



# **Systemic / Strategic Aspects and Potentials in the Haynes Model of Divorce Mediation**

## **How Do Requirements of the Mediation Process Empower the Couple to Solve Present and Future Problems?**

**Jon Amundson and Larry Fong**

Over the past decade there has been an increasing interest in what is referred to generically as ‘family or divorce mediation’ (Brown and Mandela, 1977, Irving and Benjamin, 1983). This practice is concerned with the process of marital dissolution and involves a structured orientation to separation and termination in a relationship (Haynes, 1984). While superficially the opposite of marriage counselling, it does in fact encompass many of the same dynamics.

While the end is practical – the preparation of independent households, division of community property, and the resolution of child custody and access issues – the process often requires the same sentiment found in family or marital therapy (Baptiste, 1983). This is an emphasis upon cybernetic or systemic issues in the couple’s relationship and the use of technique or intervention appropriate to them.

John Haynes, one of the foremost mediation practitioners in the United States, has developed a model that is perhaps the most popular vehicle today for carrying out mediation work. There are around

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2,000 mediators across North America trained in this approach, and this is in part due to its efficacious design. Fundamentally, the model operates against a backdrop of empowerment, the ‘guiding principle’ to empower individuals in service to:

1. work out their own settlements on their own terms as an alternative to placing ‘authority’ in the hands of a judge within an adversarial context; and
2. balance, on a secondary level, power deficiencies and resolve the power struggle that may have in fact sponsored dissolution in the first place.

This second-level empowerment involves strengthening each of the individuals and refers to filling in the areas of deficiency that either existed in their marriage or that emerged with separation and pending divorce.

The pursuit of this ideal mediation is held up as a more rational alternative to adversarial litigation and perhaps, in complicated unions, as a less expensive solution (Bahr, 1981; McIsaac, 1981; Pearson and Thoennes, 1982). It places individuals on an equal footing under the eyes of a mediator grounded in the belief that empowerment is the best remedy. It is directive in that a well-defined course is to be followed and specific issues are to be addressed.

Initially, under the Haynes model, a couple is engaged in a conjoint fashion – with both of them present. In fact, it is recommended but not demanded that all sessions be held conjointly (Brown and Manela, 1977). The process, intent, and final goals are laid out. Some mediators choose to introduce a flexible contract specifying hours, fees, number of sessions, issues to be addressed and, of course, action to be taken at termination.

The primary assignment is the preparation of separate budgets; each person is told to go home and prepare a detailed budget listing his or her living expenses, actual or anticipated, (post-divorce). Though prepared separately, these figures and presumed areas of expense are to be shared by the couple. This is not a subject for debate but an object for personal and conjoint reflection and, in the next or subsequent sessions, it will be considered in relation to current income and assets.

If either of the participants fails to complete their assignments, the mediator seeks to present only instrumental assistance, by going through a budgetary process in session or through reflecting – based upon the mediator’s experience and expertise.

In the light of budget preparations, budgets prepared for separate households, liquid assets, cash

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on hand, and regular income are evaluated. This is in essence the economic basis for the dissolution of the couple. What they had together must go into supporting their independence; their estate, fixed and semi-fixed assets, and related personal and community property are evaluated. In the mediation process this moment is often referred to as ‘the cold shot of reality’, for the actual nature of divorce is that it ends up as a situation of short-term reduction of economic status and long-term diminished potential for returns.

The mediator is again at this point ‘on call’ for the couple. He or she is not responsible for dictating or defining the most suitable arrangements but rather is there to back up, support, or clarify the participants’ self-initiated course of action (Barsky, 1984). All steps so far are set against a backdrop of family issues of importance and the mediator’s appreciation of clinically relevant dynamics between the couple. Usually, by this point, they will have made sufficient data available. One aspect of this will be an appreciation of substantive versus symbolic demands; issues that are relatively clean and instrumental in nature, and those overdetermined concerns that extend into highly affective and convoluted areas of the marriage.

If at this point budgeting hurdles are cleared, then the point at which property can be divided is approached. There are four basic components:

1. identification,
2. understanding,
3. valuation, and
4. division of assets.

The first two relate to identifying and appreciating what it is the couple had together. This includes items ranging from actual cash to anticipated revenue. Such assets would include insurance policies, pension plans, net worth statements, bank passbooks, stock certificates, deeds to property, interest in companies, and so on. Everything should first go on the bargaining table. In the budgeting process there has already been a quick review separately of income and income potential. This is included in the separate financial statements. It is intended that obvious personal property can be removed from consideration without conflict.

Things in question (houses, cars, and such) will emerge at the centre of the conflict and things yet unconsidered (art, records) will take on conflictual and negotiable potential. It is at this point that the heart of instrumental mediation has been reached. Dependent upon the value afforded these items, the short- and long-term desires of the individuals, and the budgets they have prepared, the division of

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property takes place. It is here that an accountant, evaluator, or attorney is often useful, for there are tax issues and even legal demands that must be acknowledged. Once this has been dealt with, the mediation is ready to move on to the issues of custody, maintenance, and support.

It is highly unlikely that the couple will have reached this stage without at least some discussion of custody and support. For the mediator, these subjects have been deferred or defused in relation to lesser but more practical concerns. At this point the problem is addressed from two points of view:

1. that while 'coupling' and the spousal arrangement shall end, parenting will continue; and
2. that the win/lose perspective reflective of traditional maintenance/support conflict should be re-cast in the light of a win/win perspective or pursuit of mutual independence.

This, of course, affects plans for the future: employment, mobility, other relationships, child versus spouse support, and so on. The mediator's task is to continually introduce such variables into the mediation process, and to escalate all attempts by the couple to simplify the process. Complex issues can be only resolved simply when all the complexity has been addressed.

Ultimately, an informal agreement is reached encompassing not only property and maintenance/division issues, but residential arrangements and visitation for the children, and even amendments-for-purpose-of-amending the agreement. This is presented as a guide for the attorneys in drawing up a decree of divorce and it is held as representative of the couple's desires and best interests.

It is a fact, however, that approximately 98 percent of all memorandum of agreements are altered by the couple during the first year following the divorce (Haynes, 1984). Therefore, one might ask, what is the point in all of the above? Why all the laborious task of working out arrangements, often in meticulous detail, to find that such are overturned by the couple? The answer is, of course, to effect creative problem solving within the couple subsystem, and it seems that an initial strategic/systemic perspective in this process is the context mediation sets (Kelly, 1983). It appears that much of mediation is in the form of a therapeutic ritual concerned with altering the nature of family cohesiveness.

The mediation process is then, from this perspective, symbolic. It is 'as if' we are allocating resources, working out budgets, designing security measures for the children, and so on. Inherent in this process is a rehearsal or practice for those times in the future when things need more of the same ritual. All things held equal, a mediated settlement is precise and efficacious in dealing with the vicissitudes of divorce; however, in the real world of human relationships nothing is held equal – at least not for long. The real essence, then, of mediation is to teach 'em to fish. (It was a favourite slogan of the Peace Corps

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that if you feed a man you make him grateful and dependent, but if you teach him to fish he will feed himself and be independent.)

It appears that this might best be exercised in a context of strategic moves and systemic considerations. Under the Haynes model, at the onset of mediation, the 'ex-couple-to-be' enters a therapeutic bind reminiscent of strategic or paradoxical moves. They are told mediation is an exercise in personal empowerment and independence and are immediately subjected to a directive and well-specified process. This is in some ways akin to the 'be spontaneous' or 'show initiative' sense of double bind that, when employed therapeutically, leads to an unsettling of nested and established patterns in individual and relationship dynamics.

In order to comply with the empowerment injunction, the couple must adhere to the course set for them by the mediator. Adherence, compliance and co-operation therefore equal independence, personal power, initiative, and self-affirmation. This bind is compounded by the course mediation chooses to follow. In an unstructured situation, estranged couples elect to pursue their most emergent issues. These issues are highly emotionally charged and intrusive (Kelly, 1983). Inevitably, these issues are directly related to the precipitating features of divorce (power-related themes, issues of symmetry/complementarity, dominance/subordination, and so on). In fact, couples often see mediation as liberation from these patterns; a liberation, however, associated with vindication or affirmation by the mediator that he or she will see who is really 'right' in all this.

However, in a highly symbolic and strategic move the mediator focuses attention upon perhaps the most mundane area of the individual's concern: an individual's budget. This is usually outlined sufficiently in a mediation session to provide guidelines or an overview of what is required, but not in fact executed or directly guided by the mediator.

The mediator now must emphasise his or her complementary position in the couple's own empowerment process. This leads to a role for the mediator as both a directive/process-oriented convenor and as a passive, at times impotent, observer or witness to the couple's own empowerment. This process is cybernetically pleasing, for it reflects the apparent propensity of systems to pursue both change and stability when seeking to adapt to new or stressful circumstance (Keeney and Ross, 1985).

This issue of change-versus-stability is crucial to therapeutic or mediation efforts, for 'resistance', avoidance of task, or 'stuck points' in mediation may be thought of as times when too much 'difference'

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or too much ‘sameness’ is felt by one or both individuals.

It seems useful for the mediator to be both a purveyor of change *and* a champion of stability, as necessary. Acting in these roles, the mediator both speeds up and directs as well as slows down the process. This helps the couple to adapt to separation.

The budget exercise is the first therapeutic ritual enacted. Its outcome is important for receptivity to mediation, and in fact the likelihood of its success may hinge upon the mediator’s response to its outcome. Results are useful in defining the marital relationship more distinctly. The budget exercise may point out the tacit role definition for the mediator, or help define the existential positions of each partner. It will also provide a potential success upon which later successes can grow. Individual budgeting does five things:

1. It emphasises indirectly the process of separation and renewed individuation that is required in a ‘healthy’ divorce circumstance.
2. From the chaos of marriage dissolution, the process of budgeting permits a concrete, grounded source of meaning that each couple seizes upon.
3. It awakens subtle, symbolic issues and hence is diagnostic in revealing what it is that might lie ahead, that is, issues for the future.
4. It establishes the mediator in the paradoxical position of director/passive observer of the couple strengthening his or her future role as a servant to both change and stability in the process of adaptation.
5. Finally, it is an area of higher probable success than any other area. Resolution of precipitating conflicts, allocation of resources, custody/access and so on, indicate an initial success and the awakening of some degree of expectant faith for success in the people involved.

Based upon outcomes here further therapeutic rituals are possible: fixing of assets and liabilities, structuring of maintenance/support, disposition of property, and so forth. However, these rituals are enacted to reframe the couple’s circumstance. As individuals reacting to an adversarial process, they are symmetrically opposed (give versus take, win versus lose). It is the mediator’s task to repunctuate this stance in such a way as to foster co-operative conflict in pursuit of dissolution (Everett and Volgy, 1983). In general this is done by sublimating all conflict to the Haynes goal of mutual independence.

Essentially, the tracking question is: ‘What needs to be done to foster your independence from her or him in the most rapid yet (mutually) effective fashion?’ As with most interventions, it is done in a

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reframing way that is consistent with the ‘culture’ of the couple (Saposnek, 1983). This issue of mutual independence as exposed by the Haynes model should not be a slogan or maxim but, instead, a contributor to a vital process often returned to in order to refocus the tasks at hand. Independence is obviously a desirable outcome for both parties.

There is a distinction that must be made at this point between mediation of, one the one hand, a systemic nature and, on the other, of mediation undertaken from a strategic standpoint. From an ideological point of view, the concepts of empowerment and independence are encouraged from a re-educative perspective and presented as a right and proper position to embrace. Deviation from this ideology is seen as resistance in the most classical sense; as the inability of an individual to ‘get’ the right idea or perspective. There is a Jeffersonian quality to this position, an ideological stance where the mediator provides the alternative to the marital/divorce struggle.

The mediator sets the pace, defines the substantive issues and is ‘in charge’. The couple must ‘buy into the model’ and embrace, through the persuasion or personality of the mediator, the ‘right way’ of seeing or doing things. Should things fall apart, it is due to the resistance or ‘lack of readiness’ on the couple’s part to get divorced.

This is in severe juxtaposition to the strategic/systemic stance where ideological maxims serve only as ‘convenient social fictions’ used to ‘jump start’ the mediating couple when they reach an impasse. Interventions are designed or created for a particular problem and the goal is more process-oriented. The clients are provided with alternatives from which they will make the ‘right’ choices, albeit often in a subtly directive way. In fact, focus upon the process will dictate to the mediator what move can or should be made, what might work, and the unique or singular nature of any particular couple’s dynamics. It is the couple who educates the mediator in order to apply his or her process, not the other way around.

Mediation is instrumental in its focus upon resolving specific conflict, and metaphoric in alluding to a process of conflict resolution that it is hoped will become accessible to the couple through the process. As such the mediator must be aware of two tracks in his or her works and actions: both the bottom line features of negotiated settlements and the more subtle or indirect ways of going about such negotiations. This seems to be best carried out in an atmosphere of systemic/strategic appreciation and requires particular vision on the part of the mediator.

Several key issues need to be addressed in this regard.

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Initially, it is important to keep in mind that conflict is often transformed when it is seen not from a lineal perspective but, instead, considered systemically. This is to suggest that ‘unreasonableness, power tripping, manipulation, and such’ is best seen not as the property of one personality but, instead, the product of a set of defined patterns of interactions. These dynamics can be seen as a commentary or description of a higher order process governing definition of the relationship. For example, a ‘she wants too much/he won’t give enough’ impasse reflects an inability, on the higher level, to let go of patterns of interaction that may have been negative features of the marriage in the first place. Armed with this perspective the mediator is better equipped to:

1. Escape the tendency to let personal bias directly or inadvertently align him or her with one or the other of the couple so as to preserve a sense of therapeutic neutrality, and
2. Provide the material out of which interventions of a higher order can be generated.

A mediator, for instance, can:

- Share in an insightful manner the ‘real’ reason an issue has arisen so precipitously in the couple’s inability to let go of the marriage.
- Positively connote the impasse as reflective of a need for everyone to realise things should not move as fast as they have, and that fights are to reduce pain associated with too rapid a resolution.
- Apologise for moving too quickly and appreciate the feedback to slow down.
- Increase the pressure by ‘piling on’, taking one or both positions, and increasing the reasons that exist by confirming the legitimate needs or values of each to an extreme degree.
- Declare impotence and an inability to resolve a problem by placing oneself sufficiently ‘one down’ so as to require that the couple fill the vacuum left.
- Take an oppositional stance that places mediator and couple in a symmetrical relationship; that is, ‘heat it up’ and then withdraw, leaving them with enough in common to solve their own problems.

It is also important to appreciate, in the larger sense, the mediator-couple subsystem and the role or purpose the mediator plays in this from the perspective of each partner. Every relationship is governed by forces related to power and influence and how close or how far the boundaries beyond the relationship can be pressed (that is, what is permitted and how ‘far’ each can go with or from the other). These forces related to proximity and distance which govern a marriage usually go ‘haywire’ when it dissolves. Rather than enforcing and fostering the need for individuality and coupleness, the proximity/distance dynamics are now found lurching wildly between the hopes and fears of both termination *and* reconciliation.

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It is a mistake to assume this ambivalence is absent from the arena of mediation, and a further error to assume the mediator does not have a role to play in governing these issues. Alternately, fear or anxiety about being apart or together/involved with the other partner emerges; the mediator will play a role either in service to the couple's needs *or* in service to the mediation task.

One way of thinking of this is that the mediator continually runs a risk of 'greasing' the dysfunctional dynamics of 'neither-marriage-nor-divorce' by keeping things in limbo and lowering the separation anxiety of the participants. In this role a mediator keeps the situation from boiling over but does not take the couple off the fire. This is usually associated with an interminable process.

In a second role, however, there are usually the mutually exclusive agendas of a task-oriented mediator and an ambivalent couple. As the urge for dissolution becomes more established, the couple can share a pseudo-communality behind their 'resistance' to the mediator's injunctions. Where the first situation leads to a continually complementary shift to being supportive and facilitative, the second emerges as a symmetrical power struggle, usually leading to a mediator's demise by being 'ground up' by the system.

To help prevent the 'grease or ground' syndrome, the mediator must attend to the process on systemic-related issues and be prepared to 'jump start' stalled couples around mediation issues.

While each case calls forth its own interventions, several specific techniques might be provided. Though some of these have been discussed elsewhere (Saposnek, 1983), they have special relevance in the light of the Haynes model. The use of *reframing* has already been touched on, for we see in the Haynes model the emphasis upon independence and parenting as therapeutic categories into which conflict can be reframed. For example, should a couple be unable to resolve either joint or sole legal custody arrangement, the discussion can be geared toward how one or the other position will further successful parenting (that is, how will sole, or joint, custody help him or her parent better?).

To reframe a problem or cast it in a different light is a useful strategy in getting out of 'boxes'. A similar concept is that of *positive connotation*, where the emphasis is upon why a behaviour that is apparently wrong is actually correct. Again, it is useful when at an impasse to find a reason that such a state might be really correct or good. A couple cannot reach agreement about their children; in this case the mediator might connote this as a show of devotion and commitment to the best arrangement possible, and so the couple should continue to resist anything 'whipped up too fast'.

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Sometimes it is useful, if not necessary, to be prepared to declare *hopelessness or therapeutic impotence*, to give up (so to speak) by declaring the situation (ideally one small area of mediation) as without any possible resolution. To shift from being helpful (promoting of change) to hopelessness (stuck or promoting of stability) obliquely suggests a similar but opposite shift in the couple: from hopeless/helpless (stable) to helpful/changeful (more adapting). This can be used to lead the couple toward solution when in fact an impasse is anticipated. For example, if as a result of exploratory exercise, it is apparent that one issue (for example, maintenance) may be a point of irresolution, it is possible to lead into that particular area of ‘predicting’ little likelihood of any success. With the Haynes model, the mediator can even state the approach ‘requires’ addressing a particular issue but resolution is ‘of course’ unlikely.

*Directives*, especially, *rituals*, are especially useful in addressing systemic issues. Again, the entire Haynes model and its directives may be seen as a protracted and extensive therapeutic ritual aimed at evoking a perspective useful in the ongoing management of separation as a product of divorce.

The formal process of divorce mediation may be akin in some respects to its opposite, the ritual of marriage. So what marriage facilitates personally and socially might be facilitated in an equal and opposite fashion by divorce. Rituals of a formal nature and part of the model (for example, budget exercise, fixing of assets, property division) are to be complemented by momentary rituals, again as part of a systemic or strategic perspective.

One useful ritual ‘incantation’ is the right of refusal; that at any point, anyone, including the mediator, has the right to terminate mediation. This incantation may be repeated at any point and used to redress power issues, develop perspective and free participants from compulsive roles or positions around the task. Other mini-rituals may include sending a non-driving spouse to learn to drive or to get a licence, changing a will or insurance policy, making a list of wrongs or hurts then burning it in session, taking a course, and so on. All are intended to relax the rigidity leading to an actual or potential impasse and to promote more facilitative resolution.

From a cybernetic/systems point of view, failure in mediation is seen equally as ‘resistance’ in the mediator and in the couple. This suggests that the mediator who cannot accommodate the couple through flexibility of approach and application of skills is as resistant as the clients to the task at hand.

Successful mediation appears to be governed by the same principles that are emerging at the cutting edge of family therapy. The construction of therapeutic realities, whether for counselling or

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mediation, has as its final goal reorganisation on a secondary or higher level that will result in change in more instrumental or practical areas of daily living.

What should the successful mediator do? *Send the couple fishing!*



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**Dr Jon Amundson** (MA, MAPP, and PhD Claremont Graduate University) has been involved in clinical practice since 1980 in Calgary, Alberta, Canada. His work ranges from treating adults and children to forensic assessment and court-related intervention. He has written and published in the areas of forensic psychology, clinical hypnosis, ethics and treatment models in such journals as Family Court Review, Mediation Quarterly, Journal of Marital and Family Therapy, Family Process, The Practitioner Scholar, and the American Journal of Clinical Hypnosis. See [amundsonandassociates.com](http://amundsonandassociates.com) for more information on his work and career. Aside from his professional interests and involvement, he has been a world champion in Polynesian canoe racing.

**Dr Larry S Fong** has worked as a lecturer, consultant and trainer in conflict management around the world. He has delivered mediation training to judges, police personnel, psychologists, lawyers and business people in 14 different countries. He has also worked as a consultant for major organisations in



the telecommunications, oil and gas and service industries as well as with military, police, banking, educational and service institutions. He is a recipient of the Dr John Haynes Memorial Award (AFMS) and the Distinguished Mediator Award (ACR). His book, 'Mediation', is published in English, German and Italian. Since 1989 his training tapes have been sold worldwide.

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