

## Turf Battles and Professional Biases: An Analysis of Mediator Qualifications in Child Custody Disputes

Throughout the past decade, divorcing husbands and wives, as well as others in the family law arena (including domestic court judges and attorneys), have become increasingly disenchanted with the adversarial system and its treatment of divorce and child custody cases. Critics of the adversarial system have identified several problems: namely, the system's tendency to increase trauma, escalate conflict, and encourage "cat and dog fights that run counter to the best interest of the children involved."<sup>1</sup> Critics also point to the adversarial system's failure "to address unresolved feelings about the marriage and separation that often precipitated custody and other conflicts in the first place," as well as its failure to enhance cooperation and assist divorcing families in constructive problem-solving.<sup>2</sup> In sum, opponents of the litigation route to divorce argue that "it requires the involvement of persons who are neither trained nor necessarily sensitive to interpersonal relationships and the psychological mechanisms and nuances involved in the decision-making and dispute resolution made necessary by the disruption of these close personal relationships (*i.e.*, judges and lawyers)."<sup>3</sup>

"Mediation, the use of neutral third persons to help parties in a dispute reach an agreement between themselves,"<sup>4</sup> offers an alternative to the traditional adversarial process. Mediation is particularly well-suited for resolving divorce and child custody disputes, where the parties have a need to remain in contact with each other even after adjudication due to on-going parental responsibilities and obligations. Research indicates that "[c]hildren of mediated divorces appear to adjust better to the divorce, and their parents are less hostile toward each other."<sup>5</sup>

Mediation is also advantageous because "it is cheaper, faster, and potentially more hospitable to unique solutions that take more fully into

---

<sup>1</sup> Kenneth J. Rigby, *Family Law: Alternate Dispute Resolution*, 44 LA. L. REV. 1725, 1727 (1984).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* (citations omitted).

<sup>4</sup> Gary W. Paquin, *The Development and Organization of Domestic Relations Mediation in a Multi-Function Mediation Center in Kentucky*, 81 KY. L.J. 1133, 1133 (1993).

<sup>5</sup> *Id.* (citing Stephen J. Bahr, *An Evaluation of Court Mediation: A Comparison of Divorce Cases With Children*, 2 J. FAM. ISSUES 39, 39 (1982)). But see JESSICA PEARSON & NANCY THOENNES, *Divorce Mediation: Strengths and Weaknesses Over Time*, in ALTERNATIVE MEANS OF DISPUTE RESOLUTION 456, 474-76 (H. Dowison et al. eds., 1982) for research indicating no consistent or significant differences in post-divorce settlement adjustment according to exposure to mediation versus more traditional adjudicatory processes.

account nonmaterial interests of the disputants."<sup>6</sup> One explanation for these advantages is that mediation is not governed by rules of procedure or substantive law.<sup>7</sup> Certain assumptions that dominate the adversary process, such as a "win-lose" mentality, are also noticeably absent from mediation. In contrast to adjudication and arbitration, in mediation, the ultimate authority resides with the disputants.<sup>8</sup> The mediator does not impose an agreement on the parties; rather, mediation empowers the parties to exercise self-determination and to arrive at a solution themselves. The conflict in each mediation is deemed to be unique and therefore less amenable to solution by the simple application of a general principle or rule of law.<sup>9</sup> Each "case is neither to be governed by a precedent nor to set one. Thus, all sorts of facts, needs, and interests that would be excluded from consideration in an adversary, rule-oriented proceeding could become relevant in a mediation. Indeed, whatever a party deems relevant is relevant."<sup>10</sup>

Because it remedies many of the perceived defects associated with the adversarial system, mediation—both voluntary and compelled—has replaced adjudication as the preferred means of resolving divorce and child custody disputes.<sup>11</sup> With the emergence of mediation as the preferred means of resolving these types of disputes, a concomitant "appropriation [has come] by the helping professions of authority in this area."<sup>12</sup> "Turf battles" have ensued, with representatives from both the legal and the mental health professions arguing that the others' training is inadequate to address these types of issues. This Note analyzes whether attorneys or mental health professionals<sup>13</sup> are better suited, due to their training and experience to mediate child custody disputes.

This issue is not easily resolved, both because of a dearth of empirical studies identifying the particular skills necessary for successful mediation and disagreement as to "whether parties . . . stand more in need of protection of their legal interests or of their emotional interests. In addition, the individual personality traits of each mediator rather than professional

---

<sup>6</sup> Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 34 (1982) (citation omitted).

<sup>7</sup> *Id.* at 34.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Jana B. Singer, *The Privatization of Family Law*, 5 WIS. L. REV. 1443, 1497 (1992).

<sup>12</sup> Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 727 (1988).

<sup>13</sup> The term "mental health professionals" is used here to mean psychologists, social workers, counselors, or persons with a graduate behavioral science background.

## TURF BATTLES AND PROFESSIONAL BIASES

training may actually provide the key to successful mediation."<sup>14</sup> In spite of these difficulties, it is still possible to identify the significant advantages and disadvantages of each approach (attorney-mediator versus mental health professional-mediator), in the hope of arriving at the qualifications most conducive to effective mediation of child custody disputes.

### I. ATTORNEY-MEDIATORS

The recent rise in divorce mediation by private attorneys can be explained as the result of two factors: dissatisfaction by attorneys with the present adversial system and increasing awareness on the part of divorcing couples of available alternatives.<sup>15</sup> The approaches taken by attorney-mediators can be classified into two main categories: "divorce mediation as simply an alternative non-adversary legal consultation" or divorce mediation as a "facilitation of rational discussion."<sup>16</sup> Operating under the first approach, an attorney-mediator assumes the role of an independent adversary and reveals to each party "the seriousness of his or her adverse legal interest."<sup>17</sup> Under the second approach, the mediator, although an attorney, refrains from giving any legal advice or telling the parties what position they "should" adopt on any given issue, thereby fulfilling the role of neutral facilitator of rational discussion.<sup>18</sup> Under both approaches, the attorney-mediator strongly encourages each party to seek independent legal counsel during the mediation process.<sup>19</sup> Regardless of which method an attorney-mediator subscribes to, various strengths and weaknesses can be identified that accompany such a role.

#### A. Advantages

The main advantages offered by attorney-mediators can be grouped into three categories: (1) educating the parties;<sup>20</sup> (2) drafting and reviewing the

---

<sup>14</sup> Susan C. Kuhn, *Comment: Mandatory Mediation: California Civil Code Section 4607*, 33 EMORY L.J. 733, 763-64 (1984).

<sup>15</sup> Russell M. Coombs, *Noncourt-Connected Mediation and Counseling in Child-Custody Disputes*, 17 FAM. L.Q. 469, 473 (1984).

<sup>16</sup> *Id.* at 472-73.

<sup>17</sup> *Id.* at 474.

<sup>18</sup> *Id.* at 475.

<sup>19</sup> *Id.* at 474, 475.

<sup>20</sup> Mary Pat Treuthart, *In Harm's Way? Family Mediation and the Role of the Attorney Advocate*, 23 GOLDEN GATE U.L. REV. 717, 742 (1993).

custody agreement;<sup>21</sup> and (3) ensuring a greater level of confidentiality than that offered by nonlawyer-mediators.<sup>22</sup>

Perhaps the most significant advantage of having an attorney mediate a child custody dispute is his knowledge of the law. This knowledge enables an attorney-mediator to educate the parties as to their legal rights and to convey the legal consequences of their choices when they reach an agreement. Even if the attorney-mediator gives no legal advice *per se*, any "practical advice" he does offer is undoubtedly influenced by his legal background.<sup>23</sup>

The advantages of having better-educated parties in a mediation are manifest. "A party who is informed about the law governing an issue would be in a better position to decide which rights may be willingly ceded and which should be asserted in the negotiation process."<sup>24</sup> An attorney-mediator could prevent parties from basing their decision to mediate and judgments during mediation upon inaccurate assumptions about what result would follow if they were to take their case to court.<sup>25</sup> Moreover, apprising parties of their legal rights during the mediation process may actually ensure greater compliance with a final agreement. Parties who discover their legal rights after an agreement has been negotiated and mediation has come to an end may view the agreement as unfair and might therefore be less willing to adhere to its terms.<sup>26</sup> In addition, an attorney-mediator's legal training places him in a superior position to explain to the parties the tax consequences of the divorce and custody agreement.<sup>27</sup>

Knowledge of the relevant law not only allows an attorney-mediator to educate the parties as to their legal rights, but, when coupled with the attorney's prior exposure to the judicial process, also makes him uniquely aware of the kind of settlements that judges will usually accept for inclusion in the final divorce decree. The attorney's practical experience can help streamline the mediation process by preventing a divorcing couple from wasting time trying to reach a settlement which contains terms the attorney-mediator knows the local courts would not accept.<sup>28</sup> One divorce mediation expert argues, "Mediation cannot be practiced successfully in a great range of cases without a thorough knowledge of the various practical settlement options. . . . [A] lawyer has much more potential than any other

---

<sup>21</sup> *Id.*

<sup>22</sup> Coombs, *supra* note 15, at 491.

<sup>23</sup> *Id.*

<sup>24</sup> Kuhn, *supra* note 14, at 766.

<sup>25</sup> Riskin, *supra* note 6, at 35.

<sup>26</sup> Kuhn, *supra* note 14, at 766.

<sup>27</sup> *Id.*

<sup>28</sup> Coombs, *supra* note 15, at 491-92.

## TURF BATTLES AND PROFESSIONAL BIASES

professional for making a recommendation that is likely to be accepted."<sup>29</sup> Thus, the best training for drafting divorce settlement and custody agreements is arguably the experience of family law practice.<sup>30</sup>

Although there are therapeutic elements to mediation, it should not be confused with psychotherapy. In order to reach a negotiated settlement, the mediator and his clients "must deal throughout with tasks that are concrete, and their focus must be predominantly on external data and issues, not on internal psychological reactions."<sup>31</sup> Thus, the mediation process can be described as explicitly a problem-solving one. Attorneys are therefore well-suited to mediate since they are trained to resolve conflicts.<sup>32</sup> The success of mediation depends in part on a full and accurate exchange of information; however, it also depends upon "the focus that is furnished by someone who is trained to discern the precise level and nature of the conflict, defining it neither too broadly nor too narrowly."<sup>33</sup>

Another advantage associated with attorney-mediators is a greater assurance of confidentiality. An attorney is duty-bound to keep certain information confidential by the American Bar Association's Model Code of Professional Responsibility. Specifically, the Code states that except as otherwise permitted, "[A] lawyer shall not knowingly . . . [r]eveal a confidence or secret of his client . . . [or] [u]se a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure."<sup>34</sup> It is not yet clear whether the confidentiality privilege associated with the traditional attorney-client relationship exists when the attorney is mediating rather than representing a client.<sup>35</sup> However, attorney-mediators can ensure that communications are protected by having parties sign an agreement which clearly acknowledges the confidentiality of the mediation process.<sup>36</sup>

Given that mediation is the preferred means of handling child custody cases,<sup>37</sup> this method of dispute resolution should be encouraged. One way to achieve increased referral to and use of mediation is to have attorneys, rather than mental health professionals, serve as mediators. For example, divorce attorneys (confident in the combination of legal and mediative skills

---

<sup>29</sup> Lawrence D. Gaughan, *Divorce Mediation: An Important New Role for Lawyers*, VA. B.A. J., Summer 1986, at 8, 9.

<sup>30</sup> Gaughan, *supra* note 29, at 11.

<sup>31</sup> Joan B. Kelly, *Mediation and Psychotherapy: Distinguishing the Differences*, 1 MEDIATION Q. 33, 35-36 (1983).

<sup>32</sup> Gaughan, *supra* note 29, at 10.

<sup>33</sup> *Id.*

<sup>34</sup> MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1980).

<sup>35</sup> Coombs, *supra* note 15, at 491.

<sup>36</sup> *Id.*

<sup>37</sup> See *supra* note 11 and accompanying text.

possessed by a law-trained mediator) might be more willing to refer clients to mediation if an attorney-mediator (rather than a mental health professional-mediator) were to handle the dispute.<sup>38</sup> Parties themselves might also be more apt to agree to mediation if an attorney were to serve as the mediator because "[o]ur society and most individuals in it are oriented toward individual rights and interests and consider—correctly, for the most part—that lawyers are their only source of help in achieving, perfecting, or protecting such rights."<sup>39</sup> In addition, attorney-mediated dispute resolution might be more appealing to parties than mediation conducted by a nonlawyer because of an expectation that the attorney-mediator is held to a higher standard of care required by the bar. "This difference would be especially important to those [parties] who wish to minimize the risk of receiving bad or incomplete 'incidental' legal advice, or who wish to have the information presented in context of its impact on other legal issues about which a nonlawyer may be uninformed."<sup>40</sup> Thus, another ancillary benefit that comes from having an attorney (rather than a mental health professional) mediate child custody disputes is the potential increase in referral to and use of mediation.

### B. Disadvantages

The main disadvantages associated with attorney-mediators are: (1) their education and approach to problem-solving is seen to be inimical to the peaceful resolution of such emotionally-charged issues as child custody; (2) the increased risk that the weaker party (if any) will be exploited; and (3) potential professional responsibility problems.

Neither law school curricula nor continuing legal education is specifically aimed at building the "skills, knowledge, or attitudes" needed to serve as a mediator in a child custody dispute.<sup>41</sup> One commentator contends that attorneys are particularly ill-suited to serve as mediators because they operate under the following two basic assumptions: "(1) that disputants are adversaries—*i.e.*, if one wins, the other must lose—and (2) that disputes may be resolved through application, by a third party, of some general rule of law."<sup>42</sup> These assumptions are diametrically opposed to the assumptions which underlie mediation, namely: "(1) that all parties can benefit through a creative solution to which each agrees; and (2) that the

---

<sup>38</sup> Riskin, *supra* note 6, at 43.

<sup>39</sup> *Id.* at 42.

<sup>40</sup> Andrew S. Morrison, *Is Divorce Mediation the Practice of Law? A Matter of Perspective*, 75 CALIF. L. REV. 1093, 1122-23 (1987).

<sup>41</sup> Rigby, *supra* note 1, at 1750.

<sup>42</sup> Riskin, *supra* note 6, at 44.

## TURF BATTLES AND PROFESSIONAL BIASES

situation is unique and therefore not to be governed by any general principle except to the extent that the parties accept it."<sup>43</sup>

Many attorneys' abilities to serve as mediators are also inhibited by their standard "world view," which is based upon a cognitive and rational outlook. In the words of one writer:

Lawyers are trained to put people and events into categories that are legally meaningful, to think in terms of rights and duties established by rules, to focus on acts more than persons. This view requires a strong development of cognitive capabilities, which is often attended by the under-cultivation of emotional faculties.<sup>44</sup>

Legal education is primarily responsible for this world view, a view that is embraced by most practicing attorneys. Indeed, "ninety percent of what goes on in law school is based upon a model of a lawyer working in or against a background of litigation of disputes that can be resolved by the application of a rule by a third party."<sup>45</sup>

As a result of this education, many attorneys may not be able to effectively function in a nonadversarial process such as mediation. One legal scholar notes that "[t]oo many lawyers view the suggestion of compromise as an admission of weakness,"<sup>46</sup> while another asserts that "[divorce mediation] is an unfamiliar field and seems to go contrary to much of [an attorney's] training and experience."<sup>47</sup> In addition, "some have made the intuitive argument that individuals who have had extensive litigation or judicial backgrounds may find it even more difficult than others to facilitate discussions without offering an opinion."<sup>48</sup> Yet another scholar notes:

Unless they espouse the dispute resolution values embodied in divorce mediation, lawyers are likely to become a dysfunctional element in the process, not only jealous of its intrusion into their domain of competence, but also unable to adapt professionally to a situation of controlled and defused, rather than polarized and contentious, conflict.<sup>49</sup>

---

<sup>43</sup> *Id.* at 44.

<sup>44</sup> *Id.* at 45.

<sup>45</sup> *Id.* at 48.

<sup>46</sup> Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 670 (1986).

<sup>47</sup> Gaughan, *supra* note 29, at 9.

<sup>48</sup> Sharon Press, *Building and Maintaining a Statewide Mediation Program: A View from the Field*, 81 KY. L.J. 1029, 1038 (1993).

<sup>49</sup> Paquin, *supra* note 4, at 1145.

Thus, the legal background that is seen as an advantage offered by an attorney-mediator also serves to inhibit his role as a facilitator of communication.

An attorney's legal expertise and prior exposure to the judicial process might also work against his effectiveness as a mediator in another respect. Because attorneys know what types of arrangements the judges in the area will or will not accept, they may focus solely on the legal aspects of the custody decision, leaving many underlying emotional issues largely unresolved. One legal scholar contends that an "attorney is neither equipped nor interested in dealing with a client's emotional upheaval. He is looking for a settlement that can be taken into court for approval."<sup>50</sup> Unresolved emotional issues may subsequently erupt into larger problems and prevent compliance with the final custody agreement.

An attorney's lack of expertise in dealing with psychological issues and therapeutic processes, however, might not be fatal to his ability to effectively mediate a child custody dispute. It has been argued that:

What mediation requires is not the reestablishment of trust between a couple, but rather a working negotiation relationship. . . . [C]ouples who present themselves for mediation . . . need the lawyer's assumption that legal problems exist and can be solved, rather than [a] therapist's premise that their personal relationship needs to be restored.<sup>51</sup>

Clearly, "feelings and emotional expressions have a place in mediation. However, while they are sometimes identified or labeled, they generally are not made a major focus of the mediation."<sup>52</sup> The rationale behind this demphasis of emotion is that if mediation is dominated by the expression and exploration of feelings, the tasks needed to reach a settlement agreement cannot be accomplished.<sup>53</sup> Therefore, the mediator's goal is not to explore and interpret feelings "at any deep level," but to manage the expression of emotion.<sup>54</sup>

Contrary to the contention that all attorneys are ill-equipped to mediate child custody disputes, some are actually rather qualified. Attorneys with five years of family law practice are likely to possess, more than any other professional, the skills needed for effective mediation.<sup>55</sup> "A successful

---

<sup>50</sup> Fineman, *supra* note 12, at 752.

<sup>51</sup> Gaughan, *supra* note 29, at 10.

<sup>52</sup> Kelly, *supra* note 31, at 39.

<sup>53</sup> *Id.* at 40.

<sup>54</sup> *Id.*

<sup>55</sup> Gaughan, *supra* note 29, at 10.

## TURF BATTLES AND PROFESSIONAL BIASES

family law practice is generally founded on an excellent judgment of people, effective counseling skills, and a good practical sense of the possible options."<sup>56</sup> All of these skills are the touchstones of an effective mediator.

A second disadvantage associated with attorney-mediators is the increased risk that the weaker party (if any) will be exploited. "In the hope of keeping the mediation process alive and achieving a mediated settlement, the lawyer could let the process continue when it really should be ended."<sup>57</sup> It reflects positively on an attorney-mediator's practice when parties tell others that they reached a settlement. "It is this inducement to get satisfied clients that could cloud a lawyer's judgment and cause him to miss signs of one party's domination over the other."<sup>58</sup> Another reason why an attorney-mediator might allow one party to exploit the other is his previous experience with the adversary system. "When one party to the mediation has a weak argument, the [attorney]-mediator's adversarial training might cause him to favor the party with the stronger argument. Such bias might eventually force one party to submit to the other against his or her will."<sup>59</sup>

The final disadvantage inherent in having an attorney serve as the mediator in child custody disputes is the potential professional responsibility problems it presents. The attorney-mediator may be deemed to be representing conflicting or potentially differing interests.<sup>60</sup> In order to avoid

---

<sup>56</sup> Gaughan, *supra* note 29, at 10. See also Bruce W. Callner, *Boundaries of the Divorce Lawyer's Role*, 10 FAM. L.Q. 389, 393 (1977), for the proposition that the counseling skills necessary to handle domestic relations cases can be developed from the experience gained in the daily practice of law.

<sup>57</sup> Coombs, *supra* note 15, at 492.

<sup>58</sup> *Id.* Note, however, that "outside consultations with lawyers can defend against the possibility of bias (deliberate or not) in the lawyer-mediator's work and reduce the chances that one party will inappropriately exercise power over the other." Riskin, *supra* note 6, at 40.

<sup>59</sup> Christopher Allan Jeffreys, *The Role of Mental Health Professionals in Child Custody Resolution*, 15 HOFSTRA L. REV. 115, 132 (1986). Note that "[f]orcing submission is forbidden by the Standards of Practice for Family Mediators, which provides that if the agreement reached is unreasonable, either party can exercise an option of returning to the adversary process." *Id.* (citing *Standards of Practice for Family Mediators*, 17 FAM. L.Q. 455, 456 (1984)).

<sup>60</sup> See Linda J. Silberman, *Professional Responsibility Problems of Divorce Mediation*, 16 FAM. L.Q. 107, 109 (1983); Zena D. Zumeta, *Mediation as an Alternative to Litigation in Divorce*, 62 MICH. B.J. 434, 438 (1983). Disciplinary Rule 5-105 of the Model Code of Professional Responsibility states that an attorney may not represent competing parties to a controversy. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105 (1980). See generally Morrison, *supra* note 40, for another comprehensive discussion of the professional responsibility problems of divorce mediation.

an ethics code violation, many attorneys explain to the parties that they maintain a neutral position throughout the mediation and do not represent either party.<sup>61</sup> As additional protection, some attorneys provide a written agreement which reemphasizes their neutrality and each party's right to consult independent counsel.<sup>62</sup> It is difficult to determine the degree of risk involved when an attorney serves as a mediator in child custody disputes, as ethics committees have been divided on the issue.<sup>63</sup> One successful counter-argument to the potential ethics code violation has been that an attorney does not represent either party in mediation; his role at the mediation proceeding is simply that of a referee (that is, he merely aids the mediating parties in reaching an agreement; he does not offer legal advice).<sup>64</sup>

## II. MENTAL HEALTH PROFESSIONAL-MEDIATORS

As a result of their education and training, mental health professional-mediators typically approach mediation much differently than attorney-mediators. Mental health professionals "may focus more heavily on preserving the integrity of the individuals or on evaluating individual needs than [attorneys] who might instead concentrate primarily on the legal ramifications of a particular custody option."<sup>65</sup> It is precisely this difference in background and approach that gives way to the many advantages enjoyed by mental health professional-mediators.

### A. Advantages

First, mental health professional-mediators possess expertise in the management of people's emotional problems. This expertise is effectively put to use in divorce mediation. One commentator explains, "Because divorce mediation seeks to avoid the traumas associated with an adversarial divorce by having the parties cooperate in reaching an amiable settlement, the mental health professional's expertise in dealing with emotional situations from a non-adversary angle is very advantageous."<sup>66</sup> Given that "[i]n most mediations, the emphasis is not on determining rights or interests, or who is right and who is wrong, or who wins and who loses because of which rule; . . . [but on] establishing a degree of harmony

---

<sup>61</sup> Coombs, *supra* note 15, at 492.

<sup>62</sup> *Id.* (citing Silberman, *supra* note 60, at 111-12 nn.20-22).

<sup>63</sup> Coombs, *supra* note 15, at 492.

<sup>64</sup> Jeffreys, *supra* note 59, at 133.

<sup>65</sup> Coombs, *supra* note 15, at 476.

<sup>66</sup> *Id.* at 493.

## TURF BATTLES AND PROFESSIONAL BIASES

through a resolution that will work for [two particular] disputants,"<sup>67</sup> mental health professionals are particularly well-suited to serve as mediators.

Specifically, a mental health professional's training in the behavioral sciences better enables her to: (1) facilitate communication during the mediation; (2) help a divorcing couple reach an agreement that is in the best interests of their child(ren); and (3) offer helpful conflict management advice that might prevent future disputes and noncompliance with the final custody agreement.

The effectiveness of a mediator's interpersonal communication skills is paramount.<sup>68</sup> During divorce mediation, "[c]ouples communicate on different levels and convey ulterior messages through words, gestures, and body language. A mediator trained in the behavioral sciences would probably be more sensitive to this kind of subtle communication and therefore be better able to reduce the incidence of destructive messages."<sup>69</sup> One author, arguing that such interpersonal communication skills are not easily learned, maintains: "It is generally easier for one trained in behavioral sciences to acquire legal and other knowledge required for mediation, than [it is] for the legally trained person to gain knowledge and a feel for behavioral science and counseling skills."<sup>70</sup>

Mental health professionals are also in a better position to explain the emotional stress that the parties (both parents and children) experience in the divorce process.<sup>71</sup> Feelings of "guilt, anger, and lowered self-esteem" can be largely alleviated by giving the parties a better understanding of the stages people usually go through during a divorce.<sup>72</sup> Mental health professional-mediators can also inform a divorcing couple as to the new forms that family dynamics take when parents in two different homes share their children.<sup>73</sup> For instance, children of divorce frequently engage in

---

<sup>67</sup> Riskin, *supra* note 6, at 34.

<sup>68</sup> O.J. COOGLER, *STRUCTURED MEDIATION IN DIVORCE SETTLEMENT: A HANDBOOK FOR MARITAL MEDIATORS* 76 (1978).

<sup>69</sup> Kuhn, *supra* note 14, at 765-66 (citing COOGLER, *supra* note 68, at 76).

<sup>70</sup> COOGLER, *supra* note 68, at 75. However, one study indicated that "there is no interdisciplinary difference in the ability of judges and mental health professionals to select a custodial psychological parent; both overwhelmingly chose as the custodial parent the one which the evaluation reflected as having a more positive and consistent emotional bond with the children." Jane F. Charnas, *Practice Trends in Divorce Related Child Custody*, 4 J. DIVORCE 57, 62 (1981).

<sup>71</sup> Kuhn, *supra* note 14, at 764-65.

<sup>72</sup> *Id.* at 765.

<sup>73</sup> Donald T. Saposnek, *Strategies in Child Custody Mediation: A Family Systems Approach*, 2 MEDIATION Q. 29, 41 (1983).

“strategic behavior” in an effort to reunite their parents.<sup>74</sup> Parents often misinterpret this behavior, and the tension between them escalates.<sup>75</sup> A mediator who is trained in family dynamics can explain the child’s behavior to the parents and may be able to neutralize angry feelings.<sup>76</sup> Once these negative feelings have been neutralized, parents are more likely to reach an agreement that is in the best interests of their children.<sup>77</sup>

Finally, mental health professional-mediators are better trained than attorney-mediators to give parties conflict management advice. Armed with the knowledge of how to manage post-divorce family conflicts, couples are more likely to comply with their final custody agreement. Studies have shown that not only does child custody mediation performed by a mental health professional enhance the parties’ ability to co-parent, but it also improves the mental health of their children.<sup>78</sup>

### B. Disadvantages

The disadvantages associated with having mental health professionals mediate child custody disputes include: (1) inadequate understanding of the law and the types of agreements that judges will accept; (2) professional bias; (3) potential risk that the weaker party (if any) will be exploited; (4) less guarantee that communications will be kept confidential; and (5) potential professional responsibility problems.

The primary weakness of a mental health professional-mediator is unfamiliarity with the law. Because of her lack of expertise in this area, a mental health professional-mediator may create an agreement which will not withstand judicial scrutiny.<sup>79</sup> In defense of their emphasis on emotions rather than accepted legal principles, mental health professional-mediators argue that attorney-mediators focus on “rights, claims, due process, and

---

<sup>74</sup> Saposnek, *supra* note 73, at 31, 32. An example of this type of behavior would be a child telling one parent that the other parent did not have any food in the house during the child’s last visit—the rationale being that getting the parents to fight is better than having them not speak at all and may even be the first step on the road to reconciliation. *Id.* at 32.

<sup>75</sup> *Id.* at 32.

<sup>76</sup> *Id.* at 32, 33.

<sup>77</sup> *Id.* at 41. See generally Lawrence S. Kubie, *Provisions for the Care of Children of Divorced Parents: A New Legal Instrument*, 73 YALE L.J. 1197 (1964) and Robert A. Solow & Paul L. Adams, *Custody by Agreement: Child Psychiatrist as Child Advocate*, 5 J. PSYCHIATRY & L. 77, 87 (1977), for the proposition that psychiatric considerations, rather than legal ones, are the best guarantors of a child’s welfare.

<sup>78</sup> Jane A. Waldron et al., *A Therapeutic Mediation Model for Child Custody Dispute Resolution*, 3 MEDIATION Q. 5, 11-19 (1984).

<sup>79</sup> Coombs, *supra* note 15, at 493.

## TURF BATTLES AND PROFESSIONAL BIASES

other things 'peripheral' to the real issues."<sup>80</sup> Indeed, the imparting of legal information is viewed by at least one author as "only an incidental component of the larger task of helping the couple resolve their own differences on the issues surrounding the marriage dissolution."<sup>81</sup>

In addition, mental health professionals might not be the neutral, disinterested decision-makers they hold themselves out to be. One legal scholar argues that "[t]hey have an institutional and professional bias [in favor of] certain procedural and substantive results. . . ."<sup>82</sup> These results may benefit the mental health profession by creating the need for mediation and counseling and by producing changes designed to enhance and ensure mental health professionals' continued centrality in custody decisionmaking.<sup>83</sup>

One disadvantage that both attorney-mediators and mental health professional-mediators may share is exploitation of the weaker party. One commentator warns that the "alegal character" of mediation conducted by nonlawyers is particularly problematic: "[I]ndividuals who are not aware of their legal position are not encouraged by the process to develop a rights-consciousness or to establish legal rights. Thus, the risk of dominance by the stronger or more knowledgeable party is great."<sup>84</sup>

Another pitfall of mediation conducted by mental health professionals is the lack of a confidentiality privilege.<sup>85</sup> In order to offset this disadvantage, some mediators draft agreements which they have the parties sign that recognize the confidentiality of the process.<sup>86</sup> Whether such agreements will be honored, however, is not yet known.<sup>87</sup>

A final disadvantage of having mental health professionals mediate child custody disputes is the potential unauthorized practice of law problem.<sup>88</sup> Because "[d]ivorce mediation involves the resolution of issues which inevitably involve legal questions,"<sup>89</sup> it has been said that "in

---

<sup>80</sup> Fineman, *supra* note 12, at 754.

<sup>81</sup> Silberman, *supra* note 60, at 127.

<sup>82</sup> Fineman, *supra* note 12, at 761.

<sup>83</sup> *Id.* at 730.

<sup>84</sup> Riskin, *supra* note 6, at 34-35. The parties' legal rights remain protected at some level, however, because they may retain independent counsel if they choose.

<sup>85</sup> Coombs, *supra* note 15, at 493.

<sup>86</sup> *Id.* at 493-94.

<sup>87</sup> *Id.* at 494. Note, however, that the New York legislature resolved the question surrounding the status of such agreements by drafting a statute which extends confidentiality to mediation proceedings. Jeffreys, *supra* note 59, at 133 n.140 (citing N.Y. JUDICIARY LAW § 849-b(6) (McKinney Supp. 1987)).

<sup>88</sup> See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 3-1 (1980); Coombs, *supra* note 15, at 493; Zumeta, *supra* note 60, at 439.

<sup>89</sup> Coombs, *supra* note 15, at 493.

conducting the mediation, the mental health professional walks a tightrope between talking the couple through the issues and giving them legal advice."<sup>90</sup> Indeed, even though mediators do not legally "represent" the parties, and are usually instructed not to provide legal advice or professional counsel, they "sometimes field questions regarding, for example, the likely disposition of a case at trial."<sup>91</sup> The dangers in such a practice are evident: mental health professional-mediators "do not receive evidence under oath and rarely have a grasp of the whole picture that may emerge at trial."<sup>92</sup>

Despite the fact that mediating couples are advised to obtain independent counsel for the final drafting of the divorce/custody agreement, some mental health professional-mediators nonetheless draw up the initial agreement that the parties take to their respective attorneys for final drafting.<sup>93</sup> "By drawing up this memorandum of understanding at the end of the negotiations, the mediator may open himself or herself to charges of straying into the legal arena [since] 'drawing up a separation agreement . . . traditionally constitute[s] the practice of law.'"<sup>94</sup> This allegation that mental health professional-mediators are engaged in the unauthorized practice of law can, however, be dispensed with if mediation is viewed as an extrajudicial process wherein the mental health professional (just like the attorney-mediator) acts merely as a referee between the two mediating parties and not as legal counsel.<sup>95</sup>

### III. CO-MEDIATION TEAMS

Given the various disadvantages associated with each profession's role in child custody disputes, both attorneys and mental health professionals have grounds for fearing that the others' training may be inadequate to effect successful mediation.<sup>96</sup> "Some attorneys are uncomfortable having mental health professionals . . . work with a client's financial issues, which they believe require intimate knowledge of the law. Some mental health professionals, on the other hand, object to having attorneys mediate child custody issues without sufficient knowledge of child development and skills in interviewing."<sup>97</sup> The truth is, both professions help clients—attorneys

---

<sup>90</sup> Silberman, *supra* note 60, at 123.

<sup>91</sup> Thomas J. Stipanowich, *The Quiet Revolution Comes to Kentucky: A Case Study in Community Mediation*, 81 Ky. L.J. 855, 899-900 (1993).

<sup>92</sup> *Id.* at 900.

<sup>93</sup> Coombs, *supra* note 15, at 493.

<sup>94</sup> *Id.* (quoting Silberman, *supra* note 60, at 131).

<sup>95</sup> Jeffreys, *supra* note 59, at 133.

<sup>96</sup> Paquin, *supra* note 4, at 1139.

<sup>97</sup> *Id.*

## TURF BATTLES AND PROFESSIONAL BIASES

with the parties' rights and mental health professionals with the parties' emotions.<sup>98</sup>

Parties should not have to choose between the benefits offered by an attorney-mediator and those offered by a mental health professional-mediator. Now, they do not have to make this choice. Parties engaged in voluntary mediation (or, in some cases, even those engaged in mandatory mediation) can have "the best of both worlds" by selecting a co-mediation team rather than an individual mediator. The concept of a hybrid co-mediation team combines the expertise of both professions, thereby reflecting a "fusion" of the numerous legal and emotional issues inherent in the divorce process.<sup>99</sup>

The rationale behind the co-mediation team concept is that cooperation among the legal and mental health professions is needed for the overall success of divorce mediation.<sup>100</sup> One author notes, "The human ramifications of divorce are too complex to be dealt with by a single profession. . . . Co-operative effort between law and the behavioral sciences would result in less fragmentation and more comprehensive and enduring service to families undergoing breakdown."<sup>101</sup>

### A. Advantages

An interdisciplinary co-mediation team offers the following advantages: (1) increased potential for identifying issues of various kinds; (2) reduced concerns regarding perceived mediator bias (male and female mediator teams are particularly helpful for divorce and child custody cases); and (3) division of labor and continual cross-training.<sup>102</sup>

One argument in favor of co-mediation is that increasing the points of view involved in mediation increases both the potential for identifying issues of various kinds and the chances that a successful agreement will be reached. One legal scholar has touted co-mediation as an "interdisciplinary approach [that] seems to offer enormous promise. It can attend at once to [the] legal, emotional, value, and relational needs [of the parties]."<sup>103</sup> A "gender-balanced lawyer-therapist team" can be used to address a number of issues, including "gender bias, neutrality, power balancing, and the interface of legal and emotional issues that are germane to the mediation

---

<sup>98</sup> Fineman, *supra* note 12, at 746 n.85.

<sup>99</sup> Coombs, *supra* note 15, at 489.

<sup>100</sup> *Id.* at 484.

<sup>101</sup> HOWARD IRVING, DIVORCE MEDIATION: A RATIONAL ALTERNATIVE TO THE ADVERSARY SYSTEM 25 (1981).

<sup>102</sup> Stipanowich, *supra* note 91, at 897.

<sup>103</sup> Riskin, *supra* note 6, at 38.

process."<sup>104</sup> In sum, many mediators believe that "mediation is truly better for its clients than any of the separate contributing parts. That is, in its best form, . . . divorce mediation meets its clients' needs more completely and more coherently than either the traditional legal process or divorce counseling alone."<sup>105</sup>

A second advantage of the co-mediation model is the reduced risk of mediator bias. "Having two mediators in each session serves as a device to correct and minimize errors or omissions, particularly when they involve bias, prejudice or procedural error."<sup>106</sup> Again, the assignment of a male-female/attorney-mental health professional team facilitates gender-balancing.<sup>107</sup> Such a combination not only demonstrates to the couple the fusion of legal, emotional and economic issues, but also provides a "model of autonomous and independent behavior as an example of how a couple can work together with mutual respect."<sup>108</sup>

The last major benefits of the co-mediation team approach are the division of labor and continual cross-training.<sup>109</sup> The breakdown of tasks in a co-mediation team is as follows: the mental health professional deals "with the emotional elements which might be blocking an effective settlement,"<sup>110</sup> (always ensuring that the mental health of the child(ren) involved is protected) while the attorney member of the team apprises the parties of their legal rights and drafts the final separation/custody agreement.<sup>111</sup> Such division of labor allows for the most effective and successful mediation of the child custody issue.

A co-mediation team also serves as a valuable training device. Often, divorce "[m]ediation requires different skills, or skills in addition to those that the lawyer [or] therapist . . . may have used before. Through the use of co-mediation, a less experienced mediator can observe first-hand and participate first-hand in a co-mediation process without jeopardizing the

---

<sup>104</sup> Treuthart, *supra* note 20, at 756-57 n.118 (citing Lois Gold, *Lawyer and Therapist Team Mediation*, in *DIVORCE MEDIATION: THEORY AND PRACTICE* 209 (Jay Folberg & Anne Milne eds., 1988)).

<sup>105</sup> Kelly, *supra* note 31, at 33.

<sup>106</sup> Paquin, *supra* note 4, at 1142.

<sup>107</sup> *Id.* at 1143.

<sup>108</sup> Coombs, *supra* note 15, at 494 (quoting Jay Folberg, *Divorce Mediation—A Workable Alternative*, in *AMERICAN BAR ASSOCIATION, ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION* 40 (1982)).

<sup>109</sup> *Id.*

<sup>110</sup> Silberman, *supra* note 60, at 128.

<sup>111</sup> *Id.*

## TURF BATTLES AND PROFESSIONAL BIASES

outcome . . . because of the mediator's lack of experience."<sup>112</sup> In addition, co-mediation provides continual cross-training for those already experienced in mediation. "It also allows colleagues the opportunity to examine together the mediation process of the particular session (what worked and did not work) as a further learning device."<sup>113</sup> In time, members of both professions develop confidence in handling a wide variety of issues with which they were previously unfamiliar.<sup>114</sup>

### B. Disadvantages

Despite the numerous advantages it enjoys over mediation conducted solely by either an attorney or a mental health professional, co-mediation should not be thought of as a panacea. Drawbacks of the co-mediation approach include: (1) potential professional responsibility problems; (2) difficulty in finding professionals willing and able to participate in such a program; and (3) increased cost.

The interdisciplinary co-mediation team is subject to some of the same professional responsibility attacks faced by each discipline individually, as well as some new ones.<sup>115</sup> "The lawyer still faces potential problems regarding representing clients with adverse interests. In addition, the lawyer might be accused of improperly practicing law with a nonlawyer, splitting fees with a nonlawyer, or working for clients of a lay employer."<sup>116</sup> Some attorneys have attempted to prevent this problem by explicitly defining their role "as a joint mediator who is not practicing law at all,"<sup>117</sup> but is merely facilitating an extrajudicial process. The mental health professional on an interdisciplinary team still faces the accusation that she is engaging in the unauthorized practice of law, but the presence of the attorney-mediator seems to mitigate this risk.<sup>118</sup>

The practical difficulties of co-mediation may impede the implementation of such a program even more than any potential professional responsibility problems.

---

<sup>112</sup> Paquin, *supra* note 4, at 1143 n.28 (quoting Martin A. Kranitz, *Co-Mediation: Pros and Cons*, in *DIVORCE AND FAMILY MEDIATION* 76 (James C. Hansen & Sarah C. Grebe eds., 1985)).

<sup>113</sup> Paquin, *supra* note 4, at 1142-43.

<sup>114</sup> *Id.* at 1143.

<sup>115</sup> Coombs, *supra* note 15, at 494.

<sup>116</sup> *Id.* (citing Silberman, *supra* note 60, at 131). See also MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 3-8 (1980).

<sup>117</sup> Coombs, *supra* note 15, at 494.

<sup>118</sup> *Id.* (citing Silberman, *supra* note 60, at 130).

[I]nterdisciplinary work is difficult. Lawyers and therapists look at the world differently. In addition, the team approach presents problems of control, responsibility, and jurisdiction that will severely tax the talents and personalities of those who try it. The lawyer-therapist/mediator team can work very well, but only rarely will an adequate match-up of professionals occur.<sup>119</sup>

Thus, while an interdisciplinary approach is attractive in theory, in practice, it is actually quite difficult to find professionals amenable to such a process.

The final disadvantage associated with co-mediation is that it increases the overall cost to the parties. Although divorcing couples who participate in co-mediation receive the benefit of both legal and mental health expertise, it is at a cost of paying two professionals. These increased costs can be a real concern for couples with limited financial resources.

#### IV. CONCLUSION

Mediation—both voluntary and compelled—has emerged as the preferred means of resolving child custody disputes. Particular advantages and disadvantages are associated with each of the three main approaches to child custody mediation: attorney-conducted, mental health professional-conducted, and mediation conducted by an interdisciplinary team. An assessment of the various advantages and disadvantages reveals that co-mediation by an interdisciplinary team of professionals is the most conducive to the resolution of child custody issues. This approach, however, is the most expensive and difficult to implement.

If cost is a significant concern (as it would be in any mandatory court-connected mediation program or for couples with serious financial limitations), the parties must forego the benefits of co-mediation and choose between either attorney-conducted or mental health professional-conducted mediation. Although this Note has outlined the theoretical distinctions between each professional's ability to mediate child custody disputes, in reality, the differences are few. Recent empirical studies suggest no differences in user satisfaction rates. "Indeed, the only background characteristic that [has been found to be] associated with more favorable outcomes [is] the experience level of the mediator. For both lawyers and social workers, agreement rates and approval ratings improve[] significantly after they ha[ve] mediated five cases."<sup>120</sup>

---

<sup>119</sup> Riskin, *supra* note 6, at 38-39.

<sup>120</sup> Jessica A. Pearson, *Family Mediation*, in NATIONAL SYMPOSIUM ON COURT-CONNECTED DISPUTE RESOLUTION RESEARCH: A REPORT ON CURRENT RESEARCH

## TURF BATTLES AND PROFESSIONAL BIASES

Not only have studies shown few differences between attorney-mediators and mental health professional-mediators, but they also reveal little variation in success rates when both types of professionals are compared to volunteer lay people.<sup>121</sup> "Research on mediator qualifications has failed to show a correlation between the mediator's education and rough indicators of performance, such as settlement rates or satisfaction by the parties."<sup>122</sup> Studies such as these cast a shadow of doubt on "whether mediator qualifications, particularly those requiring educational degrees, make a substantial contribution to the fairness of the process."<sup>123</sup>

Given that few substantive differences have been documented between the quality of mediation conducted by professionals, such as attorneys and mental health experts, and those conducted by volunteer lay persons, one might argue that money spent on employing the services of a highly-educated mediator is better spent elsewhere. There is anecdotal support for the higher costs associated with mediation conducted by professionals. For instance, private mediators receiving court referrals usually charge \$125 per hour for several hours of mediation in Florida, where advanced degrees are required, while mediators in Maine (who are not required to hold post-baccalaureate degrees) are paid \$50 per mediation.<sup>124</sup> Such evidence, coupled with the studies which demonstrate few differences between mediation conducted by professionals and that conducted by volunteer lay persons, suggests that perhaps our focus (and disputants' money) should be directed away from the qualifications of mediators and more towards discovering the most effective way of resolving disputes.

*Nichol M. Schoenfeld*

---

FINDINGS—IMPLICATIONS FOR COURTS AND FUTURE RESEARCH NEEDS 75 (Susan Keilitz ed., 1993).

<sup>121</sup> *Id.*

<sup>122</sup> Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1344 (1995).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 1345.

