

# The Use of Mediation and Arbitration for Resolving Family Conflicts: What Lawyers Think About Them

by  
Mary Kay Kisthardt†

The use of alternative methods for resolving family conflict has increased significantly in the past few years,<sup>1</sup> but many attorneys are still wary.<sup>2</sup> In an effort to discover some of the sources of this hesitation as well as identify support for “alternative” processes, the American Academy of Matrimonial Lawyers surveyed its members concerning the use of dispute resolution methods. The purpose of this study was to ascertain attorneys’ perceptions of the advantages and disadvantages of the two most commonly used alternative dispute resolution mechanisms: mediation and arbitration. Whether clients will continue to use these methods depends in great part on the willingness (and perhaps the perceived obligation)<sup>3</sup> of their advisors to suggest them and to agree to participate with clients in these processes. Thus

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† Associate Professor of Law, University of Missouri–Kansas City School of Law.

<sup>1</sup> LINDA R. SINGER, *SETTLING DISPUTES* 36 (2nd ed. 1994) (stating that ten percent of divorces are handled by private mediators and that the number increases each year).

<sup>2</sup> Richard C. Reubin, *The Lawyer Turns Peacemaker*, 82 ABA J. 55 (Aug. 1996) (reporting on results of a poll which found that 51% of attorneys questioned favored mediation over litigation for resolving disputes, while 31% preferred litigation. When asked about arbitration, 43% preferred litigation while 31% preferred arbitration).

<sup>3</sup> See Robert F. Cochran, *Legal Representation and the Next Steps Towards Client Control: Attorney Malpractice for the Failure to Allow the Client to Control Negotiation and Pursue Alternatives to Litigation*, 47 WASH. & LEE L. REV. 819 (1990) (suggesting that attorneys have an ethical obligation to advise clients about the availability of alternative dispute resolution mechanisms). *But see* Michael Prigoff, *Should There Be a Duty to Advise of ADR options? No: An Unreasonable Burden*. 76 ABA J. 50 (Nov. 1990). *See also*, Nicole Pedone, *Lawyers Duty to Discuss Alternative Dispute Resolution: In the Best Interests of Children*, 36 FAM. & CONCILIATION CTS. REV. 65 (1998).

attorneys’ perceptions of the appropriateness of these dispute resolution methods will greatly influence their future utility.

The study that is the center of this report was mailed to 1500 members of the American Academy of Matrimonial Lawyers in the Fall of 1996. One hundred twenty three surveys were returned to the editor of the Journal of the American Academy of Matrimonial Lawyers and their results were compiled at that office.<sup>1</sup> The survey consisted of both multiple choice and openended questions.

Because of the great variation in mediation programs throughout the country, universal conclusions are difficult to draw. Rather, this article attempts first to describe some of the similarities and differences among mediation programs or services. It then identifies what attorneys commonly perceive as the advantages and disadvantages of mediation regardless of program differences.<sup>2</sup> Ultimately, however, this article

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<sup>1</sup> The surveys are available for review at U.M.K.C. School of Law, 5100 Rockhill Road, Kansas City, MO.

<sup>2</sup> The results of the study were consistent with those reported in the few studies in which attorneys’ attitudes toward mediation have been examined. See Catherine M. Lee, Christine P.M. Beauregard & John Hunsley, *Lawyer’s Opinions Regarding Child Custody Mediation and Assessment Services*, 29 PRO-



attempts to go beyond mere reporting to examine some of the factors that will help attorneys determine whether a particular dispute resolution mechanism is appropriate for a given case and how perceived disadvantages can be minimized. The question is not whether settlement is good or bad, but under what circumstances non-traditional processes should be used for the resolution of particular kinds of family conflict.<sup>3</sup>

The first section of the article describes the use of mediation for addressing dissolution related issues. Mediation can be defined as a use of a third party facilitator to help the parties reach an agreement.<sup>4</sup> This section focuses both on mediation that is court-ordered and mediation that is voluntarily arranged by the parties. Some common characteristics of court-ordered programs are provided after which a discussion of the advantages and disadvantages of the use of mediation in court-ordered programs is discussed. This section will also examine variations among survey responses when the mediation process is voluntary.

Section II will focus on factors that should be considered in determining whether mediation is appropriate. It will also offer some suggestions for minimizing the perceived disadvantages which are particularly important when mediation is mandatory.

Finally, an Afterword on arbitration reporting on the survey results will be included. A more complete discussion of the use of arbitration for the resolution of family disputes is not included here because it is aptly covered in three other articles in this volume.<sup>5</sup>

### Section I. Court-Ordered Mediation

The survey sought information concerning four general characteristics of court-ordered programs. The responses have been summarized under the following headings: 1) the scope of issues considered in the mediation; 2) under what circumstances the mediation requirement could be waived; 3) whether attorneys were present at the

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PROFESSIONAL PSYCHOLOGY: RESEARCH AND PRACTICE 115 (1998); Elizabeth J. Koopman, E. Joan Hunt, Francine G. Favretto, Laurie S. Coltri & Tracy Britten, *Professional Perspectives on Court-Connected Child Custody Mediation*, 29 FAM. & CONCILIATION CTS. REV. 304 (1991); Laura S. Smart & Connie J. Salts, *Attorney Attitudes Toward Divorce Mediation*, MEDIATION Q. (December 1984) at 65. See also, Catherine M. Lee, Christine P.M. Beauregard & John Hunsley, *Attorney's Opinions Regarding Child Custody Mediation and Assessment Services: The Influence of Gender, Years of Experience, and Mediation Practice*, 36 FAM. & CONCILIATION CTS. REV. 216 (1998) citing James C. Richardson, *Court Based Divorce Mediation in Four Canadian Cities: An Overview of Research Results*, (Catalogue No. J2-76/1988). Ottawa: Department of Justice.

<sup>3</sup> See Carrie Menkel-Meadow, *Whose Dispute Is it Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663 (1995).

<sup>4</sup> A more complete definition of mediation is offered by Dean Folberg:

An alternative to violence, self-help, or litigation that differs from the processes of counseling, negotiation, and arbitration. It can be defined as the process by which the participants, together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs. Mediation is a process that emphasizes the participants' own responsibility for making decisions that affect their lives.

JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICT WITHOUT LITIGATION* 7-8 (1984).

<sup>5</sup> Joan Kessler, Allan Kortzinsky & Stephen Schlissel, *Why Arbitrate Family Law Matters*, 14 J. AMER. ACAD. OF MAT. LAW 333 (1997); Christine Albano, *Binding Arbitration: A Proper Forum for Child Custody*, 14 J. AMER.

ACAD. OF MAT. LAW 419 (1997); Frank McGuane, *Model Marital Arbitration Act: A Proposal*, 14 J. AMER. ACAD. OF MAT. LAW 393 (1997).



sessions; and 4) how the costs of the mediation were assessed. The comments relating to the perceived advantages and disadvantages of the process are then summarized.

#### A. Description/Scope

A total of 110 or nearly 90% of the respondents reported that court-ordered mediation was used in their jurisdiction. Of that number the vast majority (104) indicated that child custody issues were the subject of court-ordered mediation. In addition, approximately half of the respondents indicated that child support (50), property division (56), and spousal support (53) could also be addressed in the context of a court-ordered mediation session.<sup>6</sup>

Throughout the country child custody disputes are the most common focus of court-ordered mediation programs.<sup>7</sup> The reasons for this vary but center primarily on the assumption that child custody cases, which also would include visitation disputes, are the most likely candidates for a resolution mechanism that promotes communication between the parties and attempts to preserve a relationship between them.<sup>8</sup> Virtually universal sentiment exists that an adversarial proceeding is the least advisable method for promoting the long term cooperation between parents that benefits children.<sup>12</sup> Indeed, the attorneys in our survey cited this as an advantage of these programs. Some typical comments included: “[W]hen children are involved, it helps parents to cooperate”; “[H]elps parents to focus on the needs of the children instead of their own needs.” Other benefits for children were reflected in statements such as “[S]tops manipulation of children” and “[T]akes children out of the adversary system.”

Increasingly child support issues are being addressed in these same sessions, most likely because issues of child support and child custody are seen as significantly intertwined.<sup>13</sup> Historically the exclusive focus on child custody was viewed as a way of protecting women from custody blackmail, a theory based on the assumption that women would trade economic support for additional time with their children.<sup>14</sup> Since the adoption of child support guidelines throughout the country has made the resolution

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<sup>12</sup> The Maine Legislature has declared it a public policy “that encouraging mediated resolution of disputes between parents is in the best interest of minor children.” ME. REV. STAT. ANN. tit. 19 § 752(1) (1993).

<sup>13</sup> Nancy Rogers and Craig McEwen report that research results from Canada and Wales suggest that settlements that focus exclusively on child custody are less likely to endure. Nancy Rogers & Craig McEwen, *MEDIATION: LAW, POLICY & PRACTICE*, §12:02 n. 19 (1994), citing Ogus, Walker & JonesLee, Report of The Conciliation Projects Unit, *University of Newcastle Upon Tyne to the Lord Chancellor on the Costs and Effectiveness of Conciliation in England and Wales* 219, 264, 385 (1989); James C. Richardson, *Court-Based Divorce Mediation in Four Canadian Cities: An Overview of Research Results*, Report Prepared for The Department of Justice, Canada 45 (1988).

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<sup>6</sup> These numbers are consistent with those reported by the National Center for State Courts. In 1991 it reported that of 205 court-related divorce mediation programs for which it has data, 109 of them focused exclusively on custody and visitation conflicts while the other 96 included spousal support and property division issues as well. Craig McEwen, Nancy Rogers & Richard Maiman, *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1322 n. 18, 1362 n. 261 (1995).

<sup>7</sup> See Christy L. Hendricks, *The Trend Toward Mandatory Mediation In Custody and Visitation Disputes of Minor Children: An Overview*, 23 J. FAM. L. 491 (1994).

<sup>8</sup> Gary W. Paquin, *Protecting the Interests of Children In Divorce Mediation*, 26 J. FAM. L. 279, 281 (1987-1988).

<sup>14</sup> See RICHARD NEELY, *THE DIVORCE DECISION* (1984); Lenore J. Weitzman, *GENDER DIFFERENCES IN CUSTODY BARGAINING IN THE UNITED STATES, ECONOMIC CONSEQUENCES OF DIVORCE: THE INTERNATIONAL PERSPECTIVES* 396 (Lenore Weitzman & Mavis Maclean eds. 1992) (citing a study in which one third of the wives reported experiencing such pressure). A study of California divorces did not find support for this proposition. ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 151 (1992). See also Margaret F. Brinig & Michael V. Alexeev, *Trading at Divorce: Preferences, Legal Rules and Transaction Costs*, 8 OHIO ST. J. DISP. RESOL. 279, 292 (1993) (reaching a conclusion similar to Maccoby and Mnookin). Joan B. Kelly, *A Decade of Divorce Mediation Research, Some Answers and Questions*, 34 FAM. & CONCILIATION CTS. REV. 373, 377 (1996) (stating that there is no empirical evidence to support the claim that mediation forces women to give away custody or primary care “entitlements”).

of financial support disputes more predictable, this concern is lessened. This predictability may also account for the increased scope of mediations.

The use of court-ordered mediation for the resolution of property division and spousal support, however, is not as widely accepted. About half of the respondents indicated that these issues were also addressed in court-ordered mediations. Many attorneys in our survey suggested that they were more comfortable with the resolution of child custody disputes in mediation than they were with the resolution of property division and spousal support issues. This attitude most likely reflects the tendency of lawyers to see economic issues as “legal” and therefore requiring the expert skills of lawyers in traditional practice, whereas custody issues are more “emotional” and therefore may be adequately handled by mental health professionals in mediation.<sup>9</sup> One attorney responding to the survey summed it up this way: “Support and property division are objective and should be resolved through attorneys.”<sup>10</sup>

This distinction between “legal” and “emotional” issues was implicit in many of the comments. Attorneys, quite naturally, see divorce as primarily a “legal” matter in which individuals have certain rights that are recognized by the law and which should guide the resolution of the divorce-related issues.<sup>11</sup> Although lawyers recognize that divorce is a highly emotional matter for most clients, this aspect is seen as secondary to their representation.<sup>12</sup> Some even go so far as to suggest that “emotionalism is most readily diffused by a fair economic resolution.”<sup>13</sup> This attitude of distinguishing between issues that are resolved by application of “legal” rules (i.e. procedural processes) becomes problematic for some lawyers when child custody must be considered. This may be due in part to the realization that the “legal” standard of “best interest of the child” that is used in making custody determinations is nebulous at best

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<sup>9</sup> Jessica Pearson, M. Ring & Anne Milne, *A Portrait of Divorce Mediation Services in the Public and Private Sector*, 21 CONCILIATION CTS. REV. 1 (June 1983) (finding that 90% of public sector mediators were mental health professionals). Although some argue that even when the focus is on child custody, lawyers should still be used as mediators. Judy C. Cohn, *Custody Disputes: The Case for Independent Lawyer - Mediators*, 10 GA. ST. U. L. REV. 417 (1994).

<sup>10</sup> For a further discussion of this issue, see Nichol M. Schoenfeld, *Turf Battles and Professional Biases: An Analysis of Mediator Qualifications in Child Custody Disputes*, 11 OHIO ST. J. DISP. RESOL. 469 (1996).

<sup>11</sup> See, e.g., Martha Fineman, *Dominant Discourse, Professional Language and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 752 (1988).

<sup>12</sup> See e.g., Bruce W. Kallner, *Boundaries of the Divorce Lawyers Role*, 10 FAM. L.Q. 389 (1977).

<sup>13</sup> Phyllis Gangel-Jacob, *Some Words of Caution About Divorce Mediation*, 23 HOFSTRA L. REV. 825, 827 (1995). But see, W. Richard Evarts & Frances H. Goodwin, *The Mediation and Adjudication of Divorce and Custody: From Contrasting Promises to Complimentary Processes*, 20 IDAHO L. REV. 277, 278 (1984) (“The failure to cognize that most domestic disputes are primarily affective, emotional and subjective has supported the illusion that procedural dissolution settles the matter between the parties.”)

and that child-related issues are often significantly emotional ones. This may account for the deference sometimes given to mental health professionals when the issue is about “kids and not money.”

Members of the mental health profession, the other discipline most commonly involved with divorcing couples, see divorce as primarily an “emotional” event where decisions regarding all aspects of the dissolution, including legal ones, are made in the context of an emotionally charged environment.<sup>14</sup> This difference in approach to the various dimensions of divorce related issues is also reflected in the identity of the mediator. In many court-sponsored programs where the focus is most likely to be on child custody, mental-health professionals are often used as mediators.<sup>15</sup> In our survey approximately one-third of the respondents indicated that mental health professionals who were approved or certified by the court were mediators in court-ordered or court-sponsored programs.

In voluntary mediation, however, where financial issues are more likely to be discussed, attorneys often view themselves as more appropriate mediators.<sup>16</sup> This attitude of superior ability to deal with financial issues may also have an effect on how the mediation is conducted. At least one study found that when lawyers acted as mediators in full divorce mediation, they tended to focus on economic issues rather than issues relating to children.<sup>23</sup>

#### B. *Waiver of the Court-Ordered Mediation Requirements*

Traditionally, mediation has been seen as a voluntary process. Therefore requiring parties to attend sessions is, to some, inconsistent with the basic philosophy of mediation.<sup>24</sup> The reasons most often cited for requiring participation are overcoming institutionalized resistance and providing education for the parties about the process.<sup>25</sup>

Even proponents of a mandatory system recognize that under certain circumstances requiring parties to attend would be counterproductive.<sup>26</sup> Therefore, waiver options are gaining favor.<sup>27</sup> Approximately one-third of the respondents indicated that a process existed in their jurisdiction for seeking a waiver of the mediation requirement.

The process for waiving the mediation requirement varies from jurisdiction to jurisdiction, but many common factors exist.

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they’re hardly educated in the convolutions of the law . . . many are incompetent. They don’t recognize the pitfalls, so obviously they fall into them. And once you make a mistake, it’s too late for the client.” The author goes on to state “Golden commented that he does not oppose mediation if it’s done by lawyers. ‘Insight is not gleaned from a three week course. It’s gleaned from practice in courts and out.’ Even an inexperienced lawyer, he noted has attended three years of law school and has met the requirements for a license.” See also, Nancy J. Foster & Joan B. Kelly, *Divorce Mediation: Who Should Be Certified*, 30 U.S.F. L. REV. 665 (1996) citing Franklin R. Garfield, *Nonlawyers Should Stay Out of Family Law Mediation*, L.A. DAILY J. D.A.R., Mar. 21, 1995, at 6.

<sup>23</sup> Carol Bohmer & Marilyn L. Ray, *Regression to the Mean: What Happens When Lawyers are Divorce Mediators*, 11 MEDIATION Q. 109 (1997).

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<sup>14</sup> Florence W. Kaslow, *The Psychological Dimension of Divorce Mediation*, in *DIVORCE MEDIATION: THEORY AND PRACTICE*, 83 (Jay Folberg & Ann Milne, eds. 1988).

<sup>15</sup> Pearson, et al, *supra* note 15.

<sup>16</sup> Dan Trigoboff, *More States Adopting Divorce Mediation*, 81 ABA J. 32, 33 (1995), quoting Harvey Golden, a former Chair of the ABA Family Law Section as saying that non-lawyer mediators “take a few hours of training but

<sup>24</sup> See, Mary Pat Treuthart, *In Harm's Way? Family Mediation and the Role of the Attorney Advocate*, 23 GOLDEN STATE U. L. REV. 717, 761 (1993).

<sup>25</sup> See Craig McEwen, Lynn Mather & Richard J. Maiman, *Lawyers, Mediation and the Management of Divorce Practice*, 28 LAW & SOC'Y REV. 149, 178 (1994). See also Andreas Nelle, *Making Mediation Mandatory*, 7 J. DISP. RES. 287 (1992).

<sup>26</sup> See Society of Professionals in Dispute Resolution, *As It Relates to the Courts*, 12 (1991).

<sup>27</sup> See, e.g., HAW. REV. STAT. § 580-41.5 (1994) (mediation cannot be imposed over objection of a domestic violence victim).

Most significantly the grounds for waiver mentioned by the respondents included the presence of domestic violence, other forms of abuse, alcohol or substance abuse and to a lesser extent logistical restrictions such as a party living outside of the county. Although numerous jurisdictions did provide a process for seeking waiver, the respondents indicated that in many cases the requested waiver was not granted.

A significant controversy continues over the use of mediation for resolution of family conflicts in which there has been domestic violence.<sup>17</sup> The past several years have witnessed changes which reflect a growing awareness of the family dynamic that takes place in this situation.<sup>18</sup> Statutes or court rules use different approaches to these cases, either categorical exclusion, or ad hoc methods such as a case by case screening or exclusivity by the court upon a party's motion. These alternative approaches reflect different philosophical responses to the issue.<sup>19</sup>

Some advocates take the position that cases involving domestic violence are simply inappropriate for mediation. Their concerns can be summarized under several categories. First, the culture of battering "which embodies the relationship between a battered woman and her abuser is incompatible with the practice of mediation."<sup>20</sup> Adherents of this view argue that domestic violence is not the result of interpersonal conflict but of a culture of dominance and control.<sup>32</sup> Mediation's focus on resolving interpersonal conflict is therefore misplaced in this context.<sup>21</sup>

Second, since mediation de-emphasizes the criminal aspects of the behavior<sup>22</sup> and is future-oriented, the abuser is allowed to escape responsibility for his past behavior.<sup>23</sup> Third, the power imbalance that exists by virtue of the intimidation simply cannot be effectively remedied in the process.<sup>24</sup> Finally, the effects of domestic violence on

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<sup>17</sup> See Barbara Hart, *Gentle Jeopardy: The Future Endangerment of Battered Women and Children In Custody Mediation*, 7 MEDIATION Q. 307 (1990); Douglas D. Knowlton & Tara Lee Mulhauser, *Mediation in the Presence of Domestic Violence: Is it the Light At the End of the Tunnel or a Train on the Track*, 70 N.D. L. REV. 255 (1994); Linda Perry, *Mediation and Wife Abuse: A Review of the Literature* 11 MEDIATION Q. 313 (1994).

<sup>18</sup> Anne E. Menard & Anthony J. Salius, *Judicial Responses to Family Violence: The Importance of Message*, 7 MEDIATION Q. 293 (1990).

<sup>19</sup> For a more thorough discussion of legislative responses, see Holly Joyce, *Mediation and Domestic Violence: Legislative Responses*, 14 J. AM. ACAD. MAT. LAW 447 (1997).

<sup>20</sup> Karla Fischer, Neil Vidman & Rene Ellis, *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117 (1993).

<sup>21</sup> *Id.* at 2158. The authors suggest that focusing on conflict as the trigger for the abuse legitimizes the abuser's practice of identifying certain actions of the victim as the cause of conflict and the ensuing abuse.

<sup>22</sup> Dianne R. Stallone, *Decriminalization of Violence in the Home: Mediation in Wife Battering Cases*, 2 LAW & INEQ. J. 493, 511 (1984).

<sup>23</sup> Perry, *supra* note 28, at 314.

<sup>24</sup> Laurie Woods, *Mediation: A Backlash to Women's Progress on Family Law Issues*, 19 CLEARINGHOUSE REV. 431 (1985).

children are exacerbated when an abusive parent is allowed to use the children to retain control over their mother.<sup>25</sup>

Others argue that domestic violence ought to provide grounds for seeking a waiver but should not result in automatic disqualification.<sup>26</sup> The proponents of this approach believe that screening mechanisms to identify abuse<sup>27</sup> and appropriate inter-

<sup>32</sup> *Id.* at 2141. The authors list three elements of the “culture of battering”. First is the abuse itself, which may be physical, emotional, sexual, familial, or property. Second, a systematic pattern of domination and control; and third, the presence of coping strategies such as hiding, denying or minimizing the abuse.

vention techniques on the part of the mediator can ameliorate the harm.<sup>28</sup>

### C. Attorney Presence

Another important variable in court-ordered mediation is the presence of attorneys. Approximately 25% of the respondents indicated that attorneys are sometimes present at the court-ordered mediation session. The presence of the attorney appears to be optional and the timing of the attorney participation varies. In some cases attorneys are present only at the beginning. In other mediation situations the attorney meets with the mediator and then the clients meet with the mediator. If financial issues are considered it seems more likely that an attorney will be present at the mediation.<sup>29</sup>

Fears have been expressed that the presence of attorneys during the mediation session will undermine the “cooperative environment” and negatively affect the mediation.<sup>30</sup><sup>31</sup> In fact in some jurisdictions lawyers can be banned from the session by the mediator.<sup>32</sup> In a recent study of divorce mediation in Maine, Nancy Rogers, Craig McEwen, and Richard Maiman have addressed the issue and arrived at the conclusion that the presence of lawyers does not decrease effectiveness.<sup>44</sup>

The Maine study focused on the presence of lawyers in the mediation session. The authors identified some underlying assumptions about divorce mediation and then used

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<sup>25</sup> Mildred Daley Pagelow, *Effects of Domestic Violence on Children and Their Consequences for Custody and Visitation Arrangements*, 7 *MEDIATION Q.* 347 (1990).

<sup>26</sup> David B. Chandler, *Violence, Fear and Communication: The Variable Impact of Domestic Violence in Mediation*, 7 *MEDIATION Q.* 331 (1990).

<sup>27</sup> See, e.g., Kathleen O’Connell Corcoran & James C. Melamed, *From Coercion to Empowerment: Spousal Abuse and Mediation*, 7 *MEDIATION Q.* 303 (1990) (arguing that the ultimate determination of whether or not mediation should take place depends upon the present level of intimidation in the relationship). See also Allison E. Gerencser, *Family Mediation: Screening for Domestic Abuse*, 23 *FLA. ST. U. L. REV.* 43 (1995); Linda K. Girdner, *Mediation Triage: Screening for Spouse Abuse in Divorce Mediation*, 7 *MEDIATION Q.* 365 (1990).

<sup>28</sup> Stephen K. Erikson & Marilyn S. McKnight, *Mediating Spousal Abuse Divorces*, 7 *MEDIATION Q.* 377 (1990); Robert Giffner, *Guidelines for Using Mediation with Abusive Couples*, 10 *PSYCHOTHERAPY IN PRIVATE PRACTICE* 77 (1992); Dennis Marthaler, *Successful Mediation with Abusive Couples*, *MEDIATION Q.* (Spring 1989) at 53.

<sup>29</sup> McEwen, et al., *supra* note 25 at 181 (analyzing data from the National Center for State Courts which revealed that lawyers participated in 91% of the mandatory programs that included discussion of economic issues but in only 38% of those that focused exclusively on custody and visitation).

<sup>31</sup> -82 (1992).

<sup>30</sup> See, e.g., LENARD MARLOW, *DIVORCE AND THE MYTH OF LAWYERS*

<sup>32</sup> KAN. STAT. ANN. § 23-603(a)(b) (West 1988). <sup>44</sup> McEwen, et al., *supra* note 9.

the results of the study to dispel these assumptions as myth. The first myth is that lawyers are universally absent from mediations. Those who advocate mediation as a means of reducing cost by eliminating most attorneys' fees, see this as a positive factor.<sup>33</sup> Critics of mediation, most of them lawyers, believe that the absence of lawyers in mediation results in a failure to protect the parties' legal rights.<sup>34</sup>

Contrary to the prevailing theory of lawyer non-involvement, the study found that in Maine, lawyers usually attend mediation sessions.<sup>35</sup> The lawyers reported that they did so primarily to protect their clients from unfairness either from mediator pressure or unequal bargaining power.<sup>36</sup> The authors concluded that "[l]awyers know that even good mediation may produce a momentum to settle; they fear that mediators cannot balance unequal bargaining power adequately and may exert their own pressures for settlement."<sup>49</sup>

The other underlying assumption with respect to lawyer presence in the mediation session is that it will negatively affect the mediation in several ways. First, it is presumed that lawyers will create an adversarial atmosphere not conducive to settlement<sup>37</sup> and second, that lawyers will "take over" the process

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<sup>33</sup> *Id.* at 1351 n. 194, citing LENARD MARLOW, *DIVORCE AND THE MYTH OF LAWYERS* (1992); Victoria Soloman, *Divorce Mediation: A New Solution to Old Problems*, 16 AKRON L. REV. 665, 669-70 (1983); Gary A. Weisman & Christine Leick, *Mediation and Other Creative Alternatives to Litigating Family Law Issues*, 61 N.D. L. REV. 263, 266-67 (1985).

<sup>34</sup> McEwen et al, *supra* note 9 at 1353, citing Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L. J. 1545, 1609 (1991) wherein she states "[t]he choice presented today is between an adversary process with totally powerful legal actors, in which clients never speak for themselves (and often do not know what is going on), and a mediation process in which they are entirely on their own and unprotected."

<sup>35</sup> McEwen et al, *supra* note 9 at 1359 (reporting that 78% of the attorneys interviewed reported "almost always" attending mediation sessions and another 17% reported they "usually" did so).

<sup>36</sup> *Id.* at 1360-62. <sup>49</sup> *Id.* at 1361-62.

<sup>37</sup> *Id.* at 1354-55, citing THOMAS CARBONNEAU, *ALTERNATIVE DISPUTE*



thereby denying their clients the opportunity to fully participate.<sup>51</sup>

The study's findings did not support the former proposition and the authors cite other studies which suggest that lawyers, in general,<sup>52</sup> and divorce lawyers, in particular,<sup>38,39</sup> do not exacerbate conflict, but rather attempt to move their clients to a reasonable settlement.<sup>40</sup> The lawyers in the Maine study suggest that mediation is particularly advantageous for moderating unreasonable behavior on the part of some lawyers.<sup>41</sup> In addition, many attorneys in that study cite unrealistic expectations of clients, as opposed to adversarial tendencies of attorneys, as an impediment to settlement.<sup>42</sup> Mediators were also seen as a means of overcom-

<sup>51</sup> See John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?* 24 FLA. ST. U. L. REV. 839 (1997). Prof. Lande also suggests that lawyers continued presence will have an effect on mediator behavior as the lawyers become "repeat players."

<sup>52</sup> McEwen et al, *supra* note 9 at 1366, citing Carrie Menkel-Meadow, *Lawyer Negotiations' Theories and Realities - What We Learn From Mediators*, 56 MOD. L. REV. 361, 376 (1993); William L. F. Felstiner & Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 CORNELL L. REV. 1446 (1992).

ing this obstacle by providing the client with some "reality orientation" from a neutral third party.<sup>57</sup>

With respect to the concern that lawyer involvement will diminish client participation, the Maine study found this was not true. "Even with the lawyer present, clients reportedly participate actively in mediation sessions, speak and listen to a spouse in a controlled setting, and find an outlet for emotions such as anger."<sup>58</sup>

Attorney presence at the mediation also varies depending on whether the mediation is court-ordered or not. One might expect that voluntary mediation would result in more attorneys being present at the sessions, and the AAML study did indicate

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I can't force my client to do something the client is uncomfortable with. I'm not there to argue the other person's case. Whereas at mediation, it's an opportunity for my client to kind of expose his or her case to reality and the mediator many times is going to say 'Wait, is that what you really mean? Do you really think a judge is going to listen to this? Listen, I've just heard it for the first time and let me tell you what my reaction is.' And you're kind of exposing . . . and many times when [a client] says it to their attorney, it will be received, obviously, differently from just a completely disinterested person.

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<sup>38</sup> McEwen et al, *supra* note 9 at 1366, citing Gwynn Davis, *Partisans and Mediators: The Resolution of Divorce Disputes*, 110-26 (1980); John Griffiths, *What Do Dutch Lawyers Actually Do in Divorce Cases?* 20 LAW & SOC'Y. REV.

<sup>39</sup>, 164 (1986); RICHARD INGLEBY, *THE SOLICITOR AS INTERMEDIARY IN DIVORCE MEDIATION*, 43-55 (1988); KENNETH KRESSEL, *THE PROCESS OF DI-*

*VORCE: HOW PROFESSIONALS AND COUPLES NEGOTIATE SETTLEMENTS*, 248185 (1985) (estimating that a relatively small percentage of divorce attorneys fit the popular image of conflict escalator).

<sup>40</sup> McEwen et al, *supra* note 9 at 1366. "In sum, research depicts divorce lawyers as pragmatic negotiators who fully recognize the costs and uncertain success of pursuing cases through formal legal processes."

<sup>41</sup> One of the attorneys in the Maine study summarized this advantage as follows:

It's easy to be Tarzan over the telephone, it really is. It's real hard to pull that garbage when the client [is present]; . . . you can call my client a slut or a crook over the telephone, but it's real different to have the guts to do that when they're sitting across from you. A lot of lawyers who will do that nonsense over the telephone won't do it in person.

*Id.* at 1369.

<sup>42</sup> In the Maine study it was reported that over one-half of the attorneys interviewed spontaneously cited mediation as advantageous for this reason. Representative comments included these:

*Id.*, at 1370.

[M]ediation . . . puts two parties in the same room. We're going to talk about this. It's not, you know, I send a letter back and the client says, 'No, I'm sorry I don't want to cope with that. No, I'm not going to agree to that.' And I hear from the other attorney, 'No, my client doesn't want to do that.' You tell your spouse face to face in the same room and you'll be surprised at what happens. People don't do it. And that's good. It's easy to sit back and say to your lawyer, 'No, I don't want to agree to that. No. Forget it. I already told her I wasn't going to agree to that. I'm not going to do that.' And we both have, I mean, we all have that in terms of our clients. Put them in the room with the mediator, and the mediator says 'Well, why aren't you going to agree to that?'

'Oh. It's just not right.' 'Well, that's not a good enough reason.' . . . You know, that makes a difference.

*Id.* at 1369-70.

<sup>57</sup> *Id.* at 1369. The Maine attorney summed it up this way:

What was an unreasonable [client position], what I may consider to be an unreasonable position earlier, all of a sudden is tempered because now it's not in the protection of the lawyer's office. It's out in a setting where they're being judged a little more.

<sup>58</sup> *Id.* at 1371.

some increase in percentages over the court-ordered programs (50% versus 30%). But even the 50% figure was somewhat less than expected. This may reflect the fact that in voluntary mediation the mediator is more likely to be an attorney, and, therefore, the parties' attorneys feel less of a need to actively participate.

Another factor which may influence attorney participation is the legal effects of any agreement clients make while in mediation. Perhaps the greatest concern of attorneys whose clients enter into a mediation process is that clients will make "bad deals."<sup>43</sup> To insure that clients make informed choices some states require the mediator to advise the parties to seek attorney review of the agreement prior to signing it<sup>44</sup> and approximately half our respondents indicated this was true for their practice. Where mediation was voluntary a higher percentage (58% versus 40%) indicated that the agreement was not binding until reviewed by an attorney. This additional "safeguard" might also explain the low percentage of attorneys who were present at the mediation.

Related to the issue of the legal effect of the agreement the attorneys were asked approximately how often the agreement reached in mediation was substantially the same as the one finally approved by the court. Respondents indicated that in more than 85% of the cases the agreement was substantially the same as that approved by the court. This may mean that courts are "rubber stamping" these agreements without much consideration. Or, it could mean the agreements are ones that are satisfactory to the parties and meet standards of fairness. A slightly higher percentage of lawyers involved in voluntary mediation than in court-ordered cases (90% versus 85%) also reported that the agreement reached was substantially the same as that finally approved by the court. Voluntary mediation may be yielding more stable results because of the parties, greater satisfaction with mediation and the process in general. This stability of results may also be due to control over choice of mediators: attorneys may choose mediators who they believe will facilitate "better" agreements.

#### D. *Fees/The Cost of Mediation*

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<sup>43</sup> Although the "fairness" standard by which the deal is measured may differ among lawyers, clients and mediators. See Carol Bohmer & Marilyn Ray, *Notions of Equity & Fairness in the Context of Divorce: The Role of Mediation*, 14 *MEDIATION Q.* 57 (1996); Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 *BUFF. L. REV.* 441 (1992).

<sup>44</sup> See LA. CIV. CODE ANN. art. 9 § 353 (West 1991); WIS. STAT. ANN. 1767.11(12) (West 1993); See also American Bar Association, Standards of Practice for Lawyer Mediators (1983).

Because mediation is often touted as being a less expensive means of resolving family conflict, attorneys were also asked how fees were set.

The study indicated that the fee schedule for court ordered mediation is set in a little more than half of the cases (64/110) by the mediator. Approximately one-third of the respondents (33/ 110) replied that the court set the fee that would be charged. In some circumstances the fee varied depending on whether court personnel provided mediation services. In voluntary mediation, the majority of fees were set by the mediator, with about 10% of the respondents indicating that the fee was set by the court. Our survey did not uncover any significant concerns about the “fee structure.”

After gathering objective data about the characteristics of different programs, the survey then turned to a more subjective analysis of mediation by asking the respondents what they viewed as the advantages and disadvantages of the process.

#### E. *Advantages of the Process*

When responding to questions concerning the perceived advantages of court-ordered mediation, the responses and comments can be summarized under four categories: (1) efficiency, which was usually reflected in savings of time and/or money; (2) client satisfaction with the process; (3) client satisfaction with the outcome; and (4) emotional concerns.

##### 1. *Efficiency issues*

Many attorneys suggested that significant monetary savings occurred when the parties were able to resolve the dispute through mediation. This is consistent with the findings of other studies.<sup>45</sup> Savings can be substantial when court-ordered mediation is conducted by court personnel or the fee is set by the court. Survey responses indicated that in some jurisdictions fees are set on a sliding scale depending on income level.<sup>62</sup> Those using voluntary mediation had a slightly less positive response concerning cost reduction, most likely because fees are higher in voluntary mediation. Where voluntary mediation is “unsuccessful” attorneys may feel that the client has wasted too much money.

Many surveys indicated that even when a full agreement is not reached in mediation, however, costs may be reduced if agreement was reached on some issues. Likewise the process may have the positive effect of narrowing or clarifying the issues. Comments such as “saves time and money in the long run” are characteristic. This ultimately makes the job of the attorney negotiating an eventual agreement that much easier. In fact research indicates that mediation participants are more likely to settle prior to trial.<sup>63</sup> At least one respondent indicated that mediation narrows the issues in court as well. Approximately three quarters of the respondents also noted savings in time, and this is consistent with existing research findings.<sup>64</sup>

##### 2. *Client satisfaction with the process*

Attorneys reported that many of their clients were satisfied with the process. Comments such as “clients control their own case” and “clients felt more in control when they were directly involved in the making of the agreement” were common. Other research supports the finding that client control over the process increases

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<sup>45</sup> Joan B. Kelly, *Is Mediation Less Expensive? Comparison of Mediated and Adversarial Divorce Costs*, 8 *MEDIATION Q.* 15 (1990); Jessica Pearson &



satisfaction.<sup>65</sup> It is likely that client comfort with the process is directly related to the pre-mediation preparation of-

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Nancy Thoennes, *Divorce Mediation, Reflections on a Decade of Research*, in *MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD-PARTY INTERVENTION* 9 (Kenneth Kressel ed. 1989).

<sup>62</sup> See, e.g., JACKSON COUNTY (Mo) FAM. CT. R. 68.12.

<sup>63</sup> See ROBERT E. EMERY, *RENEGOTIATING FAMILY RELATIONSHIPS: DIVORCE, CHILD CUSTODY AND MEDIATION* 183 (1994).

<sup>64</sup> Robert E. Emery, et al., *Child Custody Mediation and Litigation: Further Evidence on the Differing Views of Mothers and Fathers*, 59 J. CONSULTING & CLINICAL PSYCH. 410 (1991).

<sup>65</sup> Cheryl Depner et al., *Client Evaluation of Mediation Services*, 32 FAM. & CONCILIATION CTS. REV. 306 (1994) (court connected); Howard Irving & M. Benjamin, *An Evaluation of Process and Outcome in a Private Family Mediation Service*, 10 MEDIATION Q. 35, 55 (1992) (private setting).

ferred by the attorney. This initial orientation to mediation is critical in the overall representation process. It is at this point that the attorney can assist the client in understanding the dynamics of the process and set an agenda for the mediation. It is at this point that the attorney can provide assistance in preparing proposed budgets and evaluating different options for parenting.<sup>46</sup> In addition proposed discovery requests and the need for temporary orders can be discussed. Clients' anxiety can be reduced when the attorney takes the time to fully orient the client.<sup>47</sup>

### 3. *Client satisfaction with the outcome*

Several themes emerged that related to client satisfaction with the outcome. Several attorneys referred to the benefit of the client taking "ownership" of the agreement. Others noted that clients were more likely to comply with an agreement that they had an active part in making. As a specific advantage, one attorney wrote that mediation leads to "more satisfied clients who can still deal with each other."

Throughout the literature appears the proposition that another of mediation's assets is its ability to further agreements that are more closely tailored to the needs of the clients.<sup>48</sup> This is especially true when the agreement relates to the day-to-day activities of family living.<sup>49</sup> The comments to the survey were consistent with this proposition. When both parents continue to be involved in their children's lives, it is even more important that expectations are clear. The importance of this is reflected in state statutes that require parents to create a child care plan when joint custody will be set by the decree.<sup>50</sup> Parents are seen as being in the best position to know what will or will not work for their children.

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<sup>46</sup> Christine Leick, *Guidelines for Mediator/Attorney Cooperation*, *Mediation Q.* (Spring 1989) at 37.

<sup>47</sup> For suggestions in this regard, see JOHN W. COOLEY, *MEDIATION ADVOCACY* 85-100 (1996). See also, C. Terrence Kapp, *Divorce Mediation What You Should Tell Your Clients*, 8 *Compleat Lawyer* 38 (1991); ERIC GALTON, *REPRESENTING CLIENTS IN MEDIATION* (1994).

<sup>48</sup> "Courts are ill-equipped to mandate particular visitation schedules and custodial arrangements, the wisdom of which depends on the situations of the parents and children rather than on legal rules." ROGERS & McEWEN, *supra*, note 13 at 230.

<sup>49</sup> Emery, *supra* note 63, at 182.

<sup>50</sup> See, e.g., MO. REV. STAT. § 452 (1987).

One final advantage survey respondents noted with respect to mediation outcome was predictability. Some comments reflected the uncertainty associated with allowing a judicial officer to make a decision. The difficulty associated with the use of vague standards such as “best interests of the child” has been well documented.<sup>51</sup> One attorney in the survey cited an advantage of mediation as “any negotiated settlement is better than the crap shoot you get at trial.” It would be interesting to evaluate the relationship between a desire to mediate and the degree to which a client is risk-averse.<sup>52,53</sup>

#### 4. *Emotional issues*

Respondents saw the ability to more adequately address the emotional aspects of dissolution as mediation’s greatest strength. A significant number of comments related to the improvement of communication between the parties and the extent to which this ultimately improved settlement opportunities.<sup>54</sup> In cases involving children, many attorneys felt that the process encouraged clients to put their children’s needs over their own. Evidence supports the conclusion that a process that reduces acrimony between the parents is associated with improved child mental health.<sup>55</sup>

Overall, many of our respondents had favorable experiences with mediation. The responses to the survey supported the claims made by others that mediation is often an appropriate process for resolving divorce-related disputes.

#### F. *Disadvantages of the Process*

Responses related to attorney dissatisfaction with the process can be divided into the following categories: 1) inefficiency concerns; 2) mediator skills; and 3) power imbalances.

##### 1. *Inefficiency concerns*

Approximately 20% of the respondents indicated that the court-ordered mediation process added to the costs of their cases. Further clarification was found in comments in which some attorneys suggested that in situations where it was clear to them that clients were not going to reach an agreement, the requirement created additional expense. Although listed as a factor to be considered as a disadvantage, it is noteworthy that only 20% (23/110) of the respondents viewed increased cost as a disadvantage compared to about 80% (87/110) of the respondents who indicated that the process resulted in *decreased* cost to the client. A similar discrepancy can be found in the area of efficiency with respect to time. While approximately 30% (32/110) of the

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<sup>51</sup> See, Robert Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONT. PROBS. 226 (1975); David Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477 (1984).

<sup>52</sup> In their highly respected article, Robert Mnookin and Lewis Kornhauser suggest that uncertainty about the outcome in court concerning custody disadvantages the relatively risk-averse parent because that parent will accept less in order to avoid the gamble inherent in adjudication. Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 53 YALE L.J. 950 (1979). See Margaret F. Brinig, *Does Mediation Systemically Disadvantage Women?*, 2 WM. & MARY J. WOMENS L. 1 (1995) (challenging the assertion that women are at a disadvantage when mediating with their husbands because of their propensity to be risk-averse).

<sup>54</sup> For research results that support this proposition see Kelly, *supra* note 14, at 379.

<sup>55</sup> Peter A. Dillon & Robert E. Emery, *Divorce Mediation and Resolution of Child Custody Disputes: Long Term Effects*, 66 AM. J. ORTHOPSYCHIATRY 131 (1996).

respondents said the mediation requirement caused delay, 70% (77/110) indicated that the process saved time. With respect to voluntary mediation a lower percentage of respondents expressed concern about delay.

It is not surprising that a greater percentage of attorneys had concerns about delay than they did about expenses. The fees for court-ordered programs are generally not high, while the requirement in some jurisdictions that the mediation process be complete before a case can be docketed for a hearing<sup>56</sup> results in the perception that the requirement almost always causes a delay. What is not clear, of course, is whether the case would otherwise have been ready for hearing even absent the mediation requirement.

## 2. Mediator skills

When asked whether dissatisfaction with the skills of the mediator was a perceived disadvantage, fully half (55/110) of the respondents answered in the affirmative. This may reflect the fact that court-ordered mediations are more likely to be conducted by court personnel (over 50% of the survey respondents indicated this) or mediators who were appointed as opposed to being chosen by the parties. The inability to choose a mediator may predispose some attorneys to a more harsh assessment of the mediator's skills. Training and certification of mediators also varies significantly from jurisdiction to jurisdiction.<sup>57</sup> Common requirements include some type of educational degree, and/or experience<sup>58</sup> as well as specialized mediation training.<sup>59</sup>

Even in voluntary mediations where the attorneys select the mediator, there was a significant level of dissatisfaction with "skills." It may be that attorneys have a different standard for evaluating a "skilled mediator." A mental health mediator who focuses more on the emotional aspect of the dissolution while helping the parties arrive at their own agreement may be seen as "unskilled."<sup>60</sup> In the same light, a mediator who facilitates the parties setting their own standards for determining fairness, as opposed to those that are presumed to be fair because they are "legal," may also be viewed as inept.<sup>61</sup>

## 3. Power imbalances

Consistent with other commentaries on the process, a widely cited disadvantage of the court-ordered mediation process was the inability of the mediator to appropriately address power imbalances.<sup>81</sup> Among other things, power imbalances may result in "unfair agreements." One attorney summed up this concern by writing "the

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<sup>56</sup> JACKSON COUNTY (Mo) FAM. CT. R. 68.12.

<sup>57</sup> See NANCY ROGERS & CRAIG McEWEN, *supra* note 13, at 12:02 (reporting that qualifications for domestic relations mediator vary from master's degrees in mental health, to law degrees to no educational degrees, where training requirements vary from 0 to 60 hours). See also Nancy J. Foster & Joan B. Kelly, *supra* note 22, at 666 (noting that 43% of the members of the Academy of Family mediators come from the mental health professions, 39% are attorneys, and the rest are from fields such as "education, business, religion, and labor").

<sup>58</sup> See FLA. R. CIV. P. 10.010(b) (requiring family mediators to have a masters or doctoral degree in social work, mental health, behavioral or social sciences; be a physician certified to practice adult or child psychiatry, a licensed attorney or certified public accountants and have four years experience in the respective field or eight years family mediation experience with a minimum of ten mediations per year).

<sup>59</sup> See IOWA CODE § 598.41 (1995).

<sup>60</sup> Emily Brown, *Divorce Mediation In a Mental Health Setting* in DIVORCE MEDIATION: THEORY AND PRACTICE, *supra* note 20, at 127 (1988).

<sup>61</sup> Leonard L. Riskin, *Toward New Standards for the Neutral Lawyer in Mediation*, 26 ARIZ. ST. L. REV. 329 (1984). See also, Ellen Waldman, *The Role*

[p]urpose of mediation is to resolve issues, not do justice, so the more dominant spouse usually prevails.” Power imbalances may result from a lack of negotiating skills, domestic violence or the use of intimidation. It is, however, striking to note that when asked whether they thought that mediation disadvantaged clients with fewer economic resources or less sophistication, only 30% (32/110) of the respondents indicated that they thought this was true.

Because clients vary in their abilities to represent themselves well, attorneys are justifiably concerned that some may be taken advantage of in a process where they have no “advocate.” Some attorneys dealt with this problem by indicating that they would not let certain clients attend mediation without them. Commentators have suggested that when the process will not involve direct attorney participation, legislatures have responded by enacting “protective” or highly regulatory procedures for the process.<sup>82</sup> Included in those are requirements that mediators advise parties to have the agreement reviewed by an attorney prior to signing.

Perhaps the most interesting comment in the study concerned whether this attorney review acted as a check on “unfair” agreements. Several attorneys commented that even though the agreement was not binding until they reviewed it, it was difficult to get clients to change their minds. Clients become emotionally invested in the agreement they made and do not want to change it. This was particularly troubling if the attorney thought the client was intimidated into making the agreement in the first place.

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*of Legal Norms in Divorce Mediation: An Argument for Inclusion*, 1 VA. J. SOC. POLICY & LAW 87 (1993) (suggesting that there has been a trend towards mediator hostility to the law).

<sup>81</sup> See Scott H. Hughes, *Elizabeth’s Story: Explaining Power Imbalances in Divorce Mediation*, 8 GEO. J. LEGAL ETHICS 553 (1995). See also Penelope E. Bryan, *supra* note 59.

<sup>82</sup> See McEwen et al., *supra* note 9, at 1331.

A related concern was that when attorneys advise against an agreement made by the client, the attorney is viewed as the “problem.”<sup>62</sup> Perhaps some of these concerns would be eliminated if the attorney and client spent time preparing for the mediation by anticipating outcomes and potential problems with them and further providing for consultation opportunities throughout the process.<sup>63</sup>

Making an initial assessment whether a power imbalance exists and then determining how to address it in the context of a mediation will be addressed below in section II.

## II. Weighing the Advantages/Disadvantages: When To Use Mediation

What the survey tells us is that attorneys still struggle with the question of when mediation is the appropriate mechanism for resolving their cases. The factors surveyed will be considered with some suggestions regarding how to weigh them in making a case assessment. When considering whether mediation is the most appropriate process, one must always ask “as compared to what?” Because attorney-negotiated settlement is the most frequently employed method for resolving domestic relations cases, the

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<sup>62</sup> For a detailed discussion of the lawyers role outside the process, see Mark C. Rutherford, *Lawyers and Divorce Mediation: Designing the Role of “Outside Counsel”*, MEDIATION Q. (June 1986) at 17.

<sup>63</sup> See Leick, *supra* note 66. <sup>85</sup> See Kelly, *supra* note 61.

question becomes “under what circumstances would mediation be preferable to negotiation?”

### A. *Efficiency*

Finances are a consideration in virtually every divorce case. The parties obviously want to save money and so strategic decisions are made using a cost-benefit analysis. Mediation generally results in cost saving.<sup>65</sup> The key to achieving or increasing these savings is appropriate preparation.

The client should understand that the goal of mediation is the making of informed choices. The best source of legal information regarding entitlements is, of course, the attorney. An initial discussion with the client about possible or likely outcomes outside of the mediation process must take place.<sup>64</sup>

The client also must know what items need to be discussed and resolved in order to reach a satisfactory conclusion. The attorney should spend time identifying those issues that will need to be included in a court submission. The attorney should also assist the client in prioritizing desires on the agenda. The client should be assured that if the attorney is not present, the agreement will not be binding until the client has reviewed and then signed it.<sup>65</sup>

If the parties are splitting the cost of the mediation it will generally be less expensive for each of them. When attorneys negotiate directly with each other, delays occur each time one of the attorneys has to go back to the client for clarification or authority. If the attorneys are present at the session, cost savings may still be present if the mediator is able to move the negotiations along more expeditiously. There is also less likelihood of imposed or stalled negotiation when a neutral third party is facilitating.<sup>66</sup> The fact that some attorneys still believe that mediation is a “duplicative process which could well be accomplished in a four-way conference involving the parties and their lawyers”<sup>67</sup> underscores the lack of appreciation for the role a facilitator can play in overcoming the impediments to settlement.<sup>68</sup> Mediation is not a substitute for lawyer participation in resolving domestic relations disputes; it is a process in which lawyers play a critical but different role.<sup>69</sup> The presence of a neutral third party completely transforms the dynamics present in four way lawyer-parties negotiation.<sup>70</sup>

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<sup>64</sup> Kapp, *supra* note 67.

<sup>65</sup> See ABA Standards of Practice for Lawyer Mediation, *supra* note 60.

<sup>66</sup> See Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RESOL. 235 (1993).

<sup>67</sup> Gangel-Jacob, *supra* note 19, at 869.

<sup>68</sup> See Robert A. Baruch Bush, “*What Do We Need A Mediator For? Mediation’s Value-Added for Negotiators*”, 12 OHIO ST. J. ON DISP. RESOL. 1 (1996).

<sup>69</sup> In their study of Maine attorneys McEwin, Maiman, and Rogers concluded that the widespread use of mediation changed the settlement work of attorneys and altered the process for handling divorces. The authors concluded that [a]ctive participation in the mediation process offers a way to moderate the unreasonable conduct or demeanor of parties and lawyers. In this fashion mediation adds a dimension to the settlement process that is otherwise unavailable even to reasonable “lawyers”. McEwin et al, *supra* note 9, at 1371.

<sup>70</sup> See DAVIS A. LAX & JAMES K. SEBANIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* (1986), Lax and Sebanius identify the risks of losing strategic advantage by disclosing information to the other side as part of a “cooperative” or “problem solving” approach. This risk can be minimized in mediation when the information is disclosed to a third party mediator (thereby creating value) without the risk of the other side using the information to gain a tactical advantage (claiming value). The mediator can then use the information both sides have provided to assist them in reaching an optimum solution.



The mediator's abilities to identify and clarify issues, see common ground, and move the parties closer to settlement are valuable tools for resolution that are much less likely to be brought to the table by partisan advocates.<sup>71</sup>

If mediation is "unsuccessful" as measured by a failure to arrive at a complete agreement, the cost may be an added expense. However, partial agreements may minimize the excess cost factor. Also, even when an agreement is not reached, the mediation might have "successfully" narrowed or clarified the issues, thereby facilitating later negotiations or possible trial. For example, the costs of additional experts such as tax consultants, business valuers or child psychologists may be reduced if through the use of stipulations the parties can come to an agreement regarding the use of outside consultants. Mediation is not a substitute for discovery but discovery costs can be reduced if the parties can identify real disclosure needs based on the unique circumstances of the situation.

Finally, additional cost saving may accrue in the form of fewer post-dissolution motions. If, as many believe, individuals are more likely to comply with agreements they reached themselves,<sup>72</sup> future costs should be reduced as well.

The other efficiency factor that needs to be considered is time. In voluntary mediation, the schedule of the process is dictated by the parties' desires rather than set by the court. To the extent that delay will benefit one party at the expense of the other, mediation may not be appropriate. However, in most cases, some issues need to be resolved quickly while others may wait. For instance, one of the most difficult issues facing divorcing families is how the children will be cared for pending the final decree.<sup>73</sup> This decision needs to be made quickly, but unfortunately often occurs in the context of a parent leaving the home, usually a highly emotionally-charged event. Mediation can be used to address this initial question in a way that provides clearer guidelines for both parents in adapting to new living arrangements while providing stability for the children.

Timing is an important factor in divorce cases for another reason. Much has been written concerning the way in which spouses experience divorce.<sup>74</sup> It is a process marked by stages<sup>75</sup> similar to those described by Elizabeth Kubler-Ross<sup>76</sup> related to the dying process. The difficulty in negotiating with spouses is that they are rarely at the

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<sup>71</sup> This comment from an attorney in the Maine study is illustrative of this point:

And I think it's an atmosphere where people are for some reason or another, maybe it's because there's another person in the room who's neutral. The climate is there for compromise and if you . . . sit in a room with two lawyers, I think, clients tend to think that they've got these two champions there and so that's the whole mode. It's just such a different dynamic when you get into the mediation room.

McEwen, et al., *supra* note 9 at 1368.

<sup>72</sup> Jeanne A. Clement & Andrew I. Schwebel, *A Research Agenda for Divorce Mediation: The Creation of a Second Order Knowledge To Inform Legal Policy*, 9 OHIO ST. J. DISP. RESOL. 95, 199 (1993), citing Andrew Schwebel et al., *PMI-DM: A Divorce Mediation Approach That First Addresses Interpersonal Issues*, 42 J. FAM. PSYCHOTHERAPY 69, 78 (1993).

<sup>73</sup> Under a newly enacted statute in Missouri, parents seeking a dissolution must include a proposed parenting plan as part of the initial petition. MO. REV. STAT. 452.310 (1998).

<sup>74</sup> Ann Milne, *The Nature of Divorce Disputes*, in *DIVORCE MEDIATION: THEORY AND PRACTICE*, *supra* note 20 at 27.

<sup>75</sup> Florence W. Kaslow, *Stages of Divorce: A Psychological Perspective*, 25 VILL. L. REV. 718 (1980).

<sup>76</sup> ELIZABETH KUBLER-ROSS, *ON DEATH AND DYING* (1969).

same stage in the emotional processing of the divorce.<sup>77</sup> The initiator has usually moved ahead and is in a different frame of mind.<sup>78</sup> Mediation allows far more flexibility in timing to take these differences into account. Once the immediate needs of the family, such as temporary child care plans, are taken care of, the final resolution can be delayed until the non-initiator has had time to accept the reality of the divorce.<sup>79</sup> While this delay may be frustrating to the initiator, the ultimate agreement is likely to be a better one if both parties are emotionally ready to deal with the issues.

A related issue is the competence of the mediator. The selection of an appropriate mediator is obviously critical. As our survey results indicate, dissatisfaction with the skills of the mediator was cited by a full half of the respondents. In a voluntary mediation, and even in some court-ordered ones, attorneys may and should take an active role in selecting the mediator.<sup>80</sup>

What characteristics are most important in evaluating a mediator for a full divorce or child custody case? Orientation of mediators differ and will influence the techniques and strategies used.<sup>81</sup>

A well-recognized leading expert on mediation, Len Riskin, has identified two broad categories of mediator orientations; evaluative and facilitative.<sup>82</sup> An evaluative mediator, as the name implies, sees her role as providing an evaluation of the merits of each side's case.<sup>105</sup> The evaluative mediator is likely to offer predictions about likely outcome if the case goes to court. The job also includes an assessment of the relative strengths and weaknesses of the case from each side's point of view. The evaluative mediator acts on the assumption that the parties are "bargaining in the shadow of the law." The advantages of an evaluative mediator are that by providing assessments and predictions some of the decision-making burden is removed from the parties and this may facilitate an agreement. Parties come to a better understanding of their positions and possible outcomes.<sup>106</sup> The disadvantages are that the rendering of the mediator's "opinion" might compromise the parties' perception of neutrality. Parties sometimes feel betrayed by the mediator's prediction if it doesn't favor their approach.<sup>107</sup> Also, because this technique decreases the level of the parties participation, their satisfaction with the outcome and process may decrease as well.<sup>108</sup> Finally, if the parties know that the mediator will render an evaluation, they are more likely to exaggerate the strengths of their case in the hope that the mediator will "convince" the other

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<sup>77</sup> Sarah Childs Grebe, *Mediation at Different Stages of the Divorce Process*, in 12 *DIVORCE AND FAMILY MEDIATION* (James C. Hanson ed. and Sarah Childs Grebe vol. ed) 34, 35-38 (1985), citing Peter Bohannon, *The Six Stations of Divorce* in *DIVORCE AND AFTER: AN ANALYSIS OF THE EMOTIONAL AND JUDICIAL PROBLEMS OF DIVORCE* (Peter Bohannon, ed. 1970).

<sup>78</sup> *Id.*

<sup>79</sup> Kaslow, *supra* note 21, at 83-101.

<sup>80</sup> See Cooley, *supra* note 67 at 38-39.

<sup>81</sup> In addition to the facilitative/evaluative models identified by Prof. Riskin and discussed *infra* at notes 104-112 and accompanying text, Prof. Robert A. Baruch Bush has also developed a typology of mediators based on their identification with one of five primary goals. His categories include (1) "settlers" (who assume that the parties primary goal is to settle even if some will be disappointed with the outcome); (2) "protectors" (who are primarily concerned with preventing an unfair process or outcome); (3) "fixers" (who emphasize the optimal solution for all parties); (4) "reconcilers" (who are particularly concerned about the ongoing relationship of the parties; and (5) "empowerers" (who focus on helping parties examine their own interests and options and arrive at an agreement they (the principles as opposed to the mediator) think is best for them). John Lande, *supra* note 51 at 851-53 citing Robert A. Baruch Bush, *Ethical Dilemmas in Mediation* 17-18 (1989) unpublished manuscript, on file with author. See also, ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER,

THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION (1994).

<sup>82</sup> Leonard L. Riskin, *Understanding Mediator Orientations, Strategies, and Techniques: A Guide for the Perplexed*, 1 HARV. NEGOTIATION L. REV. 7 (1996). See also James J. Alfini, *Moderator, Evaluative Versus Facilitative Medi-*

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ation: *A Discussion*, 24 FLA. ST. U. L. REV. 919 (1997). A critical analysis of Prof. Riskin's model can be found in Kimberlee K. Kovach & Lela P. Love, "Evaluative" Mediation Is an Oxymoron, 14 *Alternatives to High Cost Litig.* 31, 32 (1996), for a response to the Kovach article see John Bickerman, *Evaluative Mediator Responds*, 14 FLA. ST. U. L. REV. 985 (1997). For yet another typology of mediators see, James J. Alfini, *Trashing, Bashing and Hashing it Out: Is This The End of Good Mediation?* 19 FLA. ST. U. L. REV. 47 (1991). For additional information about this topic see Jefferey W. Stempel, *Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator's Role*, 24 Fla. St. U. L. Rev. 949 (1997). See also, Joseph B. Stulberg, *Facilitative Versus Evaluative Mediator Orientations: Piercing the "Grid" Lock*, 24 FLA. ST. U. L. REV. 985 (1997).

<sup>105</sup> "The mediator who evaluates assumes that the participants want and need her to provide some guidance as to the appropriate grounds for settlement—based on law, . . . and that she is qualified to give such guidance by virtue of her training, experience, and objectivity." Riskin, *supra* note 104 at 24.

<sup>106</sup> *Id.* at 44.

<sup>107</sup> *Id.* at 44 citing Arthur A. Chaykin, *Selecting the Right Mediator*, DISP. RESOL. J., Sept. 1994 at 58, 65 n.5.

<sup>108</sup> Riskin, *supra* note 104 at 44, citing Alan Alhadeff, WHAT IS MEDIATION? IN ALTERNATIVE DISPUTE RESOLUTION PRACTICE GUIDE § 23:8 (Beth T. Roth et al., eds., 1993).

side of the correctness of their position.<sup>83</sup> This might also interfere with the likelihood that parties will come to a better understanding of the others' positions and interests.<sup>84</sup>

A facilitative mediator, on the other hand, seeks to assist or promote the parties' agreement based on the parties' perception of the situation, not the mediator's. This type of mediator will use different techniques to help the parties come up with their own options and then help them to move closer together.<sup>85</sup> The mediator's assessment of the case is not presented to the parties. The advantages of this model are that it allows the parties to participate more fully in the resolution of the issues. It offers parties the greatest potential for coming to a more complete understanding of the positions and interests of each side and improves the chances that the parties will be able to reach an agreement.<sup>86</sup> The disadvantages are that if the parties are not adept at developing proposals or negotiating with each other, they may fail to recognize relevant issues or options.<sup>113</sup>

In addition to role orientation, the attorney should also question the mediator's philosophical bias on questions that will be the mediation focus such as the presumption that joint custody is the optimal plan for children, or that marital assets should be split 50-50, or that homemaking services should not be valued in the same way as "income-producing" services. Some of these biases may have their basis in state law, so a discussion of them with the mediator will likely alert the attorney to the extent to which the mediator feels the law is "controlling" in a mediated agreement.

Educational background, professional experience, and training are also areas that should be explored. For some situations, a lawyer may be deemed more appropriate,

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<sup>83</sup> Riskin, *supra* note 104 at 45.

<sup>84</sup> *Id.*

<sup>85</sup> This mediator "assumes that the parties are intelligent, able to work with their counterparts, and capable of understanding their situations better than the mediator and, perhaps, better than their lawyers." *Id.* at 24, citing Leonard L. Riskin, *The Represented Client in a Settlement Conference: The Lessons of C. Heilman Brewing Co. v. Joseph Oat Corp.*, 69 WASH. U.L.Q. 1059, 1099, 1108 (1991).

<sup>86</sup> Riskin, *supra* note 104 at 45. <sup>113</sup> *Id.* at 46.

while for others a person trained in a mental health discipline would be better.<sup>87</sup> Some mediators also co-mediate with others in order to provide gender balance or access to more than one discipline (e.g. lawyers - mental health professionals).<sup>88</sup> Finally, if the attorney is planning on being present, it is important to discuss the role the attorney will play. For instance, will the attorney make an opening statement? Will the attorney speak for the client? What will happen if the client disagrees with what the lawyer is saying? The value of having lawyers present and its effect on mediation has been discussed elsewhere, but the importance of clear role expectations cannot be overstated.

Attorneys should ask for a copy of the mediator's contract or agreement to mediate. Included in the agreement should be the following provisions: 1) process description - timing, caucuses, who will be present; 2) non-representation (if the mediator is a lawyer); 3) confidentiality; 4) use of other experts; 5) fees; 6) reasons for termination; and 7) who will be responsible for drafting the agreement.

In conclusion, the more active involvement of the client in the resolution process presents significant challenges for the attorney. It requires a modification of roles that must be carefully considered.

#### B. *Client Involvement in the Outcome*

The next factor to consider is the extent to which client involvement in the outcome is important or desirable. For instance if an aspect of the case requires judicial resolution because the legal issue is unique, then mediation is not appropriate. Examples might include the characterization of certain intangibles as marital property subject to division.

More important, to what extent does the client wish to be directly involved in the outcome? Perhaps the most commonly cited advantage of mediation for family disputes is the ability to foster an agreement that is closely tailored to the family's needs.<sup>89</sup> Making a detailed plan usually takes time and patience. Mediation can provide the forum for that to happen.

Only the parents know what holidays are important to them and how the patterns of their children's lives are going to change.<sup>90</sup> Even attorneys negotiating with each other are going to be hardpressed to deal with the nuances of the family's daily post divorce life.

Some clients may have unrealistic expectations of their legal entitlements<sup>91</sup> (e.g., I should get virtually all the marital property because of my husband's infidelity). These clients may be deeply disappointed to learn that although the infidelity may be a significant factor in their minds, judges will generally not give it much weight.<sup>92</sup> Mediation is more likely to give these clients an opportunity to advocate for a division

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<sup>87</sup> See Brown, *supra* note 79.

<sup>88</sup> See Beth Erikson, *Therapeutic Mediation*, 14 J. AM. ACAD. MAT. LAW 233 (1997).

<sup>89</sup> See Cohn, *supra* note 15.

<sup>90</sup> See ISOLINA RICCI, MOM'S HOUSE, DAD'S HOUSE, (2nd ed. 1997).

<sup>91</sup> See generally SALLY MERRY, GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS 179 (1990)

(describing how lay people view the impact of the law on them).

<sup>92</sup> The relevance of "fault" varies among jurisdictions. For a compilation of the different states' approaches see, Peter Nash Swisher, *Reassessing Fault Factors in No-Fault Divorce*, 31 FAM. L.Q. 269 (1997). See also, Ira Mark Ellman, *The Place of Fault in Modern Divorce Law*, 28 ARIZ. ST. L. J. 773 (1996).

in which marital infidelity is a consideration. The other side is likely to resist such an effort because of the “legal irrelevance.” On the other hand, the other spouse might acknowledge the breach of the couple’s own code of conduct and respond to it. The point is that the parties can set the standard for determining what should be taken into account.

If the case has to go to court, the parties are even more likely to be dissatisfied with the outcome if they believe it has failed to take into account the unique circumstances of their situation. Mediation allows the parties to take into account the broadest range of standards. This does not mean that the law is irrelevant, but it does not have to control the outcome. However, mediation’s failure to rely exclusively on “legal entitlement” as the benchmark for a “fair agreement” may also account for some lawyers’ continuing discomfort with it.<sup>93</sup>

### *C. Client Involvement With the Process*

Mediation provides an opportunity for clients to be directly involved in the resolution of their case. This is mediation’s greatest asset: to the extent that parties have the chance to communicate effectively, they can promote a good future relationship.

On the positive side, mediation allows the parties to structure a process that addresses their unique needs. It allows them to keep control over the issues that so profoundly affect them. Most important, mediation provides an opportunity to preserve an on-going relationship. The importance of this for parents cannot be overstated. The research is clear that children of divorce do best when their parents are able to maintain a cooperative relationship.<sup>94</sup> This factor should be weighed heavily in every case where children are involved. To the extent that the parties are able to minimize the adversarial nature of the divorce, the children will benefit.<sup>95</sup>

Clients should be asked how they view their future relationship with the soon to be “ex.” What would they like it to be in five years? Although some clients may truthfully answer that they wish they would never have to see him/her again, if they have children, this is not a reasonable expectation. Parents will have to deal with each other and promoting a positive relationship from the beginning is best.<sup>96</sup>

Circumstances in which lawyers perceive that the clients’ direct involvement in resolving the dispute through mediation are the most dangerous is when there exists “power imbalances.” Throughout the legal literature on mediation is continuing reference to imbalances that occur due to lack of resources, negotiating skills, intimidation or the inferior role of women in a patriarchal culture.<sup>97</sup> While some of these imbalances are more obvious, such as in the case of domestic violence, many of the concerns seem to be centered on the motion that one of the spouses is the

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<sup>93</sup> See, e.g., Bryan, *supra* note 59. Evaluating the “fairness” of the mediated agreement by comparison to the predicted adjudicatory outcome is described as the “shadow verdict” baseline for evaluating the fairness of the process. See David Luban, *The Quality of Justice*, 66 DENV. U. L. REV. 381, 187 (1989).

<sup>94</sup> See Paquin, *supra* note 11.

<sup>95</sup> See Dillon & Emery, *supra* note 74.

<sup>96</sup> Mediation is seen as appropriate because it shifts the focus from “who will be awarded custody” to “how will you continue to parent your children?”, thereby creating a less adversarial and more cooperative environment for decisionmaking, STEPHEN K. ERICKSON, *The Legal Dimension of Divorce*, in JAY FOLBERG & ANN MILNE, *DIVORCE MEDIATION: THEORY AND PRACTICE* (1988).

<sup>97</sup> See e.g., Desmond Ellis, *Marital Conflict, Mediation and Post Separation Wife Abuse*, 8 LAW & INEQ. 317 (1989). See, e.g., Truthhart, *supra* note 24, Martha Shaffer, *Divorce Mediation: A Feminist Perspective*, 46 U. TORONTO L.

“exploiter” and the other the “victim,” and that the exploiter will continue the exploitative behavior in the mediation where the victim is “unprotected.”

This is, however, a far too simplistic view of a very complex problem. In the first instance it assumes that there is a single source of power in a relationship. Second, it assumes that if a power imbalance does exist, the mediation will exacerbate rather than neutralize it.<sup>125</sup> These assumptions must be questioned.

First with respect to the sources of power, one commentator on divorce mediation has categorized the power held by one spouse over the other into five areas: economic (the ability to control the financial affairs of the couple), intellectual (both control over access to information and the ability to comprehend it), physical (which may come from the ability to control the physical surrounding of the family or from physical contact such as occurs in abusive relationship), emotional (which relates to the extent to which one spouse is dependent upon the other for having his/her emotional needs met and the extent to which he or she may be controlled by threats or intimidations) and procedural (the ability to control the procedural aspects of the dissolution).<sup>126</sup>

Another commentator has suggested that in addition to categories of power, that “power has four defining features: 1) it is composed of many factors; 2) it is relative, situational, and shifting; 3) everyone has some degree of power and 4) power is only effective when it is used.”<sup>127</sup> She adds a fifth feature when the

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REV. 162 (1988); Howard S. Erlanger, *Participation and Flexibility in Informal Processes: Caution from the Divorce Context*, 21 LAW & SOC. REV. 585 (1987); Richard Crouch, *Divorce Mediation and Legal Ethics*, 16 FAM. L.Q. 219 (1982).

<sup>125</sup> Bryan, *supra* note 59.

<sup>126</sup> Hughes, *supra*, note 81 at 575 citing JOHN M. HAYNES, *DIVORCE MEDIATION: A PRACTICAL GUIDE FOR THERAPISTS AND COUNSELORS* 49 (1981). For other theories in negotiating power between spouses, see LETHA D.

SCANZONI & JOHN D. SCANZONI, *MEN, WOMEN & CHANGE: A SOCIOLOGY OF MARRIAGE AND FAMILY*, 361-418 (1988); JOHN D. SCANZONI & MAXIMILIANE SZINOVACH, *FAMILY DECISION MAKING: A DEVELOPMENTAL SEX & ROLE MODEL* 15-44, 85-104 (1980).

<sup>127</sup> Diane Neumann, *How Mediation Can Effectively Address the Male-Female Power Imbalance in Divorce*, 9 MEDIATION Q. 227, 229 (1992).

decision involves divorce mediation: not every power difference affects the mediation.<sup>128</sup> Yet another commentator<sup>98</sup> has identified sources of power as the possession of both tangible resources,<sup>99</sup> and intangible resources.<sup>100</sup>

Finally another means of viewing marital power is to distinguish between a power resource (such as greater income) and the extent to which it will be transformed into an equivalent degree of persuasive strength (power in use).<sup>101</sup>

From these descriptions we get a glimpse of the problem. It is sometimes difficult to ascertain who has power (from any source) and then to predict whether it will be

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<sup>98</sup> Penelope Eileen Bryan, *Reclaiming Professionalism: The Lawyers' Role in Divorce Mediation*, 28 FAM. L.Q. 177, 194 (1994).

<sup>99</sup> Tangible resources include income, education, and occupation.

<sup>100</sup> Intangible resources relevant to negotiating power include personal characteristics, such as intelligence, status, and attitude toward risks; emotional states such as psychological closure, guilt, depression, self-esteem and low expectations; and, finally, relationship patterns such as dominance, dependency, physical and emotional abuse and ideology.

<sup>101</sup> DESMOND ELLIS & NOREEN STUCKLESS, *MEDIATING AND NEGOTIATING MARITAL CONFLICTS*, 64 (1996) citing R. Blumberg & M. Coleman, *A Theoretical Look at the Gender Balance of Power in the American Couple*, 10 J. of Fam. Issues 225 (1986). Ellis and Stuckless argue in response to the “feminist” critique of mediation, that societal power imbalances that favor men as a group are not invariably reproduced at the level of individual males and females participating in divorce mediation.



exercised. It may be that the husband has economic and physical power with respect to the assets, but the wife may have emotional and intellectual power with respect to the children. Not only might the power shift from issue to issue, but the spouse with the power may not be aware of it and therefore unable to exercise it.<sup>102</sup>

Rather than assume the bases of power and the willingness to exercise it, the attorney considering mediation must undertake

<sup>128</sup> *Id.*

a discussion with the client aimed at clarifying the situation. What is the financial situation of the couple and who controls spending decisions? What will be the post-dissolution economic situation of the clients? With respect to intellectual power, we might ask what information is needed in order to make good decisions and if each of the spouses have access to it?

How have the physical needs of the family been addressed or managed? Has physical force been used in the relationship or is there a fear regarding abuse?<sup>103</sup>

Emotional power may be ascertained by inquiry into the reasons for the dissolution. Information should be gathered regarding the current emotional state of the parties vis-a-vis the divorce.

Finally, what procedural steps have been taken so far, and by whom? Will greater economic resources allow the spouse to have and exercise more control over the process? How might the client fare in a negotiation with the other spouse? Is the client fearful of a face-to-face negotiation?

After the answers to these questions have been obtained, the attorney should have a much better idea of both the sources of power and the likelihood that power will be exercised. If some power imbalances are identified, several options may be available for increasing the level of power.

Economic power may be balanced by the securing of temporary orders transferring assets from the “powered” spouse to the other. Intellectual power may be increased by securing additional information, either informally or through discovery. Educating the client with respect to relevant information will also serve to increase intellectual power. Physical power imbalances may be addressed by temporary orders providing for physical needs. While protective orders may seek to address the physical threat, the sad fact is that in too many cases they are ineffective and the fear of physical abuse is often too real to be overcome. Emotional power may be the most difficult to ascertain and to address if an imbalance exists. Providing resources for emotional support may be an option. Allowing some time for the client to adjust to the emotional upheaval might also be advisable. Finally, the attorney accompanying the client to the mediation might be the best approach.<sup>104</sup>

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<sup>102</sup> See Joan Kelly, *Power Imbalance in Divorce and Interpersonal Mediation: Assessment and Intervention*, 13 *Mediation Q.* 85, 87 (1995) “There are no simplistic or universal patterns; defining women as less powerful than men fails to account for the complexity of interpersonal and particularly marital dynamics. It is important as well to understand that power is not a static entity but is instead fluid, fluctuating across different issues, and between and within sessions. Such fluidity, the claiming and relinquishing of power for different reasons, at different times, is more the norm in mediation than is the stereotype of one party taking advantage throughout mediation around every issue.”

<sup>103</sup> Several screening tools here have been developed for identifying cases in which spousal abuse has occurred. See e.g. Girdner, *supra* note 39.

<sup>104</sup> See *supra* notes 41-58 and accompanying text.

Hopefully, the attorney can address procedural power imbalances by setting forth the client's own procedural plan. Inferior negotiating skills can be addressed through education.<sup>105</sup>

Even if one assumes that the power imbalances remain in spite of the attorney's efforts to ameliorate them, is mediation always inappropriate? The answer, of course, depends on whether one believes that mediation can be an "empowering" process and that a skilled mediator will be able to identify and appropriately address the power imbalance.<sup>106</sup>

Several arguments have been made to support the proposition that mediation can work even in light of some power imbalances. The first relates to the process itself. As a goal-directed, task-oriented process mediation may encourage the full participation of both spouses because it is by nature a cooperative process. The structure of the mediation itself - with its ground rules for behavior, emphasis on tasks, and the neutrality of the mediator - lends itself to placing spouses on "equal footing."<sup>107</sup>

Perhaps most important is the role of the mediator. As the person responsible for the process, the mediator assumes a great deal of the procedural power. Advocates of mediation suggest that reframing a person's remarks and responding to intimidating negotiation tactics are only two of the ways a mediator can help balance power.

Regardless of pre-existing sources of power in the relationship, the instability brought about by the divorce itself has the potential for significantly shifting the power.<sup>108</sup> Regardless of who had power before the divorce, the divorce itself will shift some power to the person who feels guilty, has a better legal position, wants the divorce, or does not want the divorce and is willing to expend time, energy and resources slowing it down. All of these sources of power are familiar to a skilled divorce mediator who should be able to use his/her role to address them.

In spite of all this, there are those who suggest that when women are seen as the weaker spouse, empowering them in mediation may not benefit them in the long run.<sup>109</sup> Research indicates that a high degree of continuity exists in the ways spouses relate to each other before and after divorce.<sup>110</sup> Thus, there is a concern that women will be lulled into making poor agreements believing that their spouses are acting "fairly" towards them in mediation, only later to find themselves disadvantaged when old behaviors surface after the decree has been entered.<sup>142</sup>

## Conclusion

The survey conducted among the members of the Academy suggests that there is support for mediation but caution as well. The findings are consistent with other studies in which factors such as reduced cost, increased client involvement and more client

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<sup>105</sup> Mediation is simply facilitated negotiation. The client who will represent him or herself in the mediation should have a basic understanding of negotiating skills. Some attorneys provide written materials, such as Roger Fischer & William Ury's *Getting to Yes* for their clients to review prior to the mediation session. Even if the attorney will be present and active in the negotiation, it is important that the client understand and agree with what strategy will be used in order to avoid possible conflicts during the session.

<sup>106</sup> See Albie M. Davis & Richard A. Salem, *Dealing With Power Imbalances in the Mediation of Interpersonal Disputes*, *MEDIATION Q.* (December 1984) at 17.

<sup>107</sup> *Id.*

<sup>108</sup> Diane Neumann, *supra* note 127.

<sup>109</sup> Cheryl Regehr, *The Use of Empowerment in Child Custody Mediation: A Feminist Critique*, 11 *MEDIATION Q.* 361 (1994).

<sup>110</sup> HOWARD IRVING AND MICHAEL BENJAMIN, *FAMILY MEDIATION: THEORY AND PRACTICE OF DISPUTE RESOLUTION* (1987). <sup>142</sup> Regehr, *supra* note 140.



satisfaction with the process and outcome are seen as advantages. Concerns remain with respect to perceived power imbalances and the qualifications of mediators. Perhaps most significantly there remains unanswered questions about the role of the attorney when a client is involved in mediation. The search for clarification of this role will continue to present challenges for members of the family law bar.

### An Afterword on Arbitration

Respondents to the survey were also asked for their reaction to the use of arbitration to resolve family disputes. Unlike mediation, arbitration grants to the neutral third party the authority to make a decision.<sup>111</sup> In that way, it is more closely related to other adjudicative processes. Sixty-seven attorneys responded that arbitration was used in their jurisdiction.

#### A. *Scope*

The survey indicated that arbitration is most often used to resolve economic issues. All the respondents stated it was used for property division issues, with a somewhat lower usage for spousal support (54) and child support (48). A significantly lower number of respondents noted its use for child custody or visitation matters. (35). The lower usage rate for child care issues no doubt reflects the uncertain state of the law with respect to the enforcement of an arbitrator's decision regarding issues that affect children.<sup>112</sup>

#### B. *Identity of Arbitrators*

The professional orientation of the arbitrator clearly reflects the differing treatment of economic versus non-economic issues. Our respondents reported that attorneys virtually always serve as arbitrators (they were certified or approved by a court), with mental health professionals performing that function only when child care issues were to be decided. Among attorneys, several respondents noted that retired judicial officers were often used as arbitrators.

#### C. *Process Characteristics*

##### 1. *Attorney presence*

Not surprisingly, given the adjudicative nature of the process, attorneys indicated that they were virtually always present at the arbitration (59/67). As a general rule, attorneys are viewed as having a significant role to play in arbitration. The role of law is far more prominent in arbitration than mediation since the arbitrators decision in most instance is going to be guided by it.<sup>113</sup> Clients expect their attorneys to present their case and to engage in traditional representational activities.

##### 2. *Binding/non-binding*

Most often arbitration is a binding process because the parties agree in advance to be bound by the decision. In fact, it is the characteristic of finality that is seen as one of arbitration's greatest advantages. Fifty-seven of the respondents indicated that the

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<sup>111</sup> See Albano, *supra* note 8.

<sup>112</sup> See Kessler, Kortizinsky & Schlissel, *supra* note 8.

<sup>113</sup> Although the parties are free to contract otherwise.

parties can agree to make the decision binding in their jurisdiction. A small number (20) indicated that the decision was not always binding.

The scope of review of an arbitrator's award is generally very narrow. Under most circumstances it is limited to circumstances involving fraud.<sup>114</sup> Family law matters, however, often receive different treatment reflecting the courts' greater role in approving agreements related to children. The scope of the review might be a more limited one, giving the arbitrators award a presumption of validity<sup>115</sup> or a de novo review may be available.<sup>148</sup> Our survey responses indicated a fairly even split between these possibilities.

#### D. *Advantages of the Process*

##### 1. *Efficiency*

Savings in time and money are most often cited as advantages of arbitration and not surprisingly, the survey confirmed this. Fifty-three respondents cited financial savings, while fiftyfive noted savings in time as well. In the comment section, several attorneys noted that they used the process as a means of dealing with court congestion which causes needless delay. Although the lack of finality was seen as a disadvantage by those engaged in a non-binding process, some attorneys suggested that the arbitration may still result in cost savings because the decision acted as a reality check which moved the parties to a quicker (and, therefore cheaper) settlement.

Overwhelmingly, attorneys cited the ability to choose the decisionmaker as the greatest advantage of arbitration. The arbitrators who were chosen were characterized as "more specialized and sensitive to the needs of the case," and "more experienced and better than some judges." The arbitrators' flexibility in scheduling was also cited by many of the respondents as an advantage. The fact that the procedure was less formal was cited by sixty of the respondents as a positive factor. In addition, privacy was cited as an advantage by fifty-six of the attorneys responding.

#### E. *Disadvantages*

Very few of the attorneys who responded that arbitration was available in their jurisdiction were critical of it. Only thirteen indicated that it increased expense and the comments suggest that those attorneys were referring to situations where the decision was non-binding. The focus appeared to be on a duplication of effort indicating that an opportunity existed for de novo hearing.

Specifically, the non-binding nature of the process was cited specifically by ten attorneys as a disadvantage. Comments such as "unhappy side simply starts all over with either judicial review or a de novo hearing" as well as "unhappy party can contest result, non-moving party lost time and money" summed up these concerns.

Other comments focused on the superiority of mediation, citing the goal of helping parties work with each other. In general, although arbitration is not widely used to resolve family disputes, it appears to be well-received where it is available.

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<sup>114</sup> See e.g., Unif. Arb. Act § 12(a), 7 U.L.A. 140 (1985).

<sup>115</sup> See e.g., *Miller v. Miller*, 620 A.2d 1161 (Pa. Super. Ct. 1993). <sup>148</sup> See MO. REV. STAT. § 453.405.1 (1998).