were in the process of divorcing, others had never married or had been divorced for a considerable time. During the almost two years of taping, only three couples declined to sign the consent forms and allow me to tape and sit in on their sessions. Therefore, while the sessions taped do not constitute either a random or a strategically selected sample, I believe a reasonable claim can be made to their representativeness. Transcripts of the tapes are on file with the author.

8. CAL. FAM. CODE § 3177 (West Supp. 1994) requires that "Mediation proceedings ... shall be held in private and shall be confidential." In California, it is a matter of local court rule whether or not the mediator may submit a recommendation to the court. CAL. FAM. CODE § 3183(a) (West Supp. 1994). In Los Angeles County, where this research was conducted, mediators are not permitted to make recommendations to the court. By contrast, the California jurisdictions discussed by Professor Trina Grillo are recommending jurisdictions. *See*, Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991).

Conciliation Services Division. The object of the study was to reveal how the way parents' speak affects custodial arrangements, and what significance this has for legal equality. Do men use strong power talk to beat women up verbally, thus gaining increased child custody? Do women have the advantage because they speak more naturally of nurturance, love, and relationships? Does the data support the stereotypes, confirm the feminist paradigm, or tell a different story about the intersection of language, gender, and power in child custody mediation?

In analyzing these texts, I apply a straightforward measure of what constitutes power in mediation: which parent gets more of what is asked for incorporated into the custody and visitation agreement. The Article focuses on a single rhetorical device which distinguishes mediation from litigation: a participant's ability to quote the speech of others in narrating events.[9] This device, which noted sociolinguist Deborah Tannen calls "constructed dialogue,"[10] is powerfully persuasive in helping parents get the agreements they want. I endeavor to explain why this is so. I also develop an analog of the Hearsay Rule to equalize parental power by recognizing, interpreting and managing constructed dialogue during mediation sessions.

Section Two of this Article sets the theoretical context. I first summarize the critique of mediation as a process which promises empowerment but perpetuates gender inequalities, and examine that critique in light of statistical and sociolinguistic research, highlighting the need to explore issues of empowerment through fine-grained textual analysis.

I then turn to the theory of "constructed dialogue." Constructed dialogue analysis focuses on the way a speaker "quotes" the speech of others (accurately or inaccurately) to create a dramatic, emotional involvement between speaker and hearer and to shift responsibility and blame from the speaker to the person "quoted." I show how a parent's ability to tell a narrative which contains a little "play" can be potently persuasive in mediation.

In Section Three, I analyze in detail three cases rich in constructive dialogue. In the first case, "Safe from Screaming," a five foot tall Central American immigrant mother becomes a veritable spitfire of persuasive power by telling stories which put her gripes against her husband into the mouths of her children. In the second case, "Twisted Prisms," a school teacher father outflanks his seemingly equally articulate former wife, also a school teacher, by using constructed dialogue to quote authority figures and emphasize his demands, while his wife's narratives, like a trope for silence, talk about people talking without quoting them. In both of these cases, the skillful constructed dialogue user gets the mediator's support, and ultimately the desired agreement. In the third case, "Stopping Payment," two former spouses, both immigrants

9. At formal trials, of course, reported speech problems are often formulated as Hearsay Rule issues. For a full discussion of the similarities and differences between hearsay and constructed dialogue, and the legal implications of these differences see *infra* notes 105-111 and 180-221 and accompanying text.

10. DEBORAH TANNEN, TALKING VOICES: REPETITION, DIALOGUE, AND IMAGERY IN CONVERSATIONAL DISCOURSE 98-133 (1989); Deborah Tannen, *Introducing Constructed Dialogue in Greek and American Conversational and Literary Narrative in* DIRECT AND INDIRECT SPEECH 311-332 (Flourian Coulmas, ed. 1986); Deborah Tannen, *Hearing Voices in Conversation, Fiction, and Mixed Genres, in* LINGUISTICS IN CONTEXT: CONNECTING OBSERVATION AND UNDERSTANDING 89-112 (Deborah Tannen, ed., 1988).

from Eastern Europe, tell opposing versions of the same telephone call and the same argument with such a ferocious parity of constructed dialogue that agreement is stalemated and a skilled mediator virtually throws up his hands.

In Section Four, I return again to theory, explaining how the sociolinguistic characteristics of constructed dialogue meld with the broader discourse of mediation. Drawing on the work of sociolinguist Robin Lakoff,[11] I argue that mediation discourse, as a hybrid of law and psychology, creates a risk of power abuse when the lines between psychological and legal discourse are blurred. Then I demonstrate how the twofold quality of constructed dialogue, as an empathy generating connector between speaker and hearer and a shifter of responsibility from speaker to person "quoted," makes it a particularly likely vehicle for such problems.

In Section Five, I analyze how parental narratives would be altered if the Hearsay Rule were applied to them. I then suggest counterweighting the persuasive power of constructed dialogue through the development of a series of guidelines analogous to the Hearsay Rule, but suited to the mediation context. Constructed dialogue is controlled in formal trials through strict limitations on the admissibility of quoted speech, but such constraints are incompatible with the conversational processes of mediation, where consensus occurs through the relatively free-flowing interaction of participants' narratives. Further, line-by-line analysis of constructed dialogue in mediation texts reveals that very little of it would be excluded by the Hearsay Rule. Instead, power inequalities caused by, or resulting in, differential skill in constructed dialogue are best equalized by the mediator's proactive management. Mediators should be alert to occurrences of constructed dialogue, the impact it may have on them, the underlying power imbalances it may signal, and the particular hazards of discourse blurring. Whenever possible, mediators should equalize the rhetorical power of the parties by asking questions which elicit reported speech and vivid details. I conclude by recommending ten guidelines for the management of constructed dialogue in mediation.

II. THE THEORY

A. Does Mediation "Engender" Power?: Critique And Counter-Critique

Introduced together with joint custody and gender equality, as part of a sea change in child custody law,[12] mediation strives to lay a basis for

11. ROBIN TOLMACH LAKOFF, TALKING POWER: THE POLITICS OF LANGUAGE (1990).

12. Mediation has an ancient and global ancestry. *See infra* note 17. But the specific pedigree of child custody mediation is easily traced. In a now classic article, Lon Fuller argued that mediation was uniquely suited to family disputes because families are private ordering systems characterized by cohesive pulls and intractable dyadic oppositions. Lon Fuller, *Mediation - Its Form and Functions,* 44 S. Cal. L. Rev. 305 (1971). The Association of Family and Conciliation Courts, a court-centered organization promoting more cooperative dispute Settlement, was founded in 1963. WILLIAM A. DONOHUE, COMMUNICATION, MARITAL DISPUTE, AND DIVORCE MEDIATION 5 (1991). In 1975, O.J. Coogler, angered at the adversarial quality of his own divorce, founded the Family Mediation Association, and introduced the concept and practice of "structured mediation" as a participatory non-hostile

cooperative co-parenting and to efficiently evolve hand-tailored custody and visitation agreements that are consistent with the child's best interests and the parents' unique concerns and schedules.[13] Prior to any judicial hearing on the

approach to settling divorce cases. O.J. COOGLER, STRUCTURED MEDIATION IN DIVORCE SETTLEMENT: A HANDBOOK FOR MARITAL MEDIATORS xv, 23 (1978); CHRISTOPHER W. MOORE, THE MEDIATION PROCESS (1986). In 1976, court sponsored mediation became a mandatory pre-requisite to litigating custody in California's San Francisco, Sacramento, and Los Angeles counties. Hugh McIsaac, *Court-connected Mediation,* 21 CONCILIATION CTS. REV. 1 (1983). Since 1981, attendance at court sponsored mediation is a mandatory pre-requisite to litigating custody in California. The governing law (which has served as a model for many other jurisdictions) is found in CAL. FAM. CODE §§ 3160 - 3186 (West 1994).

13. Mediation has flourished and been institutionalized to deal with two problems which followed the gender neutralization of custody law and the trend towards both parents' active involvement in child raising, especially the joint custody option. The first problem is psychological. Research and clinical insights repeatedly confirm that frequent and continuing contact with both parents is in the child's best interests. Meyer Elkin, *Joint Custody: In the Best Interest of the Family, in* JOINT CUSTODY AND SHARED PARENTING 11, 12 (Jay Folberg, ed., 1991); E.M. Hetherington et al., *Effects of Divorce on Parents and Children, in* NONTRADITIONAL FAMILIES (Michael E. Lamb, ed., 1982); JUDITH S. WALLERSTEIN & JOAN B. KELLY, SURVIVING THE BREAKUP: HOW PARENTS AND CHILDREN COPE WITH DIVORCE (1980). But emotional detriment to children results when they become pawns in long-lasting interparental conflicts. FRANK F. FURSTENBURG & ANDREW J. CHERLIN, DIVIDED FAMILIES: WHAT HAPPENS TO CHILDREN WHEN PARENTS PART (1991); JANENT R. JOHNSTON & LINDA E.G. CAMPBELL, IMPASSES OF DIVORCE: THE DYNAMICS OF FAMILY RESOLUTION AND CONFLICT (1988); Janet R. Johnston et al., *Latency Children in Post-Separation and Divorce Disputes,* 24 J. AM. ACAD. CHILD PSYCHIATRY 563 (1985); J.R. Johnston et al., *Ongoing Post-Divorce Conflict: Effects on Children of Joint Custody and Frequent Access,* 59 AM. J. ORTHOPSYCHIATRY 576 (1989); Judith S. Wallerstein, *Children of Divorce: Report of a Ten-Year Follow-Up of Early Latency-Age Children,* 57 AM. J. ORTHOPSYCHIATRY 199 (1987); JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE (1989). Mediation is seen as a way to reduce interparental acrimony and teach the techniques of prospective cooperation. The second problem is practical. Shared parenting entails a plethora of scheduling details which are more efficiently worked out by the parents than the court. Participation makes the plan more workable and more likeable, increasing judicial efficiency and parental compliance.

merits,[14] parents are required to meet in a confidential session with a trained mediator[15] to work out an agreement.[16]

Despite its benign purposes, court sponsored mediation remains controversial because it emphasizes the restructuring of human relationships through compromise rather than the application of substantive and procedural rules. Its institutionalization has taken place within a maelstrom of position-based theorizing that has led to strangely shifting bedfellows.[17] Proponents of

---

14. When it forms part of a marital dissolution proceeding, child custody mediation usually occurs midway into the process. In my study, I found that parents who were represented by counsel had often joined issue, negotiated on many points, and perhaps had some preliminary motions decided on non-custody matters prior to coming to mediation. Such mediation sessions were often scheduled in advance by the attorneys several weeks before the court date. Attorneys sometimes waited for their clients during sessions. Unrepresented parents were often referred immediately to mediation by the judge when they brought custody motions and had to reappear before the judge on the same day if an agreement was not reached. For such parents, the mediator often provided the first opportunity for parents to speak to a professional about the divorce process. In addition to the mediation session(s) during the divorce process, as part of the court's continuing jurisdiction over custody, divorced or separated parents may request mediation sessions to rearrange their parenting plans or may be referred to mediation by the court, post divorce, as part of determining a custody or visitation related motion. The three cases discussed in this article are all post divorce sessions concerning possible changes in the parenting plan.

15. Mediators, having no power to impose a decision, employ a battery of techniques akin to those used in negotiation, counseling and family therapy to help the participating parents shape a mutually satisfactory agreement, with greater or lesser active intervention and suggestion making as the need may require. These techniques are well explained in practice oriented books such as: JAY FOLBERG & ALLISON TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION (1984); STEPHEN GOLDBERG ET AL., DISPUTE RESOLUTION (1985); JOHN W. KELTNER, MEDIATION: TOWARDS A CIVILIZED SYSTEM OF DISPUTE RESOLUTION (1984); *and* MOORE, *supra* note 12.

16. CAL. FAM. CODE § 3161 (West 1994) states that the purposes "of a mediation proceeding [are] to reduce acrimony that may exist between the parties ... [t]o develop an agreement assuring that close and continuing contact with both parents that is in the best interests of the child ... [and to] effect a settlement of the issues of visitation rights of all parties that is in the best interests of the child."

17. Mediation was first advocated and inspired by anthropologists and other social scientists whose nonwestern fieldwork impressed upon them the virtues of resolving disputes by working through their human dimensions in a culturally sensitive context. *See, e.g.*, James L. Gibbs, Jr., *The Kpelle Moot, A Therapeutic Model for the Informal Settlement of Disputes,* 33 AFRICA 1 (1963) *reprinted as Two Forms of Dispute Settlement Among the Kpelle of West Africa, in* THE SOCIAL ORGANIZATION OF LAW 368 (Donald Black & Maureen Mieski, eds. 1973); PHILIP H. GULLIVER, DISPUTES AND NEGOTIATIONS (1979); Laura Nader, *Styles of Court Procedure: To Make the Balance, in* LAW IN CULTURE AND SOCIETY 69 (Laura Nader ed., 1969); SIMON ROBERTS, ORDER AND DISPUTE: AN INTRODUCTION TO LEGAL ANTHROPOLOGY (1979). Yet, the inspiration had no sooner been operationalized in the community justice movement of the 1960's and 1970's when it sparked a rigorous social science critique, premised, in part, on the procedural-justice-as-panacea ideology which dominated public interest legal activity in the 1970's. Extrapolated to a class-based complex society and linked to governmental institutions of social control, it was claimed, mediation constituted coercion with a velvet glove: disguising social issues as interpersonal problems, trading procedural justice for paternalistic self-help, locking the disenfranchised out of the judicial system, presupposing normative consensus where none exists, and reducing the semblance of coercion which leads to legitimate resistance. *See*, Richard Abel, *The Contradictions of Informal Justice, in* THE POLITICS OF INFORMAL JUSTICE VOL. 1: THE AMERICAN EXPERIENCE 270-272, 296-297 (Richard Abel ed., 1982); Richard Delgado et. al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution,* 1985 U. WIS. L.REV. 1359 (1985); Owen Fiss, *Against Settlement,* 93 YALE L.J. 1073 (1984); Robert L. Kidder & John A. Hostetler, *Managing Ideologies: Harmony As Ideology in Amish and Japanese Society,* 24 LAW & SOC'Y REV. 895, 896 (1990) ("[I]n both Japanese and Amish societies, an informalist antilaw ideology of harmony and consensus is deliberately promoted and sustained by leader

mediation[18] view it as a process which empowers parents[19] to speak in their own voices, tell their own stories, forge their own solutions,[20] and, through experiential learning, acquire the techniques for future resolution of parenting problems.[21]

---

elites who are pursuing goals and using strategies that do not conform with the ideals they profess.") Some early advocates have become mediation's severest critics. *See,* Laura Nader, *The Recurrent Dialectic Between Legality and Its Alternatives: The Limits of Binary Thinking*, 132 U. PA. L. REV. 621 (1984); Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. (1994) (asking why attorneys have so easily accepted mediation); and even LAURA NADER, HARMONY IDEOLOGY (1992) (arguing that even in the Zapotec village context, compromise oriented resolutions substantially reflect the hegemonic colonial legacy and the Spanish imposition of "Christian" values). All the while, lawyers and legal scholars who support mediation have had to act as its champion in an uphill battle against the doctrine-and-judgment based ideology of law's adversary culture — a battle which has generated much legal scholarship espousing mediation with almost mystical and religious fervor. *E.g.* Joshua D. Rosenberg, *In Defense of Mediation*, 30 FAM. & CONCILIATION COURTS REV. 422 (1992); DONALD SAPOSNEK, MEDIATING CHILD CUSTODY DISPUTES (1983). The aura of mission is still palpable in both legal scholarship and in the culture of organizations such as CEDR and SPIDR which have contributed to the institutionalization of mediation through the professionalization of those who do it.

18. *See, e.g.*, COOGLER, *supra* note 12; FOLBERG & TAYLOR, *supra* note 15; KELTNER, *supra* note 15; SHEILA KESSLER, CREATIVE CONFLICT RESOLUTION: MEDIATION (1978); MOORE, *supra* note 12; Donald Saposnek, *Clarifying Perspectives on Mandatory Mediation*, 30 FAM. & CONCILIATION COURTS REV. 490 (1992).

19. Mediation is potentially empowering on many levels. First, it enables parents to frame both problems and solutions from the narrative history of their own families and their own value systems, rather than reframe them to conform to the code of kinship established by the legal and extra legal factors which operate within the judicial system. Second, it enables parents to tell their stories with their own voices, rather than through lawyers and third party witnesses. Third, parents speak conversationally, on their own behalf, rather than through the stilted adversarial form of the litigation process, with its specialized rules of examination and evidence. Fourth, it enables parents to confront and dialogue with each other - taking affirmative steps, in the presence of a trained facilitator, to resolve the acrimony and power imbalances which prevail in their own lives. Fifth, it permits the incorporation of both legal and relational issues, approaches, and resolutions. Sixth, it can create hand-tailored "customized" solutions fitted to unique family situations which are beyond the knowledge of judges and lie in the interstices of the legal rules. And seventh, the mediation process itself serves as a crash clinical course or behavior modification experience — teaching parents the techniques of constructive argumentation necessary for future cooperative co-parenting.

20. Mediation is said to provide qualitatively better justice by enabling participants to formulate their own issues and create their own resolutions. Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR"*, 19 FLA. ST. U. L. REV. 1, 7-8 (1991) ("[A]lternative forms of dispute resolution ... could lead to outcomes that were efficient in the Pareto-optimal sense of making both parties better off without worsening the position of the other. In addition, the processes themselves would be better because they would provide a greater opportunity for party participation and recognition of the party goals."); Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition? The Mediator's Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253, 268 (1989) ("[S]elf-determination and empowerment are furthered through outcomes that are designed by and for the parties, rather than outcomes designed by and (at least in part) for outsiders. Mediated outcomes empower parties by responding to them as unique individuals with particular problems, rather than as depersonalized representatives of general problems faced by classes of actors or by society as a whole.").

21. Baruch Bush, *supra* note 20, at 270-271 ("Here, then, are the special powers of mediation: It can encourage personal empowerment and self-determination as alternatives to institutional dependency, and it can evoke recognition of common humanity in the face of bitter conflict. Both powers involve restoring to the individual a sense of his own value and that of his fellow man in the face of an increasingly alienating and isolating social context. These are valuable powers indeed. Further, they are unique to mediation. These are functions mediation can perform that other processes cannot.").

Opponents of mediation view it as a process which further disempowers the relatively powerless — substituting mind games for rights talk, stripping them of attorney champions, due process safeguards, rules of evidence, and the accountability of recorded proceedings and written decisions.[22] Critics claim that in the absence of explicit law and published decisions, the disempowered parent is at increased risk of manipulation by the more powerful parent and the even more powerful mediator, whose biases may be as great, and less explicit, than those of a judge. Without lawyers to speak for them, custody is awarded to the parents who speak best for themselves. Without transcripts to speak after them, there is no recourse.

The contrast often made between the virtues of legal counsel and the hazards of mediators, as though they were equally available and mutually exclusive options, is disingenuous because many divorcing parents have no lawyers.[23] Yet the mediation process does pose an inherent paradox of power:[24] by freeing the participants from the domination of courtroom constraints it risks the possibility that the stronger parent may dominate the weaker.

Some claim that this paradox of power perpetuates patriarchy[25] — systematically prejudicing mothers. The argument that mediation differentially

---

22. For the critical view, see sources listed *supra* note 17 and *infra* note 25.

23. JESSICA PEARSON, CALIFORNIA JUDICIAL COUNCIL, THE JOINT CUSTODY, VISITATION, AND CHILD SUPPORT PROJECT (1993) (In a 1990 sample of 600 divorce judgments involving minor children in Los Angeles County California 35% of the cases had no attorney representation, in 68% only one parent was represented); ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 108 (1992) (In a sample of 1,100 divorcing families, filing between September, 1984 and April, 1985 in San Mateo and Santa Clara counties in California, 20% of families had no legal counsel, in 24% only the mother had counsel and in 9% only the father had counsel); JOHN A. GOERDT, NATIONAL CENTER FOR STATE COURTS, DIVORCE COURTS: CASE MANAGEMENT, CASE CHARACTERISTICS, AND THE PACE OF LITIGATION IN 16 URBAN JURISDICTIONS (1992) (across all 16 jurisdictions only 29% of divorce cases had two attorneys); Mary Duryee, Statewide Office of Family Court Services, San Francisco, California, Demographic and Outcome Data of a Court Mediation Program (1991) (40% of family law litigants unrepresented); Jessica Pearson, *Ten Myths About Family Law*, 27 FAM. L.Q. 279, 281-282 (1993) ("The reality is that two-attorney representation characterizes a small proportion of the divorcing population.... [F]or many parents attorney representation is not a practical alternative. Greater hope, therefore, lies with public sector interventions like divorce ... mediation.").

24. Mediation is a "puzzlement" to which the word "paradox" is not uncommonly applied. In her study of interpersonal dispute mediation in New England, Professor Sally Merry uses the phrase "paradox of legal entitlement." She explains that the paradox is that when ordinary people seek to empower themselves, vis a vis their neighbors by making use of the legal system, they are simultaneously forfeiting their individual power to the legal system. Ultimately, however, through repeated use, such people can learn the ways of the legal system and relatively empower themselves within it speaking generally of informal and alternative dispute resolution processes. SALLY MERRY, GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS 181-82 (1990). *See also* Sara Cobb & Janet Rifkin, *Practice and Paradox: Deconstructing Neutrality in Mediation*, 16 LAW & SOCIAL INQUIRY 35 (1991); Craig A. McEwen & Thomas W. Milburn, *Explaining a Paradox of Mediation*, 9 NEGOTIATION J. 23, 23 (1993)(describing the "paradox of the hesitant but satisfied mediation participant").

25. *See* Carol Bruch, *And How Are the Children? The Effects of Ideology and Mediation on Child Custody Law and Children's Well-being in the United States*, 2 INT'L. J. L. & FAM. 106 (1988); Martha Fineman, *Dominant Discourse: Professional Language and Legal Change in Child Custody Decision Making*, 101 HARV. L. REV. 727 (1988); Grillo, *supra* note 8; Martha Shaffer, *Divorce Mediation: A Feminist Perspective*, 46 U. TORONTO FAC. OF L. REV. 162 (1988); Junda Woo, *Mediation Seen as Being Biased Against Women*, WALL ST. J. August 4, 1992, at B1, B9; Woods, *Mediation: A Backlash to Women: Progress on Family Law Issues*, 19 CLEARINGHOUSE REV. 431 (1985); *Cf.*, Janet Rifkin, *Mediation from a Feminist*

affects mothers is triple stranded. The first strand is structural inequality.[26] Women are relatively economically disempowered. Simultaneously, and perhaps consequentially, they are culturally presumed to shoulder the primary responsibility for day-to-day childcare (and do so with statistical significance). Since women do the work of childcare while men pay for it, the argument goes, they enter mediation at a bargaining disadvantage. They must trade on their right to custody for the financial means to exercise it. [27]

The second strand is prejudice. Professor Richard Delgado argues, on the basis of social psychology studies, that people's prejudices surface more freely in informal contexts, rendering mediation potentially dangerous to structurally disempowered groups, including women.[28] Professor Trina Grillo observes that prejudice, even fear, may come into play where women exhibit "unfeminine"

Perspective: Promises and Problems, 2 LAW & INEQUALITY 21 (1984) (a more balanced and optimistic view).

26. Cross-culturally, mediation processes tend to perpetuate dominant social values, inequalities and all. Sally Merry, *The Social Organization of Mediation in Nonindustrial Societies: Implications for Informal Community Justice in America in* THE POLITICS OF INFORMAL JUSTICE Vol. 2: Comparative Studies 21 (Richard Abel ed., 1982). If gender inequality is deemed a dominant value of American society, it is a short hop to this conclusion: "[while] patriarchal values and power structures remain strong, mediation will not, as a general proposition, produce results that are in the interests of women." Martha Shaffer, *Divorce Mediation: A Feminist Perspective,* 46 U. OF TORONTO FAC. L. REV. 162, 167 (1988).

27. *See, e.g.*, Barbara Lonsdorf, *The Role of Coercion in Affecting Women's Inferior Outcomes in Divorce: Implications for Researchers and Therapists,* 16 J. DIVORCE & REMARRIAGE 69 (1991); Lenore Weitzman, *Gender Differences in Custody Bargaining in the United States in* ECONOMIC CONSEQUENCES OF DIVORCE: THE INTERNATIONAL PERSPECTIVE (Lenore Weitzman & Mavis Maclean eds., 1992). The post divorce financial picture for mothers is less bleak than once portrayed in LENORE WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA (1985). Fathers who are not high earners also suffer financially after divorce. R. Haskins, *Child support: A Father's View, in* CHILD SUPPORT: FROM DEBT COLLECTION TO SOCIAL POLICY 306 (S. Kamerman & A. Kahn eds., 1988); Joy A. Arditti and Katherine R. Allen, *Understanding Distressed Fathers' Perceptions of Legal and Relational Inequities Postdivorce,* 31 FAM. & CONCILIATION COURTS REV. 461, 463-464 (1993). Yet, statistically, women earn less money and have sole custody more often subjecting them to a financial stress at divorce which is unlikely to change without a gender equal workplace. Yet nothing suggests women suffer negative financial consequences from mediation. Pearson, *supra* note 23, at 283-284 (finding as many as 20% of women had a perception of financial pressure in mediation). In California, only custody issues are mediated and conversation about support and property does not take place during mediation sessions so that any influences are indirect and, on the basis of current research, highly speculative.

28. Delgado et. al., *supra* note 17, at 1383-91. Professor Delgado argues that many people suffer from a "moral dilemma" arising from the conflict between the "American Creed" of equality and their own prejudices. They are more likely to suppress these prejudices when the formal judicial system imposes a public conscience and a standard for expected behavior. He concludes that mediation poses heightened risks of prejudice when it touches sensitive, intimate areas such as family disputes. *Id.* Professor Delgado essentially transplants Professor Abel's critique, *supra* note 17, to the family mediation context. Professor Abel's critique was directed primarily at institutions such as alternative criminal justice forums and small claims courts, where the state or wealthy entities are the moving parties. *See* Richard Abel, *The Contradictions of Informal Justice, in* 2 THE POLITICS OF INFORMAL JUSTICE: Comparative Studies 21 (Richard Abel ed., 1982). To my mind, it has minimal applicability to domestic disputes where power imbalances are less tied to institutional structures. The social position of women, as an economic class, is not necessarily mirrored in the relationship between husband and wife. Further, the principles of justice involved in the resistance and aggressive demands of minority groups as a whole are different from family cases in which interpersonal conflict between the parents may be directly detrimental to the child.

behavior such as extreme anger or lapses in parenting competency or responsibility.[29]

Perhaps more persuasive is the argument's third strand — that women have internalized their structural disempowerment. As a result, they may too readily defer to the mediator's or their male co-parent's requests, fail to state their own interests with adequate assertiveness, or value family relationships (or the appearance of them) so highly that they cannot adequately express (or perhaps even feel) the legitimacy of their own interests regarding custody.[30] Gender-related risk adversity,[31] or a tendency to be deceived by the relational discourse of mediation into disgorging their emotional turmoil in lieu of stating their prospective demands, may disempower women. Mediation's emphasis on compromise and joint responsibility, Professor Grillo argues, may short-circuit the blaming process - further disabling women who have been socialized to deny their own anger.[32] Reasoning deductively from hypothetical worst-case scenarios about mediation,[33] she argues that the combination of potential covert and overt mediator bias,[34] the sensitivity of the relatively disempowered to subtle coercive pressures by mediators and co-parents,[35] and the ability of fluent liars to out-talk reticent truth tellers renders mediation dangerous.[36]

Those who worry about the impact of mediation on women have recommended remedial measures from the mild to the draconian, including making mediation optional, prohibiting mediation where there is a history of or allegations of abuse, using only "private" sessions in which the parents never meet face-to-face and the mediator acts as a go-between, or eliminating court-sponsored mediation entirely.

---

29. Grillo, *supra* note 8, at 1575-77, 1579-81. Such lapses, so the argument goes, do not impact equally upon men since the base line assumption is that they are not primarily responsible for childcare - so anything they do is perceived positively. *Id.*

30. Isolina Ricci, *Mediator's Notebook: Reflections on Promoting Equal Empowerment and Entitlement for Women, in* DIVORCE MEDIATION: PERSPECTIVES ON THE FIELD 49 (Craig A. Everett ed., 1985).

31. *Id.* MACCOBY & MNOOKIN, *supra* note 23, at 49-52 (risk adversity and transaction costs, measured in both financial and emotional terms, may affect how parents bargain at divorce).

32. Grillo, *supra* note 8, at 1566-67, 1572-73, 1576.

33. Anecdotal accounts lend some support to the position that ideological positions are advocated by mediators in the idiom of mental health. For example, a how-to book written by a former Los Angeles Conciliation Court mediator explains: "I introduce the concept of the symbiotic relationship between mother and child in the early years, so that parents will have some background knowledge. I stress that both parents must cooperate so *their* child will not end up being deprived of one parent." FLORENCE BIENENFELD, CHILD CUSTODY MEDIATION: TECHNIQUES FOR COUNSELORS, ATTORNEYS AND PARENTS 84 (1983). Yet, such statements are a far cry from the textual data needed to assess what really gets said and what effect it may have on outcome. This *realpolitik* mix of normative ideology and goal directed strategy is probably no more common between mediators and divorcing parents than between lawyers and divorcing parents. *See* Austin Sarat & William L. F. Felstiner, *Legal Realism in Lawyer-Client Communication in* LANGUAGE IN THE JUDICIAL PROCESS 133 (Judith N. Levi & Anne Graffam Walker, eds. 1990); Austin Sarat & William L. F. Felstiner, *Law and Social Relations: Vocabularies of Motive in Lawyer/Client Interaction,* 22 LAW & SOC'Y REV. 737 (1988); Austin Sarat & William L. F. Felstiner, *Law and Strategy in the Divorce Lawyer's Office,* 20 LAW & SOC'Y REV. 93 (1986) (ethnographic study shows lawyers talk to clients about politics and connections not law and justice).

34. Grillo, *supra*note 8, at 1555-57.

35. *Id.* at 1583-84.

36. *Id.*

The feminist critique of mediation delineates possible processual risks for certain parents. But feminist theory, deductively employed, is an unsatisfying basis on which to reach sweeping conclusions. It is too easy to imagine the flip side of the equation. That is: that men are relatively disempowered because mediation uses a primarily relational discourse in which women are more comfortable; that men typically have difficulty expressing their nurturing tendencies[37] and crying in front of authority figures; that culture and tradition favor mothers as the primary caretakers,[38] despite ostensible legal gender neutrality; and that the separation of custody issues from those of assets and support removes fathers' main bargaining chip.[39]

Further, whatever economic superiority husbands may possess, recent research lends strong statistical support to the position that fathers are disadvantaged in custody determinations. In their recently published, award — winning, longitudinal study of 1,100 divorcing families in California's San Mateo and Santa Clara counties,[40] Professors Eleanor Maccoby and Robert H. Mnookin found that fathers are much more reluctant than mothers to ask for as much custodial involvement as they want.[41] And they get custody less often. [42]

---

37. The stereotypical idea of fathers as either disinterested in daily caretaking or easily and callously disengaged from it post divorce ignores the complex psychodynamics related to the post divorce change in parental roles. Becoming a non-custodial parent, a diminished position having no counterpart during marriage, is a painful experience, accompanied by feelings of guilt, depression, anxiety, and loss of self-esteem. Though the statistics favoring maternal custody cause it to happen more to fathers than mothers, in frustration and self-protection non-custodial parents of both sexes may increasingly withdraw from their children. Frank F. Furstenberg et. al., *The Life Course of Children of Divorce: Marital Disruption and Parental Contact,* 48 AM. SOC. REV. 656 (1983) (discussing fathers); HELEN ROSE FOCHS EBAUGH, BECOMING AN EX (1990) (discussing mothers who give up custody of their children).

38. MACCOBY & MNOOKIN, *supra* note 23, at 113-114 ("Despite the evidence of change, our examination of custodial outcomes suggests very substantial gender differentiation. The overwhelming majority of mothers still want sole physical custody of their children, and this is usually the outcome. While many fathers expressed a preference for a less traditional arrangement, mothers were much more likely than fathers to act on their desires by filing a specific custodial request. Many fathers do not file a conflicting request in their legal papers, in spite of their expressed preference. And in cases where they do, and the requests conflict, mothers succeed twice as often as fathers in securing their preferred outcome. In short, although gender stereotypes are no longer embedded in the statute books themselves, and California law is certainly viewed as sympathetic to more androgynous forms of physical custody, the actual custodial outcomes still reflect profound gender differentiation between parents: the decree typically provides that the children will live with the mother.").

39. Professor Mnookin views divorce as a system of private ordering in which the applicable laws create a group of "bargaining endowments" which parties use to negotiate in the law's shadow. These chips may reflect more or less nearly what any particular party actually wants. *Id.* at 39-55.

40. *Id.* at 113-114.

41. *Id.* at 100-01. The data base for the study consisted of court records and three interviews per family: one conducted shortly after the petition for divorce was filed; the second one year later; and the third conducted two years following. More than one third of the fathers did not petition for as much physical custody as they told the interviewers they wanted. *Id.* at 101.

42. *Id.* at 103-01. Where both parents requested maternal custody, maternal custody was awarded 89.4% of the time. By contrast, when both parents requested paternal custody, paternal custody was awarded only 75.5% of the time. *Id.* at 300. Where there was a split in the initial custody request, mothers' requests were granted about twice as often as the fathers' requests. Of the 198 cases in which there was a conflict, the mother was granted the custody she requested in 117 cases, the father was granted the custody he requested (or more) in 52 cases. In the remaining 29 cases, the custodial award was a compromise between the parents' requests. *Id.* at 103-104.

When each parent sought sole custody, the mother received sole custody four times (45 percent) as often as the father (11 percent).[43]

Even more striking, the study indicates that it is fathers - not mothers - who need attorney champions to gain custody. Mothers, with lawyers or without, nearly always requested the custody they wanted. Fathers did not. Only 21 percent of fathers without counsel even made a request, whereas 80 percent of fathers who were represented by counsel did so.[44] Further, while fathers as a group rarely gained custody, in cases where only the father had a lawyer, the father gained physical custody almost one third of the time.[45] It seems at least possible, then, that it is fathers, not mothers, who need attorneys to help them speak out for what they want and who may be disadvantaged by the requirement that they speak for themselves in mediation.

Questions of engendered power in mediation are informed, but not resolved, by several statistical surveys of outcomes and participant satisfaction, which reveal a disjunction between results and perceptions of them. In a statistical study of 608 non-custody cases which were randomly referred to either small claims court or mediation, the University of New Mexico Center for the Study of Dispute Resolution interviewed participants regarding several measures of short and long term satisfaction *and* compared them to objective measures of outcome.[46] The striking result was that women, as a group, were less satisfied, on a statistically significant level, with mediation than with litigation, but that women received better outcomes in mediation, also to a statistically significant level![47] This suggests there may well be a gender related user perception gap between what actually occurs and what might have been.

Similarly, Professors Emery, Matthews, and Wyer studied outcomes and perceptions of couples whose custody cases had been randomly referred to either mediation or litigation.[48] They found no meaningful differences in the

43. *Id.* at 105. Further, when the parents made competing demands for sole custody, if the children were residing with the mother at the time of separation, the mother received sole custody 67% of the time; but, if the children were residing with the father at the time of the separation, he received sole custody only 25% of the time. Fathers are equally disadvantaged when the custody arrangements are informal. After separation, and prior to filing petitions for dissolution, 67.6% of all children were living with their mothers. *Id.* at 74. Maccoby and Mnookin explain the strong "tilt" towards mother residence as resulting from a cluster of factors: (1) more mothers than fathers are pre-separation primary caretakers; (2) many parents think that experience and competence in parenting are related; (3) most fathers feel confident that their former wives are, and will continue to be, good mothers; (4) the majority of mothers have misgivings about the adequacy of childcare provided in the husband's post-separation household. *Id.* at 96. Parental trust or mistrust bears heavily on the children's post-divorce residency. However, when custodial arrangements were changed informally *after* divorce the direction was also decidedly towards maternal custody. *Id.* at 96.

44. *Id.* at 111.

45. *Id.* "Regardless of group, mother physical custody was the most common outcome, ranging from a low of 49 percent of the cases when only the father had a lawyer, to a high of 86 percent when only the mother." *Id.* at 109-111.

46. Michele Hermann, et.al., The Metrocourt Project Final Report: A Study of the Effects of Ethnicity and Gender in Mediated and Adjudicated Small Claim Cases at the Metropolitan Court Mediation Center, Bernalillo County, Albuquerque, New Mexico, Cases Mediated or Adjudicated September 1990 - October 1991 (January 1993) (unpublished manuscript on file with the author).

47. *Id.* at x - xii.

48. Robert E. Emery, et.al., *Child Custody Mediation and Litigation: Further Evidence on the Differing Views of Mothers and Fathers*, 59 J. of CONSULTING AND CLINICAL PSYCHOLOGY 410 (1991).

content of mediated and litigated custody agreements.[49] Although the *results* were the same, mothers were less *satisfied* with the outcome of mediation, believing they had lost more and won less,[50] while fathers were significantly less satisfied that their rights were protected in *litigation*![51]

Professors Emery, Matthews and Wyer explain the discrepancy between actual outcome and participant satisfaction as a question of "voice."[52] They write "[v]oice appears to be of considerable significance to fathers....This suggests that affirmation of their parental role is at least part of what fathers who contest custody are seeking."[53] Fathers' perceptions that mediation provides a forum for the telling and legitimation of their custodial claims, which is denied to them in litigation,[54] goes far towards explaining their satisfaction with the process. But it is potentially inconsistent with Professors Maccoby and Mnookin's finding that *pro se* fathers fare far worse in custody disputes than those represented by counsel.[55]

Speaking out to one's own satisfaction is sometimes very different from convincing others that one is correct, especially in informal legal contexts. While the discrepancy between speaking satisfaction and success has not been systematically studied for mediation, it has been amply analyzed for small claims courts, which are also forums where litigants are able to tell their own stories unimpeded by evidentiary constraints. Professors John Conley and William M. O'Barr found that litigants' narratives could be arranged along a rules-relationships continuum.[56] Relational accounts emphasize details of interpersonal relationships, the social networks in which they are situated, and broad notions of social need and entitlement. They lack essential legal connections, such as causality, and the deductive hypothesis-testing structure

---

49. *Id.* at 414. There was a slightly higher rate of joint legal custody in mediation, but fathers did not receive more actual time with their children. *Id.* at 414.

50. *Id.* at 415.

51. *Id.* In one study of an unmatched sample of Marin County, California parents who elected either litigation or non-court sponsored mediation through the Northern California Mediation Project, there were no gender related perception differences. Joan B. Kelly, *Mediated and Adversarial Divorce Resolution Processes: A Comparison of Post-Divorce Outcomes*, 21 FAM. L. 382, 387 (1991).

52. Emery et al., *supra* note 44, at 461.

53. *Id.*

54. The open-ended questionnaire responses of 87 divorcing Virginia fathers indicated that "men believe they are treated unfairly; they seem themselves as the losers." Joyce A. Arditti & Katherine R. Allen, *Understanding Distressed Fathers' Perceptions of Legal and Relational Inequities Postdivorce,* 31 FAM. & CONCILIATION COURTS REV. 461 (1993). Fathers wrote:

> 'The divorce was not my fault, and I feel that I have not been treated fairly in the courts. Fathers have no rights.' ... 'It's as if the system rewards women for divorce.' ... 'I think many fathers feel the same as I did when it came to the divorce, about fighting in court, I felt it would be a losing battle for me' ... "I was denied visitation for the first year after we separated.... I found the court system to be highly biased and discriminatory toward the husband.'

Id. at 468-469.

55. *See supra* notes 40-45 and accompaning text.

56. JOHN M. CONLEY & WILLIAM M. O'BARR, RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE (1990) [hereinafter RULES V. RELATIONSHIPS]. Professors Conley and O'Barr call their method "ethnography of discourse. ... The basic assumption ... is that careful qualitative study of legal discourse provides evidence of goals, strategies, and thought processes of the speakers." *Id.* at 35. *See also*, John M. Conley and William M. O'Barr, *Rules Versus Relationships in Small Claims Disputes, in* CONFLICT TALK: SOCIOLINGUISTIC INVESTIGATIONS OF ARGUMENTS IN CONVERSATIONS 178 (Allen D. Grimshaw ed., 1990).

upon which cases often depend.[57] The rule-oriented litigants focus on more precise rules and principles that apply irrespective of social relationships and status; they structure their accounts as a deductive search for blame.[58]

Rules orientation and relational orientation do not have equal consequences. Because rules-oriented accounts articulate better with the rule-oriented "agenda of the law,"[59] judges are more apt to understand, empathize with, and decide in favor of rule-oriented litigants.[60] Moreover, the distribution of relational discourse is not random; but occurs most often among women, minorities, and the poor.[61] Professors Conley and O'Barr reflect on these research results, in light of their own earlier research findings that certain microlinguistic features, also found primarily in the speech of women, minorities, and the poor, rendered witnesses at formal trials less believable.[62] They opine:

> We find a convergence of the tendencies toward the powerless speech style[63] and the relational orientation, and a complementary convergence

---

57. William M. O'Barr & John M. Conley, *Litigant Satisfaction Versus Legal Adequacy in Small Claims Court Narratives, in* LANGUAGE IN THE JUDICIAL PROCESS 97, 98, 128 (Judith N. Levi & Anne Graffan Walker eds., 1990).

58. RULES VERSUS RELATIONSHIPS, *supra* note 56, at 58-59.

> The rules-relationships continuum can also be understood in ideological terms. Relational speakers espouse an ideology of enablement which holds that the law is an instrument of vindication with a broad mandate to right wrongs. Legal officials are expected to take an active interest in the problems of litigants, to seek out just solutions to these problems, and then to take whatever steps are necessary to punish wrongdoers and compensate victims. By contrast, the rules-oriented approach is consonant with an ideology of limitation which considers the law to be a limited-purpose institution, existing to provide clearly defined remedies for people whose problems fit certain narrow categories. Legal officials are seen as having the negative function of excluding those claims which do not satisfy the categorical prerequisites.

Id. at 173.

59. *Id.* at 66.

60. *Id.* at 114-15, 123-24. In essence, Professors Conley and O'Barr find that the seemingly informal small claims court is rules-oriented, as are most small claims judges. They describe five jurisprudential styles: the strict adherent to the law, the law maker, the mediator, the authoritative decision maker, and the proceduralist. *Id.* at 82-112. Of these, only the mediator is relationally oriented. Judicial expressions of understanding for relationally oriented litigants are rare. *Id.* at 124. *See also*, John M. Conley and William M. O'Barr, *Fundamentals of Jurisprudence: An Ethnography of Judicial Decision-Making in Informal Courts*, 66 N. CAROLINA L. REV. 467 (1988).

61. The typical small claims defendant is a relational person responding to a rule-oriented claim. Since, the court is predominantly rule-oriented, the defendant is most likely to lose. RULES V. RELATIONSHIPS, *supra* note 56, at 124. Further, "[t]he discourse of relationships is the discourse of those who have not been socialized into the centers of power in our society. Gender, class, and race are deeply entangled with the knowledge of and ability to use the rule-oriented discourse that is the official approach of the law." *Id.* at 173.

62. WILLIAM M. O'BARR, LINGUISTIC EVIDENCE: LANGUAGE, POWER AND STRATEGY IN THE COURTROOM (1982); John M. Conley et al., *The Power of Language: Presentational Style in the Courtroom*, 78 DUKE L. J. 1375 (1978) (In the earlier study, Professors Conley, O'Barr and Lind set out to identify, in witness' testimony at formal trials, several speech characteristics which linguist Robin Lakoff had identified with women's speech. They found that these characteristics were more associated with lower social status than with gender. In simulations, mock jurors (psychology students) found several of these characteristics to be inversely related to their perceptions of the witnesses' convincingness, truthfulness, competence, intelligence, and trustworthiness.).

63. "Powerless" speech, one of the microlinguistic aspects which Conley and O'Barr found to affect witness' believability is characterized by *inter alia* the abundant use of "hedges"("I think", "it looks like", "kinda", "sort of"); hesitation forms ("uh", "well" and other

> of rule-orientation and the absence of powerless stylistic features. Thus, it may be that the burden of stylistic powerlessness, which falls most heavily on women, minorities, the poor, and the uneducated is compounded on the discourse level by the tendency among the same groups to organize their legal arguments around concerns that the courts are likely to treat as irrelevant.[64]

Relationally-oriented speakers are disadvantaged as to small claims court outcomes; a disadvantage which seems to fall most heavily on the structurally disempowered. Ironically, however, despite the hidden costs of relationally-oriented narratives, the opportunity to tell a story in everyday terms significantly enhances litigants' satisfaction with the process and perception of its fairness.[65] Conley and O'Barr find that the opportunity to tell one's story to the court in one's own words, and to have it heard, is as or more important, to many litigants than is case outcome.[66]

Professors Conley and O'Barr's analysis of the double-edged power of "voice" in small claims courts, suggests it may be the missing link to explaining discrepancies between results and perceptions, and cautions us that power differentials cannot be inferred from either without studying actual texts. But their results do not permit easy interpolation into the mediation context.[67]

For one thing, the facile categorization of women as among the structurally disempowered may not exist in child custody mediation because of the statistical predominance and cultural norm of maternal custody.[68] For another, the University of New Mexico study found significant discrepancies in satisfaction and success *between* small claims courts and mediation.[69] The sad irony of the small claims process revealed in Professors Conley and O'Barr's study is that small claims judges allow litigants to talk about relationships, but

---

non-phonemic sounds); excessive use of overly polite forms ("sir," "please"); question intonation (making a declarative statement with a rising intonation so as to convey uncertainty); over use of intensifiers ("very", "certainly") to such a degree that they suggest that the speaker is not to be taken seriously in their absence; and using direct quotations in reporting the speech of others. O'BARR, *supra* note 62, at 63-71.

64. RULES V. RELATIONSHIPS, *supra* note 56 at 80-81.

65. O'Barr & Conley, *supra* note 57, at 97, 98.

66. RULES V. RELATIONSHIPS, *supra* note 56. *Accord*, Andrew Arno, *Structural Communication and Control Communication: An Interactionist Perspective on Legal and Customary Procedures for Conflict Management*, 87 AM. ANTHROPOLOGIST 40 (1985).

67. Small claims courts differ from mediation in important ways. Small claims courts are less alternative dispute resolution forums than expedited trial settings. Legal rules remain the ostensible basis for decision-making (unless a particular judge decides to take time-out to attempt a mediated settlement). In the expedited trial setting, the litigant is required to bring an action under the legal rule but deprived of an attorney trained in the knowledge of which legal rule might fit the case. In such a situation, it seems predictable that the party who knows the legal rules (or can talk like she knows the legal rules) is generally going to be the winner. A close reading of the illustrative cases in Professors Conley and O'Barr's study reveals that the meaning they give to the terms "relational"or "relationship" is very different from that of feminist theorists who have written about mediation. *See supra* note 25 and sources cited therein. While the feminist writers use the words to refer to an emotional-moral orientation which places particular value on relationships and connections with people, Conley and O'Barr use the terms to refer to an orientation towards speaking in terms of status relationships and popular views of rights and justice (generalized relationships between people) because the speakers' distance from the "centers of power"renders them unfamiliar with the specific relationships to which the law attaches significance (e.g. offer and acceptance in a contract)

68. See *supra* notes 40 - 45 and accompanying text.

69. See *supra* notes 46 - 47 and accompanying text.

impose legal rules in rendering their decisions.[70] Child custody mediation constitutes a significantly different forum in this regard. Its substantive law is about relationships - about rearranging the relationship between the parents from one of conflict to one of co-operative co-parenting memorialized in the custody and visitation agreement.[71] And its process works through relationships — the parents and the mediator engage in a conversation in which, through a series of steps of micro-persuasion, they lead one another towards a consensus.[72]

It may well be that the consequences of voice for power, gender, outcome and satisfaction differ importantly in mediation. But whether and how they do is an empirical question whose answer can only be learned by looking directly at what parents say when they mediate.

B. Mediation as a Rhetorical Forum

As the dispute forum changes, the efficacy of different forms of expression to control the meaning of events and determine outcomes[73] also

---

70. Relational talk is not always disempowering in a legal context. In a study of a small sample of law students performing a law school class negotiation exercise, Loyola Law School student Joshua Solomon found that women law students used a relational approach more than men, and they were more successful in representing their client. The case concerned a wrongful termination. The client wanted his job back. Women, focusing on the importance of work relationships, negotiated to get the man's job back; while men law students more readily compromised for money damages. Joshua Solomon, Gender Differences in Dispute Resolution (Fall 1993) (on file with the author).

71. Lon Fuller, *Mediation - Its Forms and Functions*, 44 S. CAL. L. REV. 305, 325 (1970) ("The central quality of mediation [is] its capacity to reorient the parties to each other ... by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another.").

72. The flow of discussion, disagreement, and argument during mediation is less like formal turn-taking, or the question and answer format of a trial, than it is like an informal family argument during conversation. Thus, ideas and positions put forth by one party may be quietly dropped or adopted by the other party without any overt recognition that this is taking place. For an analysis of such occurrences in family talk see Samuel Vuchinich, *The Sequential Organization of Closing in Verbal Family Conflict, in* CONFLICT TALK: SOCIOLINGUISTIC INVESTIGATIONS OF ARGUMENTS IN CONVERSATIONS 118 (Allen D. Grimshaw, ed. 1990). Close textual study is often needed, and sometimes proves insufficient, to determine who has convinced whom and when. Each turn of talk in the mediated conversation has some persuasive impact on the next, and the manner of persuasion proceeds in all directions simultaneously. The parents persuade and resist each other and the mediator. The mediator persuades, resists, and guides each of the parents. Joseph P. Folger & Robert A. Baruch Bush, *Ideology, Orientations to Conflict, and Mediation Discourse, in* NEW DIRECTIONS IN MEDIATION: COMMUNICATION RESEARCH AND PERSPECTIVES 3, 4 (Joseph P. Folger & Tricia S. Jones eds., 1994).

> [T]hird parties may be as responsive to characteristics of the dispute, disputants, and unfolding interaction as they are to the formal intervention mandates .... The resultant "transformation"of disputes in intervention is itself a dynamic process. Characteristics of the emerging dispute ... prompt third-party moves. These .... in turn trigger disputants' actions and reactions, ultimately shaping how the conflict unfolds and what the intervention becomes.

Id.

73. Some scholars argue that all of law is a battle in which words are the weapon of choice. *See* NORMAN FAIRCLOUGH, LANGUAGE AND POWER (1989) (taking a critical approach to the hegemonic influence of dominant discourses); PETER GOODRICH, LEGAL DISCOURSE: STUDIES IN LINGUISTICS, RHETORIC AND LEGAL ANALYSIS (1987); JAMES BOYD WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW xi (1985) ("On this view law is in the first place a language, a set of terms and texts and understandings that give to certain speakers a range of things to say to each other.... For this 'language' is not just a set of special-sounding words, but a set of intellectual and social activities, and these constitute both a

changes.[74] Mediation rhetoric differs from trial rhetoric in ways which may significantly alter the balance of power. The formalized question and answer format which characterizes a party witness' testimony at trial[75] is replaced by a conversationally paced first person narrative in which evidentiary rules are suspended; repetition and contextual background information are encouraged; and strict turn-taking rules are replaced by an informal etiquette of time-sharing. The relative power advantage may thus likely belong to the vivid and persuasive oral storyteller with the ability to hold the floor. The opportunity to construct narratives of one's own life experience, rather than being forced to fit one's problems into the "slots" provided by the attorney's specific questions, or re-frame one's life within the elements of a cause-of-action is potentially

---

culture-a set of resources for future speech and action, a set of ways of claiming meaning for experience-and a community, a set of relations among actual human beings."); JAMES BOYD WHITE, WHEN WORDS LOSE THEIR MEANING 273 (1984) ("To conceive of the law as a rhetorical and social system, a way in which we use an inherited language to talk to each other and to maintain a community, suggests in a new way that the heart of the law is what we always knew it was: the open hearing in which one point of view, one construction of language and reality, is tested against another."); Richard K. Sherwin, *Dialects and Dominance: A Study of Rhetorical Fields in the Law of Confessions,* 136 U. PA. L. REV. 729 (1988); Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field, Translator's Introduction,* 38 HASTINGS L. J. 805, 837 (1987) ("A trial is a confrontation between individual points of view, whose cognitive and evaluative aspects cannot be fully distinguished. The confrontation is resolved by the solemnly pronounced judgment of an 'authority' whose power is socially granted. Thus the trial represents a paradigmatic staging of the symbolic struggle inherent in the social world: a struggle in which differing, indeed antagonistic world-views confront each other. Each, with its individual authority, seeks general recognition and thereby its own self-realization."). *Cf.* HAYDEN WHITE, THE CONTENT OF THE FORM: NARRATIVE DISCOURSE AND HISTORICAL REPRESENTATION (1987) (essays on the importance and distinctive meaning of narratives constructing a particular mythic view of reality in historical writing).

74. As the dispute forum changes, the participants, the relationships among them, and the meanings and significance attached to different perceptions and different ways of deciding what is "true" all change. *See, e.g.*, Folger & Bush, *supra* note 72; Lynn Mather, *Dispute Processing and a Longitudinal Approach to Trial Courts,* 24 LAW & SOC'Y REVIEW 357 (1990); Lynn Mather & Barbara Yngvesson, *Language, Audience, and the Transformation of Disputes,* 15 LAW & SOC'Y REV. (1980 - 81); Barbara Yngvesson & Lynn Mather, *Courts, Moots, and the Disputing Process, in* EMPIRICAL THEORIES ABOUT COURTS 51 (Keith O. Boyun & Lynn Mather eds., 1983).

75. Ethnographers of formal trials have found that formal rules of evidence can be verbally disabling and difficult for lay witnesses to understand. RULES VERSUS RELATIONSHIPS, *supra* note 56; LINDA GIRDNER, Contested Child Custody Cases: An Examination of Custody and Family Law in an American Court (1981) (unpublished Ph.D. dissertation, available from University of Michigan Microfilms). But there are other speaking constraints as well. Professors Conley and O'Barr enumerate them as follows:

> 1. A witness may not ordinarily repeat what other persons have said about the events being reported; 2. A witness may not speculate about how the situations or events being reported may have appeared to other people or from other perspectives; 3. A witness may not ordinarily comment on his or her reactions to, or feelings and beliefs about, events being reported; 4. In responding to a question, a witness ordinarily may not digress from the subject of the question to introduce information that he or she believes critical as a preface or qualification; 5. A witness may not normally incorporate into his or her account any suppositions about the state of mind of the persons involved in the events being reported; 6. Value judgments and opinions by law witnesses are generally disfavored; 7. Emphasis through repetition of information is restricted; 8. Substantive information should not be conveyed through gestures alone; and 9. A witness is generally forbidden to make observations about the question asked or to comment on the process of testifying itself.

RULES V. RELATIONSHIPS, *supra* note 56, at 13-14.

empowering.[76] But it is also highly challenging. Without an attorney to elicit the story or provide an exegesis of it through closing and opening argument, the rhetorical burden on the party is significant.

Some parents are much better at meeting the rhetorical burdens of mediation than are others. In reading and re-reading the texts of the mediation narratives it became obvious to me that those parents who seemed to "tell a better story" garnered the mediator's support behind them and prevailed more often on the terms of the agreement. But it took many further and closer readings of the texts, undertaken in alternation with an intense immersion in current sociolinguistic theory, before I began to isolate the rhetorical strategies which made for a better story teller — strategies which did not correlate directly with either the equities of the narratives' contents nor the correctness and fluency of the speech on such matters as grammar, pronunciation, and erudition. When I finally realized that whether and how parents "quote" the speech of themselves and others in telling their narratives about family relationships is one factor strongly associated with outcome in mediation,[77] the insight came like an epiphany.

For several reasons, focusing on speaking in "quotes," or more formally, the use of reported speech, provided an opening wedge into both the systematic differences in persuasive power between mediation and litigation and the empirical study of engendered empowerment. The potential efficacy of the speaking device differs dramatically between formal adjudication and mediation. Reported speech is potentially disabling to a court witness because it perpetually runs afoul of the Hearsay Rule. Adversary counsel is likely to jump

---

76. Lawyers are trained to force the grist of clients' lives into legal categories. The resemblance between the real family and its legal reconstruction may be greater or less. GIRDNER, *supra* note 75, at 6, 8 ("While taking part in an adversary proceeding ... [lawyers] translate the complex situation of the family into a recognizable form based on the rules, legal concepts, and procedures necessary for adjudication by representatives of the state.... [This] is transformed into a measuring stick by the legal system to judge the behavior of family members."); *see* Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse,* 77 CORNELL L. REV. 1298 (1992) (presenting a detailed analytical history of a case handled by a law student clinic the author directs, demonstrating how lawyers miss clients' real issues and injustices because they see through legal blinders); *see also,* Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR,"* 19 FLA. ST. U. L. REV. 1,7 (1991) ("Human problems become stylized and simplified because they must take a particular legal form for the stating of a claim.").

77. It is, of course, not the only significant rhetorical strategy or speech pattern which may affect the outcome of a dispute. Several "hidden" factors have been discovered for trial and hearing witnesses. These include "powerful" or "powerless speech style", *see supra* note 63; narrative coherence, BERNARD S. JACKSON, LAW, FACT AND NARRATIVE COHERENCE (1988) (In discussing what he calls "the narrativisation of pragmatics" in the common law trial, Jackson argues that it is the "narrative coherence" of the witness which persuades - or fails to persuade - of the truth of the witness' testimony.); recency, consistency, and detail of testimony, Kim Lane Scheppele, *Just the Facts, Ma'am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth,* 37 N.Y.L. SCH. L. REV. 123 (1992); grammatical forms through which blame is expressed, SUSAN BERK-SELIGSON, THE BILINGUAL COURTROOM: COURT INTERPRETERS IN THE JUDICIAL PROCESS (1990); and whether and how one's court testimony is translated, *id.*, or one speaks with an accent. Marie Matsuda, *Voices of America: Accent, Antidiscrimination Law and a Jurisprudence for the Last Reconstruction,* 100 YALE L. J. 1329 (1991). Professor Sara Cobb suggests that three features of narrative (coherence, closure, and interdependence) may work together to create the prevailing mediation story. Sara Cobb, *A Narrative Perspective on Mediation, in* Folger & Jones, *supra* note 72, at 48. Further research, undoubtedly, will disclose yet others.

in with an objection whenever speech is reported. Even if the objection is overruled, the flow of the witness' narrative is temporarily interrupted, damaging its vividness and persuasiveness. Further, in the interests of judicial efficiency, repeatedly "reporting speech" is likely to result in a judicial direction to "testify only to what happened not what somebody said" - making a witness with the habit of speaking in quotes highly self-conscious of his speech pattern. Under the pressure of giving trial testimony, he may be unable to state the same facts in an acceptable rhetorical form. To the extent that a witness needs to rely on the reported voices of others for making one's points, those points may well go unmade in the formal legal setting.[78]

By contrast, the use of reported speech in ordinary conversational storytelling is a powerful technique. In oral cultures, it is often considered to be the sine qua non of the bard or political rhetorician.[79] As a hallmark of oral storytelling, it is used more often in the United States by persons with less formal education[80] (think, for example, of rap music), and thus can be a powerful class leveler in the mediation context. Further, ethnographic studies suggest that reporting speech and "talking about talking" occurs more often in women's speech than in men's.[81] Using reported speech in conversation has

78. Ethnographers of trials have particularly pointed to the Hearsay Rule as running counter to the ordinary conversational tendency to speak in quotes. The rule is often poorly grasped by and poorly explained to lay witnesses. For actual texts of witnesses who were unable to tell their stories coherently in court because the Rule tied their tongues, see William M. O'Barr & John M. Conley, *Litigant Satisfaction Versus Legal Adequacy in Small Claims Court Narratives, in* LANGUAGE IN THE JUDICIAL PROCESS 103-105 (Judith N. Levi & Anne Graffam Walker eds., 1990). Professors Conley and O'Barr comment on the Rule much as one might on the incest taboo: "These texts suggest that in some respects at least witnesses often attempt to tell their stories in courts as they might tell them in everyday situations, and they are often frustrated in the attempt. If witnesses did not tend to report conversations in their testimony, the rule of hearsay would not be needed; in any event, there would not be such frequent objections resulting from attempts to keep secondhand information out of testimonial accounts." *Id.* at 104-105. Linda Girdner found the Hearsay Rule to constitute a similar stumbling block to Illinois parents litigating custody. GIRDNER, *supra* note 75, at 43-44.

79. *See* Niko Besnier, *Reported Speech and Affect on Nukulaelae Atol, in* RESPONSIBILITY AND EVIDENCE IN ORAL DISCOURSE 161 (Jane H. Hill & Judith Irvine eds., 1993); KAREN J. BRISON, JUST TALK: GOSSIP, MEETINGS, AND POWER IN PAPUA NEW GUINEA VILLAGE xiii (1992); Barbara Kirshenblatt-Gimblett, *The Concept and Varieties of Narrative Performance in East European Jewish Culture in* EXPLORATIONS IN THE ETHNOGRAPHY OF SPEAKING 283 (Richard Bauman & Joel Sherzer eds., 1974); Deborah Tannen, *"I Take Out the Rock - Dok!" How Greek Women Tell About Being Molested (and Create Involvement)*, 25 ANTHRO. LINGUISTICS 359 (1983) (containing multicultural examples of stories narrated with constructed dialogue). For analytical treatment of the rhetoric of oral bards and demagogues see POLITICAL LANGUAGE AND ORATORY IN TRADITIONAL SOCIETY (Maurice Bloch, ed. 1975); IN VAIN I TRIED TO TELL YOU: ESSAYS IN NATIVE AMERICAN ETHNOPOETICS (Dell Hymes ed., 1981); and POLITICALLY SPEAKING: CROSS-CULTURAL STUDIES OF RHETORIC (Robert Paine ed., 1981). For a novel that captures in writing the oral storyteller's skill read CHINUA ACHEBE, THINGS FALL APART (1958).

80. *See, e.g.*, MARJORIE H. GOODWIN, HE-SAID-SHE-SAID: TALK AS SOCIAL ORGANIZATION AMONG BLACK CHILDREN (1990); WILLIAM LABOV, LANGUAGE IN THE INNER CITY: STUDIES IN BLACK ENGLISH VERNACULAR 354-396 (1972); AMY SHUMAN, STORYTELLING RIGHTS: THE USE OF ORAL AND WRITTEN TEXTS BY URBAN ADOLESCENTS (1986); Amy Shuman, *"Get Outa My Face": Entitlement and Authoritative Discourse, in* RESPONSIBILITY AND EVIDENCE IN ORAL DISCOURSE 135, 145-151 (Jane H. Hill & Judith T. Irvine eds., 1993).

81. *See, e.g.*, Marjorie Harness Goodwin, *Tactical Use of Stories: Participation Frameworks Within Girls' and Boys' Disputes, in* GENDER AND CONVERSATIONAL INTERACTION 110 (Deborah Tannen ed., 1993); Jane H. Hill & Ofelia Zepeda, *Mrs. Patricio's Trouble: The Distribution of Responsibility in an Account of Personal Experience, in*

been rationalized variously as anything from an effort to deflect responsibility from oneself[82] to an attempt to establish communal solidarity and empathy with the listener[83] — alternative explanations which echo suspiciously the negative and positive valences of women's role as respectively subordinate and nurturant.

One thing, however, is clear. To the extent that a person's speech is characterized by the habit of making points by quoting the speech of others, the effect is empowering in mediation and disempowering in litigation. Much of the deductivist argument for the relative disempowerment of women and minorities in mediation[84] has been premised in the idea that members of such groups lack either the verbal resources or the self-confidence to speak for themselves and that unconscious prejudices may exist which disadvantage their means of expression. If reported speech is characteristic of these groups and also has persuasive power in mediation, I hypothesized, it could well tip the balance on persuasiveness in a different direction.

C. "Constructed Dialogue": What it is; Why it is Powerful

Before turning to a detailed discussion of the custody mediation texts it is necessary to understand not merely that reported speech makes potent rhetoric, but why it does so. Sociolinguist Deborah Tannen refers to reported speech as "constructed dialogue."[85] She uses the term for two reasons. First, the decision to use dialogue is not the inevitable result of the occurrence of speech in the episode.[86] Rather, it is a creative narrative choice.[87] She explains:

> [s]pecifically, casting ideas as dialogue establishes a drama in which characters with differing personalities, states of knowledge, and motives are placed in relation to and interaction with each other.... [T]heir repetition in another context changes their nature and meaning and makes them the creation of the current speaker [88] ... [expressing] the relationship not between the quoted party and the topic of talk but rather the quoting party and the audience to whom the quotation is

---

RESPONSIBILITY AND EVIDENCE IN ORAL DISCOURSE 197 (Jane H. Hill & Judith T. Irvine eds., 1993); Barbara Johnstone, *Community and Contest: Midwestern Men and Women Creating Their Worlds in Conversational Storytelling in* GENDER AND CONVERSATIONAL INTERACTION 62, 73-74 (Deborah Tannen ed., 1993) ("Talk is not just a possible background activity in these stories. Story plots sometimes revolve crucially around talk; saying the right thing can defuse a dangerous situation, for example, or a person's verbal response to an event can create the humor in a story .... [T]alk seems to be a more salient sort of detail for the women than for the men."); ROBIN TOLMACH LAKOFF, LANGUAGE AND WOMAN'S PLACE (1975); Amy Sheldon, *Pickle Fights: Gendered Talk in Preschool Disputes in* GENDER AND CONVERSATIONAL INTERACTION 83 (Deborah Tannen, ed.1993).

82. Hill & Zepeda, *supra* note 81.

83. Barbara Johnstone, *Community and Contest: Midwestern Men and Women Creating Their Worlds in Conversational Storytelling, in* GENDER AND CONVERSTATION INTERACTION 62, 71-74 (Deborah Tannen, ed. 1993).

84. See *supra* text accompanying notes 25 through 32.

85. DEBORAH TANNEN, TALKING VOICES 125 (1989).

86. *Id.*

87. Professor Tannen writes: "[T]aking information uttered by someone in a given situation and repeating it in another situation is an active conversational move that fundamentally transforms the nature of the utterance." *Id. at* 105. Constructed dialogue is "a discourse strategy for framing information in a way that communicates effectively and creates involvement." *Id.* at 110.

88. *Id.* at 118-119.

> delivered....[89] By setting up a little play, a speaker portrays motivations and other subtle evaluations internally — from within the play — rather than externally, by stepping outside the frame of the narrative to make evaluation explicit. [90]

A signal aspect of this transformation is that the use of constructed dialogue generates a powerful dramaturgical involvement between speaker and hearer. Professor Tannen explains:

> The casting of thoughts and speech in dialogue creates particular scenes and characters .... it is the particular that moves ... by establishing and building upon a sense of identification between speaker ... and hearer. [91] ... By giving voice to characters, dialogue makes story into drama and listeners into an interpreting audience to the drama. This active participation in sense-making contributes to the creation of involvement. Thus understanding in discourse is in part emotional.[92]

Second, constructed dialogue is often a gist catching paraphrase expressed as a quote rather than a verbatim account of another's words. It frequently takes forms which could never have been heard or said as they are reported. These include instantiation[93] ("He always says ..."); choral dialogue [94] ("All of them said to me..."); or inner speech of oneself or another[95] ("So I said to myself ...").

Whether or not the speaker who uses constructed dialogue is reporting verbatim, remembering inaccurately,[96] or intentionally misrepresenting, the spirit, nature, and force of the utterance are fundamentally transformed.[97] Constructed dialogue may function as much to maintain the hearer's involvement in a story as to faithfully and accurately reflect a source.[98]

---

89. *Id.* at 109.
90. *Id.* at 125.
91. *Id.* at 104.
92. *Id.* at 113.
93. *Id.* at 111-112. Instantiation may sometimes be the product of multiple perceptions blurred and fused in memory. While it is unlikely that instantiated dialogue ever represents exactly what was ever said, much less exactly what is always said, the use of instantiated dialogue may be an accurate restatement of what the speaker remembers, rather than a deliberate dramatic invention. Memory is an active process in which memories of similar experiences subconsciously become blurred and fused, especially when the past experiences are emotionally charged. Edward J. Imwinkelried, *The Importance of the Memory Factor in Analyzing the Reliability of Hearsay Testimony: A Lesson Slowly Learnt - and Quickly Forgotten,* U. 41 FLA. L. REV. 215, 226-227 (1989); Felice J. Levine & June L. Tapp, *The Psychology of Criminal Identification: The Gap from* Wade *to* Kirby, 121 U. PA. L. REV. 1079, 1099, 1107 (1973); I. Daniel Stewart, Jr., *Perception, Memory, and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence,* 1970 UTAH L. REV. 1, 9, 17.
94. TANNEN, *supra* note 85, at 113-114.
95. *Id.* at 114-116. Professor Johnstone finds that European-American middle-class midwestern women, when telling conversational stories, often report as speech, statements which were never actually spoken. She writes "[in] the worlds many women create in their stories ... what you don't say is as important as what you do say; a world in which linguistic interaction is crucial." Barbara Johnstone, *Community and Contest: Midwestern Men and Women Creating Their Worlds in Conversational Storytelling, in* GENDER AND CONVERSATIONAL INTERACTION 62, 74 (Deborah Tannen ed., 1993).
96. There is reason to believe that reported speech may be particularly sensitive to memory distortions. People can ordinarily remember visual perceptions (recognition memory) more easily than they can verbal descriptions (recall memory). Imwinkelried, *supra* note 93, at 225-226; Levine & Tapp, *supra* note 93, at 1086, 1095, 1101; Stewart, *supra* note 93, at 19.
97. TANNEN, *supra* note 85, at 109.
98. *Id.*

Other scholars[99] have explained how constructed dialogue is a potent tool for redistributing knowledge, agency, and responsibility between the speaker and those whose dialogue she constructs.[100] Through the use of constructed dialogue a speaker can manage to add the weight of authority to her own voice (e.g. "The judge said, 'Your husband is abusive'"),[101] or to shift responsibility by distancing herself from the statement (e.g. "My son said, 'I saw daddy smoking marijuana'").[102] The potency of constructed dialogue can be illustrated with a few examples. Consider the statement: "My son said 'I saw daddy smoking marijuana.'" At trial, this statement would probably trigger an objection and be found inadmissible as evidence of the father's drug use.[103] At mediation, the mother freely uses the same sentence, enabling her to avoid both personal responsibility for the statement and speculation about the child's viewpoint while simultaneously creating the mediator's empathetic dramaturgical involvement in the concrete visitation situation and focusing the mediator's attention directly on the child, whose interests are determinative in custody cases.

---

99. Jane H. Hill & Judith T. Irving, *Introduction* to RESPONSIBILITY AND EVIDENCE IN ORAL DISCOURCE 4 (Jane H. Hill & Judith T. Irving eds., 1993).

100. *See id.* Through the drama created by constructed dialogue, the link of responsibility between speaker and person quoted is connected with the emotional involvement created between the speaker and the hearer. *Id.* at 7 ("Reported speech is an example of a way a speaker claims, in effect, that an utterance has already been co-constructed.... Reportive frames and 'double-voiced utterances' thus lie at the heart of our concern with the display of evidence and the attribution of responsibility in discourse. ... The allocation of responsibility in talk is inherently duplex, linking the attribution of agency and evidence referentially constructed in an utterance with their indexical construction in the act of speaking (and in the audiences act of interpreting).").

101. John W. Du Bois, *Meaning Without Intention: Lessons from Divination, in* RESPONSIBILITY AND EVIDENCE IN ORAL DISCOURSE 24, 28 (Jane H. Hill & Judith T. Irvine eds., 1993) (responsibility for the statement is shifted from the diviner to the oracle. Du Bois argues that divination presents a challenge to speech act theory because its motivating goal is the production of meaning independent of the intentions of a responsible speech actor). LAURENCE GOLDMAN, TALK NEVER DIES (1983) (analyzing disputing rhetoric among the Huli of New Guinea, for whom skill in the attribution of talk to self and others is a hallmark of the skillful litigator).

102. *See*, JOEL C. KUIPERS, POWER IN PERFORMANCE: THE CREATION OF TEXTUAL AUTHORITY IN WEYEWA RITUAL SPEECH (1990); Joel C. Kuipers, *Obligations to the Word: Ritual Speech, Performance, and Responsibility Among the Weyewa, in* RESPONSIBILITY AND EVIDENCE IN ORAL DISCOURSE 88 (Jane H. Hill & Judith T. Irvine eds., 1993) (reported speech in the early phases of the ritual distributes responsibility for social disruptions); Jane H. Hill & Ofelia Zepeda, *Mrs. Patricio's Trouble: The Distribution of Responsibility in an Account of Personal Experience, in* RESPONSIBILITY AND EVIDENCE IN ORAL DISCOURSE 197 (Jane H. Hill & Judith T. Irvine, eds. 1993) (Native American woman displaces blame for her son's school difficulties which don't coincide with her educationally-oriented self image); Niko Besnier, *Conflict Management, Gossip, and Affective Meaning on Nukulaelae in* DISENTANGLING: CONFLICT DISCOURSE IN PACIFIC SOCIETIES 290 (Karen A. Watson-Gegeo & Geoffrey White eds., 1990); Niko Besnier, *Reported Speech and Affect on Nukulaelae Atoll in* RESPONSIBILITY AND EVIDENCE IN ORAL DISCOURSE (Jane H. Hill & Judith T. Irvine eds., 1993) (Because it is culturally inappropriate to comment on another's thoughts, emotions, or intentions, speakers express them through constructed dialogue).

103. Without knowing the context in which the son made this statement, it cannot be said with certainty that it would be inadmissible hearsay as proof that Daddy smokes marijuana. It might be admissible under a hearsay exception, such as that for present sense impressions or excited utterances. *See infra* part V (discussing the Hearsay Rule and its exceptions). What is almost certain, however, is that the rhetorical form would trigger an objection by counsel interrupting and impeding the mother's testimony, and a likely judicial ruling on the statement's limited utility — sending up a warning about the hazards of responsibility shifting, however hard it might be to heed.

Further, at mediation the mother can render her opinions on the effects of the father's habits on the children as though they were concrete facts by putting them into the children's mouths. Consider, for example, a mother who is complaining about the father's tardiness. Her speech is dramatically persuasive if she says, "What concerns me is when the kids say, 'Why is Daddy always late when he comes to get us?'"[104] Moreover, even if the children have said nothing at all on the subject, the mother need not lie to harness the rhetorical strengths of constructed dialogue. Consider, for example, the mother who expresses concern that the father has kept the children out beyond their bedtime, by constructing an inner dialogue. She says to the mediator, "They were so tired. It's like they're saying to me, 'Please Mommy, I want to sleep. I can't stay out with Daddy anymore.'" The mother, of course, has not reported actual speech at all, but the hearer perceives it as though something has been said.

In the preceding paragraphs I have explained that constructed dialogue issues loom large when Hearsay Rules are dissolved. But the two terms, constructed dialogue and hearsay, are not mere synonyms from different professional jargons. They deal with very different dimensions of the problems raised by reported speech. In looking at constructed dialogue issues, we are examining how the person who is *reporting* someone else's speech chooses to selectively quote, not quote, or reconstructively paraphrase the speech reported for strategic or dramaturgical effects. In examining hearsay issues, we are looking *through* the person reporting the speech, as though through an acoustic window, to determine the truthfulness of the statement made by the person whose speech is being reported.

The Hearsay Rule[105] assumes that the person reporting the speech, is reporting it accurately. At least, it assumes that the accurate reporting of speech is no more problematic than any other testimony given by a witness and that it can be assured by the same means as all other testimony — that is, by the oath the witness takes at trial, the possibility of perjury charges, the opportunity for cross-examination by adversary counsel, and the trier-of-fact's right to use demeanor and other non-verbal clues as means to judge the witness's credibility.[106]

The problem with which the law of hearsay concerns itself is how to assure that the person whose speech is being reported, and who is not subjected to the truth safeguarding procedures used at trial, spoke accurately. Although hearsay problems and constructed dialogue problems have something in

104. This statement raises the same hearsay issues as the previous one. *See supra* note 103. In addition, because this constructed dialogue is an example of instantiation, it might be objectionable as a form of opinion testimony by a lay witness. FED. R. EVID. 701. Instantiations (testimony as to what is always or usually done) are sometimes objectionable on the basis of relevance where the case concerns a specific event. But because evidence of ongoing family patterns is relevant to the substantive law of best interests, statements of this type are unlikely to be objectionable on relevancy grounds if they are believed to be verbatim accounts of actual statements.

105. FED. R. EVID. 801, 802; CAL. EVID. CODE § 1200 (West 1994). For purposes of parallelism with the statutory citations to California mediation law, the citations to the California Evidence Code are provided as well as those to the Federal Rules of Evidence. The California and Federal Rules are substantively identical, as are those of all other United States jurisdictions.

106. From this perspective, virtually everything parents say at a mediation session is technically hearsay because they are neither under oath nor subject to cross-examination.

common — both involve questions of whether the speaker perceived the situation accurately,[107] has an accurate memory of that perception,[108] and narrates it in a way which accurately conveys that memory[109] — they focus on very different people. Constructed dialogue focuses on the person reporting the speech, hearsay on the person whose speech is being reported. Some of the constructed dialogue parents use in the cases discussed in the following section would be classified as hearsay[110] and some would not.[111] But it is not the point of this article to illustrate how hearsay and nonhearsay co-occur in mediation. Rather, the purpose is to examine whether and how the constitution of powerful speech may be different in the alternative dispute resolution forum of mediation where the Hearsay Rule is suspended and constructed dialogue frequently and freely occurs. At trial, a witness who frequently speaks in quotes is always disabled, whether or not a particular instance of reported speech constitutes inadmissible hearsay. By contrast, in mediation, constructed dialogue is free to exploit all its power. By shifting the locus of responsibility and authority from the person speaking to the person spoken about *and* simultaneously creating a dramatic connection between speaker and hearer, constructed dialogue is free to exert all the influence that it has in oral storytelling and ordinary conversation within a dispute resolution context. In the following sections we shall see what difference this makes.

III. THE CASES

A. Why These Cases Were Selected

This section analyzes in detail the use of constructed dialogue in three representative cases which illustrate well the patterns which take place in a consistent, though sometimes less sweeping way, in many mediation sessions.[112]

---

107. Attentiveness, concentration, and the complexity and emotional associations of what is being perceived can all affect the accuracy of the memory of the event. Imwinkelried, *supra* note 93; Lawrence S. Kubie, M.D. *Implications for Legal Procedure of the Fallibility of Human Memory,* 108 U. PA. L. REV. 59 (1959).

108. Biases, emotional associations, the subsequent occurrence of similar events, and suggestions and stimuli operating at the time of recall all play a role. Imwinkelried, *supra* note 93; Kubie, *supra* note 107. Further, memory of dialogue is particularly suspect, because ordinarily people can remember visual perceptions (recognition memory) more easily than they can verbal descriptions (recall memory). Imwinkelried, *supra* note 93, at 225.

109. 2 MCCORMICK ON EVIDENCE § 245 at 93 (John W. Strong et. al., eds. 4th ed 1992).

110. FED. R. EVID. 801; CAL. EVID. CODE § 1200 (West 1994).

111. For a fuller discussion of the overlap between Hearsay issues and constructed dialogue issues see Part V *infra.*

112. Several of my colleagues who have read earlier drafts of this article have asked me what claim can be made for the typicality of the three cases discussed. Any such response must begin with a caveat: this research design was neither that of a quantitative survey nor an experiment, and thus not intended to show massive statistical correlations nor scientifically rigorous causalities. Rather, it was ethnographic and thus intended to yield deep interpretive explanations of concrete cases, contextualized and informed by my two years of participant observation in the conciliation court. With that in mind, constructed dialogue occurs in approximately one half of the cases in the study. Wherever it occurs, it stands out. It becomes a focus for talk, an occasion for mediator response and often a main theme or talking point of the session. Also, it made an impression on me. I sat through each of the cases I taped, and, in refreshing my recollection by reading the tapes, I realized that the points made in constructed dialogue were always among those which had dominated my view of the mediation session at

The cases have been chosen as illustrations for three reasons. First, in each case, at least one of the parents makes extensive use of constructed dialogue to discuss all the contested issues.

Second, all three cases concern an issue which falls within a field of great legal indeterminacy, the making of a major change in visitation which significantly changes the time one parent will spend with a child, without any change in the formal allocation of custody. While such changes are extremely common between divorced parents, and key points of irritation between them, they are very "soft" legal issues. They are indeterminate in the sense that they raise issues in the interstices of the legal standards.

Because their resolution involves only a "rearrangement" of visitation and not technically a "change" in custody (which requires changed circumstances making the existing arrangements no longer in the child's best interests), litigated decisions are almost entirely a matter of judicial discretion. Consequently, black letter law is neither a significant guide nor a backdrop for the mediation sessions. This makes it possible to focus on mediation as a more independent process, and to examine the relationship between persuasive rhetoric and outcome as independently from the "merits" of the case as is possible in a real world ethnographic setting.

Third, in each of these cases, the text reveals how the *mediator* responded to the constructed dialogue. Thus, by examining what the mediator said (or did not say) in response to the parents' use of constructed dialogue, it is possible to gain insight into the risks posed for power equality by implicit, inappropriate mediator-parent alliances.

---

the time, though I was not aware of why. Further, I always discussed the cases with the mediators, who became my friends and colleagues, during breaks in the sessions, after the sessions, sometimes over lunch. I realized, again in studying the texts, that constructed dialogue seemed to dominant their impressions as well.

Constructed dialogue is not always determinative. Content counts. (A father who says "It was wonderful last night to hear my daughter say 'Daddy, I hate you' when I beat her with a broomstick" is unlikely to get custody no matter how well he speaks.) So do the practical problems raised by work and school schedules. And children sometimes voice independent views. In one constructed dialogue rich session not discussed here, mother and father told equally vivid and very opposite stories. At a midpoint break the mediator and I both commented on how perplexing and unpredictable the case was. But the couple had brought the daughter who "broke the tie" by declaring her desire to live with "mom."

The three cases discussed here are special in the degree in and clarity with which constructed dialogue shapes the outcome. Thus, like the "hard" or "cutting edge" cases which ordinarily make law review articles, they point the spotlight on a significant problem which otherwise lurks hidden in the thickets of many less dialogue rich disputes.

B. The Cases Examined

CASE ONE

"SAFE FROM SCREAMING": THE CASE OF JOHN AND LAURA[113]

----------ABSTRACT----------

SYNOPSIS OF FACTS: John and Laura, the parents of a son and daughter have been divorced for five years. Initially, they had a parenting plan in which the children resided primarily with Laura, spending Wednesday nights and every other weekend with John. More recently, because of John's intermittent employment as a commission sales person, the schedule has been informally modified so that John sees the children on a flexible basis that comports with his work responsibilities. Some two months prior to the mediation session, John and Laura had a fight when Laura returned from work after John had been baby-sitting the children at Laura's house. Laura alleges that John threw a glass at her and bruised her. She has photos and has filed a police report. John claims, and Laura admits, that Laura broke a bottle over his head, resulting in a wound serious enough to require stitches. Laura, the petitioner, has filed for a restraining order, claiming abuse by John, and is seeking a change in the visitation schedule. She wants no overnight visits for John; specified visitation (either 2:30 to 5:00 on Saturdays or all day Sundays); forfeiture of the preceding visitation if he is more than 30 minutes late and has failed to cancel the visit; and that pick up and return of the children should be at a police station located twenty miles from John's residence.

PROCESS: Mediator first meets with both parents; then privately with Laura; then privately with John and then with both parents together.

OUTCOME: The mediation session results in Laura getting everything she wants except the police station pick up. Subsequently, the police station pick up is granted by the judge in a five minute *pro per* appearance by the parties immediately following the session.

In this case, Laura uses constructed dialogue ten times; John uses it only five times. Laura's simple numerical advantage, however, must be augmented by a full analysis of how each of them uses constructed dialogue to dramatically reconstruct their respective narratives.

First, significant differences occur in John's and Laura's respective use of constructed dialogue during the initial joint session when they are discussing the fight which triggered their appearance at mediation. The couple substantially agree about how the fight happened. Because the baby-sitter had to leave early, Laura's cousin Denny asked John to baby-sit for the children until Laura came home from work. Laura learned that John was at the house when she

113. This session was taped in downtown Los Angeles in mid-September 1991. To protect the anonymity of the parents, no exact dates are given and all names used in this article are fictitious.

telephoned the baby-sitter from her car phone en route home. John claims that Laura entered the house angry and raging while Laura claims that John was drunk and insulted her. They "traded insults" (John's words) and a glass broke (which Laura claims John threw at her). She, in her own words, "picked up a bottle and I hit him on the head," after which John required stitches.[114]

However, there are three crucial points which tip the balance of equities regarding the incident. These are: (1) which of them began the verbal aggression and/or got out of control; (2) how the children responded to the incident; and (3) whether John was surreptitiously present in the house. Laura succeeds in making all three of these points through constructed dialogue. First, Laura re-constructs her own speech eight times to present herself as the model of control and decorum.[115]

LAURA'S USE OF CONSTRUCTED DIALOGUE TO DISCUSS THE FIGHT

Laura's Self-Portrait Through Constructed Dialogue

(1) "So I said to the sitter, 'Just wait for me,' and she said, 'Well, your nephew is here,' and I said 'No.' I said, 'Just wait for me.'"

(2) "So I called from my car, and I said to the sitter, 'Just wait for me. Do not go anywhere.'"

(3) "I just said, 'Please leave.'"

(4) "He would start accusing me, like of, in really ugly words ... how I invite everybody over to my house, and when that started to happen, I just said, 'Children, please go upstairs.'"

(5) "I said, 'Please leave.'"

(6) "...and what was started as about me sleeping with other men, I just said, 'Hey, this is my house, and I want you to get, you know, leave my house.'"

---

114. John also describes the incident, "[A]ctually, she sent me to the hospital ... she hit me over the head with some type of glass object that broke and, uh, uh, fractured my skull and, I had to get stitched up at a hospital ... I had blood flowing all over me, one of the neighbors gave me a few napkins and, uh, I went to the emergency hospital and ... 600 bucks, they stitched me up."

115. These instances are presented in chronological sequence, not in the order in which they were said by Laura.

(7) "So I w- had told myself I wasn't going to let him touch me."

(8) "My neighbor had his door open and said 'What happened?' I said, 'My ex-husband is there; I think he's gonna hurt me.'...they're going 'Are you OK? Are you OK?' and I said 'I'm fine.'"

To a hearer such as the mediator, who is trying to participate in the conversation and get an understanding of what happened, rather than reviewing a text to be alert for linguistic strategies, this dialogue conveys the impression of a woman in calm command, exercising prudent concern for her children's welfare and her own safety. When listening to reported speech, the speaker is typically what linguists refer to as "transparent" — we hear through the present speaker like an acoustic window to hear the speech of the person speaking in the story being told.

However, textual analysis reveals another dimension. Apart from the unlikelihood that Laura can precisely remember such ordinary words two months later, there are textual clues which suggest that Laura's account is not verbatim. In Sentence 1 "No ... Just wait for me" is not responsive to the sitter's, "Well, Your nephew is here." The statement, "Children, please go upstairs" is in somewhat more formal style than we would expect a concerned mother to use to her children in the middle of a family crisis.

More telling, and more technical, is Laura's self-repair in Sentence 6. ("'Hey, this is my house, and I want you to get, you know, leave my house.'") Laura apparently starts to say, "Hey, this is my house and I want you to get out of here," but, realizing that this angry colloquialism does not comport with her intended self-presentation, she changes in mid-sentence to something more polite. (If you doubt this, consider whether the sentence "Hey this is my house and I want you to leave my house" is one which would naturally occur in conversation and note the parenthetical "you know" which is addressed directly to the mediator in mid-quote, as if to qualify that what she said she said was not actually what she said).

Finally, Sentence 7 is not really reported speech at all. It was never said and was probably never thought in those exact words. Rather, it is inner dialogue: Laura's rationale for later yelling out, running to the neighbors' and hitting John over the head with a bottle. It constitutes her denial of John's allegation that she responded hysterically when she saw him. Similar is her statement to the neighbor, "I think he's gonna hurt me ... I'm fine."

Further, even if all eight instances of dialogue were a verbatim account of what Laura actually said at the time, they do not represent everything she said. Rather, they are a creative and strategic selection of dialogue which serves to dramatically construct Laura's image for the mediator.

In trying to convince the mediator how seriously the children are affected by John's behavior, however, she does not rely on her own words.

Instead, she puts the relevant statements directly into the mouths of the children.

Laura's Construction Of The Children's Dialogue To Show The Impact Of The Fight On Them

(9) "My daughter picked up a bottle and said 'My daddy smells like this.'"

(10) "The children are scared, y'know, they say, 'Oh, Mommy, y'know, we don't like Daddy anymore; he hurts mommy.'"

Laura's use of constructed dialogue to make her point that John's behavior seriously affects the children is dazzlingly effective. Consider Sentence 9. Laura could simply have said, "I got home and saw that John was really drunk." Certainly, if he had been so drunk that a child would have said that he smelled, an adult could have perceived his intoxication immediately. But, constructed dialogue is much more interesting. Whether or not Laura's daughter actually said these words (she might well have if she shares her mother's flair for the dramatic), Laura's retelling immediately conjures up an entire cinematic scene in which a child, hesitant to express directly her full awareness of the dangers of drunken anger, tries dramatically to intercede, alert her mother to her father's inebriation, and forestall a fight which may endanger them all. It cannot but succeed in focusing the mediator's rapt attention on the possibility of physical and psychological harm to the child from the parent's substance abuse — the situation which, under child custody law, is likely to result in the most restrictive type of visitation.

Further, the use of constructed dialogue shifts responsibility for the allegation of drunkenness from Laura to her daughter. If Laura were directly to assert that John was drunk he would be more likely to interrupt with an instant denial as he does later in the session when Laura does say this. Laura need not comment directly on John's drunkenness or opine on its effect on the children. Her daughter's talk both alleges the fact and expresses its impact. Laura's single line of talk not only involves the hearer in a dramatic scene worthy of daytime television but also communicates a critical point of custody law. It is not what parents do exactly that determines the allocation of custody, but what the best interests of the children are in the situation. The difference between the two is often hard for attorneys to explain, much less for parents to argue. But Laura's single line of dialogue does it all!

Sentence 10 is a less vivid example of exactly the same thing. In shifting responsibility to the children, Laura is able to communicate that it is not she, but the children, who do not want their father to come to the house. In having the children say, "He hurts Mommy," Laura again communicates the subtle legal difference between inter-parental conflict itself (in fact, Laura admits to

being 'fine' while John requires stitches), which is merely context, and the impact of perceived hostility on the children which can be dispositive in child custody.

Further, based upon internal linguistic clues, Sentence 10 is less likely than Sentence 9 to be a report of actual speech. First, the dialogue is not localized to a particular time; it is an instantiation, an example of what the children sometimes say. Second, as an example of choral talk, it is most unlikely to have occurred unless John and Laura's children are given to speaking in unison like a Greek chorus. Yet this does not diminish its vividness as a narrative device.

Laura also uses constructed dialogue to make her point that John was surreptitiously present in the house. Laura first learns that John is at her house during her telephone conversation with the baby-sitter. She is surprised.

Laura's Use of Constructed Dialogue to Show that John was Surreptitiously Present in the House

(11) "I had no idea. Apparently, I don't know if he [John] did it, or Denny told the children 'Don't tell mommy.'"

In Sentence 11 Laura reports an obviously fictitious dialogue. She even comments that she doesn't know whether or not anything of the kind was ever said. Laura wants to make the point that John's presence in the house was deliberately being kept secret from her. It is not the strongest way to make the point. Putting the words in John's mouth would make a stronger statement. It is impossible to read her subconscious thoughts to know why she puts the dialogue in Denny's mouth rather than John's. Perhaps she suspects that John, who is present, will deny having said any such thing. Perhaps it was merely inadvertent. Here we are analyzing spontaneous conversation, not the considered dialogue of a play. But she does succeed in dramatically conjuring up the existence of a conspiracy which she admittedly only suspects — a clear example of the efficacy of constructed dialogue.

In marked contrast to Laura's use of constructed dialogue to make points in her favor, is the absence of constructed dialogue from her discussion of the point she wishes to de-emphasize — namely, the children's desire to see their father. As to this point, she says, "They have asked about him ... and they want to see him" but she does not put words in their mouth. Similarly, in expressing her own view, she uses a highly distancing double negative which superficially suggests the very opposite of what it means and expresses her unwillingness to opine on this point: "I don't want to say they couldn't care less if they never saw him again." The above examples of Laura's constructed dialogue demonstrate how skillful Laura is in using constructed dialogue as both an offensive and defensive weapon and in arguing the best interests case.

JOHN'S USE OF CONSTRUCTED DIALOGUE TO DISCUSS THE FIGHT

Compared to Laura, John uses constructed dialogue less and ineffectively, although he does succeed in employing it defensively. Like Laura, he constructs his own statements during the fight as expressing control and decorum.

John's Self-Portrait Through Constructed Dialogue

(12) "The first thing I asked when we started arguing was, 'Please don't do this in front of the kids now.'"

(13) "I just said, 'I just want to get out of here'"

And, rather than reconstruct his own verbal abuse he uses the responsibility sharing (and rather catchy) circumlocution, "We were trading insults." And he uses it twice assertively to make the point that Laura was angry when she walked into the house:

(14) [Speaking about the telephone call from the car] "Denny says, 'Oh she's real mad, y'know, because of this thing.'"

(15) "She says, 'What are you doing here, uh, you just can't waltz in and out any time you want.'"

But John never shifts responsibility through constructed dialogue, nor does he use it to expose critical best interests issues. Moreover, his one attempt at using constructed dialogue in exculpatory fashion backfires.

John's Effort to use Constructed Dialogue in Exculpatory Fashion

(16) "She's paying the sitter and Denny's sitting there. And, uh, so he said, 'Y'know, maybe we ought to leave before she comes home.' Denny said that to me. And then as we were about to leave, the sitter said she may have to leave early and asked me to stay. Denny'd already gone out the door. 'So in case Laura doesn't get home on time, will you stay with the kids?' And I said, 'Fine.'"

Understanding why John's efforts to exculpate his presence in the house through constructed dialogue flounder requires a detailed technical analysis of his statement. The most vivid, involving part is his direct quotation of Denny: "'Oh she's real mad, y'know, because of this thing .... Y'know, maybe we ought to leave before she comes home.'" Yet it is precisely this part of the dialogue which cuts against John's interest; it is virtually an admission that he should have gone.

Another part of the statement supports John's position, making the point that as a responsible parent he had to stay in the house to take care of the children. ("And then, as we were about to leave, the sitter said she may have to leave early and asked me to stay. Denny'd already gone out the door. So in case Laura doesn't get home on time, will you stay with the kids?") But this part is syntactically confused. It is difficult to disentangle the direct quotation, or even to determine who was making the request, Denny or the baby-sitter. The parenthetical, "Denny'd already gone out the door" is ambiguous. Had he actually left, or was he just on his way? Could he be called back if they were only just "about to leave"? How much time actually elapsed? Was John hanging around after he had agreed the right thing to do was leave? To what is John really saying, "fine"? Is it to Denny's statement that he should leave or the baby-sitter's, or Denny's, request that he should stay? As a trope on John's belief that he has been trapped and victimized by unfortunate circumstances (a theme which permeates this mediation session), it works admirably on an artistic level, but as an example of the use of constructed dialogue to shift responsibility it is a disaster!

The differences in John's and Laura's uses of constructed dialogue which are present in the triggering fight story during their joint session continue during their respective private sessions with the mediator, although John and Laura are not now confronting each other directly.[116] This is best illustrated by examining excerpts of their speech on similar subjects. One of the points at issue during their respective sessions is marijuana use.

116. It is interesting that there is no difference in constructed dialogue empowerment between the joint and separate sessions because separate sessions are frequently used, and recommended by many (including this author) as one way to correct for power differentials. *See, e.g.*, Randy Frances Kandel, *Time and Structure of Mediation Sessions in the Los Angeles County Conciliation Court*, 30 FAM. & CONCILIATION CTS. REV. 474 (1992).

CONSTRUCTED DIALOGUE ABOUT MARIJUANA USE

Laura's Use of Constructed Dialogue

(17) "My children, uh, started telling us that Daddy smokes the green stuff, and when they go over, they in - they said, 'You know, I'll show you what Daddy does.' My son went into the kitchen, pulled some aluminum foil ... I said 'what are you doing?' 'It's what my Daddy does when he puts these blocks in here.' 'What kind of blocks?' 'Well, just this little block. But he smokes the green stuff.' And he went into the bathroom and got, uh, uh, paper - uh, toilet paper, and he goes, 'Mommy, can I get the Nintendo?' and I said, 'No, what are you doing?' He said, 'I just want to show you what Daddy does.' ... Uh, my children, my daughter, my son'll go, 'Oh, yeah, that's what Daddy does.' And I can't prove that, but that's another reason he's been intoxicated."

John's Narrative on the Subject of Marijuana Use

(18) "And I mean, the kids tell me, y'know, all k— when they say, well, the kids said this, and the kids have said that. Y'know, they, uh, her boyfriends have smoked grass in the house; one of 'em admitted it to me that they both did, and my son, uh, has - has, has, uh, has reported this. But I —"

Speaking to the mediator about John's marijuana use, Laura once again creates a play with the children as central characters; just as she has done with the earlier alcohol story. In marked contrast, when John talks about Laura's marijuana use, he almost deliberately avoids constructing a concrete account. It may (or may not) be that the children employ this form of "Show and Tell." But as reported by their respective parents, the importance of marijuana use to a custody allocation seems very different.

Another point of controversy between John and Laura is whether the exchange of the children should be done at the police station. Again, their respective use of constructed dialogue diverges dramatically.

CONSTRUCTED DIALOGUE ABOUT MEETING AT THE POLICE STATION

Laura's Use of Constructed Dialogue

In Laura's private session, the mediator has told Laura that it is her impression that John is very adamant about not meeting at the police station but that it is important for the children to feel safe, and allowed Laura to comment on this point. Laura's response follows:

(19) "I spoke to the kids about it as a matter of fact, last night. I said, 'Mommy's going to court tomorrow.' 'Oh, what for? Because Daddy hit you?' and I said 'Yes. And, and I want to ask the judge to, uh, uh, write me that I can, you can see your daddy, y'know, there's Saturdays, and I have to take you to the police station and pick up you there, and Daddy will bring you back.' And my son says, uh, 'Inside the police station?' I said, 'Oh, we can just wait outside.' I said Mommy just wants to feel safe if Daddy tries to hurt her, that uh, the police are right there and we can say, 'Excuse me, but we have a problem' ... And my son and my daughter said, 'Oh, that's fine, but why can't we wait inside the police station? We want to.' And I said, 'OK.' So they have to feel safe also."

John's Use Of Constructed Dialogue

In significant contrast, during John's subsequent private session he makes an abortive attempt to use constructed dialogue to express his concern that the children will be emotionally troubled by feeling that their parents are so out of control that they have to meet at a police station:

(20) "Don't you also feel the kids and still, like these-these two, just speaking of my, uh, uh, my ex and I, these two adult idiots can't get along, and they gotta — I-I, y'know, that's that's what she's brought it down to."

Linguistic analysis of Sentence 19 is more complicated than in the marijuana stories. Laura again constructs a dialogue which is unlikely to be a verbatim report (note the choral dialogue of "Why can't we wait inside the police station? We want to.") But she clearly does not want to lie. She does not

report that the children say they are afraid; their expressions of enthusiasm might reflect anything from a sense of adventure to a distaste for waiting in parking lots. But Laura sigues into her own comment, "So they have to feel safe also". Laura's implication of causation through juxtaposition of the children's dialogue with her own comment, leads the mediator to understand the children's constructed dialogue as a concern for their own safety. She answers Laura with an enthusiastic "Right. Yes." and thereafter presses for a police station meeting.

By contrast, John's statement in Sentence 20 falls flat. The mediator replies, "Well, y'know, the kids may, um, and I don't know what the kids are gonna feel, but as long as the kids feel safe, that's really the most important."

During the separate session, Laura also uses constructed dialogue strategically to advance her demand for a strict and limited visitation schedule for John which includes a provision that he will forfeit the next visitation if he fails to appear or to timely cancel. Of the ten instances of constructed dialogue during the separate session, six are devoted to this matter; conveying an image of John, through his own mouth, as a selfish and unreliable cad whose irresponsibility detrimentally impacts upon both the children and Laura as a harried working mother.

Laura's Use of Constructed Dialogue to Advance Her Visitation Demands

(21) "I always get a sitter, but, he always says, "Well, maybe I can watch them, maybe, maybe."

(22) "This is very typical: I made my plans for the kids, and he will call the kids and say, 'Do you want to come with Dad?' and of course they want to go with Dad, so my plans get, like, all, y'know, thrown away, and I am on a schedule."

(23) "He'll call and say that he, well, 'I was working until 5:00 in the morning,' but my attorney, our friend, plays basketball at this club and he sees him at 8:30 playing basketball."

Laura constructs the children's dialogue to show how his irresponsibility affects them:

(24) "It's hard for them to go to school on Wednesday; 'Is my dad gonna pick me up?' and I go, 'I don't know, honey. If he doesn't, I'll be there.'"

(25) [In regard to the forfeiture provision] "He goes, 'Well, you're the one who's going to be wasting your time in court, not me. I get bailed out. I get a public defender, and you're the one who has to pay attorney's fees.'... I mean, I never got, he's never gotten punished, if you wanna put it that way."

(26) [In regard to the police station pick-up] "The police station ... his ego side of him, 'I can do whatever I want.'"

Again, none of these quotes are localized in time. Rather, they are instantiations, designed to show the impact of a recurrent pattern in her life. Two of the provisions that she is seeking (the visitation forfeiture and the police station pick up) are hard on John. She constructs his dialogue in Sentences 21, 22, 25 and 26 to show that he deserves it. Sentence 26 is a particularly telling example of how Laura narrates her assessment of John as though it were John's self-assessment. It goes beyond constructed dialogue, purporting to be a restatement of what one part of John's personality, his ego, tells the rest of him. How could anyone ever challenge this?

In contrast to Laura, during his separate session, John uses constructed dialogue only once to try to advance his cause — the abortive and ineffective Sentence 20. The other instances of constructive dialogue are randomly distributed in his rambling narrative and instance his own self-perception as a victim of circumstances. While these instances expose his mental state, they do little to advance his cause.

John's Constructed Dialogue During the Private Session

(27) [In regard to the triggering fight] "[Her lawyer] says, 'Well, this is the situation I wanted.'"

(28) [Speaking of how he has lost his apartment because Laura sent the police to his house on a pretext] "My roommate got very upset, he asked me to move, he said, 'I don't want the police coming into my house for you and your ex's problems.'"

(29) [Speaking of how Laura once got angry when their son wanted to stay overnight with him] "So then she said, 'OK, you take [our son] ... and don't ever bring him back.'"

(30) [Speaking of how she then came and whisked their son away from his counseling session] "'I'm sorry this happened. I don't approve of it.'"

(31) [Speaking of a job he has just recently failed to get] "I went down to meet the owner my third interview, uh, I was going to work all day Saturdays, and I went down, just assumed I was gonna be hired, and the, they said, uh they hired a nephew or something, so I think I'm out of luck on one job."

HOW THE MEDIATOR RESPONDS TO JOHN AND LAURA

One of the most striking things which emerges from studying the dialogue of mediation sessions is that the more powerfully speaking parent does more than merely convince the less powerfully speaking parent. She convinces the mediator as well. The California statute, like most custody mediation statutes, charges the mediator with facilitating an agreement in the child's best interests;[117] thus encouraging an interventionist style in which the mediator actively promotes or suggests certain options when the parents cannot reach agreement.[118]

But interventionist mediation requires a high level of skill in distinguishing the child's interests from interparental power plays. Operating in conversational style, in real time, successful mediator interventions must take place with the split second timing characteristic of turn taking in natural conversational flow; the mediator must be almost intuitively alert to power imbalances.[119] In practice, the mediator is often caught between the parents' need to argue and the mediator's goals of cooperation and compromise.[120] The

117. CAL. FAM. CODE § 3161 ("The standards of practice shall include ... provision for the best interest of the child ...."); § 3180 ("The mediator shall use best efforts to effect a settlement of the custody or visitation dispute that is in the best interest of the child....").

118. Mediation theorists may differ on whether affirmative suggestions and selectively facilitative interventions are inconsistent with mediator impartiality and neutrality. But court sponsored child custody mediation in California, as elsewhere, works in the shadow of the substantive law of the child's best interests and is decidely interventionist in orientation. This is explicit in the writing of Los Angeles County Conciliation court mediators themselves. *See* FLORENCE BIENENFELD, CHILD CUSTODY MEDIATION: TECHNIQUES FOR COUNSELORS ATTORNEYS, AND PARENTS (1983) (author is a former mediator); George Ferrick, *Three Critical Questions*, 13 MEDIATION QUARTERLY 61 (1986) (the author, who is presently a mediator, outlines a method for "muscle mediation.") In an informal interview with the author, Mr. Ferrick likened the mediator's technique to a laser beam, focusing in on the specific disagreements between the parents and trying to resolve them.

119. Even with the trained sensitivity professional mediators develop:

> the mediator, due to her own internal processes, may not in fact, have a sufficiently clear vision of the interaction between the divorcing spouses to make a considered decision about if and how the power needs to be balanced. The existence of partiality, countertransference, and projection on the part of mediators explains why mediators' attempts to redress imbalances cannot necessarily be relied upon to meet the problem of unequal bargaining power.

Grillo, *supra* note 8, at 1592. Professor Grillo argues, not entirely convincingly, that the informal but time-limited and goal focused process of mediation poses a particular psychodynamic danger — it is more likely to foster projection, transference, and countertransference than are formal court proceedings, yet lacks the time to resolve these matters which may be available in therapy. *Id.* at 1590-92.

120. Getting the "floor" and determining the topic of talk during a mediation session sometimes involves mediator/parent competition as well as interparental competition. David Greatbatch & Robert Dingwall, *The Interactive Construction of Interventions by Divorce Mediators*, *in* NEW DIRECTIONS IN MEDIATION: COMMUNICATION RESEARCH AND PERSPECTIVES 84 (Joseph P. Folger & Tricia S. Jones eds., 1994). Skilled mediators know just when and how to interruptively intervene. T.S. Jones, *Lag Sequential Analyses of Mediator-Spouse and Husband-Wife Interaction in Successful and Unsuccessful Divorce*

mediator is challenged to retain control of the session so that it remains focused on harmonious solutions rather than degenerating into a conflict ridden ritual attack cycle between the parents.[121] The mediator is thus likely to be attracted to the more vivid story or to steer the conversation in the direction which will lead to peace, a direction which may mean supporting the parent least likely to give way.[122]

Because mediated agreements are reached by a series of compromises and micro-persuasive steps leading towards consensus, and the mediator has no power to impose custody and visitation plans on the parents, the exact moment when the mediator becomes convinced that the custody and visitation plan advocated by one of the parents is either better for the child or is *both* consistent with the child's best interests *and* more likely to be agreed to is not clearly delineated as it is in a judicial opinion. But a careful reading of the texts reveals that at certain critical moments, and after listening to certain critical dialogue, the nature of the mediator's interventions change from those of a *neutral* facilitator trying to keep the talk civil and steered towards compromise to those of a *selective* facilitator, steering the parents towards a particular compromise through the use of innuendo, selective reenforcement of certain statements by the parents as opposed to others, explicit affirmative suggestions, and outright positional statements.[123] Precisely how this is done varies with the

---

Mediation in, MANAGING CONFLICT: AN INTERDISCIPLINARY APPROACH 93 (M. Afzaur Rahim ed., 1989).

121. Communication theorist William A. Donohue studied twenty sessions taped in the Los Angeles County Superior Court, Conciliation Services Division (where the author's research was later conducted) in the early 1980s to see how mediators controlled a session to facilitate an agreement. In his view, there are two conflicts: the conflict between the parents (which must be resolved) and the conflict for control of the session between the mediator, who wants to reach agreement, and the parents who want to fight. Tracking the sessions at eight time points, he found that in the agreement sessions, parents kept a fairly consistent attitude towards reaching agreement, and that mediators led them through a series of phases with a fairly steadily increasing emphasis on proposal making. By contrast, in the no-agreement sessions, parents entered into ritual attack-defend cycles, and mediators tried to avoid dealing with the relationship issues by talking about facts, resulting in a lack of communication between them. DONOHUE, *supra* note 12, at 153-67. *Accord*, T.S. Jones, *Phase Structure in Agreement and No-Agreement Mediation*, 15 COMM. RES. 470 (1988).

122. "When two people are in conflict, having a third, purportedly neutral person take the viewpoint of one or the other results in a palpable shift of power to the party with whom the mediator agrees .... This can make the parties feel less, not more, in control of the process and its consequences for their lives. There is much room for, but little acknowledgment of, the possibility of the mediator's exhibiting partiality or imposing a hidden agenda on the parties." Grillo, *supra* note 8, at 1585-586.

123. David Greatbatch and Robert Dingwall, who coined the term "selective facilitation" apply conversational analysis techniques to the text of an English mediation session to show how the mediator "selectively facilitates" her position that the family home should not be sold, although the father wants to do so. The mediator presses for her position by associating it with some of the interpersonal "values" of mediation, saying, "I don't think you're proposing to cut the ground from beneath them you're not proposing to take their home away." As Greatbatch and Dingwall explain: "Her position is almost impossible for [the husband] to counter because it pre-supposes that, were he to contemplate selling the matrimonial house at this time, he could be seen as taking away his children's home. Such an action could only damage his moral adequacy as a caring parent and would thus breach one of the basic framing assumptions that mediators seek to establish and maintain: that, as caring parents, the disputants will endeavor to reach a settlement that is fair to their children." David Greatbatch & Robert Dingwall, *Selective Facilitation: Some Preliminary Observations on a Strategy Used by Divorce Mediators*, 23 LAW & SOC'Y REV. 613, 632-633 (1989).

mediator's style. Some are more visibly assertive and interventionist than others.

The mediator in John and Laura's case was a low-key type who did not make clear positional statements. Yet the text contains subtle clues which reveal the points at which the mediator became persuaded as to the correctness of Laura's views regarding strictly scheduled and limited visitation time and transferring the children at the police station.

By the end of the first joint session, the mediator is absolutely convinced that a strict schedule is better. When Laura concludes her talk for the first joint session by saying, "What I want to make sure is that we do get a schedule here," the mediator responds adamantly, "I think you may, I think you do need one. That's, that's what we'll look at." The mediator's self-repair from "you may" to "you do" reveals her own understanding of her change in position from neutrality to selective facilitation. Thereafter, the mediator promotes this position in how she handles each parent during the separate sessions. When during the private session, Laura describes her daily routine to the mediator, to explain why she needs the strict schedule, the mediator supports her with agreeable comments and affirmative backchannel utterances (understanding noises like "um hm" and "ah hah" which indicate the hearer is listening empathetically). The mediator makes backchannel utterances thirty times during the private session with Laura. Further, the mediator never tries to explain to Laura what John's point of view is, or why his work needs require him to have a flexible schedule. Similarly, when Laura asks for a provision stating that if John misses a visit he must forfeit the subsequent one, the mediator never suggests that this may be hard on John. She merely proposes that John have a right to cancel by telephone and have 20 minutes leeway in his arrival time because of the Los Angeles traffic.

The mediator's approach to John is very different. During his entire private session, she makes a backchannel utterance of support only once. In addition, whenever John advocates for flexible time, the mediator tries to ram the fixed schedule down his throat, barely listening to his pleas for flexibility. Consider the following dialogue:

M: "She's proposing that you see the children on alternate Saturdays, between 2:00 and 5:30...OK?

J: "Well, I mean, that's for, for three hours ... It's like, it -it just doesn't make sense to me."

M: "OK. Well, let me tell you what she's proposing, then, and tell me what you think might be, uh, something that would be acceptable to you. She's saying alternate Saturdays 2:00 to 5:30 ..."

J: "Yeah, I mean, she-she's flexible there, uh, ..."

M: "2:00 to 5:30 either day ? ...

J: "Like I say, that's flexible, as long as, y'know, if you're willing to talk ...."

M: "Well, y'know, I'm encouraging both of you to be on time, because I think, one of the things that I, that I think that people do when either party is late, is that what you're basically doing is give the kids over to another parent. ...And the other parent, whoever is left waiting, in other words, is usually mad, most of us get angry when we're made to wait ... and then we bring our kids, and they, think—'Oh God, y'know, they're mad at each other again.'"[124]

Similarly, during the separate session with Laura, the mediator becomes convinced that meeting in the police station is a good idea. Immediately following Laura's constructed dialogue in Sentence 19,[125] the mediator responds enthusiastically. The mediator responds with an empathetic "Right! Yes!"; thus "buying-in" to Laura's implication of causality.

By contrast, in the private session with John, the mediator shows no appreciation whatever for his position. Consider the following dialogue:

M: "Now, she's pretty firm on the North Hollywood police station.... She's not agreeing to anything public except a police station."

J: "But don't you, don't — I mean, I know you're not here to take sides; isn't that being a little bit, uh, uh, stubborn? ... I mean this kind of thing *builds* walls, it doesn't, y'know"

The mediator doesn't explicitly take sides. But her response echoes what Laura has just said:

M: "Well, I'll tell you. Y'know, whatever happens, again ... things can be changed if an event needs a change; the other thing is that, um, it's important to have a meeting group where everybody, including the kids, feel safe...."

J: "Don't you also feel the kids and still, like these-these two, just speaking of my, uh, uh, my ex and I, these two adult idiots can't get along, and they gotta — I-I, y'know that's what she's brought it down to."

M. "Well, y'know, the kids may, um, and I don't know what the kids are gonna feel, but as long as the kids feel safe, that's really the most important."

---

124. Observe how the *mediator* uses instantiated choral dialogue here to dramatize the common sense wisdom about human behavior which she marshalls in support of Laura's request for a fixed schedule.

125. Recall that in Sentence 19, *supra*, Laura says in pertinent part: "And my son and my daughter said 'Oh, that's fine, but why can't we wait inside the police station? We want to.' And I said, 'OK.' So they have to feel safe also."

Laura's constructed dialogue has triumphed. Notice how the mediator damns John's position with faint praise by failing to support him or his views in any way.

J: "You don't have an opinion, you're not; you're not gonna get involved, huh?"

M: "That's my role."

DISCUSSION: WHY THIS AGREEMENT IS NOT INEVITABLE

The above evaluation of constructed dialogue is placed in broader context by recognizing that the agreement reached in "Safe from Screaming" is far from legally inevitable or even predictable. While both parents had a history of engaging in potentially violent confrontations,[126] which the mediator properly sought to avoid through suggesting a neutral meeting place, John's proposals of such meeting places as Laura's attorney's place or the children's karate studio would have provided equally safe havens in more congenial, comfortable, and familiar locations. Further, curtailment of John's visitation, which Laura approached punitively,[127] was necessary neither to avoid interparental hostility (which a neutral meeting place might have accomplished) nor the dangers of parental drug abuse, regarding which both parents had an equivalent history.[128]

Also, the strict and severe limitation on John's time with the children (which Laura argued was mandated by her scheduling needs) seems at least arguably contrary to the California statutory mandate that frequent and

126. Laura, unlike John, has a history of violent panic attacks, which have resulted in psychiatric hospitalization. John relates: "She would, I think, let things build up inside. Her father died in a gun battle when she was 2 and she used to — just call it freak out, there were 7 or 8 times she was hospitalized in Orange County in an institution ... and then she'd just lose touch, where if you didn't hold her down, she'd actually come after you ... I would just hold her, I wouldn't know what to do to hold her, and then she'd get up and just start breaking things and tearing things." Laura has also made several suicide attempts, including one while pregnant with their son. ("...when she was pregnant with my son, she'd tried to commit suicide a few times ... And when she was pregnant with my son, she jumped in a pool; she had a big robe on, and uh, tried to kill herself. She didn't come up, and this was like the 7th or 8th time in our relationship where she really freaked out and lost it, and the one time she-she started drinking very heavily beside the pool and then just jumped in ... I jumped in, pulled her out"). These descriptions are buried in John's discursive, topic-jumping narrative. The mediator neither comments on them nor follows them up.

127. Laura: "Every single time I file a police report ... and the whole thing, and I go, like, uh — and *never* has ever happened, I mean, I never got, he's never gotten punished, if you wanna put it that way ...."

128. Both parents also had a history of drug use. John narrates "Uh, we both lived in the fast lane, I mean, even coming back from Canada, they, they wrote down, she brought a coke spoon back with her, and, uh, her idea for my birthday, then, was to go out and buy $400 worth of coke and get a limo and, uh, say Happy Birthday. It takes two." While both deny present drug use only John says "I would take a drug test to prove it." Laura says only "Well ... you can't prove that."

continuing contact with both parents is in the children's best interests.[129] Continually, since the divorce five years earlier, John had kept the children for weekends, midweek overnights and longer periods, during all of which, Laura admitted, the children were well cared for.[130] Further, John and Laura agreed that the children enjoy spending time with John,[131] who interacts more with them in sports and play activities,[132] always want to go with him, and to stay with him longer,[133] and that they procrastinate over coming home and John's leaving.[134] In addition, the strict schedule Laura demanded forced John to choose between time with his children and job opportunities — while an agreement structured around John's need for flexibility would have enabled John and the children to enjoy substantial time together with facilitating John's employment and thus, indirectly, John's ability to provide child support. Yet John's issues and suggestions, sometimes buried in lines of discursive, at times hard-to-follow narrative, did not receive the mediator's attention in the way that Laura's powerful rhetoric did.

CASE TWO:
"TWISTED PRISMS":[135] THE CASE OF JANE AND STEVEN"

----------ABSTRACT----------

SYNOPSIS OF FACTS: Jane and Steven, recently divorced after two years of prior separation, have a four year old daughter, Clara. The custody agreement provides for joint legal custody; primary physical custody for Jane; first, third, and fifth weekends of the month for Steven; an alternating division of holiday time; and an alternating division of

---

129. CAL. FAM. CODE §§ 3020, 3040(a)(1), 3161(b)(1) (West 1994).

130. John explains his standard of care: "[T]he kids have never been in any danger, ever had a scratch, and they've been with me for 5 years. When I pick 'em up, they go at it, sometimes they have scratches on their face, and, uh, with me, I'm with 'em constantly. I have never had a, a, a, a date spend the night when the kids are with me, and, y'know, that's not the case there [at Laura's]. I'm, I'm very protective of them.... I mean, the kids l-love to stay over, and I mean, like I said, in the 4 years that I've had 'em, they've never so much as gotten a scratch." Laura begrudgingly agrees "They, they usually have a good time with him. I'm the one who's uptight about it."

131. Laura states that the children want to see John because he's their "Dad"; that when he calls them on a weekend they "of course" want to go with him, regardless of what plans she has made; and that they protest if she tells them they can't go.

132. John explains that when he goes to see the children he brings "an athletic bag where I can change and get shorts on ... if the kids and I play out in the back.... I'm really tight with the kids and all ... I'm very active and physical with the kids. Uh, she's not, and the kids enjoy this." Laura, reluctantly, agrees "Right, I — here is this parent who has to, work, y'know, 60-70 hours a week to support them.... He doesn't do that. So he can play with them."

133. John makes this point and Laura, grudgingly agrees "I'll say that. So, fine, so they don't wanna come home."

134. John: "It's always a little bit difficult for me even to be at the house, y'know, the kids would ask me to stay, and I would never stay when she would, she asked me to leave, I'd leave. Sometimes the kids would, would prolong it 5 minutes."

135. This session was taped in Pasadena in mid-December 1992. Again, all names are fictitious.

summer vacation time in two week long blocks which is to start when Clara is five and a half (two summers after the mediation). Steven has petitioned to modify certain terms of the agreement. Most important, he wants summer vacation time with Clara to begin this year. Jane and Steven's marriage has been marked by non-communication. At the time of the mediation, Jane communicates with Steven about Clara by putting notes in her overnight bag; Steven's communication with Jane seems virtually nil. Jane wants Clara's summer visitation with Steven to begin at age 5 because that is when she can "relate an autobiographical incident." Steven maintains that Clara can communicate now; that Jane's position is simply vindictive.

PROCESS: At Jane's request, Jane and Steven never speak face-to-face during the session. The mediator acts as an intermediary. He speaks first with Steven, then with Jane, then with Steven, then with Jane again, to finalize the agreement and obtain her signature.

OUTCOME: Most, but not all, of the small changes are made. The following summer Steven will have Clara for five weeks in three separate time blocks (most of what he asked for).

CONSTRUCTED DIALOGUE IN THE CASE OF STEVEN AND JANE

Steven and Jane's mediation session is significantly different in form from John and Laura's. It is much briefer and consists entirely of separate sessions (four alternating separate sessions beginning with Steven). The session contains more negotiated bargaining and much less extended narrative discussion of specific incidents. Steven uses constructed dialogue 30 times; 20 instances of his constructed dialogue consist of markers of elocutionary force which dialogize his own speech (e.g., "Like I said ...."; or "I'm asking you"). Jane uses constructed dialogue only 8 times.

Steven is, indeed, the more powerful and skillful user of constructed dialogue. How and why this is so can be understood through a more detailed comparison of their respective uses of constructed dialogue in three ways : (1) to report childcare incidents and anecdotes; (2) to refer to authority figures; and (3) to talk about talk itself, both their own and others.

Although the childcare talk is briefer than in the "Safe from Screaming" case, it is similar in purpose and function. Steven recounts two incidents using constructed dialogue.

Steven's Use Of Constructed Dialogue To Recount A Child-Related Incident.

(32) "Clara came with a hand print on her face and then she said it was from falling down the slide."

(33) "Clara has a spot of spaghetti sauce on her head ... I left before she came to pick up Clara. It was at a mutual friend's house and she later reported back to me that Jane was going to make a big deal that Clara had somehow, that I had abused her and my friend Sam said 'Jane, I think if you take your finger and lick it off you'll find it's spaghetti sauce.' And indeed it was!"[136]

Once again, the use of constructed dialogue conjures up vivid, emotionally involving scenes, even though, in the second instance, Steven purports only to recount a story which has been told to him rather than an event he has experienced. Steven's "retelling" accomplishes two things. First, it makes Jane's concern with the inadequacy of Steven's parenting skills seem absurdly exaggerated. The hearer readily imagines Jane tasting oregano flavored tomatoes as she intensely licks her finger! But it also shifts responsibility for this appraisal of Jane's anxieties and Steven's abilities from Steven to the objective voice of the "mutual friend," a witness who speaks through the constructed dialogue. It is the mutual friend, not Steven, who finds Jane so obsessive as to be comic!

Steven's self-repair ("That Clara had somehow, that I had abused her") is especially interesting. In using the passive voice, Steven's first impulse is to minimize any suggestion that he has harmed Clara. He apparently begins to say "that somehow Clara had been abused." But he quickly realizes that through the constructed dialogue of the "mutual friend" as an objective witness any possibility of his having abused Clara will be eliminated. And he therefore repairs by painting himself in the worst semantic light ("That I had abused her") so that the innocence of his behavior can shine all the more brightly through the comment of the mutual friend.

Steven uses the constructed dialogue of authority figures (doctors, lawyers, and his father) eight times to add the weight of their authority to his own demands.

Steven's Use Of Constructed Dialogue To Refer To Authority Figures

(34) "A lot of things ... I said I did not want in there [the original custody agreement], he [his first attorney] assured me they were not in there."

(35) "According to my attorney she [his daughter] is just as capable of being sick at my house as she is at her mother's house if she's able to travel."

---

136. Jane also tells one such story well: "My daughter is real attached to her blanket and it's a major problem for him.... Well, she said 'I want my blanket' and he said 'Nah, you're too old.'" However, Jane's timing of the telling is off. She recounts it only after an agreement has been reached. When she answers in the negative to the mediator's question "Will that break the agreement if he has an issue about that?" the mediator ignores her story.

(36) [Referring to his request for the telephone number of his daughter's pre-school] "I believe the doctor says I'm entitled to that right and I didn't get that."

(37) [Regarding his right to take care of his daughter if Jane goes out of town] "My attorney said it is pretty standard and that it should not be a problem."

(38) [Regarding his request to have the no drug or alcohol use clause removed from the agreement] "My attorney said there is no way to enforce it"

(39) "Like my dad says 'If you don't ask for it you don't got it.'"

In each of these instances, the voice of the authority figure is called upon to "back up" some specific demand of Steven's; suggesting, perhaps, in addition, that he is ready and able to litigate to obtain it if necessary.

By contrast, Jane uses a quotation from an authority figure only once. In attempting to show the mediator why she is distrustful of Steven's parenting skills, she recounts an incident in which Clara came home from a visit "all glazed over" and, not knowing what else to do, she took her to the doctor to file an abuse report. But, as with John in the previous case, she is snagged by her own emotional ambivalence and the constructed dialogue reflects only that. She articulates neither a demand nor a reason for one.[137]

Jane's Use of Constructed Dialogue to Refer to an Authority Figure

(40) "The doctor said 'I'm not going to write this down ... but it could be emotional trauma, it could be neglect, it could be she's coming down with something, I don't know.'" (Hearing this, the mediator doesn't know either and when he asks for the outcome she can only shrug her shoulders).

Two thirds (20 out of 30) of Steven's use of constructed dialogue consists of markers of elocutionary force which he attaches to his statements or his repetitions of the mediator's statements, to give them emphasis by treating them as though they were reported speech.[138] Two of these refer to a previous event,

137. Professors Maccoby and Mnookin find that nearly two out of three mothers, and about 40% of all fathers in their California study express doubts about the other parents' competency as a caretaker for the child. ELEANOR E. MACCOBY & MNOOKIN, *supra* note 23, at 84-85. If Jane wants to alert the mediator that there is a factual basis to her fears she needs to tell a rhetorically and substantively compelling story.

138. *See* LAURENCE GOLDMAN, TALK NEVER DIES: THE LANGUAGE OF HULI DISPUTES (1983) (in commenting on the legal rhetoric among New Guinea's Huli people, Professor Goldman remarks on the power that talking about one's own talk gives to an orator discussing a dispute, e.g. "I say this now ...")

a conversation with his attorney.[139] Seven times they refer to a prior time during the current mediation session, thus once again emphasizing that he has a demand or has made a point from which he will not budge.[140] Ten times he refers to the sentence he is at that moment speaking.[141] Twice they refer to a statement he is going to make during the current mediation session.[142]

In marked contrast, Jane constructs her own speech and that of others as though it were non-speech or silence. For example: "But I don't know what to tell her and what not to tell her and try to prepare her and what's too much."; "I don't know how much to tell her and how much not to."; "Since there is really no basis to say no, I don't really know what I have to say about it." Her statements consistently emphasize her lack of knowledge: "What more is he asking for?"; "He never asked."; "I don't really know what more he wants."; "It's just that he's never asked for it."; "If he's that uncomfortable talking to me he can stick a note in the bag."; "If I actually talked to him sometime and knew what he was like."

Ironically, the absence of constructed dialogue which makes Jane's narrative sound insipid is, at least in part, a function of the relationship between Jane and Steven. Both Jane and Steven perceive their relationship as lacking in communication; but they express this lack very differently. Steven sees himself as having legitimate rights and demands which Jane wilfully refuses to fulfill. Paramount among them is his right to communicate with and have substantial visitation with his daughter.

Although to my eyes, Steven appeared to be on the verge of explosive anger throughout the mediation session, his speech is a composed and articulate list of demands specifically structured around numbers and times.[143] He

139. ("A lot of things ... I said I did not want in there [the custody agreement]") ("I flat out told my attorney that was not acceptable to me and that there was no reason why I shouldn't have summer visitations starting right away.")

140. ("Like I said, I only got her on the weekend of Easter but not for the spring break.") ("I did say I wanted an explanation of illness from the doctor, not just a billing statement.") ("Like I said, I just get a billing statement that says Clara went to the doctor.") ("Like I said before, if I can take care of Clara for one two-week period without a problem, I am pretty darn sure I can take care of her for alternating two week periods.") ("I told you right flat out when I came in here that that was one.") ("I've pretty much spelled out what I want so if I agreed to four weeks instead of every other two, I'm compromising and still letting you know that that is not what I wanted.")

141. ("Let me just tell you that has been the one thing that I went back and back and back.") ("I also want to say that that's a first.") ("I'll tell you right now ... I wouldn't ask for all four weeks in a row, it would be two here and two somewhere else.") ("Okay, let me ask you this. If I go home after having agreed ... have I given up my right to ask the judge for that?") ("No, I'm not saying that.") ("Ill say this, it seems that there has never been a reason to have have her starting till 1994.")

142. ("I want to ask for five instead of four [weeks].") ("I'm going to say one more thing then I'm going to drop it.")

143. Steven has prepared himself for the mediation session. He has obtained a list of demands from United Fathers, a fathers' rights organization and articulates them specifically. He has already obtained some of them previously. For example, Steven has visitation with Clara on the first, third, and fifth weekends of the month as opposed to the more usual alternate weekend schedule — giving him two additional days with Clara whenever there are five weekends in a month. Steven's narrative, like Jane's, is a story of miscommunication and manipulation. But he expresses his concern over the lack of communication with his specific demands for information. He asks for doctor's reports, school information, unmonitored telephone calls, and that letters he writes to Clara be opened directly by her. He, like Jane, is seeking direct communication with and through Clara.

expresses his view of himself as a wronged father in the classic discourse of rights — a word which he uses seven times.[144]

Jane, on the other hand, sees herself as a victim without a voice — a condition which she emotionally extends or projects onto her daughter.[145] Jane has difficulty communicating with Steven because of her need to escape from the psychological manipulation he exercised over her during the marriage and through Clara.[146] Consequently, she is unable to judge his parenting abilities.[147] She wants Clara to tell her what happens, and how Clara feels about visits with Steven, but Clara is too young to recount such things. Therefore, Jane doesn't want Clara to spend extended weeks of vacation time with Steven until she is older.[148] What Jane hears, what is at issue to her in this case, is silence.[149] She therefore fails to construct dialogue, and even talks about talk without using dialogue.

Jane's Talk about Talk Without Using Constructed Dialogue

(41) "It was a lot of name calling and I cut off my family and he was telling me which friends were allowed in the house."

(42) "I could not even be in the room with him without getting in a confrontation and there was just incident after incident if

---

144. Steven has been wronged by the disinterest and incompetence of his trial attorney: "I had very inadequate representation the day I was in court.... I had never met this partner, he had never even looked at my file before the morning of the hearing.... I tried to get him to take recourse and he was very inept at doing that." He is being wronged by the vindictive manipulations of his former wife: "There has just been so many games played that I want to ensure that I am going to have my rights ... She has gypped me out of weekends." Steven says of Jane "I think it's just a case of extreme vindictiveness.... Yes, and I think its fueled a lot by her step family because I don't think she has a backbone of her own."

145. She is concerned ("for a long time he was really unable to put her needs first ... and I don't know if he really fits her in."). Jane says of Steven "[He exercised] a lot of mental control over me ... as time went on it was getting tougher and tougher to fulfill all those responsibilities and satisfying him.... He was really unable to put ...[Clara's] ... needs first ... he wasn't above using her to manipulate me but I don't know if that's a factor anymore."

146. She explains "While we were married he had a lot of mental control over me.... Even now when I see him and I'm dropping my daughter off and I visit, just his look and his tone of voice is enough to send me wanting to dive under the dashboard of the car. So it makes it really hard for me to communicate with him."

147. When the mediator asks if she thinks he is a good father she says, "It's hard to know because he was far away.... If I actually talked to him sometime and knew what he was like."

148. Therefore, "the reason I was sticking to five years old is that according to my school district, five years old is when you are able to relate an autobiographical incident with clarity and she can tell me if something is disturbing her."

149. Steven, however, cannot or will not deal with this as a relational problem Jane has with him (although at the mediator's urging he eventually agrees to send her notes). He says: (1) "She know as much about my parenting skills as I know about hers. What's for me to say that she's being a good parent? I don't see her being with Clara"; (2) That he has had Clara given a Peabody Picture Book Test on which she scored seven months ahead of her age group (which would make her maturation level that of a 5 year old on the summer in question); and (3) that "she was fine with communicating her needs for two weeks" during the previous summer "so what's the difference between that and every other two weeks?" (thereby conflating the matter of communicating to him with the matter of communicating about him).

dinner wasn't cooked right, the trash wasn't taken out on time, the cat wasn't being taken care of, the baby was crying."

(43) "When Clara comes home she complains about the visit. She had a two week vacation with him in the summer and came home and declared that she was never going again.... She just said she didn't like it."

(44) "She's got bruises all across her forehead from being where they were loading a bus and he didn't tell me what those bruises were from I had to get it out of her and it took two days."

(45) "Right now she'll come back from a visit and something disturbs her, it takes me days to drag it out of her. Guess she just doesn't have the range for it."

(46) "There was an incident when I went to pick her up and she was just glazed over and couldn't talk and she was answering in...."

Unlike Steven, Jane does not speak of her "rights" but of what is "right" for the child.[150] Her sentences are fraught with an indecisiveness reflecting her own ambivalence — her worry that Clara should spend time with Steven but may be harmed thereby in some indeterminate way;[151] her anxiety that she is projecting her own emotions onto Clara; her fear that her worry is not a projection;[152] and her need to be reassured through Clara's words,[153] because Steven will not speak to her. She is trapped in a tangle of relationships which she is unable to unravel and reformulate. Jane's repeated use of sentences

150. Even though she admits she is "scared to death" of Steven, she says "I want to do what is right for my daughter and that is why I am here."Her narrative is reminiscent of the "ethic of care" crisis described by Carol Gilligan in her pioneering study on "woman's voice." Professor Gilligan writes

> [T]he logic underlying an ethic of care is a psychological logic of relationships which contrasts with the formal logic of fairness that informs the justice approach.... It is precisely this dilemma - the conflict between compassion and autonomy, between virtue and power - which the feminine voice struggles to resolve in its effort to reclaim the self and solve the moral problem in such a way that no one is hurt.

CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 71 (1982).

151. ("The reason why I was objecting ... up to now is because I do not know what kind of a parent he is."); ("But I don't know how he is with her."); ("I want her to have time with her dad, but I don't know how much would be harmful?" [clearly said as a question to which the mediator responds that it will only be harmful if it is abusive]); ("I want him to have a good time with her but I don't see that towards me has changed."); ("I don't know what he's like towards her.")

152. ("What tools she needs to deal with going back and forth - I want it to be easy for her and I want her to feel confident in going. But I don't know what to tell her and what not to tell her and try to prepare her and what's too much.")

153. ("[T]he reason I was sticking to five years old is that according to my school district, five years old is when you are able to relate an autobiographical incident with clarity and she can tell me if something is disturbing her.")

employing the "I want ... but" syntax communicates her uncertainty, and signals to the mediator that she can be persuaded.

Just as in "Safe from Screaming," John's fixation on his relational problems is disempowering because it results in his disorganized, non-responsive and almost stream of consciousness dialogue, Jane's relational problems disable her in a more direct and obvious way. Consistent with the trope of silence which runs throughout Jane and Steven's case, Jane's relative disempowerment, resulting from her emotional ambivalence, is reflected in her inability to formulate any counter-proposal and her repeated terse and simple statement that she does not know what to do.[154]

---

154. This theme repeats itself in five critical turns of talk with the mediator about Steven's increased summer visitation:

(1) M: "So how does that pertain to the summer matter of vacations starting in 1993?"

J: [long pause]. "Well, I don't like it, but I don't know how much of that is just me."

(2) J: "If I actually talked to him sometime and knew what he was like..."

M: "Do you want to talk to him now? I thought it was your desire not to."

J: "Yeah, it is but I don't know how he is with her. I only know how he is with me and when we were together he wasn't above using her to manipulate me but I don't know if that's a factor anymore"

M: "I can't shed light on that"

(3) M: "What did it end up being?" [regarding Jane's suspicion that Steven has abused Clara]

J: "I don't know what tools she needs to deal with going back and forth - I want it to be easy for her and I want her to feel confident in going. But I don't know what to tell her and what not to tell her and try to prepare her and what's too much. ...I don't know how much to tell her and how much not to."

(4) J: "I want her to have time with her dad, but I don't know how much would be harmful?"

M: "Well, it won't be harmful unless there's an abusive environment ... if you don't suspect abuse, well, how do you feel about the summer of 1993?

J: "I'm not comfortable with it, but since there is really no basis to say no, I don't really know what I have to say about it."

(5) M: "If you truly feel it's inappropriate for the child I cannot argue with you.... If you feel it is inappropriate for the child then you should say that."

HOW THE MEDIATOR RESPONDS TO STEVEN AND JANE

The mediator's conviction that it is developmentally appropriate for Clara to have extended summer visitation with Steven is crucial in shaping the agreement which ultimately results. Unlike John and Laura's mediator, the mediator in Steven and Jane's case is overtly interventionist, making his position plainly and directly known to both parties. He mediates with a definite strategy, asking parents why they want what they ask for far more often than the other mediators I observed. He explained to me that he tries to get parents to understand the reasons why they want certain things so that he has a basis for judging their range of flexibility and for suggesting alternatives which might be equally satisfactory but make compromise more likely.[155]

During the first separate session with Steven, the mediator signals his agreement with Steven's request for extended summer visitation to begin when the daughter is four and a half. He says, "Alright, it doesn't sound like you want too much." This certainly gives Steven a hint that, if he remains insistent, the mediator will press Jane for what he wants. Then the mediator provides a psychological rationale to support Steven's view that Jane is being unreasonable. He explains, "Well, you know when people are in an antagonizing position they see everything in such a twisted prism that everything is unreasonable."[156]

Even before meeting with Jane, Steven's powerful speech has influenced the mediator, so that Jane, the weaker speaker, has an even steeper uphill task.[157] In sixteen separate efforts at persuasion, the mediator employs various

> J: "I want him to have a good time with her but I don't see that towards me he has changed, and I can only assume that towards her, maybe he hasn't either, and that is what has me concerned. He did not really spend quality time with her before and he really didn't meet her needs when were together, and all I see is his manner towards me and I don't know what he's like toward her."

155. This explanation took place in response to my question, over lunch, immediately following the session with Jane and Steven.

156. There is an internal clue in this session that Steven's insistence is increased by the mediator's agreement. When Steven says that he wants the no use of drugs or alcohol provision removed from the visitation agreement, the mediator says, "I see this as an appropriate clause myself" and Steven quickly, and voluntarily drops the issue, saying, "leave it in. Fine. I have no problem with it. It's not part of my life."

157. Professors Sara Cobb and Janet Rifkin find that parties who tell their story of a dispute first in a mediation session have narrative dominance, establishing a privileged position regarding the accounting of an event, so that the second speaker's story becomes a subplot, reaction, or revision rather than a true alternative. Sara Cobb, *Empowerment and Mediation: A Narrative Perspective,* 9 NEGOTIATION J. 245 (1993); Sara Cobb & Janet Rifkin, *Practice and Paradox: Deconstructing Neutrality in Mediation,* 16 LAW & SOCIAL INQUIRY 35 (1991). In their words, the dominant narrative "colonizes" the other. *Id.* at 35. Unfortunately, Professors Cobb and Rifkin do not discuss the relationship between narrative dominance and mediation

techniques to encourage Jane to concede to Steven. Three of these are distinctive enough to warrant special discussion.

First, the mediator tells Jane repeatedly, that in the mediator's (professional) opinion, the extended summer vacation is developmentally appropriate. The mediator tells Jane that Steven's request is "reasonable." He repeats later "She's going to be 4 and 1/2 years this summer; instead of 1994, it is appropriate to ask for the summer to start this summer." He tells her that the daughter cannot possibly be harmed by having "too much" time with the father, unless Steven is abusive. The mediator's position remains constant. Her narrative does not persuade him that what he believes to be the developmentally appropriate norm is inappropriate in this case.

Second, when the mediator tells Jane that the choice is hers to take a position, and that he will bring back to Steven whatever she says, the mediator again stresses that he thinks Steven's request is reasonable:

> I cannot in any way coax you into what you need to do. I think it is appropriate for the child and if you get this perspective and you agree, then fine, but if you don't you need to say that — I cannot say that to you. You need to say that and I need to negotiate with him.

The double-message to Jane is clear here. The mediator will present her views, but not very forcefully.

Third, the mediator tells Jane two full fledged mythic cautionary tales, each based on a prior case he has mediated, to encourage her to separate what he believes to be her relationship issues with Steven from consideration of the child's best interest. The first tale is an expanded version of the "twisted prisms" metaphor he has told Steven to describe Jane. The mediator recounts:

> [The mother] comes to pick up her 5 1/2 year old daughter [at the father's house]. [The father] has dinner with his own family and children at 7:00. So he asks her, to know whether to wait or not, 'Are you going to feed her dinner?' But people aren't like that, that is not what she hears. People have very twisted prisms. She hears, 'Are you going to control me again?' That's what happens unfortunately, people who come through these doors always behave in a manner which are most oblivious to the other side. I have seen maybe two or three cases where the people are able to place themselves in the shoes of the other and just address the issue of the children. That is rare unfortunately. Invariably, they use the child - sometimes even maliciously.

Multiple messages are contained in this tale. The mediator is telling her that she is behaving, or constructing her emotions improperly. This is normal, not unusual - almost everyone does it. But it is unfortunately adverse to the child's best interests. The tale illustrates the particular task facing Jane: do not misperceive Steven's present concern with the child's interest as an attempt to manipulate you just because Steven has manipulated you in the past. It presents the goal which Jane must aspire to in the future reconstruction of her

---

outcome. Neither do they amplify their statement with a detailed textual analysis of dominant and colonized narratives. Further, speaking priority probably plays a more significant role in the community mediation context studied by Professors Cobb and Rifkin, where first and second speakers are analogous to plaintiffs and defendants than it does under the more amorphous legal standards and joint conversational approaches of child custody mediation. Nonetheless, the importance of getting the first turn may be significant in this case where the process was mostly negotiational and the parents never met face to face.

relationship with Steven - she must separate her own emotional responses to Steven from her concern with Clara's interests.

Further, the tale presents an example with "Right" clearly weighted on Steven's side. Although Jane expresses some legitimate doubts about extended visits with Steven (the child comes home with bruises, or 'glazed over;' she doesn't talk about her experiences, declares she won't go again, or "pitches a fit" before visits), no such doubts are legitimated by the tale in which the father only wants to know whether to feed his child dinner. By implication, the possibility of harm to Clara becomes a null category.

In addition, the tale reflects the moral structure of mediation: when interparental emotions are tense they are to be pushed aside in the child's best interest. Thus, it contains a built-in incentive for Jane. The necessary task is also difficult. Many fail, blocked as they are by the shadows of misperception. But if Jane succeeds she will be a heroine.[158]

The second tale is to similar import. The mediator recounts:

> Earlier today there was a mother here who honestly thought that morally it was not appropriate for her 16 year old to visit dad because he was living with a 'bimbo.' So this is a 16 year old and she wanted the father to send the 'bimbo' away for the weekend the child was there. But I talked to this teenager and he wanted to be with dad and he liked his girlfriend but he didn't want to offend his mother. Sometimes people use those moral issues seemingly in a congruent manner but, I think, inappropriately. If you feel it is inappropriate for the child [not to have extended summer vacations in 1993] then you should say that.

The message here is similar to that in the first tale: Don't disguise your personal animosities towards the father's lifestyle as protective concern for the child's best interests. But it is even stronger, adding the dimension of developmental appropriateness which dominates best interests jurisprudence. By analogy with the tale, the mediator tells Jane that if she doesn't permit her 4 and 1/2 year old daughter to have extended summer vacations with her father she will look as ridiculous as the mother who doesn't want her almost grown-up son to spend time with his father's girlfriend (and perhaps become the subject of the cautionary tale told to the next mediating couple). The telling of this tale towards the end of the separate session with Jane virtually dares her to capitulate — she should hold out only if she wants to emulate the woman in the tale.

Then, the mediator speaks with Steven again, in a second private session, to work out a compromise summer visitation schedule. At this point, Steven wants to have six weeks of visitation, which he is willing to take in two week blocks. Jane wants Steven to have only two weeks altogether, but is willing to compromise. The mediator is true to his word. He presents Jane's position, but as one which is different from his own:

> She has a problem. I don't want to get into what her problem is with that, I think it's appropriate for the child to spend time with you more

158. Skilled trial lawyers also use narrative elements in constructing their stories of the case. Really good ones may involve the judge or jurors as protagonists. *See* Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y.L. SCH. L. REV. 55 (1992) (describing how the criminal defense attorney constructs the narrative of the trial in such a way that the jurors will be heroes if they overcome the obstacles of the prosecution's evidence and do the right thing by acquitting the defendant).

> than two weeks.... Look, you want to call it emotional, her baggage, her emotional whatever you want to call it ... I don't know why and I don't know that I can present appropriately what the reason is for her. It is something that is — she has difficulty with ... I'm just giving you her perceptions. You both have your own perceptions. I'm saying that she has some issues about the lack of knowledge.... All I'm saying to you is that [is] her perception....

The mediator offers Steven the compromise of four weeks vacation. Recognizing that the mediator's views support his own insistence, Steven presses for five weeks — only one week less than his initial demand. The mediator responds "I think five weeks for you would be great. It's appropriate for the child to spend time with you in my opinion. I can speak to mom and I'll ask her." The result is almost a foregone conclusion. In their second private session, the mediator tells Jane, "He was very insistent ... so I offered the compromise of just five weeks. Can you handle that?" And Jane replies, "Yeah, that's fine." Steven has prevailed.

DISCUSSION: WHY THIS AGREEMENT IS NOT INEVITABLE

Just as in the "Safe from Screaming" case, the agreement reached here is far from a foregone conclusion as a matter of law. Although Jane does not press her case forcefully, there are a number of reasons for questioning the appropriateness of longer visitation: Steven's visitation time began with supervised visitation; Clara complains about the visits and has to be "bribed" (with McDonald's) to go; and, at least once, Clara came home having been seriously bruised by a bass drum (an accident, but possibly one reflecting carelessness on Steven's part). Further, the child already has substantial time with her father (alternating weekend visitation, two weeks in the summer, and half of each vacation period).[159] Finally, the existing agreement, reached in open court, is only two months old. A court might well be very reluctant to change so recent an agreement, with no new facts to support it. Thus, in this area of great legal indeterminacy, persuasive rhetoric has a critical impact on the terms of agreement.

---

159. This is more than sufficient to meet both her developmental needs and the statutory mandate of close and continuing contact. *See supra* note 129. Also, compare how little time was found adequate under the same statutory mandate for John, the constructed dialogue weak speaker in the "Safe from Screaming" case.

CASE THREE:
"STOPPING PAYMENT": THE CASE OF GREGORY AND ALEXA[160]

The "Stopping Payment" case is discussed here for purposes of contrast with the preceding two cases. In this case, the parties are at a virtual parity of power as regards constructed dialogue. Gregory uses constructed dialogue 32 times during the session. Alexa and her boyfriend Henry, together, use constructed dialogue 28 times. The mediator remains neutral throughout.

----------ABSTRACT----------

SYNOPSIS OF FACTS: Gregory and Alexa came to mediation in an effort to revise their custody and visitation agreement, in the context of their having filed mutual orders of contempt. Gregory was alleging that Alexa had obstructed and denied his visitation with the parties' three daughters, ages 7, 13, and 17. Alexa was alleging that Gregory had failed to abide by the existing agreement, and was late in his support payments (a matter which the conciliation court has no jurisdiction to address).

Most of the discussion at the mediation session is about a single event. While Alexa and Henry were out-of-town skiing, Gregory gave the monthly support check to the thirteen year old daughter, Vera, for delivery to her mother. The check was lost. Vera telephoned Gregory to ask for a replacement check. Gregory said he would provide another check if Alexa paid the $10 to stop payment on the original check. Later, Vera telephoned Gregory again. She told him that she herself had lost the check and that Alexa wanted Vera to pay the $10. Alexa gave Gregory the $10 when he came to pick up the children for visitation.

PROCESS: The mediation session is conducted primarily in separate sessions. The first private session is with Gregory. The second private session is with Alexa and Henry, the man with whom she is living. Thereafter, the three meet for a very brief and informal final joint session.

OUTCOME: No agreement is reached. The case concludes with the mediator recommending that a child custody evaluation be conducted and asking the parents if they would voluntarily agree to it and let him know in two weeks.[161]

Nearly all the constructed dialogue concerns the telephone conversations between Vera and Gregory, or the conversation between Gregory and Alexa, in

160. This session was taped in downtown Los Angeles in late February 1992. Again, all names are fictitious.

161. The child custody evaluation is the next escalation of a child custody case where no agreement is reached in mediation. The parties can either agree to the evaluation, or the mediator can make a recommendation for an order of child custody evaluation to the judge, who will usually go along with the mediator's request and so order it. CAL. FAM. CODE § 3183(b).

front of Alexa's house, when Alexa gives Gregory the $10.[162] Gregory, on the one hand, and Alexa and Henry on the other hand, allocate responsibility and blame differently in their differing constructions although they are reporting the same conversations.

CONSTRUCTED DIALOGUE IN THE "LOST CHECK" TELEPHONE CALL

Gregory's Constructed Dialogue[163] About the Conversation with Vera Regarding the Lost Check

(47) "She [Alexa] went out of town last week or 2 weeks ago. She told my girls, 'Lie to your father. 'I'm not home.' She told the kids.... They don't 'She is not home."

(48) "I give the child support payment to Vera on February 1st.... Next day I ask her, 'Did you give the check to your mother?' 'Oh, yes.' She was lying because her mother was in the ski location. She came back 10 days later and the check wasn't in the house. Vera comes to me again; she's putting her in the middle. She has a lawyer. I have a lawyer. Vera comes to me, 'Dad, Mom lost the check. Can you give us other one?'"

(49) "If I sent it by mail, she's [Alexa] not cashing the check for 10 or 15 days, and she [Alexa] says I'm send the check late."

(50) "The check was lost. She [Alexa] said give her other check. I said 'I'm more than happy to give other check if she give me $10 to stop payment.' And the same day, same night, Vera calls me, said 'I think it's my fault, and I have to give her the $10.' She's playing guilt feeling with me, she knows, money was no object with her."

(51) "She [Alexa] asked for other check, she thought was making stop payment at no charge to her....Yeah, she asked for the other check, because she wants the check, yes."

---

162. For ease of intelligibility, the dialogue is analyzed topically rather than in the sequence it was said during the mediation session. Within each topic, however, the instances of constructed dialogue are presented in the chronological order in which they were said.

163. The dialogue is presented *verbatim*. Gregory's statements require some close reading because he is an Eastern European immigrant whose grammar is often confusingly incorrect.

Henry's Constructed Dialogue About the Conversation with Vera Regarding the Lost Check

(52) "Um, we have suggested to Vera that she handle it in the way that's most comfortable for her, as far as the ... in-interacting in what is essentially an agreement between Gregory and Alexa. That if she feels OK in taking the check, that's no big deal for her, that's fine. Now that it's become an issue, we've given her the option to allow her to choose, and say, 'It's OK if you tell your dad just to mail it, and to take you out of the process, so that you're not responsible.'"

(53) "When Vera brought the check home, and it got lost, she was given the responsibility for it, and we, as you do, feel that that's inappropriate and unfortunate that this happened, although we tried to make it a learning experience for Vera overall, and not focus on it as an accident. But when she'd been contacting him and said, y'know, 'I lost the check, it got lost, it was given to me, it was my responsibility,' he accuses, that 'You're a liar, you're a liar. You've been put up to this.' That, see, and she says, 'No, I'm not, this really hap'.... 'No, you're lying to me. What is your, how did your mother tell you? Who's telling you to say these things?' So she's ... like this, all the time. She's a nervous wreck."

(54) "And that's what we, basically we said that to Vera as well, but if she feels as though she doesn't want to, this process, just tell him, 'Use the mail. Just mail the check. I don't wanna carry it.' And we've told all the kids that it's OK for them to say to their father, 'Dad, this is between you and Mom; I don't want to carry it.'"

Both the similarities and differences between Gregory and Henry's respective constructed dialogues express their divergent views of the complex relationships among the people involved. There is little difference in content between Gregory's account of what Vera says when she admits to having lost the check (Sentence 50: "I think it's my fault, and I have to give her the $10") and Henry's account (Sentence 52: "I lost the check, it got lost, it was given to me, it was my responsibility"). Probably neither is reporting verbatim (for one thing, it is unlikely that American born Vera forgot to use the indefinite article "an" between "us" and "other" in Sentence 48 as Gregory reports it). The differences in the words Gregory and Henry use indicate that their dialogues are more reconstruction than memory. But each quotation is a rough

paraphrase of the other, suggesting that each man is reporting the gist of what he remembers having heard. There, the similarity very nearly ends.

When Gregory "quotes" Vera's words they convey a sense of ambiguity and uncertainty — the words of a child who is being made to shoulder blame but is not at all convinced that she has done wrong ("I think it's my fault"); the lack of conviction expressed by someone whose strings are being pulled. The implicit message in Gregory's account is that Alexa is manipulating Vera as a means of manipulating *him.* In Gregory's version, the whole problem results from Alexa's successive manipulations. First, Vera loses the check because Alexa has told her to lie about her not being home. (Sentence 47: "She told my girls, 'Lie to your father, 'I'm not home.'"). Then Alexa makes Vera take responsibility to "guilt trip" Gregory into paying for the stop payment. (Sentence 50: "Vera calls me, said 'I think it's my fault, and I have to give her the $10.' She's playing guilt feelings with me, she knows, money was no object with her.")

Gregory's point is that Alexa's words determine Vera's words. And he makes this point, dramatically, by constructing a dialogue in which causality is implied through the sequence of statements:

> She [Alexa] told my girls, 'Lie to your father. I'm not home.' They don't 'She is not home.' (Sentence 47) ... Next day I ask her [Vera] 'Did you give check to your mother?' 'Oh, yes.' She is lying because her mother is in ski location. (Sentence 48) ... The check was lost. She [Vera] said 'Give her other check' I said, 'I'm more than happy to give other check, if she give me $10 to stop payment.' And the same ... night Vera calls me, said 'I think it's my fault, and I have to give her [Alexa] the $10.' (Sentence 50).

Gregory uses constructed dialogue to shift responsibility for the lost check from Vera, whose words he has actually heard, to Alexa, whose words he has not heard and cannot possibly remember (because they have never been repeated to him). He constructs a dialogue in which "memories" of what Vera said to him are connected with fabrications of what Alexa said to Vera privately ("Lie to your father. 'I'm not home.' ... They don't 'She is not home.'").

Gregory quotes Alexa as telling the girls to lie to him. He puts these words directly into her mouth, although he has neither heard them, nor heard them reported to him by the children. In this way, he shifts responsibility and blame for the misrepresentation away from himself, and also away from his daughter who made the misrepresentation, if anyone in fact did, and onto Alexa. He communicates the idea that his children tell him things that are not true not because they want to — but because they are victims of their mother's manipulation. He doesn't know this for sure — it is merely his interpretation of what takes place. But he makes the point appear not merely factual and salient, but dramaturgically emphatic by reconstructing Alexa's dishonest words. Through a linguistically interesting use of constructed dialogue, Gregory communicates his belief that his daughters would have spoken differently if they had been allowed to speak freely.

Rather than saying what they actually told him, he says what they did not say in the form of a quote (Sentence 47: "They don't 'She is not home.')

Implicitly, this construction conveys the sense that this is what they would like to say if Alexa were not manipulating them.

Further, Gregory includes in his constructed dialogue Vera's statement, "'I have to give her [Alexa] the $10.'" (Sentence 50). Significantly, this statement is absent from Henry's account of the conversation (Sentence 53). The statement scores a strong point in Gregory's favor in two respects. First, it suggests what a vicious mother Alexa is. In effect, it says "how terrible that Alexa is punishing a child for such a minor accident when she can well afford the $10." Second, it illustrates poignantly how Alexa uses the children to manipulate Gregory. How could he not but want to cover the cost of stopping payment himself if it is innocent Vera who must otherwise be made to shoulder the cost? Here, again blame and responsibility subtly shift from Vera who, by her words, takes responsibility for the loss to Alexa who refuses to pay the $10.

Now compare Henry's decidedly different version of the same conversation.[164] When Henry "quotes" Vera, her statement becomes that of a mature adolescent trying to take responsibility for her own acts (Sentence 53: "I lost the check ... it was given to me. It was my responsibility.") Now responsibility for Vera's predicament is emphatically shifted away from Alexa and squarely onto Vera's shoulders.

Henry's implicit point is that Gregory puts Vera in a tough position and attacks her when she tries to measure up to it. In Henry's version, Gregory emotionally upsets Vera by accusing and interrogating her. (Sentence 53: "[H]e accuses, that 'You're a liar, you're a liar. You've been put up to this.... What is your, how did your mother tell you? Who's telling you to say these things?"). Henry makes his point most emphatically. He "repeats" dialogue he has never heard (having been neither a party to the telephone call nor with Gregory when it took place). And, he emphasizes it with repetition ("You're a liar; you're a liar ... you're lying to me.'). Just listening to Henry, the hearer can feel the pounding intensity of Gregory's accusatory words.

And it is just this pounding to which Alexa's boyfriend wants the mediator to respond. Gregory might well have accused Vera of lying — he uses the word "lie" repeatedly in his own narrative. But if Gregory did do so, the import from his perspective was very different. He was trying to find out why Vera kept changing her story — first saying Alexa was home when she wasn't; then saying Alexa lost the check when perhaps she didn't; and finally saying that Vera had lost the check and had to pay for the stop payment. Perhaps she didn't? No wonder Gregory is hurt and angry that he can't get a straight story from his own children.

Henry's and Gregory's versions make an interesting contrast. Henry's use of constructed dialogue to tell the mediator what Gregory said to Vera during the telephone conversation parallels Gregory's reconstructions of what Alexa says to the children. Just as Gregory could not possibly have heard Alexa speak to Vera, Henry could not possibly have heard Gregory talking first hand by telephone to Vera. If Vera reported these words, Henry does not say so. Instead, he shifts responsibility from Vera, the speaker he probably heard, to

164. He was not a party to the conversation. Nor does he say how he learned of its contents. Did he overhear it? Did he get a report from Vera? Or is he simply "repeating" what he supposes must have been said?

Gregory, the speaker he almost certainly did not hear. Both Gregory and Henry use constructed dialogue to dramatize the stress placed on Vera but in Gregory's narrative the responsibility for the stress is passed onto Alexa while in Henry's narrative, responsibility for the stress is passed onto Gregory.

Throughout, Henry presents Alexa and himself as supportive of Vera, reporting their own sagacious advice in Sentences 52 and 54. Yet, once again, there are internal clues that Henry is not reporting any actual conversation, but an instantiation representing what has "basically" (Sentence 54) been said. Further, Henry does not place his own words in quotations. Rather, he constructs Vera's. (Sentence 54: "' Use the mail. Just mail the check. I don't wanna carry it.... Dad, this is between you and Mom; I don't want to carry it.'").

The dialogue Henry constructs in Sentence 54 is a linguistic parallel of Gregory's statement in Sentence 47 ("They don't 'She's not home.'"). In Gregory's sentence the quoted non-quote is Gregory's expression of what Vera would say if she were allowed to. In Henry's sentence, the quoted non-quote directly challenges Gregory's implicit allegation of manipulation by expressing the idea "Here's what Vera has freedom, permission, and encouragement to say *if* she wants to."

Although it is complex, this talk is neither a play nor a carefully planned piece of self-serving testimony. These are spontaneous narratives, told in the emotional excitement of a tense situation, within a courthouse building in the shadow of the law (an environment which encourages truth even if it does not compel it).[165] In addition, the parents in the cases discussed above had given their written consent to participate in my research immediately before the session and knew that they were being taped. All of this suggests that these people did not intentionally fabricate, prevaricate, or lie. In all likelihood, they reported what they remembered having heard. If this is so, the striking differences in their constructed dialogue must have a basis in their differences in perception of the events which occurred. At least an interpretive venture into such underlying perceptions is in order. Fortunately, Gregory and Alexa's differing reports of the conversation which took place between them when Alexa gave Gregory the $10 to stop payment on the check, provides an opportunity to do so.

165. Although the parties are not under oath, they are in the court house, in rooms adjacent to the family law courtrooms, speaking to a court official, in the midst of litigation in which issue has been joined. Sometimes these mediation sessions take place immediately after, or immediately preceding an appearance before the judge. Five of the six parents were represented by counsel, and in the first two cases, at least one attorney was waiting outside. All of these things certainly encourage the parties to be truthful, in a way similar to that of trial procedures, albeit with diminished force.

CONSTRUCTED DIALOGUE IN GREGORY AND ALEXA'S 'LOST CHECK' CONVERSATION

Gregory's Constructed Dialogue

(55) "And the court order said, when I pick up the kids, no exchange of ye-parents communicate or interrupt each other. Alexa comes to my car. I am in the car, following the court order. 'Gregory.' I said, 'Hello.' 'Where is the check?' 'Hello, Alexa.' That's the same way I said hello to her, and she did not answer the same way. And she is ready for wars. She made a scene in front of the kids. 'You see? He doesn't give me the check. He said 'Call my lawyer' 'Could I talk Alex-Alexa?' 'Call my lawyer. Call your lawyer.' She made a scene in front of the kids. 'You see your father? He tells me to call my lawyer. And making a scene. I was very polite, 'Please, I don't want to talk to you. Call you, your lawyer.' And she made the scene for the kids to remember what bad father I am. They didn't hear what I said, but they remembered the scene with mother."

(56) "And I follow in the court order ... I'm not getting out the car. I'm not yelling. I only had one thing. 'Alexa, hello.' And her answer, 'I'm not socializing with you.' She was socializing with me? 'Please call your lawyer, you have a lawyer. And we go see him.' And I was sitting in the car and I did not believe I lived with this woman for 20 years and I didn't see ...."

Alexa's Constructed Dialogue

(57) "When he pulls into the driveway, y'know, I just hold my breath, because he's not supposed to. It's just his way of playing games. But I don't I don't go talk to him, I don't do anything. The only thing I did, the first time probably in about a year, was yesterday, I went out there and gave him $10 to put a stop payment on the check that I was supposed to be getting on the last ... And I said to Vera 'It's hard for you to do this.' I gave him $10, and said 'Hello.' [He said] 'How *are* you? You wanna *beg* for the money, little shit? Can you be a little cordial? Talk to me.'"

This encounter was fraught with tension because of the check and because both parties were under a court order not to speak to each other during the pick up and return of the children. Thus, any word could ignite an explosion. Gregory and Alexa's constructed dialogues reveal that the two made very different sense of one another's statements. To expose the differences, I have excerpted the two versions. Gregory's narrative includes the following:

> I am in the car, following the court order. 'Gregory.' I said 'Hello.' 'Where is the check?' 'Hello Alexa.' That's the same way I said hello to her, and she did not answer the same way.... [She said] 'You see? He doesn't give me the check, he said 'Call my lawyer' [I said] 'Could I talk, Alexa? Call my lawyer. Call your lawyer?' ... [She said] 'You see your father? He tells me to call my lawyer,' and making a scene. I was very polite, 'Please, I don't want to talk to you. Call your lawyer.' (Sentence 55)
>
> I'm not getting out of the car. I'm not yelling. I only had one thing. 'Alexa, Hello.' And her answer 'I'm not socializing with you.' ... [I said] 'Please call your lawyer, you have a lawyer.' And we go see him. (Sentence 56).

Alexa's dramatically different description is:

> I went out there and gave him $10 to put a stop payment on the check ... [and he said] 'Hello! How *are* you? You wanna *beg* for the money, little shit? Can you be a little cordial? Talk to me.' (Sentence 57).

Can Gregory and Alexa possibly be honestly reporting the same conversation? To understand how the answer may very well be "Yes" put yourself in the place of each speaker in turn. First, Gregory perceives himself to be scrupulously following the court order. He doesn't even get out of the car when he drives up. He thinks he is being merely civil when he says "Hello." But, to Alexa, even such a greeting is a violation of the order's terms. She perceives it as an opportunity to wedge himself in, get more than he is entitled to, and get on her case. What he views as mere civility, she perceives as aggression. So she responds angrily "Where is the check?" Now, he is the one affronted by her attitude. From his perspective he tries to avoid the situation and follow the spirit of the court order not to engage in confrontation by suggesting that if she has an issue with him they should call their respective lawyers to discuss it. But this only escalates the situation. From her perspective, he is trying to precipitate a confrontation and avoid paying the support money he owes by suggesting that they speak to their lawyers. So she gets angry and announces to the family, perhaps dramatically, that he is telling her to talk to the lawyers, rather than abide by what he has agreed to do and replace the support check if she gives him the stop payment money. Now it is Gregory who understands, or misunderstands Alexa's frustration as a deliberate attempt to

make a scene in front of the children so she can later allege that he is violating the court order. He tries to get her to behave in what he considers to be a civil and decent fashion by repeating his greeting 'Hello! How are you?' hoping she will respond in kind. But what she hears as the import of Gregory's words is that he won't give her the support money unless she condescends to "socialize" with him. His "Hello" is perceived as a persistent insult. That is, she hears "You wanna beg for the money, little shit? Can you be a little cordial? Talk to me." When they speak to the mediator, each reports the memory of their own experience.

HOW THE MEDIATOR RESPONDS TO GREGORY AND ALEXA

The mediator in Gregory and Alexa's case had more experience than the other two combined, and was, in my estimation one of the most skilled in the conciliation court. Yet he felt powerless to intervene affirmatively and wound up recommending a child custody evaluation. During an aside, he said to me sarcastically "This is really good for, uh, studying mediation, and what I say and how I say it, what comes out of it."

His remarks during the session reveal his frustration. The relevant comments, excerpted, are as follows:

> You've been here before, numerous times now ... From a mediator's perspective, in all the things that you've presented, all the things that she's presented, they're on two opposite ends. She, everything that you present ... she will deny ...And, and yet at the same, everything she presents you deny. And it's very difficult ... Uh, the problem is...that is it that...clearing, clarifying? What is it that we want to accomplish? What is it that we want to do? ... Well, I'm supposed to be in the middle. That's what mediation's all about .... I'm still at a quandary on what to do, because, uh, ... each of you speak with such conviction, it's incredible! It, it really is ... amazing ....So I presented the idea of a child custody evaluation...

C. Discussion: The Three Outcomes Compared

The examples discussed above suggest that constructed dialogue is persuasive in mediation. Further, they demonstrate that this power cannot be predicted merely from gender. In the case of John and Laura it was the mother who was the powerful master of constructed dialogue; in the case of Steven and Jane it was the father; and in the case of Gregory and Alexa the father was an equal match for the mother and her live-in boyfriend.

Neither can the knowledge of who will speak more powerfully be predicted by review of a litigation file which indicates a history of abuse or manipulation of one partner by the other. Steven and Jane's case began with a temporary restraining order against Steven and supervised visitation for him; and in that case, Jane was indeed the weaker speaker. But in the case of John and Laura the tables were surprisingly turned. Although the case file revealed a

history of abuse by John over a several year period, and the triggering incident for the mediation session was a fight which led Laura to seek a restraining order, Laura proved to be by far the more powerful speaker.

Similarly, the matter of powerful speech cannot be predicted from socioeconomic status, ethnicity, educational level, or even formal mastery of the English language. Laura, who was a relatively recent immigrant from Central America, and probably lacked much formal education spoke far more powerfully than her husband who, though also a Latino, had been raised in Los Angeles and graduated from an American college. Though probably the least educated of all six parents, she was, perhaps, the most powerful speaker. Similarly, Gregory, an adult immigrant from Eastern Europe who spoke with a thick accent and grammatically incorrect (almost "broken") English was a match for the team of Alexa, who spoke excellent English, having immigrated from Eastern Europe as a child and her boyfriend Henry who was born in the United States.

In addition, the power imbalance created by differential use of constructed dialogue does not seem to be ameliorated by having the parents mediate through separate sessions. At least in the case of John and Laura, the equivalent differences persisted across both the private and joint sessions; Jane was virtually unable to give "voice" to her child's needs despite the private session. In the case of Gregory and Alexa, separate sessions may well have exacerbated the problem since the parents were unable to "reality check" each other by criticizing one another's narratives in the mediator's presence.

Further, the cases indicate that the relationship between powerful speech and the outcome of the mediation session cannot be understood as a simple function of the relative power of the parties. Rather, as in the cases of Jane and Steven and John and Laura, the more powerful speaker heavily influences the mediator. Mediator and powerful parent form an unconscious alliance. In the interests of reaching agreement and in his statutory capacity as representative of the child's best interest, the mediator works on the less powerful parent, using professionally honed interventionist techniques of persuasion to selectively facilitate the desired outcome. The deck is doubly stacked against the less powerful speaker.

IV. THE ANALYSIS

A. Power and Danger in the Blurring of Legal and Psychological Discourse

The cases discussed above illustrate the persuasive potency of constructed dialogue in mediation. But a thorough understanding of how this rhetorical strategy affects the fairness of the process, requires analysis of its articulation with the broader discourse of child custody mediation as a hybrid of law and psychology.

Mediation, inspired by the methods of dispute settlement in small scale traditional societies,[166] has proven itself an apt process for resolving child

166. For example, dispute resolution in a Mexican Zapotec community aims at talking through the problem and restoring the social equilibrium. Laura Nader, *Styles of Court Procedure: To Make the Balance in* LAW IN CULTURE AND SOCIETY 69 (Laura Nader, ed.

custody cases because the interpersonal entanglements among co-parents (like those among co-residents of isolated, self-sufficient towns and villages) are multiplex (the parties have a history of social, kinship, and economic connections which is deep and complex). And, these multiplex relationships must necessarily continue *in futuro,* placing a premium on harmony-restoring, prospectively oriented compromise solutions and creating an incentive for achieving them.

Yet, there are also critical differences. In the traditional setting the mediator shares the parties' social world and typically knows the bare bone "facts" of the dispute. The social construction of the meaning of those "facts" and the parties' emotional perception of them which develop during the mediation session take place against a background of shared knowledge. Thus, the blurring of subjectivity and objectivity, of shared fact and private perception, which occurs in the parties' dramaturgical narration of events is minimally problematic.[167]

But in court sponsored mediation (as at trial), the mediator (like a judge or juror) is a stranger who acquires knowledge of the "facts" only through the parties narration of their perceptions.[168] To the extent it is necessary for the mediator, in steering the parties towards a solution, to draw a distinction between fact and perception, the court sponsored mediator faces a very different task from the village mediator (who knows the facts first hand and by reputation) or the trier-of-fact at trial (who relies on multiple witnesses, examination and cross-examination, and the rules of evidence).

Instead of the first hand knowledge and shared cultural understandings which the mediator in a traditional context relies on to facilitate resolving the dispute, the mediator in a child custody dispute facilitates dispute resolution by interpreting the parents' narratives within the professional discourses of law and psychology, discourses which resonate in the parents' own speech. In both discourses, language plays a powerful role in determining the contested domain

---

1969). In Liberia, "house palavers" restore harmony and balance, resolving disputes by letting the aggrieved parties talk out the problem "until they are satisfied." James L. Gibbs, Jr., *The Kpelle Moot: A Therapeutic Model for the Informal Settlement of Disputes,* 33 AFR. 1 (1963) *reprinted as Two Forms of Dispute Settlement Among the Kpelle of West Africa in* THE SOCIAL ORGANIZATION OF THE LAW 368 (Donald Black & Maureen Mileski eds., 1973); Peter Sevareid, *The Case of the Unreturned Goat: Dispute Resolution by a Mano Court in Liberia,* 7 TEMP. INT'L. L. J. 61, 75 (1993); Peter Sevareid, *I Know Money, I Don't Know Human Beings: A Mano House Palaver,* 17 LIBERIAN STUD. J. 105 (1992). *See also,* CAROL J. GREENHOUSE, PRAYING FOR JUSTICE: FAITH, ORDER AND COMMUNITY IN AN AMERICAN TOWN (1986) (ethnography of the ideology of harmony and peace in a Southern United States Baptist community). Similar processes occur in other ethnic communities. *See, e.g.,* Leigh-Wai Doo, *Dispute Settlement in Chinese-American Communities,* 21 AM. J. OF COMP. L. 627 (1973).

167. For example, among the Dou Donggo of Eastern Sumbawa, Indonesia, disputes often take place in public, making the "facts" common knowledge. The purpose of evidentiary hearings is not to determine what actually happened but to produce a fleshed-out version of events which, although phenomenally false, is an accurate representation of the overarching social and moral issues involved. Peter Just, *Let the Evidence Fit the Crime: Evidence, Law, and "Sociological Truth" Among the Dou Donggo,* 13 AM. ETHNOLOGIST 43 (1986).

168. Tricia S. Jones, *A Dialectical Reframing of the Mediation Process in* NEW DIRECTIONS IN MEDIATION: COMMUNICATION RESEARCH AND PERSPECTIVES 26 (Joseph P. Folger & Tricia S. Jones eds., 1994) (noting this difference in the mediator's relationship to the parties and suggesting that the mediator's relational context be factored in to mediation theory and practice).

of truth. In psychology, language determines truth by constructing an ameliorized view of a situation which may lead to future changes of behavior and affect. Thus a new vision of truth by the participants constructs a prospective truth.[169] In litigation, language also determines truth. The most persuasive narrative convinces judge or jury to find as true a particular version of the facts and to render a decision which accords with those facts. The court order also constructs a prospective truth, by requiring the parties to behave towards one another in specific ways on penalty of sanction.[170] When seen as ideal types, the therapeutic creation of truth is successful because the participants are self-convinced. The legal creation of truth is successful, because it operates by sanctions. Similarly, in its ideal form, court sponsored mediation should operate through both of these modes: the parents' self-initiated version of the truth is rendered binding by conversion to a court order. The court order should reflect the reality which the parents' have come to see. But, in practice, mediation rarely progresses so smoothly. The lines are blurred. Mediation discourse flows between law and psychology in an unpredictable amalgam.[171]

---

169. In this aspect, child custody mediation closely resembles those types of solution-oriented family therapy which operate through the interactive linguistic formulation of a new intersubjective view of the issue. *See* Donald Saposnek, *Strategies in Child Custody Mediation: A Family Systems Approach,* 2 MEDIATION QUART. 29 (1983); BILL O'HANLON & JAMES WILK, SHIFTING CONTEXTS: THE GENERATION OF EFFECTIVE PSYCHOTHERAPY 47, 177 (1987) ("The therapeutic problem to be worked on does not exist outside the therapist's office ... it is a product of the client's and the therapists' talking together.... A 'fly on the wall' who did not know we were doing psychotherapy would not necessarily suspect that that was what we were doing: he would see and hear only an ordinary conversation."); JERRY EDWARD GALE, CONVERSATION ANALYSIS OF THERAPEUTIC DISCOURSE: THE PURSUIT OF A THERAPEUTIC AGENDA 33, 41-42 (1991) (In solution-oriented conversations, the therapist works towards changing the client's view of the problem. Through negotiating the problem definition, a therapeutic reality is constructed.); *see also,* Theodore R. Sarbin, *The Narrative as a Root Metaphor for Psychology in* NARRATIVE PSYCHOLOGY: THE STORIED NATURE OF HUMAN CONDUCT 3 (Theodor R. Sarbin, ed. 1986); Elyn R. Saks, Interpreting Interpretation: The Limits of Hermeneutic Psychoanalysis, (1993) (unpublished manuscript on file with the author) (discussing legal limits of the "storied" nature of therapy).

170. Professor Richard Terdiman, in his discussion of Pierre Bourdieu's concept of the juridical field, alludes to speech act theory and explains:

> Ordinarily we think of language as describing a fact or state of affairs. But in the concept of the 'performative' the philosopher J.L. Austin sought to formalize a special linguistic capacity (one which is particularly inherent in the law) that makes things true *simply by saying them.* This power is of course the attribute of judges and judicial decisions, among others. The texts of the law are thus quintessentially texts which produce their own effects.

Richard Terdiman, *Translator's Introduction to Pierre Bourdieu, The Force of Law: Toward a Sociology of the Juridical Field,* 38 HASTINGS L. J. 805, 809 (1987) (footnote omitted). On speech act theory see, JOHN LANGSHAW AUSTIN, HOW TO DO THINGS WITH WORDS (1962); JOHN R. SEARLE, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE (1969).

171. The hybrid character of mediation is repeatedly stated and elaborated by its architects, theorists, and practitioners. *See, e.g.,* FLORENCE BIENENFELD, CHILD CUSTODY MEDIATION: TECHNIQUES FOR COUNSELORS, ATTORNEYS, AND PARENTS 9-13 (1983) ("I facilitate expression of feelings, concerns, and wishes... I help parents to become aware of their attitudes, beliefs, behavior, and communication patterns"); O.J. COOGLER, STRUCTURED MEDIATION IN DIVORCE SETTLEMENT: A HANDBOOK FOR MARITAL MEDIATORS 80 (1978) ("The *psychological structure* must provide a setting in which the physical and emotional needs of the parties are sufficiently met that they can make maximum use of their rational abilities"); G. Peter Hoefnagels, *Mediation: A Method of Law and Psychology in the Netherlands in* DIVORCE MEDIATION: PERSPECTIVES ON THE FIELD 185, 186 (Craig A. Everett, ed. 1985) ("[M]ediation is a method in which the psychological and judicial stages of divorcing are attuned to each

Linguist Robin Lakoff[172] explains that this has critical implications for the possibility of power abuse. The psychological discourse is therapeutic — it speaks in the language of help, taking responsibility, rearranging relationships. It asks for honest confessions of one's feelings, speaks in metaphors and ambiguities, acknowledges the importance of inner feeling states and even fantasies, and admits of the validity of different versions of truth.[173]

To illustrate, let us consider the following example. In the interests of an honest discussion of feelings, the mediator may encourage the father to say "I was practically stamping my feet and foaming at the mouth when she brought our daughter home late. I said, 'What in hell is the matter with you?' I said. 'It's late. I have an important business meeting in the morning." The mother may then say "But our daughter looks at me, almost with tears in her eyes and says 'Mommy, mommy, I miss you so much. Can't we stay a little longer? Can't we? Can't we?'" From the perspective of human emotions, there are two equally valid versions of truth - the father's and the mother's.

But, as Robin Lakoff explains, the discourse of law employs a different paradigm. It speaks in the language of concreteness and certain meanings, it focuses on real world actions, it assigns blame, it chooses certain versions of fact as truth, and it has real world consequences.[174]

Again consider the above example. If the parents have a custody and visitation agreement which says that the parents are not to argue, fight, or speak ill of each other in front of the children (as many agreements do) the father is at fault. If the custody and visitation agreement states that the mother is to

---

other...."); Joseph L. Steinberg, *Through An Interdisciplinary Mirror: Attorney-Therapist Similarities in* DIVORCE MEDIATION: PERSPECTIVES ON THE FIELD 9 (Craig A. Everett, ed. 1985) ("The best mediator, of course, is neither lawyer nor therapist - but a blending of both."); Donald D. Saposnek, *Strategies in Child Custody Mediation: A Family Systems Approach*, 2 MEDIATION Q. 29 (1983); Donald D. Saposnek, *Clarifying Perspectives on Mandatory Mediation*, 30 FAM. & CONCILIATION COURTS REV. 490 (1992) (both explaining and extolling the use of therapeutic techniques in custody mediation); Judith S. Wallerstein, *Psychodynamic Perspectives on Family Mediation*, 14/15 MEDIATION Q. 7 (1986-1987) (effective family mediation requires both theoretical and clinical psychodynamic expertise); Jyoti Weaver, *Therapeutic Implications of Divorce Mediation*, 12 MEDIATION Q. 75 (1986) (delineating similarities in goals and process between therapy and mediation). Scholars have examined how these two discourses are constructed by professionals and by participants in mediation. *See*, Christine B. Harrington, *Socio-legal Concepts in Mediation Ideology*, 9 THE LEGAL STUD. F. 33 (1985); Christine B. Harrington & Sally Engle Merry, *Ideological Production: The Making of Community Mediation*, 22 LAW & SOC'Y REV. 709 (1988); SALLY ENGLE MERRY, GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS 110-15 (1990) (studying community rather than custody mediation and finding that legal, psychological and "moral discourse" are important); Sally Engle Merry, *Culture, Power, and the Discourse of Law*, 37 N.Y.L. SCH. L. REV. 209 (1992); Sally Engle Merry, *The Discourse of Mediation and the Power of Naming*, 2 YALE J. OF L. & HUMAN. (1990); *See also*, Nader, *supra* note 8; Martha Albertson Fineman *supra* note 25, (speaking more pejoratively of the professional hegemony exercised by the discourse of the mental health professions). Whether boon or bane the discourse overlap is substantial and significant for both practitioners and scholars.

172. ROBIN TOLMACH LAKOFF, TALKING POWER: THE POLITICS OF LANGUAGE 127-41 (1990).

173. *Id.* at 129-31.

174. *Id.* Professor Lakoff describes the differences between therapeutic and legal discourse in terms of the following paired oppositions (the therapeutic is given first in each opposition): "private v public; collaborative v. adversarial; understanding (forgiving) v. blaming; informal v. formal; spontaneous v. ritualistic; allusive v. literal; implicit v. explicit; 'play' v. 'real'; and continuous and overdetermined v. dichotomous." *Id.* at 129.

return her daughter at 8:00 p.m. sharp, the mother is at fault. A confession of feelings becomes a confession in the legal sense - an admission of wrongdoing to which consequences may attach.

If the goal of the mediation session is to revise the visitation agreement, the above exchange of dialogue speaks in a legal discourse, whether the parents are aware of it or not.

The agreement must either specify a rigid time schedule, as the father wants, or allow for greater flexibility, as the mother wants. Therefore, the parents' narratives have real world consequences; either a strict or a flexible time schedule will become the legally binding choice. Consequently, the parents' dialogues are also evidentiary statements of legally significant fact going to the question of whether strict or flexible time is the better choice.

If the interpretation of the parents' narratives on the level of psychological discourse does not result in agreement; that is, if the parents do not, on their own, reach an appreciation of one another's different perspectives which enables them to compromise, the mediator intervenes to selectively facilitate the better choice. That is, the mediator must make a legally significant conclusion as to which version of truth should be become legally true *in futuro* by force of the agreement.

Herein, the danger of power abuse lies. As Robin Lakoff explains, when the discourses of law and psychology are employed, the greatest danger of power abuse lies in blurring the lines between them.[175] Despite the differences between the two discourses, therapy and law share common characteristics which contain the possibility for misuse. Specifically, they share the attributes of a purpose-directed discourse, in which the narrative construction of events and the assignment of responsibility can be determined by professionals whose expertise is fraught with power.[176] So long as the rules of the discourse genres are followed, however, the potential for abuse is significantly mitigated. "But," she writes, "crossing lines blurs distinctions and leads inevitably to misunderstanding and confusion, and ultimately to abuse of the weaker and noncompetent language user."[177] Law and psychology are especially susceptible to misuse through discourse blurring because of their seeming mutual concern with responsibility, truth, confessions, and people considered as "cases."[178]

Professor Lakoff gives the example of a police interrogation of a criminal suspect. The police say, "Come on, confess. You'll feel better if you tell someone and get it off your chest." The suspect, feeling guilty, confesses in the psychological discourse mode and spills the story of the crime. He does feel much better, until he is convicted on the basis of his (now legal) confession and sentenced to ten years in the state prison![179]

B. Blurred Discourse in Mediation Statutes

The discourse blur which Professor Lakoff illustrates with the example of the criminal suspect is pervasive and potentially pernicious in court

175. *Id.* at 137.
176. *Id.* at 131.
177. *Id.* at 137.
178. *Id.* at 131.
179. *Id.* at 135-37.

sponsored mediation where it can be seen even in the statutory language. The California statute, the governing law for the cases in this study, is representative. As the first statute to mandate court sponsored mediation, it has served as the model for other jurisdictions. Section 3161 of the California Family Code states:

> The purposes of the mediation proceeding are as follows:
>
> (a) To reduce acrimony that may exist between the parties.
>
> (b) To develop an agreement assuring the child close and continuing contact with both parents that is in the best interest of the child.
>
> (c) To effect a settlement of the issue of visitation rights of all parties that is in the best interests of the child.

This statute imposes on the mediator a three-fold discourse blurring statutory charge. The first charge is to reduce acrimony between the parents. This charge clearly calls for the use of the psychological discourse mode. Section 1815 of the California Family Code mandates *inter alia* that mediators must have: "a master's degree in psychology, social work, marriage, family and child counseling, or other behavioral science substantially related to marriage and family and interpersonal relationships ... [and] knowledge of adult psychopathology and the psychology of families ...."[180]

The statutory charge of reducing acrimony obliges the mediator to use his professional therapeutic skills to encourage the parents to freely discuss and work out their perceptions of and problems with each other and the child. It also obliges the mediator to help them use the mediation session as a learning exercise in restructuring their relationship and learning to co-operate and compromise on future parenting issues.

The second statutory charge is to develop an agreement. This charge calls predominantly upon the legal discourse mode. Its primary meaning is the production of an interparental custody agreement which can be "so ordered" by the judge and become legally effective. Indeed, the word "agreement," like the word "confession," is seemingly ambiguous as to discourse mode. "Agreement" can also refer to the parents' coming to a relational understanding about co-parenting issues. But the legal meaning predominates for several reasons. First, court sponsored mediation is justified on a legislative and bureaucratic level on the basis of its capacity to produce binding agreements in a way that efficiently utilizes judicial time and resources.[181] In Los Angeles County, for example,

---

180. Cal. Fam. Code §1815 (West 1994).

181. Administrators often have an efficiency conception of the purposes of mediation (as a time and cost efficient litigation substitute) which focuses on mediators' settlement rates and time and cost figures. Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition? The Mediator's Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253, 260, 274 (1989).

there are 36,000 to 38,000 divorces annually.[182] A small staff[183] mediates more than 11,000 custody disputes[184] and settles approximately half of them.[185] Second, although all mediators have professional degrees in mental health related areas, every mediator I worked with (with the exception of one who told me that she thought reducing acrimony was the most important aspect of mediation) unequivocally stated that their job was to mediate not do therapy. For them, a case which reaches agreement constitutes a professional success. Consequently, although mediators encourage parents to reach attitudinal agreement on parenting issues, they are generally satisfied if parents can vent their emotional issues or put them aside in the interests of reaching legal agreement.

The third statutory charge is that the agreement reached be in the best interests of the child. Moreover, the charge is repeated in other provisions of the California Family Law Code.[186] The salience of this third statutory charge creates a potential blur, if not outright conflict, in the mediators' loyalty. Even while using their therapeutic skills to freely encourage the parents to engage in honest emotionally charged conversation regarding the child, they must use those same professional skills diagnostically to screen for possible dangers to the child's well-being. In an extreme case, the mediator is under a legal responsibility to notify the state of child abuse.

Further, the standard of the best interests of the child is, itself, one which blurs the discourses. To some degree the standard is a matter of explicit substantive law. The most important explicit substantive provision is that the child have close and continuing contact with both parents: a provision stated three times in the California Family Code.[187]

---

182. In 1992 there were 38, 105 petitions for divorce filed and 38,140 divorce cases which settled prior to trial. In 1993, there were 36,429 petitions for divorce files and 28,179 divoce cases which settled prior to trial. Personal Communication with Barry Goldstein, Principle Program Analyst, Los Angeles Superior Courts Statistics Division (Oct. 23, 1994).

183. As of October 1994, there are eighteen full time mediators in Los Angeles County. Twelve other mediators work part time "as needed." Personal Communication with David Kuroda, Division Chief, Mediation and Conciliation, Los Angeles Superior Court, Conciliation Sevices Division (Oct. 23, 1994).

184. In 1991, Los Angeles County handled a caseload of 11,128 mediations. Isolina Ricci, et al., *Profile: Child Custody Mediation Services in California Superior Courts*, 30 FAM. & CONCILIATION COURTS REV. 229, 232 (1991). David Kuroda, Division Chief, Mediation and Conciliation, Los Angeles Superior Court, Conciliation Sevices Division estimates that Los Angeles County handled approximately 11,000 mediation in 1993 (Oct. 23, 1994).

185. There are no official statistics on the number or percentage of cases which settle in mediation, as distinct from other cases which settle prior to trial. The estimate of roughly 50% is the one which I have received whenever I have directly asked a Los Angeles County mediator or heard anyone from Los Angeles County Conciliation Services speak on the subject.

186. CAL. FAM. CODE § 3180(b) (West 1994) states in pertinent part that "the mediator has the duty to assess the needs and interests of the child involved." CAL. FAM. CODE § 3162(b)(1) (West 1994) states that mediation shall be conducted in accordance with standards which include a "provision" for "the best interest of the child ...."

187. *See* CAL. FAM. CODE § 3161 (West 1994); CAL. FAM. CODE § 3020 (West 1994) ("[I]t is the public policy of this state to assure minor children frequent and continuing contact with both parents ... and to encourage the parents to share the rights and responsibilities of child rearing ... [except where this would endanger the health, safety, or welfare of the child or where there is child abuse either directly or through abuse of the co-parent]"); CAL. FAM. CODE § 3162(b)(1) (West 1994) (requiring that mediation standards of practice include "provision for ... the safeguarding of the rights of the child to frequent and continuing contact with both parents").

But best interests is also a psychological standard. The term "best interests" is usually glossed as the child's total well-being, and is fleshed out with knowledge and theory about the child's developmental needs and the dangers to children of interparental conflict. The qualifications for being a mediator include professional training in this area.[188] And the mediation statute obligates the mediator to apply this knowledge in assessing and protecting the child's interest during the mediation session.

Fulfilling the third statutory charge means more than merely screening for potential abuse or encouraging parental cooperation. It means the mediator is obligated to make factual assessments (if not actual judgments) as to what type of agreement is in the child's best interests *and* to facilitate that agreement based upon what the parents say about themselves and the child during the dialogue in which the parents are "confessing" their relational problems with each other and the child *with* the mediator's active, encouraging facilitation. If the conversation fails to reach the goal of reaching agreement by doing its psychotherapeutic work, the discourse shifts so that the very same words have an evidentiary legal import becoming the factual testimony on which the mediator will base her conclusions as to what agreement to selectively facilitate in the child's best interest.

Further, the mediator must also balance the third prong of the statutory charge, the prong on which her work will be objectively judged and statistically evaluated — that of reaching agreement at all. Since the mediator has no power whatever to impose solutions, the skilled mediator must be alert to the degree and range within which each parent may be convinced to compromise or give-in — a matter that goes directly to *both* the power imbalance between the parents *and* the mediator's perception of that power. Because the mediator has no choice but to facilitate a compromise which is possible rather than impossible, the mediator has no choice but to gently pressure the parent most likely to give in. While I by no means wish to suggest that any mediator drafts an agreement which is adverse to the child's best interests, the agreement the mediator facilitates is not in the child's "best" interests in the meaning of "best" as optimum or ideal. Rather, the mediator works to reach an agreement that is within the range of what I call the "tolerable possible" — tolerable because it is not inconsistent with the child's interest and possible because the parents will agree to it.

The impact of the mediator's perception of the parents' respective willingness to compromise goes right down to the nitty-gritty details of the agreement. Provisions such as who will get the fifth weekend of a five weekend month or who will share opening presents with the child on Christmas Eve are often proposed by the mediator. Many parents are not even aware that such matters are specified in custody agreements, but their allocation makes a significant difference in how quality parenting time will be divided between them. And such suggestions are often proposed based upon the mediator's perception of the parent's stubbornness or willingness to give in.

188. CAL. FAM. CODE § 1815(a)(6) (West 1994) mandates that eligibility for the job of mediator include "[k]nowledge of child development, child abuse, clinical issues relating to children, the effects of divorce on children, the effects of domestic violence on children, and child custody research sufficient to enable a counselor to assess the mental health needs of children."

C. Blurred Discourse in Mediation Sessions

The blurring of psychological and legal discourse, with its inherent danger for power abuse, occurs in all three charges of the mediation statute. But what is even more important is that in the real life conversational time of the mediation session each of the three statutory charges is also blurred with the others so that psychology/law discourse blurring occurs across all three simultaneously.

According to the manuals of custody mediation practice, a mediation session should be divided into distinct phases.[189] While the various experts subdivide mediation into different numbers of component parts they follow a common sequence. After an introductory opening, talk should first be about background issues - that is, a psychological discourse focusing on family relationships.[190] In the second phase, the topic should switch to working out a compromise.[191] Ideally, in this phase parents should first achieve a willingness to compromise on a relational level and then segue into cooperative talk about how that compromise can be implemented through the provisions of the custody and visitation agreement. If parents cannot reach a compromise on the deep level of their relationship, they should be able to compromise by temporarily putting aside their relationship issues and concentrating on working out the agreement. The final phase should be devoted to drafting and finalizing the agreement.[192]

But in real life this is not exactly what happens. Mediators, at least during my two years of observational study, do not inform parents that this is the procedure. Neither do they say, "Now let us begin with Phase One.... Now let us move on to Phase Two." And there is a good reason for this. It is only after the parents' begin talking that mediators have any idea whether and how quickly a couple can move through the phases. Some may be ready to start out with the specifics; others never get there. Further, the parents' talk moves naturally in and out of the various phases. On one issue, such as weekend visits, they may be ready for details immediately. Another issue, which may seem very similar to an outsider, such as midweek overnights, may trigger deep and ancient relationship issues about parents' free time and disciplining children to do their homework. Compromise, or the lack of it, evolves throughout the conversation.

Meanwhile, the mediator concentrates on nudging the parents towards agreement (rather like a sheep dog herding sheep). If the parents can talk about

---

189. FLORENCE BIENENFELD, CHILD CUSTODY MEDIATION: TECHNIQUES FOR COUNSELORS, ATTORNEYS AND PARENTS 31-51 (1983); O.J. COOGLER, STRUCTURED MEDIATION IN DIVORCE SETTLEMENT 31-39 (1978); JOHN M. HAYES, DIVORCE MEDIATION: A PRACTICAL GUIDE FOR THERAPISTS AND COUNSELORS 56-78 (1981); JOHN W. KELTNER, MEDIATION: TOWARDS A CIVILIZED SYSTEM OF DISPUTE RESOLUTION 23-25 (1987); JAY FOLBERG & ALISON TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION 38-73 (1984); *see also, generally,* Nancy Thoennes & Jessica Pearson, *Predicting Outcomes in Divorce Mediation: The Influence of People and Process*, 41 J. OF SOCL. ISSUES 115 (1986); WILLIAM H. DONOHUE, COMMUNICATION MARITAL DISPUTE AND DIVORCE MEDIATION 142 (1991) (providing a useful chart summarizing the approaches of various authors of books on mediation to the division on mediation into phases).

190. *See supra* note 189 and sources cited therein.

191. *See supra* note 189 and sources cited therein

192. *See supra* note 189 and sources cited therein

their relationship in a way which is leading towards compromise, she encourages them to talk, sometimes asking questions which will clarify their feelings and issues. If their talk seems to be degenerating into unproductive argument she interrupts more dramatically — sometimes initiating separate sessions in which parents are privately asked relationship questions to help them disgorge their emotional baggage through venting; sometimes refocusing the topic on the importance of cooperation for the child.

All the time this relational talking is proceeding, the mediator listens actively. In a trained, intuitive gestalt she determines what agreement she thinks is appropriate for the child, the likelihood that each parent will give in, and the possible ways the proposed agreement can be altered to effect compromise. At the same time, she watches the clock. If it seems as though the parents will never create their own agreement she takes a more interventionist stance and affirmatively proposes a possible agreement, using what she has heard from their talk in the psychological discourse mode as evidence to formulate and press for the legal agreement. The problem is that neither the parents nor the mediator know whether or when the discourse switch will take place. The parents do not formulate their statements in anticipation of the discourse switch and the mediator does not analytically segregate which statement she is using for which purpose.

D. Blurred Discourse in Constructed Dialogue: Shifting Responsibility and Authority Across Discourse Lines

The psychology/law discourse blurring which occurs in mediation is a high risk context for power abuse regardless of what is said. But it is particularly so when parents speak with the high-tech subversive verbal weapon of constructed dialogue, which is likely to be remembered longest and most saliently by the mediator. When the mediator decides that the parents are stalemated and decides to intervene affirmatively it is precisely this constructed dialogue that, because of its rhetorical glitz, is most likely to jump discourse modes and become the grist of the mediator's proposals. But look at what can happen.

Let us return to the hypothetical above and play some permutations with it. Remember that in the hypothetical the father says he said "What in hell is the matter with you. You're late again. I have an important business meeting in the morning." The mother says the daughter said tearfully "Mommy, mommy, I miss you so much. Can't we stay a little longer. Can't we? Can't we?" Now, suppose we are going to use this exchange as factual evidence of what was said upon which to determine how the agreement might be structured in the child's best interest.

If I were the mediator, I would be inclined to hear the child's plea and give the mother a more flexible schedule, or at least another hour of visitation time. But then, I am not someone who regards punctuality as a virtue. A different mediator might well interpret the mother's tardiness as an act of disrespect to the father which is reasonably hampering the possibilities for cooperative co-parenting and urge the mother to agree to a strict schedule. But the reason this is a close call is because the mother and father here are in a parity of power as regards constructed dialogue.

But suppose the mother here were constructive dialogue disabled because as a full time homemaker she has always knuckled under when the father sounds off about how hard he has to work. In this situation the mother might have hedged, answering with a description of other things which occurred during the event in question. For example, saying, "I don't know. Well, she dawdles, she can't find her shoes. You know how it is." [These tricks could well have taken place together with the reported speech as equivalent ways of acting-out the same emotions]. But in this case, even I, who rarely get anywhere on time, might interpret the lateness as both disrespect to dad and as a lapse in parental competency and favor a strict schedule with teeth in it. Moreover, the mother's non-committal response, phrased in ambiguities and negatives, might well lead me to correctly conclude that the mother will agree readily to the strict schedule. As a mediator, I might urge it on her when I should be saying "Alert! Alert! Here lies a pre-existing power imbalance" and throwing the weight of my authority towards Mom by helping her to articulate her reasons.

But we need to remember that by using the hypothetical quote as though it were proffered as evidence of fact we are distorting its meaning by discourse mode jumping. The constructed dialogue took place while the parents were discussing their relationship issues. The father spat out his own anger and hurt by quoting himself. And the mother responded defensively; shifting responsibility for being late onto the daughter by using constructed dialogue which accomplishes that task so exquisitely.

But what the mediator heard might have been markedly different if, by mere happenstance, the mediator had given Mom the first turn at talk. In this case, the mother might well have begun by asserting her own anger, saying "I rushed through Los Angeles traffic to get her home and there he was standing at the door huffing and puffing and shouting at me 'Why in hell are you late?'" Then, the father might have been the one to responsibility shift by saying "She brings her home late and tired. The next morning all I hear is 'Daddy, daddy, daddy. I don't feel well; I don't want to go to school.' She's cranky, I'm late, we all suffer." In this case, even from me, the father is likely to get his strict schedule request.

The see-saw effect illustrated above is problematic because of the discourse blur. If the mediator is alert to the responsibility shifting potential of constructed dialogue, the two versions are functional equivalents for the psychological discourse mode. The mediator can perceive that in this case there are issues of anger, hurt, blame, and failure to take responsibility. She can also wisely surmise that they are probably reciprocal, that permitting such talk to continue may result in an unproductive ritual attack cycle, and that it is time to nudge the parents forward. But if the mediator's nudge gets nowhere, and the mediator decides to reach back into her own memory, perhaps unconsciously, to use the constructed dialogue as the basis to propose an agreement grounded in the child's best interest, the two versions are not equivalent and the whole conversational sequence is needed. In the full version, it is the child who manipulates the parents' time problem on both ends and the mediator is wisely more inclined to take a neutral stance urging both parents to give way a little to accommodate the child's needs.

As this one hypothetical illustrates, a mediator's insensitivity to constructed dialogue problems poses three major risks: (1) it can perpetuate

power imbalances in the relationship by disguising them as non-issues or a willingness to compromise; (2) it can inappropriately shift issues of blame and responsibility without the mediator being aware of it; and (3) it can lead to inappropriate or unfair agreements when the mediator switches discourse modes.

V. THE PROPOSED SOLUTION

A. Would a Hearsay Rule Help?

The above analysis indicates the importance of implementing the mandate to equalize power in mediation through the development of guidelines regarding the use of constructed dialogue.[193] One possible approach might be to import the evidentiary Hearsay Rule[194] into the mediation context because, like the constructed dialogue problem, it deals with the risks raised by reported speech. Subject to certain exceptions,[195] the Hearsay Rule prohibits the admission of out-of-court assertions to prove the truth of the matter asserted.[196] Theoretically speaking, the Hearsay Rule, as applied to mediation, would work as follows.

The mother's statement "My son said 'Daddy smokes marijuana'" would not be admissible as evidence of the fact that Daddy smokes marijuana. But imagine a more complex statement. The mother says "My son said 'I am frightened when Daddy smokes marijuana.'" Once again, this statement would not be admissible as evidence of the fact that Daddy smokes marijuana. Reported speech, however, may be admissible as evidence of the hearer's state of mind.[197] Thus, the statement would be admissible as evidence of the son's fear but not of the father's smoking.[198] The causal connection between the father's smoking and the son's fear could not be made through the mother's

193. And, eventually, such other efficacious rhetorical strategies which future close analysis of mediation texts may disclose.

194. FED. R. EVID. 802 states, "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." CAL. EVID. CODE § 1200 (b) (West 1994) states "Except as provided by law, hearsay evidence is inadmissible."

195. Under the Federal Rules of Evidence the exceptions include both those statements which are classified as nonhearsay and those which are formally classified as hearsay but admitted under one of the exceptions to the Hearsay Rule. *See infra* notes 197 - 210 and accompanying text for discussion of these exceptions.

196. FED. R. EVID. 801 states in pertinent part: "(a) ... A 'statement' is (1) an oral or written assertion ... if it is intended by the person as an assertion.... (c) ... 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

197. FED. R. EVID. 803 states in pertinent part: "The following are not excluded by the hearsay rule ... (3) ... A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition [such as intent, plan, motive, design, mental feeling, pain, and bodily health]." Statements of fear pose no hearsay problem and are admissible if they relate to some legitimate issue in the case. 2 MCCORMICK ON EVIDENCE § 26 at 243-44 (John W. Strong, et al. eds., 4th ed. 1992). In custody cases, the child's emotional state is always relevant to the best interests issue. *Accord* CAL. EVID. CODE § 1200 (West 1994) (the Califorina equivalent of FED. R. EVID. 803).

198. When an out-of-court statement has both an impermissible hearsay aspect and a permissible non-hearsay aspect, the disposition is usually to admit the evidence with a limiting instruction, unless the need for the evidence is substantially outweighed by the danger of its improper use, a steep burden. 2 MCCORMICK ON EVIDENCE, *supra* note 197 at § 249.

constructed dialogue.[199] Consequently, the mother would be barred from achieving the "triple whammy" of constructed dialogue.[200] That is, she could not simultaneously shift responsibility for proof of the marijuana smoking and evidence of its consequences for the child's best interest directly onto the person most affected, that is her son, *and* generate the empathetic vividness which reported speech gives to narrative *and* insulate the child (that is the person responsible for the testimony) from examination.[201]

While importation of the Hearsay Rule would eliminate the "triple whammy" problem in some situations, there are several reasons why it is an ill-advised solution for the problem of constructed dialogue in mediation. First, much constructed dialogue would remain admissible. A substantial amount of it would fall outside the Hearsay Rule because it is non-assertive,[202] because it is introduced as evidence of something other than the matter asserted[203] (such as circumstantial evidence of the "speaker's" state of mind),[204] or because it

199. Theoretically, the connection between the smoking and the fear must be made in one of three ways: (1) it can be left to the trier-of-fact to draw, (2) placed in the mouth of an independent third party expert witness, such as a testifying psychologist, or (3) the son can testify "I am frightened because I saw daddy smoke marijuana." If either of the latter two methods are used, the person making the statement is subject to examination.

200. To some extent, the concept of limited admissibility is a legal fiction. It is doubtful whether juries (or even judges) are always (or ever) able to keep the inadmissible purposes of the testimony from influencing their evaluation of the admissible ones. Thus, the "triple whammy effect" probably also occurs at trials, although the Hearsay Rule undoubtedly limits its impact.

201. As a matter of practice, in custody cases, judges often interview children *in camera* informally. Even when attorneys are present, the rigid formalities of evidentiary form are relaxed. For a debate over different approaches to this rule see, Hon. Richard Yale Feder, *Solutions to Dissolutions Re: Children,* 9 J. AM. ACADEMY MATRIMONIAL LAW. 93 (1992); Gaetano Ferro & Joanne Ross Wilder, *The In Camera Interview and the Role of Counsel in Child Custody Cases: A Different View,* 9 J. AM. ACADEMY MATRIMONIAL LAW. 107 (1992); and Hon. Richard Yale Feder, *Response to 'A Different View',* 9 J. AM. ACADEMY MATRIMONIAL LAW. 115 (1992). Thus, it is likely that the constructed dialogue issues discussed here are also of some concern in adversarial custody proceedings.

202. Assertion means "to say that something is so.... The rule's definition must, therefore be taken as meaning that out-of-court conduct that is not an assertion, or that even though asserted is not offered to prove the truth of the matter asserted is not hearsay." 2 MCCORMICK ON EVIDENCE, *supra* note 197, § 246 at 98. Generally, only utterances intended to convey facts or opinions are assertions. Thus questions ("What are you doing?"), commands ("Get your clothes on!"), and greetings ("Hi there!") are usually not assertions, unless they are intended to have a meaning different from the kind generally associated with the grammatical form. (E.g. saying "What are you doing?" as an indirect way of saying, "You certainly are disobeying the rules by wandering about here so late at night.").

203. Reported speech admitted for the fact that it was said, rather than the truth of what was said does not constitute hearsay. "When it is proved that D made a statement to X, with the purpose of showing the probable state of mind thereby induced in X, such as being put on notice or having knowledge, or motive, or to show the information which X had as bearing on the reasonableness or good faith or voluntariness of the subsequent conduct of X, or anxiety, the evidence is not subject to attack as hearsay." 2 MCCORMICK ON EVIDENCE 103 (John W. Strong, et al. eds., 4th ed. 1992).

204. The classification of state of mind evidence is tricky. Direct assertions of state of mind (e.g., "I am frightened") are technically hearsay (assertions being offered for the truth of what they assert) but admissible as hearsay exceptions under FED. R. EVID. 803(3) or CAL. EVID. CODE § 1250(A) (West 1994). But circumstantial evidence of state of mind is treated differently; they are non-hearsay because they are assertions being offered to prove something other than the matter asserted. To illustrate, consider Laura's statements in Sentence (6). "I want you to ... leave my house" is admissible as a hearsay exception under FED. R. EVID. 803(3) or CAL. EVID. CODE § 1250(a)) to prove that Laura wants John to leave the house. "Hey, this is my house...." is inadmissible hearsay to prove whose house it is under FED. R. EVID. 802 or

constitutes a verbal act[205] or an admission.[206] Other statements would be subject to hearsay exceptions such as present sense impressions,[207] excited utterances,[208]

CAL. EVID. CODE § 1200 (West 1994). But consider Laura's entire statement: "and what was started as about me sleeping with other men, I just said 'Hey, this is my house, and I want you to get, you know, leave my house.'" The real evidentiary purpose is to prove that Laura is calm and rationale in a crisis, and therefore that she exercises her parenting skills in the child's best interests. Since this purpose (Laura's state of mind) is different from either assertion actually made, the entire statement is nonhearsay and thus admissible. Predictably, courts often blur the difference.

205. ADVISORY COMMITTEE NOTES, FED. R. EVID. 801(C) ("If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay.... The effect is to exclude from hearsay the entire category of 'verbal acts' and 'verbal parts of an act,' in which the statement itself affects the legal rights of the parties or is a circumstance bearing on conduct affecting their rights.") Cases of defamation provide a clear example. Consider, for example, the plaintiff witness who testifies "The defendant walked up to my boss and publicly said 'You are a liar.'" The plaintiff is certainly not introducing this statement as proof of the fact that she is a liar (if the statement were really true, the defendant would have a complete defense). To the contrary, the plaintiff's point is that she is accurately reporting a false statement which was actually made. A similar situation can occur in a child custody case, where the dispositive legal issue is the child's best interests. Consider Sentence (53). Henry states that Gregory said to Vera "You're a liar, you're a liar." Henry's purpose is not to prove that Vera is a liar (that is, what the statement asserts). To the contrary, Henry's purpose is to show that Gregory makes false statements detrimental to Vera's mental health, thus acting adversely to her best interests. Thus, this constructed dialogue is admissible as nonhearsay.

206. FED. R. EVID. 801(d)(2) provides in pertinent part that "A statement is not hearsay if ... [t]he statement is offered against a party and is ... the party's own statement." Under California evidence law, admissions are classified as hearsay but are admissible under an exception. CAL. EVID. CODE § 1220 (West 1994). For example, it is nonhearsay if a mother testifies "I asked my ex-husband why he doesn't see that the children get their homework done and he said 'I certainly do. When our son doesn't do his homework I spank him 40 times with a hairbrush and send him to bed without supper.'" Importantly, the speaker whose speech is reported did not have to believe the statement to be against his interest when he said it. The father's statement constitutes an admission that custody with him is adverse to the child's best interest even if the father said it as a self-serving statement about how properly he disciplines his children. However, to qualify as admissions, statements need not so dramatically acknowledge responsibility. Admissions "are simply words or actions inconsistent with the party's position at trial, relevant to the substantive issues in the case, and offered against the party." 2 MCCORMICK ON EVIDENCE, *supra* note 197, § 254 at 142.

207. FED. R. EVID. 803(1) defines present sense impression as "A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." Present sense impressions are among the category of statements (historically known as the *res gestae* exceptions and now as spontaneous statements) which FED. R. EVID. 803 excepts from the hearsay prohibition because an intrinsic veracity is attributed to them by virtue of their utterance in temporal proximity to the events in question. California evidence law groups all spontaneous statements together under one hearsay rule exception. CAL. EVID. CODE § 1240 (West 1994). John and Laura's daughter's statement in Sentence (9) is a present sense impression because it is uttered contemporaneously with the event it describes. As a hearsay exception, it is admissible to prove that John has been drinking (not simply the daughter's state of mind). To the contrary, their son's use of a similar dramatic device in Sentence (17) constitutes inadmissible hearsay because it is spoken much later than the event it describes.

208. FED. R. EVID. 803(2) defines an excited utterance as "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." The exception is premised in the theory that stressful or exciting circumstances produce an emotional state which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication. FED. R. EVID. 803(2) Advisory Committee Notes. Depending on the stress and fear induced by the incipient fight between John and Laura, Sentence (9) might also be found to come under the excited utterance exception. If so, it would be admissible if uttered subsequent to the event so long as the daughter remained in an acutely stressed and fearful state.

spontaneous statements of feelings, symptoms, conditions or mental states,[209] or declarations against interest.[210] The charts below categorize the instances of constructed dialogue in the three cases according to their likely evidentiary rulings at trial.

209. FED. R. EVID. 803(3); CAL. EVID. CODE § 1240 (West 1994).

210. FED. R. EVID. 804(b)(3) defines statements against interest as:

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

The declarant need not be a party; but for the statement to be admissible the declarant must be unavailable, pursuant to FED. R. EVID. 804(a). CAL. EVID. CODE § 1230 (West 1994) is identical.

Chart I: *Safe from Screaming*

Sentence #	In-admissible	Non-assertive	Offered[a] for fact is was said	Offered[b] for state of mind	Verbal Act	Admission	Present sense impression	Excited utterance	Mental or physical state	Declaration against interest
1. Laura Sitter	√	√								
2.		√								
3.		√								
4. John Laura		√		√[c]	√	√				
5.		√								
6. John[d] Laura				√		√			√	
7. [e]				√						

a. This category includes the constructed dialogue of non-parties. For purposes of this article, they are classified separately from statements evidencing the parents' own state of mind, because they are very different in regard to responsibility shifting issues, although they are treated similarly under the rules of evidence.

b. This category includes statements which reveal the parent's mental states indirectly. They are not hearsay because they are not offered for the truth of the matter asserted. The category labeled "Mental or Physical State" includes direct statements about mental, physical or emotional state that are hearsay (being offered for the truth of the matter asserted) but are admissible under an exception.

c. The purpose of much of the dialogue in the "Self-portrait" sentences (1 - 8 and 12 - 15) is to show that the parent constructing the dialogue is calm, controlled, rational, and acting in the children's best interest while the co-parent is angry, abusive, out-of-control and acting contrary to the child's best interests.

d. Although Laura's statement about what John said, ("...and what was started as about me sleeping with other men..."), is not in the form of a direct quotation, it qualifies for Hearsay Rule inspection because it reports what someone else has said.

e. See, analysis of Sentence 6, note 195 *supra*.

Sentence #	In-admissible	Non-assertive	Offered for fact is was said	Offered for state of mind	Verbal Act	Admission	Present sense impression	Excited utterance	Mental or physical state	Declaration against interest
8. Neighbor Laura[f]		√		√				√	√	
9.							√	(?)[g]		
10.				√					√[h]	
11.	√[i]									
12.		√								
13.									√	

f. While the "excited utterance" exception is likely the surest route to admissibility for this dialogue (the phrase "My ex-husband is there" is only admissible under this exception) there is also an interesting twist on evidence of mental state. The phrase "I think he's gonna hurt me," is admissible under FED. R. EVID. 803(3) (or CAL EVID. CODE §1250(a)) as a hearsay exception. But the phrase, "I'm fine" is admissible as nonhearsay. It would not be offered to prove the fact asserted (Laura's position is that the incident has left her "un-fine", physically and emotionally). Rather, it is circumstantial evidence of her rationality and control, going to the critical points of best interests and parenting competency.

g. Whether this is an excited utterance depends on the daughter's mental and emotional state at the time it was said.

h. Like the dialogue in Sentence 10, different parts of the dialogue are admissible under differing theories for the admission of evidence about mental state. But this dialogue also showcases the classic problem of limited admissibility. The phrase "he hurts mommy" is admissible to show the children's state of mind, but not for the fact that daddy hurts mommy - difficult aspects to keep separate. The muddy water is made even murkier by substantive law. Abuse of one parent by the other is a factor the court must consider is determining custody. CAL. FAM. CODE § 3022. But children's perceptions are always substantively relevant to their interests, regardless of the "facts". So, how to untangle the two?

i. This constructed dialogue would be inadmissible, but not because it is hearsay. Non-expert testimony requires a foundation in first-hand knowledge or personal observation. ADVISORY COMMITTEE'S NOTE, FED. R. EVID. 701. Laura's constructed dialogue here is pure speculation.

Sentence #	In-admissible	Non-assertive	Offered for fact is was said	Offered for state of mind	Verbal Act	Admission	Present sense impression	Excited utterance	Mental or physical state	Declaration against interest
14.							(?)[j]			
15.				√	√	√				
16. Denny Sitter John	√	√	√[k]							
17. Laura Children			√(?)[l]							
18. Boyfriend Son			√ (?)[m]							(?)

---

j. Denny's statement is a close call and could go either way. It might be admissible as a present sense impression. Denny immediately reports his auditory impressions, and his conclusion about Laura's emotional state is one which is permissibly drawn by lay witnesses, FED. RULE EVID. 701 ("If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are ... rationally based on the perceptions of the witness...").

k. The sitter's testimony is not inadmissible hearsay because it is not offered for the truth of the fact asserted. (Who cares if the sitter really had to leave early or was just bluffing because she wanted the afternoon off?) Rather, it is offered for the way it informs understanding of John's decision to stay at Laura's house. Is he intrusively trespassing on Laura's privacy or competently caring for his kids? Thus, it is non-hearsay. "When it is proved that D made a statement to X, with the purpose of showing the probable state of mind, thereby induced in X, such as being put on notice or having knowledge, or motive, or to show the information which X had as bearing on the reasonableness or good faith or voluntariness of the subsequent conduct of X, or anxiety, the evidence is not subject to attack as hearsay." 2 MCCORMICK ON EVIDENCE 103 (4th Ed., 1992).

l. The son's statements in Sentences 17 and 18 might be admissible to bespeak his state of mind.

m. I have placed a question mark here for two reasons. First, the declaration against interest exception applies only where the declarant is unavailable as that term is defined in FED. R. EVID. 803(a). *Accord*, CAL. EVID. CODE § 1230. Under the facts of this case, the pertinent provision is Rule 803(a)(5) (the declarant's attendance or testimony cannot be procured by process or other reasonable means). Since the conciliation court has neither subpoena power nor contempt power (and the wife's ex-boyfriend is unlikely to appear at a custody mediation to talk through mere persuasive efforts) this declarant is likely unavailable. Second, as the question was posed to me by an evidence expert who read an earlier draft, "Do you really think that even in our 'just say no' society, telling somebody in a social situation that you've smoked marijuana is a declaration against penal interest within the meaning of the rule?"

Sentence #	In-admissible	Non-assertive	Offered for fact is was said	Offered for state of mind	Verbal Act	Admission	Present sense impression	Excited utterance	Mental or physical state	Declaration against interest
19. Laura Children[n]					√ √					√
20.			√							
21.			√							
22.		√								
23. John Attorney	√o		√							

n. Sentence 19 poses issues like those discussed in *supra* note 187. Whether the statements are non-hearsay or hearsay admissible under the state of mind exception seems to pivot on syntax. (The declarative sentences are hearsay; the others are not). But the Hearsay Rule misses the real insidiousness of this utterance by failing to grasp the problem of causality implied by juxtaposition. The children's statements are admissible as evidence of the fact that they want to wait in the police station but not of *why* they want to. This Laura provides in her own concluding sentence. A wise decision on this evidentiary question would probably admit the children's statements, but find Laura's statement inadmissible as opinion testimony rendered by a lay witness, falling beyond the bounds of FED. R. EVID. 701, or alternatively, Laura's statement might be admissible under FED. R. EVID. 701 as lay opinion testimony on the emotions of another.

o. Which of two reasons one gives for finding admissible the statement "he sees him at 8:30 playing basketball" depends upon syntactical niceties. If we read the statement as though the words "he says" are implied between "club and" and "he sees", then the statement is inadmissible hearsay. However, if these words are not implied, the statement is inadmissible as lacking a foundation in personal knowledge under FED. R. EVID. 701. CAL EVID. CODE § 702 similarly states "...the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter."

Sentence #	In-admissible	Non-assertive	Offered for fact is was said	Offered for state of mind	Verbal Act	Admission	Present sense impression	Excited utterance	Mental or physical state	Declaration against interest
24. Children Laura		√		√	(?)[p]					
25.						√				
26.	√[q]									
27.	√[r]									
28.									√	
29.						√				
30.	√[s]									
31.	√									

p. This dialogue is a very close evidentiary call. If the words are offered for their truth value, they are inadmissible hearsay. But it is certainly not frivolous to argue that Laura's words are verbal acts — by simply saying them she is manifesting maternal competence, calming and reassuring her troubled children.

q. A creative FED. R. EVID. 701 (CAL. EVID. CODE § 702) violation. Laura is not a mental health expert. Does she converse with his ego?

r. FED. RULE EVID. 701 (CAL. EVID. CODE § 702) again. (Lack of personal knowledge — John is only speculating about what Laura's attorney probably said). If John did have personal knowledge that Laura's attorney actually made this statement, it might be admissible as an admission by Laura's agent or employee.

s. I have placed a question mark here because this statement is arguably admissible under FED. R. EVID. 803(3) (CAL. EVID. CODE § 1250 (a)), to show the counselor's state of mind. But I doubt if that is the purpose of this dialogue. (Who cares how the counselor feels?) Rather, it would be intended as evidence that Laura's acts were so detrimental to their son that they merited the disapproval of a mental health professional -- therefore, said professional not being available for cross-examination, they are hearsay.

B. Discussion of Hearsay Exclusions in the "Safe From Screaming" Case

Chart I reveals that application of the Hearsay Rule would do virtually nothing to ameliorate the constructed dialogue problem in this case. Almost all the constructed dialogue evades the hearsay prohibition. At most ten instances of speech are inadmissible under formal evidentiary rules; three of these instances being excludable for lack of personal knowledge or because they are opinions rather than because they are hearsay.[211] More significantly, the possible hearsay exclusions do not rectify the rhetorical power imbalance in this case. An equivalent number of utterances each would be omitted respectively from John and Laura's narratives, and the omissions cover very similar terrain for each speaker. First, the reports of the children's tales of the other parent's marijuana smoking might be inadmissible. Since the parents seem to have no other source of information about these practices this entire line of talk might be excluded. By eliminating this subject, John would get a slight edge to whatever extent Laura's tale is the more powerful.

Second, the statements made by the "minor characters" to the family drama (Laura's attorney and cousin, the counselor, and a once possible employer of John) would be excluded. And third, John and Laura's more speculative and obviously imaginary dialogue (what Laura fantasizes John's ego says; what John imagines Laura's lawyer says to himself) would be inadmissible. In eliminating these statements, the narratives lose punch — but the Hearsay Rule seems to render Laura and John's narratives more dull in roughly equal degree.

But, application of the Hearsay Rule does not meaningfully diminish the relative power of Laura's constructed dialogue. Almost all of her constructions of the children's dialogue are admissible either to show their state of mind or under the Hearsay Rule exception for spontaneous utterances. All of her construction of John's dialogue is admissible as an admission.

Therefore, even if the Hearsay Rule (and other rules of evidence) were to be rigorously applied, Laura's constructed dialogue would be free to work all its power of dramatically shifting responsibility, blame, and opinion. Further, by gutting John's talk as much as Laura's, application of the Hearsay Rule would not relatively strengthen John's narrative, nor meaningfully alter the existing power imbalance.

211. ("I don't know if ... Denny told the children 'Don't tell mommy.'") ("the police station ... his ego side of him, 'I can do whatever I want.'") ("Her lawyer says 'Well, this is the situation I wanted.'")

Chart II: *Twisted Prisms*

Sentence #	In-admissible	Non-assertive	Offered for fact is was said	Offered for state of mind	Verbal Act	Admission	Present sense impression	Excited utterance	Mental or physical state	Declaration against interest
32.						√[t]				√
33. Statement to Steven Statement to Jane	(?)[u]			√		√	√ (?) √ (?)			
34. Steven Attorney	√[v]								√	
35.	√									
36.	(?)[w]									

t. Note the irony and implication here. The statement is not being used to prove the truth of the fact asserted. To the contrary, Steven turns Laura's explanation into an admission by implying that she hurt (or let someone hurt) Clara and then lied about it.

u. The verbal techniques Steven uses to bring comedy and suspense to this story infect the evidentiary categorization. If Sam's statement is being used to prove that what Clara had on her head was spaghetti sauce, it is either inadmissible (double) hearsay or admissible as a present sense impression of tomato sauce. But Steven makes the spaghetti sauce point through his own words ("And indeed it was!") and Steven should know this on the basis of his own personal knowledge, since it was Steven who spilled the sauce on her head! So perhaps Sam's statement is merely being offered for the fact that it was said. In that case, it is circumstantial evidence of Jane's state of mind (what a paranoid worrier she is) and therefore admissible non-hearsay.

v. Steven is here explaining his motivation for coming to mediation after having so recently signed a custody and visitation agreement. *See supra,* note 144.

w. Conceivably, in Sentences (35) - (38) Steven is just talking about the mental state these statements induced in him, making them admissible for the fact they were said. But I think this elevates form over substance. Steven's purpose seems to be to present the views of an absent expert.

Sentence #	In-admissible	Non-assertive	Offered for fact is was said	Offered for state of mind	Verbal Act	Admission	Present sense impression	Excited utterance	Mental or physical state	Declaration against interest
37.	√									
38.	√									
39.	(?)[x]									
40.	√									
41. [y]				√	√	√				
42. No reported speech										
43.									√	
44. No reported speech										
45. No reported speech										
46. No reported speech										

x. The court might simply treat this as a figure of speech, more like a proverb than a quotation. Similarly, of the twenty markers of elocutionary force which Steven uses (*see supra* notes 138-42 and accompanying text) only the two which refer to statements Steven made prior to the mediation session (*see supra* note 139) are likely to be regarded as hearsay. The other should pass as a mere rhetorical flourish. Alternatively, the statement might be disallowed as irrelevant.

y. Although not in the form of direct quotations, this sentence and Sentence 43 trigger hearsay analysis. *See* note c, *supra.*

C. Discussion Of Hearsay Exclusions in the "Twisted Prisms" Case

Chart II discloses that application of the Hearsay Rule would eliminate a significant amount of Steven's constructed dialogue, including a portion of his best anecdote, and much of the "reported speech" of his attorney, and other authority figures, whose words he uses to give strength to his own demands.

Interestingly, the Hearsay Rule operates in this case largely to proscribe the statements of such minor characters in the family drama as doctors and lawyers, just as it did in the previous "Safe from Screaming" case. But its impact is different because Steven and Laura's narratives include virtually no construction of their own speech, each other's, or their daughters — perhaps because the lack of verbal communication between them is a part of their problem.

Applied to this case, the Hearsay Rule does help equalize the rhetorical power between the parties and might appear, at first blush, to be a good solution. But the Hearsay Rule, applied to this case, equalizes power by dragging Steven's narrative down closer to Jane's level. It works by eliminating possibly important information, rather than by helping Jane to speak more powerfully, by adding vivid details (such as what Clara actually tells her mother about visits with Steven) which might bring forth information important to a fair and workable agreement. Even when it works to inhibit the more powerful speaker, application of the Hearsay Rule does not seem to be a wise approach to power equality in mediation.

Chart III: *Stopping Payment*

Sentence #	In-admissible	Non-assertive	Offered for fact is was said	Offered for state of mind	Verbal Act	Admission	Present sense impression	Excited utterance	Mental or physical state	Declaration against interest
47. Alexa Girls		√ √								
48. Gregory Vera		√ √	√[z]							
49.						√				
50. Gregory Vera Alexa		√	(?)[aa]						√ √	
51.	(?)[w]	√		√						
52.				√	√[bb]					

z. The two assertions by Vera in Sentence 48 are "Oh, yes (I gave the check to my mother)" and "Mom lost the check." Quite obviously, they are not being offered for the truth of the facts they assert. Once again, the intention is the opposite - to show that Vera said something that was not true.

aa. I am not entirely sure that Vera's statement "I have to give her the $10" is admissible as circumstantial evidence of Vera's or Alexa's state of mind. If Gregory's story is that Alexa is merely getting Vera to say things to Gregory to make him feel guilty, then this is the correct ruling. (It is Alexa, after all, who ultimately pays Gregory the $10). But if Gregory is trying to say that Alexa is a terrible mother because she is requiring Vera to pay the $10, then the statement is being offered for the fact asserted and is, therefore, inadmissible hearsay.

bb. Henry is not formally a named party in this case. But the mediation process often includes *de facto* family members. Further, Henry uses the editorial "we" to include both Alexa and himself. It makes more practical sense to regard him as speaking for Alexa as well than to contort this dialogue into some Byzantine double hearsay problem.

Sentence #	Inadmissible	Non-assertive	Offered for fact is was said	Offered for state of mind	Verbal Act	Admission	Present sense impression	Excited utterance	Mental or physical state	Declaration against interest
53. Vera Gregory			√ √cc			√				
54. Henry				√	√					
55. Gregory Alexa					√ √	√				
56. Gregory Alexa					√ √	√				
57. Alexa Gregory					√	√				

cc. This is an exquisite illustration of why verbal acts are non-hearsay. Once again, there is no intent to prove that Vera is a liar, or that Alexa is manipulative. Rather, Henry's point is that the very fact that Gregory says these things constitutes strong evidence of his detrimental effect upon his daughter.

D. Discussion of Hearsay Rule Exceptions in the "Stopping Payment" Case

Surprisingly, the "Stopping Payment" case, which contains the most complicated, contradictory, and suspiciously inaccurate constructed dialogue is untouched by application of the Hearsay Rule. Every single utterance is admissible!

In sum, then, applying the Hearsay Rule to mediation would make a small and ill-fitting dent in the constructed dialogue problem. It would exclude very little reported speech, mostly of minor characters who make nonessential comments. Because the substantive issues of child custody law concern the relationships among parents and children, the most important constructed dialogue (such as that revealing aggression or affection) would be admissible, despite the Hearsay Rule, as admissions, spontaneous utterances, or evidence of state of mind. The shifting of responsibility, blame, and opinion from parent to co-parent to child, which renders constructed dialogue so rhetorically potent in the child custody mediation forum, seems to elude the hearsay barrier.

Even where the Hearsay Rule helps to equalize power (as, for example, by eliminating the quotations from authority figures in "Twisted Prisms") it functions by crimping the more powerful speaker rather than by enabling the weaker one. Since parents' narratives are almost the only source of information available for forging an agreement in mediation, proscription seems an ill-advised approach to balancing power: it truncates the views of the more powerful parent without, in any way, bringing out the views, perceptions, and anecdotes of the less powerful parent. Equalization through rhetorical empowerment, rather than the reverse, is more compatible with the purpose and process of mediation.

Second, and not unrelated, the Hearsay Rule is an ill fitting prophylactic for the constructed dialogue problem because it focuses on the truthfulness of the original speaker rather than on the persuasiveness of the dialogue constructor.[212] The Hearsay Rule presumes, perhaps erroneously, that any unfair or undesirable effects from constructed dialogue can be controlled by subjecting the dialogue constructor to cross-examination at trial.

But cross-examination is concerned with the witness' honesty, accuracy, and memory while constructed dialogue creates power differentials through empathetic vividness and responsibility shifting, regardless of whether or not it is a verbatim report of what was actually said. In looking through the witness to the original speaker, the Hearsay Rule is actually blind to the special problems of constructed dialogue. In fact, constructed dialogue problems may also occur at formal trials, though rendered less dangerous by the Hearsay Rule, cross-examination, multiple witnesses and other evidence. Like narrative coherence, syntax, style, diction, and the use of detail, witnesses' use of constructed dialogue may unfairly affect their convincingness and persuasiveness at trial as well as in mediation. The evidentiary territory covered by the Hearsay Rule is not congruent to the risks of constructed dialogue.

212. *See supra* notes 96 -97 and accompanying text.

Third, the Hearsay Rule's purpose of ensuring truthfulness is suited to the fact-finding goals[213] of a trial, in which an (ideally) neutral third party is presumed to make an objective determination. The Hearsay Rule is less apposite to mediation. The goal of mediation is not an objective third party determination of truth and consequences but the mutual construction of a shared understanding between the parents on which a workable, mutually acceptable, parenting plan can be based. This involves the parents' either reaching a common view of the situation or a respect for each other's views and positions. To achieve this, absolute facticity (to the extent it is ever humanly attainable) is not necessary.

Rather, what is required is that the area of mutual overlap in the parents' perceptions of the situation sufficiently *approximate* reality for (1) the agreement to be consistent with the child's best interests, and (2) the parents to comply with the agreement.

Rather than neutral fact finding, the achievement of this shared approximate vision of reality requires exchanging perceptions and ideas, venting emotions, and clarifying perspectives — best facilitated by free-flowing, conversational give-and-take. To the extent that facticity and "reality testing" are important (as they become when mediators intervene with specific suggestions or selectively facilitate certain outcomes), in the context of mediation as distinct from trial, constructed dialogue probably promotes them more than would its prohibition.

At trial, evidence not admissible through the hearsay testimony of party witnesses may be admitted in other ways through lay and expert witnesses and documents presented according to carefully considered plans by trained attorneys. By contrast, at mediation, the parents' narratives are usually the only source of information about the family situation. Any such information (whether or not it measures up to evidentiary standards of veracity) which is omitted because the parents' self-consciously monitor their narratives for constructed dialogue is lost, decreasing the body of information available for the mediator to use. By contrast, "inaccurate" constructed dialogue is available for immediate critique or the construction of alternative narratives by the co-parent. Thus, the fourth reason why a Hearsay Rule is inappropriate for mediation is that the rhetorical constraints it places on talk would hamper the spontaneous and honest expressive processes through which mediation works.

Fifth, adopting a Hearsay Rule for mediation would impose an inappropriately judicial burden on mediators (many of whom have no formal legal training). The Rule's nuances and complexities make it difficult even for judges to apply correctly. Also, it would oblige mediators to assume a judgmental role inconsistent with the supportive and validating approaches most mediators use.[214]

---

213. In light of the sociolinguistic and somewhat semiotic character of this article, the word "goals" is here used advisedly, to eliminate the author's need to self-consciously cite an entire philosophical tradition from Emmanuel Kant to Jacques Derrida for the proposition that there is no such thing as objective truth.

214. The requirement that lay witnesses testify on the basis of their own personal knowledge is another formal rule of evidence that looks as though it might increase fairness if applied to mediation. The tendency of participants like John and Laura, and Gregory and Henry to "report" what they believe other people to have said outside of their own hearing suggests the promise of exploring a personal knowledge requirement. The rule is far simpler to apply than the

V. COUNTERWEIGHTING CONSTRUCTED DIALOGUE: STEPS TOWARDS A "HEARSAY RULE" ANALOG

Rather than importing the Hearsay Rule into mediation, it is more appropriate to develop guidelines for interpreting and managing constructed dialogue. Guidelines should address several concerns. Fairly balancing the power depends upon the mediator's abilities to first perceive, and second correct the situation.[215] First, mediators should learn to listen for and hear constructed dialogue and similar devices as rhetorical strategies of the speakers, rather than listening through them, as though they were hearing the actual words of the people whose speech is "reported." Second, to preserve their own impartiality and neutrality, they need to be aware of the persuasive effect good constructed dialogue may have on their own understanding of the situation so that they do not confuse weaker speech with a weaker case, thus forming an unconscious alliance with the rhetorically more powerful parent. Third, they need to be acutely aware of when they are treating constructed dialogue as a statement of parents' perceptions and when they are treating it as reported fact, lest the better told story be interpreted as truth.

Fourth, mediators should strive to balance the power between the parties by creating an equality of dramatic dialogue. Good mediators are highly adept at rectifying power imbalances expressed during the dialogue of the mediation itself. Where one parent persistently co-opts the floor they enforce strict turn-taking rules and provide parents with equal time. When parental discussion degenerates into name calling, argument, or ritual attack cycles they interruptively intervene with questions, topic changes, and sometimes admonitions to be civil and cooperative. Well trained mediators correct for power imbalances by controlling the processual flow of conversation through the use of separate sessions with each parent,[216] interruptive interventions, controlling turn-taking and topic selection, questioning, "backchanneling" (giving phatic "I hear you" remarks like "Uh huh" or "Umm hmm");[217] "framing" (encouraging parties to see an issue from a different perspective, such as the children's); and "reframing" (exposing hidden issues, such as a

---

technical Hearsay Rule, requiring only that a witness provide a foundation for the knowledge. However, the personal knowledge requirement would do little to ameliorate the problem of dramatic power in constructed dialogue. Only sentences 11, 23, 26, and 27 in this study would be inadmissible for lack of personal knowledge. Further, it is not obvious that the issue of facticity addressed by the personal knowledge requirement is identical to the "shared approximate vision of reality" that mediation strives for. The problems raised, for example, by Gregory and Alexa's radically different accounts of the same conversation, assuming them to be based on an honest divergence of memory and perception, would not be solved by a personal knowledge requirement. Application of the formal evidentiary personal knowledge requirement might prove--like the Hearsay Rule--to be incongruent.

215. In comparing the Anglo-American Hearsay Rule and its continental analogs, Professor Damaska makes the point that the potential dangers of derivative proof are less where fact-taking is controlled by the judge than where it consists of separate sifted dramaturgical presentations by adversaries. Mirjan Damaska, *Of Hearsay and Its Analogues,* 76 MINN. L. REV. 425, 431-434 (1992). In a similar way, mediators can develop skill in fully eliciting and then merging the respective adversarial narratives.

216. *See* Christopher W. Moore, *The Caucus: Private Meetings that Promote Settlement,* 16 MEDIATION Q. 87 (1987) (a "how-to" article on when to initiate separate sessions and how to use them).

217. WILLIAM A. DONOHUE, COMMUNICATION, MARITAL DISPUTE, AND DIVORCE MEDIATION 145 (1991).

relational issue underlying a fact conflict).[218] Mediators have also learned to be alert to verbal cues which signal feeling states such as anger, hurt, or a sense of being disrespected of which parents themselves may be unaware, and to intervene with questions which help parents articulate their feelings.[219] But my observation is that they are virtually oblivious to the expression of power in the dialogues contained within parental narratives.

If one parent is significantly more fluent in constructed dialogue, mediators should recognize this as a power imbalance, whether or not it is symptomatic of underlying inequalities in the relationship.[220] They should ask the disempowered parent specific questions which can draw out the vivid and detailed accounts that make for dramaturgical equality. If the parent does not respond, mediators should recognize the value of the untold story.[221] Similarly,

---

218. *Id.* at 146-147 ("When the mediator judges that the interaction has moved in a less than productive direction, the framing tactics slow down the conflict and provide disputants with the insights necessary to see their own positions, concerns, and so on, in relation to the other."); William A. Donohue, et al., *Mediator Communicative Competence*, 55 COMM. MONOGRAPHS 104 (1988) (finding that structuring the mediation session and reframing issues were the most important measures of mediator competence in getting agreement).

219. For example, a statement by a father that "My ex-wife is always at least fifteen minutes late when she comes to pick up our children" may prompt the mediator to respond: "How do you feel about that? Do you think she does not appreciate what a busy schedule you have?"

220. Professors Sara Cobb and Janet Rifkin argue that development of techniques for empowering mediation participants and maintaining mediator neutrality is hampered by a professional view of these things as intrapsychic processes rather than matters of narrative structure. Sara Cobb & Janet Rifkin, *Practice and Paradox: Deconstructing Neutrality in Mediation*, 16 LAW & SOC. INQUIRY 35, 61-62 ("In fact, mediation is a hegemonic process precisely because it generates a dominant ideology (a dominant story) by creating a web of shared meanings, a web created out of the available stories/myths and their engendered forms of practices. The dominant ideology 'dominates' not by coercion (mediators do not tell disputants what to say) but by consent (disputants use this web of meaning, co-constructed with mediators, as grounds both to affirm *and* to contest).... Neutrality becomes a practice in *discourse*, specifically, the management of persons' positions in stories, the intervention in the associated interactional patterns between stories, and the construction of alternative stories.").

221. Using a narrative model of power, Professor Sara Cobb recommends that mediators ask specific questions of each participant to bring out character, plot, and themes from their own and the other side's view. Such "circular questioning," she suggests, may forestall narrative dominance by one side and entrenched opposition by the other -- facilitating equal participation in the conjoint production of a shared narrative. Sara Cobb, *Empowerment and Mediation: A Narrative Perspective*, 9 NEGOTIATION J. 245 (1993). She cautions that power is a function of the degree to which one can be self-defining in discourse, and have that self-definition elaborated by others. To truly balance power in mediation, mediators must practice "narrative intervention," working to equalize the content of participants' stories in a way which challenges the traditional distinction between content and process in mediation. Sara Cobb, *A Narrative Perspective on Mediation: Toward the Materialization of the 'Storytelling' Metaphor*, *in* NEW DIRECTIONS IN MEDIATION: COMMUNICATION RESEARCH AND PERSPECTIVES 48, 58-59 (Joseph P. Folger & Tricia S. Jones eds., 1994). *Accord*, in less theoretical terms,

> [B]oth empowerment and recognition require ... a 'pushy' mediator ... willing and able to "push" the parties ... in the positive sense of inviting, supporting, encouraging, motivating, and urging the parties to work through the processes of self-determined choice and mutual acknowledgment.... [T]he mediator should push for the parties to disclose and otherwise marshall all information relevant to resolving the dispute ... summarize, clarify, question, and test for comprehension before allowing decisionmaking to proceed.

Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition? The Mediator's Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 277-278 (1989). To their insights, must be added the awareness that how something is said may be quite as influential as what is said.

attorneys who are preparing clients to enter mediation should be aware of the importance of using constructed dialogue. Just as they coach trial witnesses to avoid quoting what other people said, they should coach parents entering mediation to pepper their speech with the statements of the children and the co-parent and to prepare narrative accounts, including dialogue which illustrate why they want the kind of custodial arrangements they are asking for.

I conclude with suggested guidelines for interpreting and managing constructed dialogue in mediation sessions which, as the analog of the hearsay rule in adjudication, can help to rectify power imbalance.

(1) Mediators should carefully explain to parents that they will be talking about both facts and feelings because mediation has three purposes: reducing acrimony, reaching agreement, and furthering the child's best interests. Although mediators often explain to parents how mediation works, they do not always do so systematically or comprehensibly and they rarely see such explanations as part of rectifying the imbalance of power.

(2) Mediators should be trained to recognize constructed dialogue as opaque and problematic rather than as an approximate report of actually occurring speech. They should be aware that speaking in made up quotes or selective reporting of what was said is an ordinary conversational device which we all use to make points without any intention to lie or distort the truth. They should learn to recognize internal rhetorical cues — such as instantiation, choral talk, and inner dialogue — which indicate that was said was said was never said.

(3) They should be ever vigilant of their own emotional responses to constructed dialogue. In particular, they should be aware that because constructed dialogue powerfully and empathetically involves the hearer in the speaker's narrative, they themselves may remember the points made in dialogue as most salient even when they are not so in fact.

(4) They should be aware that the greater use of constructed dialogue by one parent than by the other may signal pre-existing power imbalances and/or create power imbalances during the mediation session because of its rhetorical potency. They should respond accordingly, encouraging and assisting the dialogue disempowered parent by asking explicit questions about what was said and other specifics and details. If this proves unsuccessful, they should endeavor to counterweight this power imbalance through their own consciousness of its force as they affirmatively propose solutions and selectively facilitate agreements.

(5) At no time should mediators interpret the relative absence of constructed dialogue in the speech of one parent vis-a-vis the other as the absence of a factual basis or good reasons to support the custody and visitation schedule that parent is seeking.

(6) At no time should mediators interpret the relative absence of constructed dialogue in the speech of one parent vis-a-vis the other as a positive expression of that parent's willingness to compromise or give-in in such a way that they form an alliance with the more powerful parent in encouraging the less powerful one to give way. Mediators should endeavor to render conscious their own unconscious tendency to do so.

(7) Mediators should be aware of the subtle responsibility and blame shifting power of constructed dialogue. They should be ever aware that, without meaning to lie, parents may unconsciously use constructed dialogue to put their own opinions and feelings into the mouths of their co-parents or children.

(8) Mediators should be aware that the risks of constructed dialogue are exacerbated when the discourse line between psychology and law is transgressed. They should ever guard against their own tendency to use dialogue constructed to express feelings as evidence of underlying facts.

(9) To minimize the risks of discourse jumping, mediators should endeavor, when formulating fact-based opinions about the child's best interest, to "reality check" constructed dialogue and learn the whole conversational exchange by obtaining full versions of the event from each parent, whenever such is consistent with the goals and progress of the mediation session.

(10) To further minimize the risks of discourse jumping, and to further empower parents to use their conscious and unconscious rhetorical strategies properly they should, whenever it is consistent with the goals and progress of the mediation session explicitly demarcate the phases of the mediation session for parents and render explicit when the topic of talk is focused on feelings and when it is focused on facts.