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PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

# Stumbling Down the Courthouse Steps: Mediators' Perceptions of the Stumbling Blocks to Successful Mandated Mediation in Child Custody and Visitation

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## I. INTRODUCTION

Over the last forty years, mandated mediation has gained acceptance as a complement to court-imposed directives for child custody and visitation decisions.<sup>1</sup> In large part, the popularity of mediation rests on its promise of providing a less painful route of resolution than the more traditional court process.<sup>2</sup> While a majority of states allow for mediation in appropriate family law cases, an increasing number of states are mandating mediation as an adjunct to the court's determinations of child custody and visitation.<sup>3</sup>

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1. Alexandria Zylstra, *The Road from Voluntary Mediation to Mandatory Good Faith Requirements: A Road Best Left Untraveled*, 17 J. AM. ACAD. MATRIM. LAW 69, 71 (2001).

2. *Id.*

3. See Dane E. Gaschen, Comment, *Mandatory Custody Mediation: The Debate Over its Usefulness Continues*, 10 OHIO ST. J. ON DISP. RESOL. 469, 469 n.3 (1995).

Mediation in family law has been lauded as a flexible process,<sup>4</sup> limited to child custody and visitation,<sup>5</sup> that “allows individuals to structure their own resolutions of conflict”<sup>6</sup> in a neutral context.<sup>7</sup> Commentators assert that children adjust better to the divorce with a mediated agreement,<sup>8</sup> that there are fewer hostilities,<sup>9</sup> and a better rate of compliance with the mediated agreement.<sup>10</sup>

Criticism of mediation in the family law context, and particularly mandatory mediation, has been plentiful.<sup>11</sup> Some of the early fears that mediation would disadvantage women in obtaining custody and visitation of their children due to an imbalance in bargaining power have not materialized.<sup>12</sup> When mediation is mandatory rather than discretionary, some commentators argue that the concept is contrary to basic mediation principles—parties cannot truly mediate their differences when forced to by the court.<sup>13</sup> Mediation inherently requires parties who wish to negotiate their own solutions rather than parties who are required to do so.

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4. See Andrew Kaplan, *The Advantages of Mediation in Resolving Child Custody Disputes*, 23 RUTGERS L. REC. 5, ¶ 10 (1999); Charlee Lane, *For Heaven’s Sake, Give the Child a Voice: An ADR Approach to Interfaith Child Custody Disputes*, 10 PEPP. DISP. RESOL. L.J. 623, 631 (2010).

5. See Kaplan, *supra* note 4, ¶ 11.

6. *Id.* ¶ 9. See also Kenneth J. Rigby, *Family Law: Alternative Dispute Resolution*, 44 LA. L. REV. 1725, 1744 (1984).

7. Kaplan, *supra* note 4, ¶ 9.

8. *Id.* ¶ 12. See also Jeanne A. Clement & Andrew I. Schwebel, *A Research Agenda for Divorce Mediation: The Creation of Second Order Knowledge to Inform Legal Policy*, 9 OHIO ST. J. ON DISP. RESOL. 95, 100-01 (1993).

9. See Kaplan, *supra* note 4, ¶ 13; see also Solangel Maldonado, *Cultivating Forgiveness: Reducing Hostility and Conflict After Divorce*, 43 WAKE FOREST L. REV. 441, 459 (2008).

10. Kaplan, *supra* note 4, ¶ 13. See also Bill Ezzell, *Inside the Minds of America’s Family Law Courts: The Psychology of Mediation Versus Litigation in Domestic Disputes*, 25 LAW & PSYCHOL. REV. 119, 122, 129 (2001); Gaschen, *supra* note 3, at 484.

11. For criticism of child custody mediation, see generally Dennis P. Saccuzzo, *Controversies in Divorce Mediation*, 79 N.D. L. REV. 425 (2003) (imbalance of power, mediator qualifications, and appropriate ethical standards). See also Thomas D. Vu, Note, *Going to Court as a Last Resort: Establishing a Duty for Attorneys in Divorce Proceedings to Discuss Alternative Dispute Resolution with Their Clients*, 47 FAM. CT. REV. 586, 590 (2009) (lack of formal discovery rules and tactical positioning); Marsha B. Freeman, *Divorce Mediation: Sweeping Conflicts Under the Rug, Time to Clean House*, 78 U. DET. MERCY L. REV. 67, 71, 90-91 (2000) (increased costs, lack of attorney involvement, lack of participant knowledge of legal issues, and lack of universal standards).

12. Suzanne Reynolds, Catherine T. Harris & Ralph A. Peeples, *Back to the Future: An Empirical Study of Child Custody Outcomes*, 85 N.C. L. REV. 1629, 1645-47 (2007).

13. Bethany Zeps, *Interview: Child Custody Mediation*, 16 J. CONTEMP. LEGAL ISSUES 241, 242 (2007) (sharing an interview with Joan Thomas, a divorce attorney-mediator, about her experiences with child custody mediation). See also Doug Marfice, *The Mischief of Court-Ordered Mediation*, 39 IDAHO L. REV. 57, 59 (2002).

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There may be no real differences in outcomes from mediation versus outcomes from litigation. A study in the 1990s showed no decrease in case processing time or increase in satisfaction from the mediation process.<sup>14</sup> The few studies of the stability of mediated custody and visitation issues—that is, the number of times the parties came back to court or mediation over the issues—are inconsistent. One study showed that mediated agreements were slightly more stable,<sup>15</sup> while another showed that litigated custody and visitation disputes had fewer subsequent custody events.<sup>16</sup>

Mediation in family law matters is generally limited to child custody and visitation while all other matters are decided by the court (absent a negotiated settlement of all issues by the parties). Even this bifurcation of the process, while lauded by some, has been criticized by others.<sup>17</sup> One judge argued that the child custody and visitation issues are the least contentious issues in the case,<sup>18</sup> and another commentator argued that litigation is a better fact-finding vehicle than mediation.<sup>19</sup>

The limited time and resources usually devoted to mediating these issues has been criticized as creating a process that fails to focus on relational issues that are key to resolving the custody or visitation dispute.<sup>20</sup> Moreover, the mediation process allows the divorcing couple to sit together and rehash years of anger and frustration with the mediator, which many believe is a better place to have such emotions vented than the courtroom.<sup>21</sup>

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14. Flora L. Chan & Jennifer L. Erickson, *When the Vow Breaks: An Analysis of the Impact of Intrinsic and Extrinsic Factors on Child Custody Resolution*, 41 WAKE FOREST L. REV. 1297, 1303-04 (2006) (citing LAURA F. DONNELLY & REBECCA G. EBRON, N.C. ADMIN. OFFICE OF THE COURTS, THE CHILD CUSTODY AND VISITATION MEDIATION PROGRAM IN NORTH CAROLINA: AN EVALUATION OF ITS IMPLEMENTATION AND EFFECTS (2000), available at <http://www.nccourts.org/citizens/cprograms/child/documents/custvisitmedrept.pdf>).

15. Ralph A. Peeples, Suzanne Reynolds & Catherine T. Harris, *It's the Conflict, Stupid: An Empirical Study of Factors that Inhibit Successful Mediation in High-Conflict Custody Cases*, 43 WAKE FOREST L. REV. 505, 528 (2008).

16. Chan & Erickson, *supra* note 14, at 1305-06.

17. See Ezzell, *supra* note 10, at 140-41.

18. Phyllis Gangel-Jacob, *Some Words of Caution About Divorce Mediation*, 23 HOFSTRA L. REV. 825, 831 (1995). The author is a justice of the Supreme Court of the State of New York, and the article was originally delivered as a speech at Hofstra University School of Law.

19. Ezzell, *supra* note 10, at 126.

20. See Gangel-Jacob, *supra* note 18, at 827-28.

21. See Doug Marfice, *The Mischief of Court-Ordered Mediation*, 39 IDAHO L. REV. 57, 59 (2002) (“Courts somehow believe that the mere process of mediating will, if nothing else, relieve the hostility and acrimony that the parties have for one another.”). Marfice asserts that mediation must be a cooperative undertaking to be successful.

Nevertheless, the opportunity for venting anger and frustration in mediation sessions may well increase the parties' hostility and widen the distance between them.<sup>22</sup>

Mediators may be attorneys or retired judges but may also include psychologists, counselors, and social workers that have been trained in family mediation. However, attorneys and judges have asserted that the matrimonial case is too complicated for non-attorneys to mediate, even when the issues are limited to custody and visitation, because the financial issues are inextricably entwined with the custody and visitation issues.<sup>23</sup> Further, mandatory mediation has been criticized as interfering with the attorneys' proper representation of their clients.<sup>24</sup>

Although many concerns and criticisms about the efficacy of family law mediation have been made by attorneys, judges, and psychologists,<sup>25</sup> we seldom hear from the mediators themselves about how the process works. Our earlier qualitative study focused on the perceptions of family law mediators about the purpose and impact of mandated mediation in child

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22. See Ezzell, *supra* note 10, at 133-34.

23. See Gangel-Jacob, *supra* note 18, at 828, 831-32.

It has been my experience that the more serious the economic risks, the more contentious the demands for custody—more contentious, more threatening, more litigious, more unyielding—but nevertheless not serious! Not serious because the custody issue is merely a smoke-screen for the money issue. Mandatory mediation of these so called custody cases will only contribute to this form of financial and emotional battering.

*Id.* at 832-33. See also Zeps, *supra* note 13, at 242 (“In divorce mediation the mediator is practically required to have a legal background, because of the many legal issues involved. The divorce mediator without a legal background would find it very difficult to guide the parties through the process.”).

24. Marfice, *supra* note 13, at 59.

Among the various methods of formal ADR that have evolved over time, mediation presents unique challenges to the litigation attorney, and more particularly, the defense attorney. Perhaps the most vexing problem is the emerging tendency of some courts to take a paternalistic approach to case management by ordering litigants to participate in mediation; whether they wish to or not. This sort of judicially mandated exercise of demanding that parties engage in a process which, by necessity, requires cooperation and conciliation, often presents a dilemma for attorneys involved: how can the parties be forced to mediate unless they are first at least *agreeable* to do so? Trying to compel uncooperative parties to mediate is reminiscent of the old proverb about leading a horse to water but being unable to make it drink.

*Id.*

25. See, e.g., Gangel-Jacob, *supra* note 18, at 825.

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custody and visitation cases.<sup>26</sup> In that study, we identified five perceived impacts including: (1) immediate<sup>27</sup> and extended<sup>28</sup> impacts on the courts; (2) saving time and resources; (3) positive impact on the child in terms of a faster resolution;<sup>29</sup> (4) positive impact on the parents in terms of reduced costs and enhanced parental empowerment;<sup>30</sup> and (5) a bias toward joint parenting.<sup>31</sup>

In this study, we examine the mediators' perceptions of the stumbling blocks to success in mandatory child custody mediation and make some recommendations about how the process might be improved.

## II. METHODS

### A. Subjects and Sampling Frame

Subjects were selected from a list of approved mediators who had handled mediation cases over the previous two years. All mediators served a single judicial district within the state of Illinois. The researchers were careful to select subjects from three distinct categories of mediators, (1) those with a primary counseling background (hereafter referred to as counselor-mediators), (2) those with primary attorney backgrounds (attorney-mediators), and (3) those who were retired judges (judge-mediators). Attorney-mediators and counselor-mediators completed a required forty-hour training course. Retired judges were "grandfathered into the mediation system, and none of our judge-mediator subjects had completed the mediation training program."<sup>32</sup>

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26. Charles R. Stoner, Sandra J. Perry & Tanya M. Marcum, *The Court, the Parent, and the Child: Mediator Perceptions of the Purpose and Impact of Mandated Mediation in Child Custody Cases*, 12 J.L. & FAM. STUD. (forthcoming 2011).

27. *Id.* (manuscript at 21).

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. Cir. Ct. of the Tenth Judicial Circuit of Ill., Amended Admin. Order 2006-10 § II.B.1 (2008), *available at* <http://www.peoriacounty.org/download?path=/familylaw%2FLocalMediationRules.pdf> ("Possess a degree in law or master's or other advanced degree in a field that includes the study of psychiatry, psychology, social work, human development, family counseling, or other behavioral science substantially related to marriage and family interpersonal relationships or other degree program approved by the Chief Judge or [his or her] designee. If engaged in a licensed discipline, the

Mediation became a state-wide mandate in Illinois on January 1, 2007,<sup>33</sup> and the circuit chosen for this study began mandatory mediation at that time. Our interviews were conducted during the third quarter of 2009.<sup>34</sup> It is important to note that attorney-mediators indicated that family-practice clients could not be mediation clients.<sup>35</sup> Similarly, counselor-mediators indicated that counseling clients could not be mediation clients.<sup>36</sup> It should be noted that while the researchers secured the perceptions of counselor-mediators, relatively few of the mediations that had occurred in the circuit under consideration were conducted by counselor-mediators.<sup>37</sup>

### B. *Qualitative Analysis*

This study was ideal for the use of qualitative research methodology.<sup>38</sup> Although qualitative research does not generate broad generalizations, qualitative methodology offers important advantages over traditional quantitative approaches because subjects interact directly with the

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mediator must maintain said license in full force and effect. Any retired Illinois Judge who has served in family court is deemed qualified to submit his or her name to the Chief Judge.”). This is part of the formal education section of the local rule, not part of the training section. However, in practice, this language is interpreted to mean that retired Illinois family court judges are “grandfathered” as to the training requirements. *Id.*

33. ILL. SUP. CT. R. 905.

34. Interviews were conducted after applying and receiving approval from Bradley University’s Committee on the Use of Human Subjects. As part of the approval, confidentiality of the identities of the interviewees was required. In addition, each interviewee signed an informed consent which also promised confidentiality. Each interviewee was told that he or she would not be identified in any article published about this research other than as an attorney-mediator, counselor-mediator, or retired judge-mediator. Each interviewee quoted in this article was contacted, read the quotation, and asked whether it was accurate. Therefore, in the text of the article, each quote is identified only as being made by an attorney-mediator, counselor-mediator, or retired judge-mediator.

35. Cir. Ct. of the Tenth Judicial Circuit of Ill., Amended Admin. Order 2006-10 § III, R. 3(B)(2) (2008), *available at* <http://www.peoriacounty.org/download?path=/familylaw%2FLocalMediationRules.pdf> (“A mediator who is a mental health professional shall not provide counseling or therapy to the parties or their children during or after the mediation. An attorney-mediator may not represent either party in any matter during the mediation process or in a dispute between the parties after the mediation process.”).

36. *Id.*

37. In the year of our study, 2009, of the external cases referred, 2% were done by counselor-mediators, 38% were done by attorney-mediators, and 60% were done by retired judge-mediators.

38. *See generally* BARNEY G. GLASER & ANSELM L. STRAUSS, *THE DISCOVERY OF GROUNDED THEORY: STRATEGIES FOR GROUNDED RESEARCH* 61-62, 111-12 (1967); GARY D. SHANK, *QUALITATIVE RESEARCH: A PERSONAL SKILLS APPROACH* 31-32, 150 (2d ed. 2006).

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researchers, and probes that are prompted from previous responses can be employed.<sup>39</sup>

Study participants were selected from the list of approved mediators for the circuit being studied, and researchers completed face-to-face interviews. The researchers chose the interviewing approach to gain deep insights into mediation issues and concerns by exploring the views, opinions, and perspectives of those directly guiding the process—the mediators themselves. Here, underlying themes of complex issues are revealed by analyzing the interview data—a process known as “grounded theory.”<sup>40</sup> Glaser and Strauss’ framework for using this qualitative method was utilized in this study.<sup>41</sup>

Following the rigid qualitative guidelines suggested by Taylor and Bogdan, “qualitative researchers typically define their samples on an ongoing basis as the study progresses . . . whereby researchers consciously select additional cases to be studied according to the potential for developing new insights . . . .”<sup>42</sup> In other words, when additional interviews fail to yield additional themes or perspectives, interviews are closed. In qualitative parlance, the study has reached the “theoretical saturation point.”<sup>43</sup> Following this model, we interviewed six attorney-mediators, six counselor-mediators, and three judge-mediators. We also interviewed a non-mediator family attorney and a sitting judge to gain further confidence that key insights had not been excluded or missed. As a result, a total of fifteen interviews were conducted.<sup>44</sup>

Interviews were audio taped to ensure accuracy. Interviews were coded using a line-by-line approach. Further, two researchers, working independently, coded each interview. Next, all three researchers met to

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39. ANSELM L. STRAUSS & JULIET CORBIN, *BASICS OF QUALITATIVE RESEARCH: TECHNIQUES AND PROCEDURES FOR DEVELOPING GROUNDED THEORY* 266-68 (1998).

40. GLASER & STRAUSS, *supra* note 38, at 1 (describing grounded theory as “the discovery of theory from data”).

41. *See generally id.*

42. STEVEN J. TAYLOR & ROBERT BOGDAN, *INTRODUCTION TO QUALITATIVE RESEARCH METHODS* 26-27 (3d ed. 1998).

43. *See* STRAUSS & CORBIN, *supra* note 39, at 143 (describing the saturation point as “the point in category development at which no new properties, dimensions, or relationships emerge during analysis”); TAYLOR & BOGDAN, *supra* note 42, at 79.

44. Many classic qualitative studies have been built on sample sizes that are quite small. Doctoral dissertations utilizing this methodology are often limited to fewer than ten respondents. The key here is not the number of cases, but the level of interviewing depth and the method of in-depth analysis.

reach agreement, a process known as achieving “concordance.”<sup>45</sup> The researchers gathered additional documentation to confirm the logical veracity of respondents’ perspectives. Here, external data secured from the circuit court under consideration was used. This documentation provided checks on mediator perceptions of the extent of mediation and mediation success rates.

Finally, the accepted qualitative techniques of respondent validation and member checking were utilized. Each participant was contacted, informed of the study’s results, and asked to confirm that their personal perspectives were indeed included in our results. The interviews with the non-mediator sitting judge and the non-mediator family practice attorney added additional confirmation that key perspectives were not omitted from consideration.

### III. RESULTS AND DISCUSSION

Participants in this study were asked to comment on the “stumbling blocks” they had observed or experienced while engaged in court mandated mediation of child custody or visitation. A stumbling block was viewed as a factor that negatively affected the mediation process or inhibited progress toward successful mediation outcomes. In reality, stumbling blocks occur in an interactive manner rather than in isolation. Therefore, the following results do not presume any sequential pattern to the issues presented.

#### *A. Emotional Intensity: Emotional Overload of the Parents*

A continuum of divorce resolution strategies has been proposed where mediation is positioned as an alternative between counseling and litigation.<sup>46</sup> In contrast to the adversarial court process, mediation is a “cooperative, win-win approach to conflict resolution.”<sup>47</sup>

The parents’ hostility and fear of each other is a barrier to successful mediation.<sup>48</sup> As might be expected, cases with the best chance of successful mediation are those with less conflict.<sup>49</sup> High conflict between the parents with continuing contact with the children is likely to have adverse effects on

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45. Rosaline S. Barbour, *Checklists for Improving Rigour in Qualitative Research: A Case of the Tail Wagging the Dog?*, 322 BRIT. MED. J. 1115, 1116 (2001).

46. Edward W. Beal, *A Systems View of Divorce Intervention Strategies*, in DIVORCE AND MEDIATION STRATEGIES 16-33 (James C. Hansen & Sarah Childs Grebe eds., 1985).

47. Sara Childs Grebe, *Mediation in Separation and Divorce*, 64 J. COUNSELING & DEV. 379, 380 (1986).

48. See Ezzell, *supra* note 10, at 133.

49. See Peebles et al., *supra* note 15, at 528.



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the children.<sup>50</sup> While a majority of separating adults are able to work through their anger, disappointment, and loss, one-quarter to one-third have considerable difficulty doing so, and ten percent fail to achieve this goal.<sup>51</sup>

Savvy mediators recognize the impact of parental emotions and the value gained by helping parents work through those emotions during the mediation process.

This is emotion—pure, raw emotion. It’s important stuff. They don’t want to think that it’s going to be decided on, you know, twelve factors that are in paragraph so and so of the Marriage and Dissolution of Marriage Act. They want to think that somebody . . . with a big heart is going to hear what they have to say . . . . We know that can’t happen in every case, but that doesn’t mean they can’t feel like parties that are involved and care enough to try to make it happen. (Judge-mediator)

The partial ones [partial settlements], I still feel good about because it’s moved people along. It helped them learn skills . . . . Mediation will help put people on the right step if it’s done right [and it] . . . empowers them to really learn how to talk and solve problems. (Counselor-mediator)

We recognize the significance and value of these heroic intentions. However, heightened emotional intensity and resulting emotional overload is the root of our first deterrent to successful mediation. In our study, this issue was the most frequently noted by the mediators as complicating or blocking successful mediation. In short, the emotional intensity experienced by the parental parties severely limited any attempt at constructive, cooperative, win-win dialogue.

The divorce process carries an emotional impact for the parental parties. Although the extent and intensity of the specific emotional experience is idiosyncratic, all participating mediators agreed that the “emotional spillover” of the divorce created a barrier that inhibited the mediation progress. In many cases, emotions were so “raw” that efforts to openly discuss issues and move toward resolution were limited. In some extreme cases, mediators described parental emotional expressions as pure “hatred”

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50. Brenda L. Bacon & Brad McKenzie, *Parent Education After Separation/Divorce: Impact of the Level of Parental Conflict on Outcomes*, 42 FAM. CT. REV. 85, 85-86 (2004) (“[C]ontinuing parental conflict was a more powerful predictor of children’s maladjustment than the event of separation.”). Conflict that put children in the middle was just one aspect of parental conflict measured by the authors in this article. Other measures of conflict included time sharing and parenting, financial conflict, coparental conflict, coparental support, positive parenting, cooperative parenting, and satisfaction regarding time sharing and support. *Id.* at 92-93.

51. *Id.* at 86.

and “venom.” As one judge-mediator noted, “the dislike quotient” is simply too high.

The results of this study indicated that the emotional state of the parents inhibited the mediation process in three ways. First, effective communicative exchanges, which are fundamental for meaningful mediation, were simply impossible. Some parents were unable to “get past the hurt.” In some cases, parents would engage in screaming exchanges, venting pent-up anger toward one another. In other cases, parents would respond by shutting down and psychologically withdrawing from the situation. Understandably, these emotional exchanges resulted in the parties being suspicious of one another and at the extreme, fostered a climate of revenge. Again, in some cases, the level of emotional intensity rendered one or both parties incapable of dialogue and the give-and-take interaction that was essential for mediation.

Mediators observed that the same interactions that likely contributed to the unraveling of the marriage were also present to thwart mediation. For example, if one parent was seen as inattentive, prone to angry outbursts, or demonstrating dismissive and sarcastic interactive styles during the marriage, these same behaviors would often carry over to the mediation setting.

Second, emotional overload often manifested itself as parental intractability. Here, one or both parties “dug their heels in” and were inflexible in their positions. Of course, this refusal to negotiate helped assure that mediation progress would be hindered or nonexistent.

A third factor, however, may be the most damning for mediation success. Here, it appeared that parents were so focused on their own anger and their rage against the other party that they were unable to “put the children first.” This is significant because mediators overwhelmingly indicated that unless the parties were grounded in a commitment to the “best interests of the children,” important mediation progress was unlikely.

We must note that mediators indicated that the emotional intensity of parents was often exacerbated by well-intentioned family members who inserted a form of pressure on the parties to “get even or settle the score,” contributing to an adversarial and revengeful attitude and approach on the part of the parents.

#### *B. Attitudes and Actions of Family Law Attorneys*

Family law attorneys may have conflicting thoughts about the value of mediation, particularly mandatory mediation, and may feel “caught in the

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crossfire”<sup>52</sup> when they must “suddenly shift out of a litigation mindset and into the delicate role of conciliator; a role, which some otherwise competent litigants are ill equipped and/or loath to play.”<sup>53</sup> They may have a win-lose or zero-sum view of the matrimonial case and project that bias onto the client in advance of the mandatory mediation process.<sup>54</sup> Further, if the parties come to a successful mediated child custody or visitation agreement, the parties’ attorneys may believe they cannot properly advise their clients whether the agreement is fair and therefore cannot provide proper protection because the attorneys have not “witness[ed] the give-and-take of the negotiations that created them and lack access to the information needed to evaluate properly alternatives to settlement.”<sup>55</sup>

Because of their early involvement and their pivotal role, family law attorneys involved in the case are likely to affect the first impressions of mediation. As one would expect from impression formation theory, this primacy effect can shape and disproportionately color subsequent interactions.<sup>56</sup> Previous research has suggested that due to their one-party advocacy role, attorneys may “provide the first step in escalating a competitive struggle between two hurt and angry spouses.”<sup>57</sup> In this regard, two issues emerged regarding the attitudes and actions of family law attorneys. First, there was broad concern that some family law attorneys did not effectively prepare their clients to get the most out of impending

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52. Marfice, *supra* note 13, at 59.

53. *Id.*

54. Ezzell, *supra* note 10, at 138-39 (“The attorneys representing both sides of a family law dispute bring their own special biases and psychological hang-ups to the bargaining table. A lawyer is likely to be biased in many ways, but most notably, because he or she brings a win-lose, egocentric mind set to the family law arena. While this egocentric bias may be helpful in a contract or tort case, this type of bias may encourage a family law attorney to counsel his or her client to hold out longer in mediation or take the case to court based [on] a win-lose philosophy of law.”).

55. Craig A. McEwen, Nancy H. Rogers & Richard J. Maiman, *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1346 (1995). These authors further state that some attorneys “refuse to provide opinions because they believe that they cannot competently do so under the circumstances,” and that one commentator has suggested that the attorney may commit legal malpractice for providing advice on mediated agreements when the attorney has not participated in the negotiation process. *Id.* The article highlights the family court process in Maine where attorneys generally attend the mediation sessions and “do not disappear when mediation occurs.” *Id.* at 1357, 1360.

56. E. E. Jones & G. R. Goethals, *Order Effects in Impression Formation: Attribution Context and the Nature of the Entity*, in *ATTRIBUTION: PERCEIVING THE CAUSES OF BEHAVIOR* 27-46 (E.E. Jones et al. eds., 1972).

57. Grebe, *supra* note 47, at 380-82.

mediation encounters.<sup>58</sup> In some cases, little or no education about the mediation process was delivered. Consequently, parents entered mediation “blind” as to goals, approaches, and expectations.<sup>59</sup>

Second, mediators indicated that some family law attorneys were antagonistic toward the mediation process. In these cases, mediators believed that clients had been coached to “stonewall” the process, go through the motions, and let the issues be settled in court. Logically, this approach occurred when attorneys felt their clients would prevail and extract greater benefits from the more adversarial court process than through the mediation process. Generally, this stance was predicated on a belief that a better financial outcome would be secured if an agreement was not reached during mediation.<sup>60</sup>

Mediators suggested that some family law attorneys dictated to their clients to “hold out” and yield no concessions during mandated mediation. Mediators noted that on occasion, some attorneys instructed their clients that the goal of mediation was to secure “dirt for the future” that could be brought forward during the court process.

[T]here still are attorneys that make it look to clients like this [mediation] is simply an obstacle that they gotta get out of the way before they can get to court. So, they don't come in with an open mind, and they are mad. They don't want me involved in their case. (Judge-mediator)

There is a hard and rather cynical reality that was routinely expressed by both attorney-mediators and counselor-mediators. This reality was that some family law attorneys viewed mediation as an infringement of their realm of legal activity. In short, there was active “turf protection,” fostering an atmosphere of suspicion or, in some cases, outright animosity.

If mediation is successful and gets the job done, potentially that hits the attorneys' pocketbooks because they have less to do. And that means less income. (Attorney-mediator)

Some attorneys don't want mediation to succeed . . . because when [mediators] successfully negotiate a custody case, that's several thousand dollars out of the pocket of the attorney. (Attorney-mediator)

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58. See Vu, *supra* note 11, at 590, 592 (arguing that attorneys should be more proactive in informing their clients about alternative dispute resolution). Vu is primarily focused on those states that do not mandate mediation in family law matters and advocates for a mandatory ethical rule requiring attorneys to inform their clients of the availability of ADR. *Id.*

59. *Id.* at 593. Vu suggests that attorneys may borrow from the medical profession by using consent forms verifying that the attorney has in fact sat down with the client and discussed ADR. *Id.*

60. Although custody and visitation have financial impact, direct financial directives were not included in the range of issues within the purview of mediation for the circuit in this study.

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### C. *Parental Attitudes*

A related stumbling block to effective mediation was a dismissive or defensive attitude from parents toward the mediation process. Often parents did not want to be in mediation and viewed it as an unwelcomed, time consuming, and costly inconvenience. In some cases, as noted previously, negative attitudes toward mediation were stimulated or exacerbated by the representing family law attorney.<sup>61</sup> Whatever the source (or sources), beginning mediation with an undercurrent of negative affectivity is problematic. The mediation process will have difficulty moving forward and the likelihood of building positive momentum will be minimized. In short, parents may view mediation as “just one more thing” they have to do and “one more expense” they have to incur.

I think the fact that [mediation is] mandated. So you're not getting people who want to come for services. They are made to come for services or forced to come for services . . . [and this] creates some issues. (Counselor-mediator)

Importantly, mediators felt that this parental attitude could and should be mitigated by the family law attorneys. If attorneys would provide stronger support and more careful explanations of the expectations and advantages of mediation, parents would be likely to approach the process with greater clarity, hope, and commitment to finding acceptable outcomes. The mediators in our study felt that lawyers could create a foundation for mediation by communicating the advantages of mediation over the typical court process and the hard work needed for resolution. Mediators noted that this approach would help family law attorneys, mediators, and parents work together to assure that the needs of the children were paramount.

However, as noted earlier, an internal conflict of interest may be present. Objectively, resolving issues through mediation is generally less expensive and less time consuming than working through the mechanisms of the court process. As a result, attorneys sacrifice some level of client contact and interaction as well as some level of revenue. Attorneys also lose some

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61. In a study published in 2007 on parental attitudes about various aspects of the legal process regarding child custody, the authors found a relatively high level of satisfaction with mediation, some dissatisfaction with judges, and a relatively low level of satisfaction with the attorneys. Randall W. Leite & Kathleen Clark, *Participants' Evaluations of Aspects of the Legal Child Custody Process and Preferences for Court Services*, 45 FAM. CT. REV. 260, 269-70 (2007). Perhaps parents who begin with a negative attitude toward mediation, possibly due to their attorneys' attitudes toward it, ultimately find mediation to be the most satisfactory part of the child custody and visitation determination.

degree of control, which they may perceive as affecting subsequent court actions and outcomes.

#### *D. Timing*

One legal commentator has stated that while most parties go through similar stages in the process of divorce, “this recognition has had little effect on the structure, timing, and process of mediation.”<sup>62</sup>

Nearly every mediator expressed an opinion about the timing of mediation, and we heard arguments from both sides here. Some mediators felt that the mediation process would improve if parties were placed in mediation sooner. Other mediators argued the exact opposite, preferring to see mediation delayed until some level of “emotional leveling” had occurred. Despite this diversity of opinion, the vast majority of mediators in our study favored deferred mediation.

Maybe one of the parties hasn't resolved themselves to the idea that there is going to be a divorce. So the timing may be something of a limiting factor . . . . The anger in one of the parents can be very significant at that point. (Attorney-mediator)

Most mediators participating in this study felt that there was a push to enter mediation too quickly. Understandably, the court's desire to “keep things moving” has beneficial intent. However, if either of the parties had not reached a level of emotional resolution, progress was unlikely. Mediators noted that at times “the wounds were still pretty fresh,” people were still “locked into their positions,” and they were enmeshed in a “grieving process.” Mediators noted that the parties, understandably, were suspicious of one another. Time together in the mediator's presence could help break the suspicion down. Hopefully, suspicions and defenses would then be assuaged so true communication could occur.

Mediators get people too early in the process . . . . We get people early before they calm down enough to talk rationally about this. (Judge-mediator)

Part of the timing issue is complicated by the uniqueness of each situation and the idiosyncratic nature of the parental personalities. For example, it would not be unusual for one parent to be ready for an open, solution-oriented exchange, while the other parent was still reeling from the shock and anger of the divorce. In short, parents may be at different stages in the divorce and grieving process.

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62. Mary Pat Treuthart, *In Harm's Way? Family Mediation and the Role of the Attorney Advocate*, 23 GOLDEN GATE U. L. REV. 717, 749-50 (1993).

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People arrive at the decision to divorce at different stages. One party is typically much further along in that process than the other spouse is. As a result, one of the spouses has addressed and solved for themselves a lot of the emotional issues that the other spouse hasn't. (Attorney-mediator)

Sending them too early—everybody is a little too bitter . . . . People have to be in the right mindset to work things out. When they are just splitting up, and the Petition for Dissolution of Marriage has just been filed, they're not in that mindset. The dislike quotient, if you will, is high then . . . . You're not of the mind to be reasonable at that point . . . [and there is] nothing wrong with that. It's perfectly logical. (Judge-mediator)

The timing issue is complicated, and some mediators favored moving to mediation sooner rather than later. This emphasis stemmed from concerns about minimizing trauma for the children.

You have real crisis in terms of the family and, you know, emotional trauma is going on. And then, you know, every week counts. You have to get the mediation. (Attorney-mediator)

Recommendations for appropriate timing varied as situations varied. The key seemed to be the emotional readiness of the parents—both parents. Mediators were clear that action could not be postponed too long without the children suffering. However, mediators recognized that it was pragmatically impossible to designate an appropriate, all-encompassing period of time without an in-depth evaluation of each situation. In fact, some psychological evaluative procedure would have to be built into the process. Such approaches would add, appreciably, to the cost of the mediation process. It could also create an additional layer in a process that was designed to help streamline a more sluggish court process. One judicial commentator, with a negative view of mediation in family law cases, suggests that the parties' attorneys are in the best position to put the brakes on the process and slow it down when one or both is not emotionally ready to proceed.<sup>63</sup>

#### *E. Mediation Sessions*

A common criticism of court mandated child custody mediation is that it has attributes of an assembly line.<sup>64</sup> A number of mediators felt that the mediation process was too compressed and that too few sessions were required. Both counselor-mediators and attorney-mediators noted that they needed "more hours with the couple," arguing that the required three

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63. Gangel-Jacob, *supra* note 18, at 827-28.

64. Maldonado, *supra* note 9, at 470.

sessions were simply not enough. One counselor-mediator, reflecting on the iterative building process of mediation, commented, “Mediation can’t work too quickly.”

It takes time to let people listen to each other and explore what the possibilities might be and to break down suspicion . . . . There are all kinds of practical issues that impact where they are at the time they come in to mediation. To expect that this is going to be broken down and people will be able to focus on issues and resolve them successfully in a few hours is, I think, to a great extent Pollyanna. (Attorney-mediator)

There was concern expressed about having too much time lapse between mediation sessions. In essence, the concern here was that both momentum and progress could be sacrificed. Additionally, there was explicit criticism of mediators who ended mediation after a single session. Again, a number of mediators argued that efficiency and expediency were not the primary goals of mediation.

However, mediators recognized that there is an optimum point in time for each couple when the parties are somewhat beyond the high emotional intensity of the breakup and close enough to the anticipated court hearing when the couple is receptive to a mediated solution. For example, one judge-mediator suggested that if resolution had not been achieved during the mandated sessions, it would be beneficial to have the parties meet again shortly before the hearing. The judge-mediator noted that “a calmer mood, ripe for settlement” often surfaces as the court date approaches.

#### *F. Power Differentials*

Power differentials—unequal bargaining power<sup>65</sup>—occurred in a variety of ways. First, mediators noted that it was common that one parent would have a stronger financial background, experience, and awareness than the other parent. As a result, that parent may take a more pragmatic and realistic approach to financial concerns. However, that parent may, just as likely, use that knowledge to exploit the relative naiveté of the other party. Although mediation focuses on custody and visitation issues, the more financially astute parent may envision the financial implications of these issues with greater clarity and depth. It also appeared that when financial uncertainty was present, fear was an accompanying emotion, and that fear was often manifested in expressions of anger.

Second, some individuals used their relative power to stifle, emotionally and expressively, any open, honest, and collective dialogue. Here, power

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65. Ann Laquer Estin, *Economics and the Problem of Divorce*, 2 U. CHI. L. SCH. ROUNDTABLE 517, 543 n.145 (1995) (citing Shelly Lundberg & Robert A. Pollak, *Separate Spheres Bargaining and the Marriage Market*, 101 J. POL. ECON. 988 (1993)).



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was used to intimidate and dominate the other party. One could surmise, with reasonable assurance, that such actions had probably been earmarks of the parties' marital encounters.

Well this guy is a real control freak, and the lady doesn't have a real high self-esteem. He's had her beaten down a lot. How do you deal with that? How do you get a result that . . . is not basically something imposed on her as opposed to the result of a common meeting of the minds on an issue. (Family Law Attorney)

A lot of times, it's power, control issues. The children become leverage, you know, involved in a tug of war. (Counselor-mediator)

### *G. Parents Lack Interactive Skills*

The ability to communicate involves the ability to listen as well as the ability to express one's position. Parents who attempt to suppress their emotions often impair their cognitive skills.<sup>66</sup> Some minimal level of interpersonal interactive skills is necessary for parents to achieve successes through mediation. Mediators noted that poor or dysfunctional interactive styles were probably exhibited and enhanced over years of toxic encounters between partners. Accordingly, what was manifested during mediation was likely a product of entrenched attitudes and actions that had crystallized over time.

Here, three specific issues were noted, all dealing with an inability to communicate with others when situations demanded refined conflict skills. First, parties were unable to engage in civil dialogue due to a "lack of emotional control." Here, emotional impulses were unchecked, emotional outbursts prevailed, and interpersonally destructive comments were common. Such behavior exacerbated what was already an emotionally charged and fragile situation.

Second, some parties were unable to "address reality." Here, parties were unable to objectively assess the dynamics of the situation. Emotions and subsequent actions were based on skewed interpretations of situations. Mirroring low levels of emotional and social intelligence, parties' capacity for empathy was diminished, as was their capacity to attune to and listen receptively to others.<sup>67</sup>

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66. See Melinda S. Gehris, *Good Mediators Don't Ignore Emotion*, N.H.B.J., Summer 2005, at 28, 29 ("Attempting to suppress emotion affects cognitive skills, particularly memory.").

67. See generally DANIEL GOLEMAN, *SOCIAL INTELLIGENCE: THE REVOLUTIONARY NEW SCIENCE OF HUMAN RELATIONSHIPS* (2006). Chapter 6 of this book, "What is Social Intelligence," is especially pertinent to the themes raised by the mediators in this study.

Third, a number of parties would psychologically withdraw and “shut down” as tensions built. While this response was probably learned as a mechanism to thwart further escalation of conflict situations, the response (or lack of response) inhibited and blocked parental interaction and decision-focused communication.

Although all mediators recognized the value and significance of helping parties build interactive skills, there was considerable variation regarding how effective mediators could perform this task given their training and time limitations. However, the logic for enhancing parental interactive skills was persuasive.

You’ve got highly conflicted couples who probably don’t have the tools or mechanisms to come to an agreement—even through good mediation—and they need help with these issues before they can properly sit in a room together and talk and listen and problem solve and let go and forgive and deal with their loss . . . . (Counselor-mediator)

#### *H. Lack of Education from All Parties*

All parties need the same knowledge, tools, and level of confidence to get a good outcome. (Family law attorney)

Mandated mediation is still a relatively new concept. Accordingly, some lack of understanding of the mediation process and its potential may be explained by the relative newness of mandated mediation within the circuit being studied.

One stumbling block was a broad lack of education regarding the mediation process. The lack of education extended, at least to some extent, to all parties involved. These parties included family law attorneys, parents, judiciary, and even the mediators themselves.

Most of the attention in this area, however, focused on parents and direct parental impact of the lack of education about the mediation process. Initially, there was broad concern that family law attorneys did not prepare their clients properly for impending mediation.

I have some questions, I guess, as to how mediation is presented to them . . . . I receive an initial call . . . ‘My attorney said to do this.’ So, I think there could be some hesitation because they’re not quite sure what they’re getting into. (Counselor-mediator)

“Most people come in ignorant [of the mediation process] . . . without having been taught anything.” (Attorney-mediator)

Two areas of concern prevailed. First, in many cases, parents entered mediation without knowing what to expect of the mediation process. Second, and certainly related, parents lacked a thorough understanding of the benefits and advantages that could be secured through successful mediation. Clients want their attorneys to discuss with them issues perceived as important to the client, including interpretations of the legal

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system's unfamiliar language and procedure.<sup>68</sup> Providing information about the legal process, including mediation, to the client should be part of a quality representation.<sup>69</sup>

Mediators, themselves, were not immune from criticism here. Some mediators were proud of their efficiency, having demonstrated the capacity to "knock out" an agreement and inform the court that a resolution has been achieved. However, as one counselor-mediator stressed, "that's not the same thing as . . . an effective mediation between the parties." Speed of resolution can be a signal that the mediator is assuming a strong and overly active decision-making role. Mediators were generally required to assume a "facilitative" role,<sup>70</sup> and some mediators simply lacked background and training in employing this interactive style.

It's an agreement by: "I [mediator] have the power." I have the skill set and I'm gonna tell you what to do and do it. I can't tell you how many [parents] say "Okay, I have no power. I have no say in this process." We all have a say in this process, but it takes a lot of time because it takes a lot of undoing many times in relationships . . . . (Counselor-mediator)

The need for additional mediator training and continuing education for mediators was noted by all categories of mediators.

### *I. Point of Commonality Must Be the Kids' Needs*

It is a bit simplistic to note that successful mediation demands that parents put the children first and focus their discussions and decisions around the needs of the children. However, our study offered valuable insight into the dynamics and complexity of the child's needs.

The ones that just think of themselves and don't think of the kids are the ones you're going to have problems with . . . . When people are really intent on being difficult, there's not a whole lot I can do. (Attorney-mediator)

Although children may never abandon hope that an eleventh-hour resolution will bring their parents together again, most children have

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68. Joan B. Kelly & Mary Kay Kisthardt, *Helping Parents Tell Their Children About Separation and Divorce: Social Science Frameworks and the Lawyer's Counseling Responsibility*, 22 J. AM. ACAD. MATRIM. LAW. 315, 325 (2009).

69. *Id.* at 316.

70. There are two main methods used by most mediators in child custody disputes: facilitative and evaluative. See Marsha B. Freeman, *Divorce Mediation: Sweeping Conflicts Under the Rug, Time to Clean House*, 78 U. DET. MERCY L. REV. 67, 70-71 (2000) (discussing facilitative and evaluative mediation styles).

practical and fundamental perspectives and needs. The mediators in our study noted that children need an established structure of expectations. These expectations help children gain a sense of stability even as they confront a whirl of seeming chaos. As one judge-mediator noted:

The kids aren't as much worried about what the rules are, as that there are rules, and things are going to stabilize, and their life is gonna revolve into a pattern. And I think that's the important thing.

Professionals have long recognized the emotional impact that parental separation and an ultimate divorce have upon the children.<sup>71</sup> Studies have found that children of divorce are likely to have emotional, academic, and delinquency problems.<sup>72</sup> Thus, with mandated child custody mediation and the changing dynamics of the family, attorneys are expected to deal with "emotions, human values, beliefs, secret hopes[,] and fears."<sup>73</sup> The emotions of the parties, as well as the legal process, should be focused on a mediated resolution that keeps the children's needs first and the parents' needs second.

#### *J. An Acceptance of Unsuccessful Mediation*

There is commentator agreement that some cases, such as those involving domestic violence, simply cannot be mediated or, if they are mediated, safeguards should be put into place prior to the mediation.<sup>74</sup> Joint custody, usually a goal of mediation, is often viewed as dangerous and may have adverse effects on the children if they are exposed to continuing parental conflict.<sup>75</sup>

The mediators in our study seemed to agree. In some situations, mediators noted that the intractable position of one party may be justified by reasonable fears. For example, in situations where the persistent presence of substance abuse, physical abuse, or criminal activity leads to a concern about the child's safety, agreement on some range of visitation or custody may be problematic. These may be situations where court directives are necessary and warranted. For example, one attorney-mediator commented, "[T]he ones [mediations] that don't succeed maybe shouldn't succeed." Again, the possibility of danger to the children was the prevailing concern. In other

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71. See Kelly & Kisthardt, *supra* note 68, at 316-19, 327-28.

72. Stephen J. Bahr, *Social Science Research on Family Dissolution: What It Shows and How It Might Be of Interest to Family Law Reformers*, 4 J.L. & FAM. STUD. 5, 10 (2002).

73. Kelly & Kisthardt, *supra* note 68, at 324.

74. Saccuzzo, *supra* note 11, at 433-35.

75. See Reynolds et al., *supra* note 12, at 1676-77; Bacon & McKenzie, *supra* note 50, at 85-86.

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words, mediation may be inappropriate for situations where substance abuse, criminal activity, or child endangerment is present.

*K. Withholding Information*

Mediators in our study were often limited in their roles by incomplete or highly skewed information that they received from the parental parties. Mediators indicated that they knew at times they were doing “surface mediation” and were aware that issues were lurking beneath the surface. As one attorney-mediator commented, “Subsurface issues are alluded to but not openly addressed.” Mediators observed that parties “pulled back” when sensitivities were touched. Unfortunately, issues lurking beneath the surface can sabotage the mediation and decrease the probability of success. Mediators found themselves perplexed by their inability to push deeper in these cases. As one attorney-mediator noted:

I might respect their privacy and say, well okay, you know what he’s talking about. I don’t know what he’s talking about. We don’t have to discuss it but does it help you make your decision . . . ?

Mediation can be a useful process to encourage participants to find mutually agreeable resolutions. This is achieved by prompting them to “identify issues, reduce misunderstandings, vent emotions, clarify priorities, find points of agreement, and explore areas of compromise.”<sup>76</sup> However, this process can only manifest an agreement between the parties when information is complete.<sup>77</sup> Information that is below the surface of the dispute is crucial to provide opportunities for resolution.<sup>78</sup>

#### IV. CONCLUSIONS AND RECOMMENDATIONS

Because so many states are mandating mediation in family matters,<sup>79</sup> we should look at the stumbling blocks that mediators encounter, and, considering the attorneys’ perspectives, consider how to make the process work better. We begin by noting that the role of emotions and their impact

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76. Saccuzzo, *supra* note 11, at 428.

77. Tracy L. Allen, *Riding High With Your Mediator: The Do’s and Don’ts of Effective Mediation Advocacy*, UTAH B.J., Sep/Oct 2008, at 10, available at [http://www.utahbar.org/barjournal/pdf/2008\\_sept\\_oct.pdf](http://www.utahbar.org/barjournal/pdf/2008_sept_oct.pdf).

78. *Id.*

79. Reynolds et al., *supra* note 12, at 1629.

in family law has received limited research attention.<sup>80</sup> This is especially true of mediation in cases of marital dissolution. There is an assumption (and some evidence) that mediation can reduce acrimony and encourage productive interaction between parents, at least while the mediation sessions are in progress.<sup>81</sup>

Previous research has noted that good mediators accept that one of their roles is to help the parental parties process emotion.<sup>82</sup> In this regard, mediation may provide parental parties with an opportunity to become more fully aware of the interests and needs that lie behind the emotions being expressed.<sup>83</sup> However, issues of emotional expression, emotional intensity, and subsequent emotional overload are quite complex.

When considering parental emotions, we must determine whether heightened emotional intensity may, in fact, reduce or even preclude the likelihood of mediation success. The mediators in this study leaned toward such a conclusion—a conclusion consistent with existing literature. For example, Jeffrey Messing argued that when deep psychological issues enmesh the parties, counseling may be preferable to mediation.<sup>84</sup> He noted that when the parties' issues and interests "can be managed and appropriately separated from underlying emotional or psychological dynamics," mediation holds a better chance of success.<sup>85</sup>

It is important to understand that past behaviors (those occurring during the marriage) constrain parental interactions during the mediation.<sup>86</sup> When minor children are present, divorcing parties will, in all likelihood, continue to have some level of interpersonal contact.<sup>87</sup> Accordingly, an argument can be made that mediation may help reduce acrimony between the parental parties and ultimately foster a sense of forgiveness.<sup>88</sup> Evidence suggests that if mediation deals with substantive issues in the conflict, an eventual de-

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80. Maldonado, *supra* note 9, at 446-47.

81. HOWARD H. IRVING & MICHAEL BENJAMIN, FAMILY MEDIATION: CONTEMPORARY ISSUES 413 (1995).

82. Gehris, *supra* note 66, at 36.

83. Amy L. Lieberman, *The "A" List of Emotions in Mediation: From Anxiety to Agreement*, 61 DISP. RESOL. J. 46 (2006).

84. Jeffrey K. Messing, *Mediation: An Intervention Strategy for Counselors*, 72 J. COUNSELING & DEV. 67, 70 (1993).

85. *Id.*

86. Paul J. Taylor & Ian Donald, *Foundations and Evidence for an Interaction-Based Approach to Conflict Negotiation*, 14 INT'L J. CONFLICT MGMT. 213, 215 (2003).

87. Maldonado, *supra* note 9, at 442.

88. *Id.* at 459.

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escalation of conflict should be experienced.<sup>89</sup> The complication here is that although mandated mediation is no doubt tinged with deep, residing issues of conflict, the focus is on resolving custody and visitation issues rather than the myriad of complicating forces behind the dissolution of the parental relationship.<sup>90</sup>

As noted above, researchers have suggested that these cooperative stances may not extend beyond the actual mediation sessions, most likely due to the depth of behavioral patterns that have persisted over the years.<sup>91</sup> The relationship between emotional intensity and mediation success has been explored to some extent. For example, in 2008, researchers presented an empirical study of mediation in a county of North Carolina where mediation of custody cases had been mandated since 1995.<sup>92</sup> They proposed two models of mediation.<sup>93</sup> Short mandated sessions (one or two sessions in their study) worked best for less conflicted cases.<sup>94</sup> However, for cases where conflict was deeper and more intense, more extensive mediation with more sessions was necessary for success.<sup>95</sup> While the past is not always a prelude to the future, during the contentiousness of divorce, parties probably assume that negative behaviors exhibited during their time together will be manifested and exaggerated as they deliberate the conditions and terms of marital dissolution.

A threshold model of emotional intensity may be relevant. Namely, such a model suggests that when parental emotional intensity is excessive, the probability of mediation success is limited. We conjecture that the relationship between emotion and success is not linear. Rather, there is probably some upper bound or threshold of emotion that thwarts or blocks meaningful interaction.

A 2006 study by Chan and Erickson revealed that when custody cases were initially handled through litigation, there were fewer extended custody

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89. See Loreleigh Keashly, Ronald J. Fisher & Peter R. Grant, *The Comparative Utility of Third Party Consultation and Mediation Within a Complex Simulation of Intergroup Conflict*, 46 HUMAN RELATIONS 371 (1993).

90. Maldonado, *supra* note 9, at 473.

91. IRVING & BENJAMIN, *supra* note 81, *passim*.

92. Peebles et al., *supra* note 15, at 506.

93. *Id.* at 530.

94. *Id.* at 528.

95. *Id.* at 530.

events than when the initial approaches of mediation or lawyer-negotiated settlements were used.<sup>96</sup>

The mediators in our study often commented that the mediation sessions may begin too early when the emotional intensity of the parents precludes meaningful mediation. Some mediators, evaluating the parties at this early stage, determined that mediation would not be successful and ended the process after one session.

At the initial session, mediators should assess the intensity of conflict and the readiness of the parents to participate in meaningful discussion. Mediators should have some limited discretion to determine the appropriate time for subsequent meetings, which should not exceed a predetermined time set by the court. If progress toward resolution seems feasible, postponing the mediation sessions until the emotional intensity of the parties has lessened may enhance the ultimate success of the process. The parties' attorneys should have similar discretion on when to begin the mediation process, within predetermined parameters. This would be effective because the attorneys have interacted with their clients from the beginning of the divorce process, or earlier, and can provide important guidance on the best timing of mediation.

Family law attorneys, whether or not knowingly and willingly, help create powerful initial impressions that critically affect subsequent attitudes, views, and actions regarding mediation. Attorney attitudes and actions can signal to their clients that mediation is an important opportunity for parents to move forward in the interests of their children. Or, these attorneys can sabotage subsequent mediation impacts by advocating a cavalier approach, or even openly encouraging clients to utilize blocking behaviors during the mediation process.

As noted in our results section, family law attorneys may utilize these defensive and limiting strategies for a number of reasons.<sup>97</sup> However, entering mediation with the wrong foot forward significantly restricts mediation success. It seems reasonable that mediation reaches its optimal impact when all parties—attorneys, parents, and mediators—assume a team perspective, stretching for the common interests of the children and their overall well-being. It has been suggested that family law attorneys should have an ethical obligation to educate their clients about mediation.<sup>98</sup> Perhaps a specific court rule would provide a better mandate and more specific guidance to family law attorneys about what education or preparation the

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96. Chan & Erickson, *supra* note 14, at 1305-06.

97. *See supra* Part III.

98. Vu, *supra* note 11, at 588.



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attorneys should provide to their clients in advance of the mandated mediation process.<sup>99</sup>

Finally, the issue of power differentials between parental parties is critical and reminds us that successful dialogue presumes an openness and freedom of exchange that is threatened or blocked when power differentials are present. The existence of skewed power exchanges reduces the perceived and experienced control of the less dominant parent. This experience is likely to enhance or intensify anxiety and decrease clarity and objectivity. Therefore, we concur with the mediators in this study who concluded that mediation was an inappropriate resolution strategy when wide power differentials existed between parental parties.

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99. Many parties entering the judicial process to end a marriage, determine the custody and visitation of the child, or both, are not represented by counsel. In those cases, the family law judge should undertake the duty to ensure that the parties understand the benefits and process of mandatory mediation of these matters. See Tali Schaefer, *Saving Children or Blaming Parents? Lessons from Mandated Parenting Classes*, 19 COLUM. J. GENDER & L. 491, 532 (2010). "A significant majority of domestic relations cases involve pro se filings," and about seventy percent of domestic relations cases involve at least one pro se party. *Id.*