Brigham Young University Journal of Public Law

Volume 26 | Issue 2 Article 3

5-1-2012

Mediating the Indissoluble Family: Mediator Style in Domestic Relations Cases

Carolynn Clark Camp

Follow this and additional works at: https://digitalcommons.law.byu.edu/jpl

 Part of the Family Law Commons

Recommended Citation

Carolynn Clark Camp, *Mediating the Indissoluble Family: Mediator Style in Domestic Relations Cases*, 26 BYU J. Pub. L. 187 (2012).
Available at: https://digitalcommons.law.byu.edu/jpl/vol26/iss2/3

This Article is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Brigham Young University Journal of Public Law by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

Mediating the Indissoluble Family: Mediator Style in Domestic Relations Cases

*Carolynn Clark Camp**

Mediation's rapid, and relatively recent, rise to prominence has permanently altered the practice of law in many areas of the legal field. Nowhere is this more true than in the area of family law, where mediation has become a central aspect of nearly every family case. The ubiquitous use of mediation, particularly in the family arena, brings with it many benefits both for parties and for the legal system as a whole. At the same time, the rapid rise in the use of mediation has also brought a number of challenges. Mediators come from varied backgrounds and practice a number of different mediation styles and skills. States have struggled with how to regulate mediators, and requirements and qualifications for mediators nationwide are varied and sometimes less than stringent. This difficulty in certifying who is qualified and competent to mediate, combined with a general lack of knowledge among both attorneys and the general public as to what mediation is and the differences among mediator styles, creates a challenge in matching the right mediator to the right case.

This problem is particularly troublesome when dealing with family issues, especially those that involve the custody and ongoing parenting of children. Ameliorating these difficulties has become, perhaps, even more important in light of recent and continuing changes in the nature of family disputes in the United States. In Western countries, most recognize that the rate of divorce has risen to unprecedented levels over the last half century. Scholars and researchers have noted that the nature of divorce has also changed. Early on, divorce may have been seen both legally and practically as a "clean break" between spouses, ending both the marriage and the family relationship (usually between the father and the children); now, for a variety of reasons, both fathers and mothers desire to continue in an active parenting role post divorce. Thus, divorce may end the spousal relationship but no longer ends the active parenting relationship, a phenomenon that has been referred to as "the indissolubility of parenthood." As more separated and divorced parents have a continuing need to communicate with one another and make joint

* Carolynn Clark Camp teaches mediation as an adjunct faculty member at Brigham Young University's J. Reuben Clark Law School.

decisions for their children, dispute resolution techniques that foster that communication are essential. While mediation has the potential to effectively aid parties in this endeavor, not all styles of mediation are conducive to fostering this sort of party communication. As such, measures both to regulate the field of mediation and to educate attorneys and parties about the practice of mediation are vital in helping divorcing and separated parents to select the appropriate mediator. New legislation and education that fosters attorney and mediator use of appropriate conflict-resolution techniques not only will help parties survive their dispute with a functioning—and hopefully amicable—relationship, but also will aid parties in transforming their relationship as they move forward as co-parents in this post clean-break world.

Part I of this Article will address the potential advantages of mediation over litigation, particularly for family cases. Part II will give a brief history of the use of mediation and the evolution of post-divorce parenting roles in the United States. Part III will discuss different mediator styles and establish why "facilitative" techniques should be favored over "evaluative" techniques for family cases. Part IV will elucidate current obstacles to matching the right style of mediation to the right case and give recommendations for improvement. Part V will conclude.

I. THE FAMILY CASE: LITIGATION OR MEDIATION?

A functioning and well-structured court system is one of the pillars of civil society, allowing individuals who cannot resolve their disputes amicably to obtain an impartial resolution without resorting to force or other inappropriate forms of self-help.[1] Although the structure and goals of our modern court system are laudable, participants in the system—be they attorneys, judges, or parties—will readily admit that a court-imposed resolution does not always provide the best outcome for every litigant, even for those litigants who prevail. This is particularly true in those cases where there is some desire for the relationship of the parties to survive the dispute or simply a need for a resolution that is relatively speedy and inexpensive. Imagine, for example, a simple fence line dispute between two neighbors. Assume that these neighbors have lived next to one another for a long time and will likely continue living next

1. THE ROLE OF COURTS IN SOCIETY 468 (Shimon Shetreet ed., 1988) ("The primary function of courts within any society is the resolution of disputes. At the heart of the judicial system lies the premise that self-help by force is unacceptable, so that parties who are unable to solve their dispute amicably may bring it before the court for an impartial resolution. This basic scheme . . . promotes good government and an ordered society . . . .").

door for the foreseeable future. A severe disagreement arises over the location of the boundary between the two properties, and the neighbors are unable to come to any acceptable resolution, both sides believing that they are in the right. The disagreement escalates. Now imagine what might happen if one neighbor decides to engage the services of a lawyer who sends a terse letter to the other neighbor, or goes a step further by filing an action in court and having the papers served. Does this action, so familiar in our litigious society, make the other neighbor more or less amenable to civilized discussion about the matter? More likely than not, in an effort at self-protection or retaliation, the neighbor will hire a lawyer of his own. At this point, direct communication between the two neighbors will likely cease, being replaced with the familiar phrase, "Talk to my lawyer."

This scenario elucidates one of the drawbacks of our adversary system: it is adversarial. In a litigated case, the parties must take and defend firm positions while simultaneously attacking and poking holes in the other side's case and, often, character. The fallout of this process is not generally kind to the parties' relationship. Depending on the course of the litigation in the above scenario, the two neighbors may quit speaking to one another altogether, refuse to sit in the same pew at church, or one may even decide to move away. When considering litigation in the context of a divorce or custody dispute, where the relationship between the parties is even more fragile and important, the results can be disastrous. In these cases, divorcing parents will generally have the desire, or obligation, to have ongoing communication regarding their children for years after the divorce has been finalized. If the process of obtaining the divorce or custody order has the effect of increasing the acrimony between them, neither they, nor their children, are well served. In fact, recent studies bear out that the biggest indicator of child adjustment and success in divorce situations is the level of ongoing parental conflict.[2]

In light of these problems, the legal field, and family law in particular, has embraced mediation as an alternative way to resolve disputes. Although mediation is practiced in many different ways, in general, it is defined as a voluntary process through which parties can discuss the issues in dispute and arrive at mutually agreed-upon resolutions with the help of a neutral third-party facilitator who has no

2. Joan B. Kelly, Address at the Family Law Section Forum, Salt Lake City, Utah: Divorce and Children's Adjustment: What Helps, What Harms? Current Research and Implications for Practice, Policy, and Custody and Parenting Plans (May 11, 2011) ("High conflict has been seen as the factor most damaging to [children's] adjustment (other than divorce [itself]).").

authority to impose a solution.[3] When done appropriately, mediation has several benefits for family (and other) cases that set mediation apart from litigation. First and foremost, mediation is ideally less adversarial. Mediators can be adept at helping parties move beyond their positions and past faultfinding in an effort to help them find mutually acceptable solutions that meet their interests and ongoing needs. In doing so, the mediator can encourage the parties to communicate directly with one another in more effective ways. At the very least, because the mediator cannot impose a solution, the parties are incentivized to find common ground with one another in an attempt to find solutions with which they can both agree.

Mediation also has several other benefits that can make it an attractive alternative to litigation. Mediation can often generate more creative and tailor-made solutions than can be obtained in court. Judges are limited by statutory guidelines and legal norms that often make some of the parties' desires irrelevant or impossible. For example, one can imagine how difficult it would be for a court to determine an ideal parent-time schedule, which takes into account the parties' individual schedules, desires for time with their children, and the best interests of the children involved. Often, when the parties are in dispute, a court is constrained to order a predetermined statutory schedule that fails to adequately meet any of these concerns. In mediation, however, the parties can develop their own solutions that fit their values, schedules, and other lifestyle choices. Through this process, parent-time schedules and other solutions can be custom-fit to the parties' children and to their particular circumstances. In addition, mediated agreements often have better levels of compliance than court-imposed orders. Often, when parties are given the latitude to develop their own agreements, they are more likely to abide by them.[4] This compliance is very important when considering ongoing visitation and financial arrangements regarding children.

Finally, mediation is confidential and usually quicker and less costly than litigation. Many parties who are undergoing the pain of a divorce

3. *See, e.g.*, UTAH CODE ANN. § 78B-10-102(1) (West 2009) ("'Mediation' means a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute."); JAMES J. ALFINI ET AL., MEDIATION THEORY AND PRACTICE 1 (2d ed. 2006) ("Mediation is a . . . process in which a neutral intervener assists two or more negotiating parties to identify matters of concern, develop a better understanding of their situation, and, based upon that improved understanding, develop mutually acceptable proposals to resolve those concerns. . . . [A] mediator has no authority to impose a binding decision on the parties . . . .").

4. ALFINI ET AL., *supra* note 3, at 140 ("One advantage of a mediated agreement is in compliance. Since the parties have worked out the settlement terms themselves, they are more likely to understand them, believe they are fair and workable, and feel compelled to honor them.").

appreciate the confidential nature of mediation, which safeguards the private and sensitive nature of the issues that arise in the course of a family dispute.[5] Further, if successful, mediation is far speedier and less costly than a trial. Parties to a contested divorce can take anywhere from three months to several years to obtain a final order from a court on all issues, depending on the complexity of the case.[6] When considering attorney fees and other court expenses, the costs of obtaining a divorce over the course of months or years can increase exponentially.[7] Mediation in a family case, if successful, can generally come to completion with a full agreement in a matter of one to three sessions of about three to four hours apiece.[8]

Because of these benefits, the use of mediation has been growing in all areas of the legal field and in the area of family law in particular. As will be discussed below, mediation is now required or encouraged for contested family cases, especially those involving children, in nearly every state in the nation.[9] This development is particularly favorable in light of mediation's potential to aid parents in resolving their current and ongoing disputes in a way that reduces animosity, helps them develop solutions that fit their individual needs, and is quicker and less costly than litigation.

---

5. *See* UNIF. MEDIATION ACT § 4 (amended 2003), 7A U.L.A. 117 (2006) ("Except as otherwise provided in Section 6, a mediation communication is privileged as provided in subsection (b) and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided by Section 5."); *Id.* § 8 ("Unless subject to the [insert statutory references to open meetings act and open records act], mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this State") (alteration in original). Many states, including Utah, have adopted the Uniform Mediation Act in this, or a similar, form. *See, e.g.*, UTAH CODE ANN. §§ 78B-10-104 to -108 (West 2009).

6. ALAN J. HAWKINS & TAMARA A. FACKRELL, SHOULD I KEEP TRYING TO WORK IT OUT? A GUIDEBOOK FOR INDIVIDUALS AND COUPLES AT THE CROSSROADS OF DIVORCE (AND BEFORE) 122 (2009).

7. *Id.* at 124 ("If the case goes to litigation in court, the process can cost anywhere from $3,000 to $10,000 [sic] or even more for each spouse.").

8. The timing will vary depending on the mediator and the case. One commentator indicates that mediation "usually takes 2 to 7 hours and is done in several two-hour sessions." *Id.* at 126.

9. *See* ALA. CODE § 6-6-20(b)(3) (2011) (mediation can be ordered by the judge in any case); ALASKA STAT. § 25.20.080 (2012) (mediation can be ordered in child custody cases); CAL. FAM. CODE §§ 3170, 20019 (West 2012) (mediation required in child custody or visitation disputes); FLA. STAT. § 61.183 (2011) (mediation may be ordered in cases regarding parental responsibility for children); ILL. SUP. CT. R. 905 ("Each judicial district shall establish a program to provide mediation for cases involving the custody of a child or visitation issues . . . ."); MICH. CT. R. 2.410 (court may order any civil case to appropriate ADR process); MICH. CT. R. 3.216 (all domestic relations cases subject to mediation); UTAH CODE ANN. § 30-3-39 (LexisNexis 2011) ("If, after the filing of an answer to a complaint of divorce, there are any remaining contested issues, the parties shall participate in good faith in at least one session of mediation.").

II. MEDIATING FAMILY DISPUTES IN THE UNITED STATES: A BRIEF HISTORY

Mediation has risen from obscurity in recent years, but its use was not always so prevalent. Several years ago, most in the general populace would not have known what "mediation" meant. However, evidence that mediation has finally come of age can be seen in the relatively recent rise in statutory requirements or allowance in most states to mediate many types of cases,[10] the fact that university course offerings for mediation and mediation training programs have multiplied dramatically in recent years,[11] and even representations of mediation in popular media.[12] These and other factors indicate that mediation has now reached a level of prominence in both the legal and the public eye never before experienced in the field. This explosion of mediation onto the scene, though rapid in recent years, has been slow to emerge when viewed in terms of mediation's more extended historical background. While mediation has been used informally throughout history, the first formal establishment of the practice in the United States dates back to the creation of the Federal Mediation and Conciliation Service (FMCS) in 1947.[13] The FMCS was created with the "goal of sustaining industrial stability" and continues to train mediators and provide mediation services "to private sector union and management personnel engaged in collective bargaining."[14]

Despite the establishment of the FMCS, mediation did not begin to gain a foothold until the promulgation of the Alternative Dispute Resolution (ADR) movement that began in the late 1960s.[15] This movement emphasized the use of "negotiation, mediation, arbitration,"

---

10. *See supra* note 9.

11. This trend is illustrated even by universities in Utah alone. For example, the J. Reuben Clark Law School at Brigham Young University (BYU) now offers at least seven courses or externships related to mediation. *Course Descriptions 2011–12*, BYU L. (Jan. 3, 2012), http://www.law.byu.edu/Curriculum/Course_Descriptions.pdf. There are also undergraduate courses in conflict resolution and mediation practices. *Undergraduate Catalog 2011–12* BYU (July 7, 2011), http://saas.byu.edu/catalog/2011-2012ucat/PDFCatalog/Full%20Catalog.pdf. BYU also sponsors a Center for Conflict Resolution that uses volunteer mediators to help resolve student housing and other disputes. *See generally Center for Conflict Resolution*, BYU, https://ccr.byu.edu/ (last visited Mar. 11, 2012). Utah Valley University has a similar landlord/tenant mediation service through its Office of Judicial Affairs & Dispute Resolution in addition to offering a mediation track through its behavioral-science department. *Course Catalog 2011/2012*, UTAH VALLEY U., http://www.uvu.edu/catalog/2011-2012/Catalog_11-12.pdf (last visited Mar. 6, 2012).

12. *See, e.g.*, WEDDING CRASHERS (New Line Cinema 2005); *Fairly Legal* (USA Network 2011).

13. *See* ALFINI ET AL., *supra* note 3, at 1; FEDERAL MEDIATION & CONCILIATION SERVICES, http://www.fmcs.gov/internet/ (last visited Feb. 20, 2011).

14. ALFINI ET AL., *supra* note 3, at 1; *see also* FEDERAL MEDIATION & CONCILIATION SERVICES, *supra* note 13.

15. ALFINI ET AL., *supra* note 3, at 1–2.

"summary jury trials, and early neutral evaluation processes" as "alternatives" to traditional litigation.[16] Because mediation is non-binding and relies on the parties to voluntarily develop their own agreements, the process became a favorite of the ADR movement.[17] Courts and legislators reasoned that "since disputing parties can always refuse to accept settlement terms proposed in mediation, no one could be hurt by using it."[18] When faced with the civil unrest in the 1960s, including various types of interpersonal disputes between neighbors and other types of disputes that could not be adequately addressed by traditional litigation processes, communities and courts began experimenting with mediation programs that utilized a trained, and usually volunteer, mediator to help all of the individuals interested in the dispute come together to problem-solve and develop workable solutions.[19] At this time, many pilot programs were started, including community dispute-resolution centers, the Community Relations Service,[20] and court-initiated programs to handle neighbor disputes and other small-claims matters.[21]

Although the use of mediation was expanding during this period, the legal profession was particularly slow to signal acceptance of the practice. As one author notes, a "striking feature regarding mediation's use during this period was that, to a substantial degree, non-lawyers, more than lawyers, advocated its use and implementation."[22] Lawyers, who were focused on traditional trial practices, were likely skeptical of mediation initially and unsure of their role in the new ADR landscape. The ABA did not signal any support of mediation until the mid-1970s—and even then only for "minor" disputes with the creation of the Special Committee on the Resolution of Minor Disputes.[23] The attitude at the time seemed to be that while mediation may be helpful for small community or neighbor disputes, larger and more complex legal cases required traditional litigation practices and the lawyer's expertise.

---

16. *Id.* at 2.

17. *Id.*

18. *Id.*

19. *Id.* at 2–9.

20. *Community Relations Service*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/crs/ (last visited Mar. 12, 2012) ("The Community Relations Service is the Department's 'peacemaker' for community conflicts and tensions arising from differences of race, color, and national origin. Created by the Civil Rights Act of 1964, CRS is the only Federal agency dedicated to assist State and local units of government, private and public organizations, and community groups with preventing and resolving racial and ethnic tensions, incidents, and civil disorders, and in restoring racial stability and harmony.").

21. ALFINI ET AL., *supra* note 3, at 8–10.

22. *Id.* at 11.

23. *Id.*

The use of mediation in family disputes became a driving force behind the legal field's ultimate acceptance of the practice. As divorce rates began to increase dramatically beginning in the 1980s in the United States, lawyers and parties began to realize that litigation did not always yield the best outcomes in family cases.[24] Once lawyers were retained, parties typically had no more communication with one another, relationships became more acrimonious, and it became apparent that courts were not well equipped to determine parent-time schedules or other parenting decisions.[25] Mediation became an alternative process that many lawyers were willing to try. In addition, courts and legislatures began to experiment with requirements to mediate for domestic relations cases. Currently, in many states parties are required to mediate or may be ordered to mediate a contested divorce prior to having the matter heard by a judge.[26] In most states, mediation is now accepted as commonplace in divorce, post-divorce, parentage, and other family cases, particularly those that involve the parenting of children.

The fact that mediation has become a mainstay of the contested family case is no surprise when viewed in light of recent scholarship regarding the changing nature of the post-divorce family. In his book, *The Indissolubility of Parenthood*, Patrick Parkinson notes that the meaning of divorce has evolved significantly in Western countries over the last several decades.[27] While early laws in most Western countries initially forbade divorce or only granted it upon evidence of fault on the part of one spouse, the concept of "no-fault" divorce soon swept most Western countries throughout the course of the 20th century—in the United States most notably during the 1970s.[28] Parkinson notes that, early on, "[t]he central idea of no-fault divorce was that dead marriages should be given a decent burial and that it should be possible for the parties to get on with their lives and start fresh once decisions had been made about financial matters and custody."[29] Thus, the children were generally allocated, or "custody" was awarded, to one parent, usually the mother, with "access" or "visitation" given to the other parent.[30] The concept of custody "included virtually all the rights and powers that an

24. *Id.* at 19.

25. *See supra* Part I.

26. *See supra* note 9. Many states have requirements similar to Utah, some requiring mediation for all divorce cases, or just those involving the custody of children, and others giving judges wide discretion to require or encourage mediation in these cases.

27. PATRICK PARKINSON, FAMILY LAW AND THE INDISSOLUBILITY OF PARENTHOOD 16–18 (2011).

28. *Id.* at 17–20.

29. *Id.* at 21.

30. *Id.* at 22.

adult needed to bring up a child, including the right to make decisions about a child's education and religion."[31] This award of custody allowed the custodial parent the autonomy she needed to raise the children free from the interference of the other parent. From his end, the non-custodial parent, usually the father, possibly because he was afforded no legal responsibilities (except perhaps with the imposition of child support, which was poorly enforced), rarely visited and relinquished his active parenting role.[32]

Courts approached divorce from this "clean-break" perspective on financial issues as well. Many Western countries frowned upon ongoing spousal support payments, wishing instead to sever all ties between the parties through unequal property distribution or other methods to provide for the support of a spouse without imposing an ongoing obligation.[33] This clean-break standpoint on divorce was succinctly stated by the New York Court of Appeals in 1978: "Divorce dissolves the family as well as the marriage . . . ."[34]

As Parkinson notes, the clean-break view of divorce has now eroded in most Western countries.[35] This change has been brought about by a variety of factors, including fathers' desires to be more involved with their children after divorce[36] and resulting disparities in income after divorce that left many women and children in poverty.[37] Thus, fathers began suing for joint parental authority and involvement. Governments likewise sought more joint parental involvement, at least in a financial sense, to keep women and children from falling on public welfare.[38]

Research supports this change in perception—that the family does not end but can endure post-divorce, albeit in a transformed state. A study in the 1980s in the United States indicated that, at that time, "almost 60 percent of nonresident fathers saw their children less than once per month."[39] More recent studies show that "there has been a steady increase in the levels of contact between nonresident fathers and

---

31. *Id.* at 22 (citing Lerner v. Superior Court, 242 P.2d 321 (Cal. 1952); Frizzell v. Frizzell, 323 P.2d 188 (Cal. Ct. App. 1958); Griffin v. Griffin, 699 P.2d 407 (Colo. 1985); Jenks v. Jenks, 385 S.W.2d 370 (Mo. Ct. App. 1964); Boerger v. Boerger, 97 A.2d 419 (N.J. Super. Ct. Ch. Div. 1953); Bentley v. Bentley, 448 N.Y.S.2d 559 (App. Div. 1982); Majnaric v. Majnaric, 347 N.E.2d 552 (Ohio Ct. App. 1975)).

32. *Id.* at 6–7.

33. *See id.* at 25–34.

34. *Id.* at 24 (quoting Braiman v. Braiman, 378 N.E.2d 1019, 1022 (N.Y. 1978)).

35. *Id.* at 36–37.

36. *Id.* at 6–7.

37. *Id.* at 37–39.

38. *Id.* at 36–41.

39. *Id.* at 6 (citing Judith A. Seltzer, *Relationships Between Fathers and Children Who Live Apart: The Father's Role after Separation*, 53 J. MARRIAGE & FAM. 79 (1991)).

their children" from the 1970s to the present time.[40] For example, the number of fathers who had at least weekly contact rose from 18% to 31% between 1976 and 2002.[41] The numbers are even more significant when controlled for those families in which the parents had previously been married.[42] Although worldwide statistics are hard to access, studies also show growth in litigation surrounding custody disputes and parenting arrangements.[43] For example, a study of seven states in the United States shows that between 1997 and 2006 there was a 44% increase in the number of custody filings, even though the number of divorces had actually decreased nationally by 3% during that period.[44]

Finally, recent available data from Western countries shows a marked increase in joint custody and shared parenting arrangements between divorced and separated parents.[45] Not only are family laws veering away from language regarding "custody"—which presupposes an either/or choice—in favor of shared parenting formulations, but courts and governments, in addition to society as a whole, are beginning to favor new social research that indicates children are benefitted by having two actively involved parents.[46] As such, a study in Washington in 2007 and 2008 indicated that 46% of parenting plans in divorce cases afforded at least 35% of the time to the father and 16% of these orders afforded equal time to both parents.[47] A study at the same time in Arizona indicated that 15% of orders afforded equal time to both parents.[48] Data in other states show similar trends.[49] Thus, Parkinson concludes, divorce no longer brings about the dissolution of the family, but rather a transformation of the parenting relationship.[50] Both legally and practically speaking, for many divorced and separated parents, parenthood has become "indissoluble."

In light of these trends, the continued increase in the use of

---

40. *Id.* at 7 (citing Paul R. Amato, Catherine E. Meyers & Robert E. Emery, *Changes in Nonresident Father-Child Contact from 1976 to 2002*, 58 FAM. REL. 41 (2009)).

41. *Id.*

42. *Id.*

43. *Id.* at 9.

44. *Id.* (citing EXAMINING THE WORK OF STATE COURTS 29 (Robert LaFountain et al. eds., 2008)).

45. *Id.* at 9–12.

46. *Id.* at 45–56.

47. *Id.* at 95 (citing Thomas George, *Residential Time Summary Reports Filed in Washington from July 2007 March 2008*, WASH. CTS. (July 2008), http://www.courts.wa.gov/wsccr/docs/ResidentialTimeSummaryReport.pdf).

48. *Id.* at 95 (citing Jane Venohr & Rasa Kaunelis, ARIZONA CHILD SUPPORT GUIDELINES REVIEW: ANALYSIS OF CASE FILE DATA 5, ARIZ. JUD. BRANCH (2008), http://supreme.state.az.us/csgrc/Documents/2009-CaseFileRev.pdf).

49. *Id.* at 94 95.

50. *See id.* at 64 65, 278–79.

mediation in family cases makes sense. Early on, when courts sought to aid parties in achieving a clean break and moving forward with as much autonomy as possible, mediation would have had little benefit. If a court-imposed outcome allocating the children to one parent or another was inevitable, there was little motivation to discuss or negotiate the issue in a mediation setting. In addition, if the parties were meant to move forward with little to no communication about their children or otherwise, there was not much impetus to encourage such communication in the first place. However, in a post clean-break world, the benefit and necessity of helping parties achieve their own agreements through mediation or other alternate processes becomes apparent. As courts have become more open to and encouraging of joint parenting arrangements, as statutory schemes require the ongoing financial involvement of both parents (usually in terms of more than just child support), and as parties themselves are seeking to share time with their children after divorce or separation, mediation has become an indispensable forum for parties to discuss these ongoing, cooperative arrangements.

Mediation is a particularly useful forum for several reasons. As an initial matter, there are now simply more issues to discuss, many of which do not yield easy or easily foreseeable outcomes if the matter proceeds to court. As noted above, parties with children must discuss their parent-time schedule, including a determination of which nights the children will stay with each parent in light of each parent's work schedule and the children's school schedules and activities. This discussion necessitates working out daily pick-up and drop-off times, daycare, and transportation to and from parent-time, school, and other activities. Financial arrangements regarding the children can also be quite complex. Healthcare costs, daycare expenses, and fees for school and extracurricular activities all tend to be considered outside of and in addition to the standard child support payment.[51] The parties must determine which parent will provide health insurance coverage for the minor children, how they will notify each other and pay for uninsured expenses, how they will choose an appropriate daycare provider, and how they will share costs for and agree as to the extracurricular activities in which the children will participate. On an ongoing basis, parties must then make joint decisions regarding major decisions that affect the children, including decisions that impact their health, education and religious upbringing.

51. This is the case in Utah. *See* UTAH CODE ANN. §§ 78B-12-212, -214 (West 2010); Davis v. Davis, 263 P.3d 520, 528 (Utah Ct. App. 2011) (stating that if child support is inadequate, parents may agree to share the cost of extracurricular activities, school costs, and other additional expenses).

All of these arrangements require a high degree of ongoing cooperation and communication between co-parents. Combine this with the fact that many, if not most, of these parents are likely not communicating effectively at the time of separation, and the potential for numerous and ongoing post-divorce squabbles and court petitions becomes a very real problem for parties and court dockets alike. Courts are not only ill-equipped to deal with these sorts of parenting issues,[52] but their dockets would also be hard pressed to handle the influx of cases. In the end, the parties usually are best suited to determine their own parenting arrangements, provided they are given a forum in which they can discuss the issues in an effective manner. As noted above, mediation can provide this forum and has become an essential tool in resolving these types of disputes.

Not only does mediation provide a safe and confidential environment where parties can work together to develop individualized agreements that work for them, but also, as discussed in more detail below, mediation can serve as a forum in which parties can actually learn to begin communicating effectively with one another, which could help to avoid future disputes. Thus, where mediation was once little used, in a post clean-break world, mediation has become an indispensible tool in aiding parents to effectively transform their ongoing parenting relationships.

III. MEDIATOR STYLES AND THE FAMILY CASE

Although mediation can have many benefits for domestic relations cases in comparison to litigation or other forms of dispute resolution, such benefits may not always be realized. Mediation is practiced in many different forms, and mediators engage in many different behaviors and styles, all of which may come under the general definition of "mediation." As such, mediation can look very different depending on the type of case and the mediator being observed. This is due, in part, to the fact that the field of mediation is fairly unregulated. States have struggled with how to train and certify mediators, including the question of whether the field should be limited to only mediators who have certain academic degrees or professional experience.[53] In addition, mediators

52. *See supra* Part I.

53. In Utah, for example, a mediator does not need to have any specialized background or experience to be included on the Utah Court Roster of Mediators but only needs to complete a qualified 40-hour basic training and a 32-hour domestic training in addition to other limited requirements to be included on the basic roster and domestic roster. UTAH R. JUD. ADMIN. 4-510 (3)(B)–(C). By contrast, in Michigan a domestic relations mediator must be a licensed attorney, psychologist, or counselor, or meet other similar standards. MICH. CT. RULES 3.216(G).

often use different behaviors and skills depending on their own background and training, the type of case or issue being mediated, and the parties themselves. As a result, a panoply of mediator behaviors and styles has emerged. Although these styles are generally difficult to categorize, a broad division has occurred between what is termed "evaluative" versus "facilitative" mediation.[54] While recognizing that mediators do not always fall cleanly into either category and that many mediators are adept at moving between styles and using skills from many styles where appropriate, it will be useful to discuss and compare these two major categories in a broad sense.[55] For purposes of this article, this discussion will compare and contrast three areas of mediator behavior: (1) the tendency to keep the parties together or apart in the course of the mediation; (2) the use of suggestions, evaluations, and/or pressure by the mediator; and (3) the length and number of mediation sessions.

Most lawyers in the civil arena are familiar with evaluative mediation as it is most often used in large commercial cases. These cases generally involve large sums of money and parties who may not have any interest in maintaining a continuing relationship. A classic example would be a personal injury matter where the disputants are the injured party and a large insurance company and the main issue to be negotiated is how much monetary compensation the injured party should receive. Again, while noting that mediators may differ widely in their practices, the evaluative style of mediation is broadly characterized by limited communication between the parties and the application of some degree of pressure by the mediator to help push the parties to some sort of compromise settlement amount.[56] In addition, the mediation is generally expected to be completed, with or without a resolution, in one session. In many respects, the process more closely resembles a judicial settlement conference.[57]

At the most extreme end of the evaluative approach, the parties will not come face-to-face or speak directly to one another during the course

---

54. A third category, termed "transformative" mediation, will not be specifically discussed.

55. Some authors have criticized the act of labeling mediator styles, arguing that such labels are inaccurate and that any individual mediator's style is too nuanced to be easily categorized. *See, e.g.*, Jane Kidner, *The Limits of Mediator "Labels": False Debate Between "Facilitative" Versus "Evaluative" Mediator Styles*, 30 WINDSOR REV. LEGAL & SOC. ISSUES 167, 169–70 (2011). While this may be true, placing mediator styles in general categories can help us to "understand the importance and impact of mediators' styles" in a general sense. *See id.* at 169.

56. *See* SARAH R. COLE ET AL., 1 COLE, MCEWEN AND ROGERS, MEDIATION LAW § 3:3 (3d ed. 2011); Susan Nauss Exon, *The Effects That Mediator Styles Impose on Neutrality and Impartiality Requirements of Mediation*, 42 U.S.F. L. REV. 577, 592–93 (2008).

57. Exon, *supra* note 56, at 593 (citing Murray S. Levin, *The Propriety of Evaluative Mediation: Concerns About the Nature and Quality of an Evaluative Opinion*, 16 OHIO ST. J. DISP. RESOL. 268 (2001)); COLE ET AL., *supra* note 56, § 3:3.

of the mediation. While some evaluative mediators may have a joint opening session in which the mediator explains the mediation process and allows each side to present their arguments on the issues, some omit the opening session and move the parties immediately into separate rooms. Whether or not there is a joint opening or closing session, a hallmark of the evaluative process is that the parties are kept apart, in "caucus," or separate meetings, for the entirety of the mediation session.[58] The mediator shuttles back and forth between the rooms, thus avoiding any heated disputes or arguments between the parties and retaining the ability to help the parties shape their offers outside the presence of the other party in an effort to bring them towards a compromise.

The use of some degree of pressure by the mediator to push the parties toward settlement is also characteristic of the evaluative style. It is called "evaluative" mediation because the mediator generally feels free to offer an evaluation of each party's case, focusing on the weaknesses of each party's position in an effort to move them toward settlement. For this reason, evaluative mediation is most often practiced by retired judges, experienced attorneys, or other persons who have substantive expertise in the area of the dispute, which experience imbues the mediator with credibility and authority in the eyes of the parties.[59] Where possible, these mediators actively suggest compromise solutions, point out flaws in each party's case, arm twist, cajole, and otherwise persuade or pressure each side into coming to the middle to settle the matter.[60] Evaluative mediators will certainly differ in the degree or form of pressure that they feel is appropriate, but some type of evaluation or persuasion is indeed characteristic of this style of mediation. This behavior is usually expected and even welcomed by attorneys, especially those who are having a hard time "breaking the bad news" to their clients or other client control issues.

Finally, evaluative mediations are generally expected to be completed in one session. The attorneys on each side often consider this their one chance for settlement. As a result, these sessions can last all day and even into the nighttime hours if necessary. The sheer length of the mediation can help convince the parties to settle. Often at that point, the parties have invested a considerable number of hours, not just in terms of

58. COLE ET AL., *supra* note 56 ("These mediations are likely to rely more heavily on caucuses and to provide significantly less opportunity for direct party participation and for exploration of a wide range of underlying interests.").

59. Kenneth M. Roberts, *Mediating the Evaluative-Facilitative Debate: Why Both Parties Are Wrong and a Proposal for Settlement*, 39 LOY. U. CHI. L.J. 187, 195–96 (2007).

60. James J. Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of "Good Mediation"?*, 19 FLA. ST. U. L. REV. 47, 66–73 (1991).

time, but also in attorney and mediator fees. Once completely exhausted and spent, the parties may finally capitulate and sign the final settlement agreement. Ultimately, the evaluative mediator's main goal is a final agreement (and thus an end to the litigation), obtained through whatever means necessary, whether it be pressure exerted by the mediator or by the sheer passage of time and accumulation of costs.[61]

The evaluative style of mediation, when practiced as described above, stands in stark contrast to what is referred to as "facilitative" mediation. This style, too, differs broadly in the practice of individual mediators but generally encourages face-to-face communication between the parties, places a high priority on the parties' choices and self-determination in the ultimate resolutions that emerge, and may or may not continue over multiple sessions.[62] One of the most striking differences to the casual observer is that a facilitative mediation is far more likely to happen in one room. While the mediator may separate the parties for brief periods during the mediation, or even the entire mediation in cases where there are violence or safety concerns, the focus is on helping the parties communicate directly to the greatest extent possible.[63] The facilitative mediator has specialized training and uses many skills to aid parties in communicating civilly and effectively with one another, even parties who may have a long history of conflict. The mediator may have the parties set ground rules to help them discuss the issues without interrupting one another; in addition, the mediator may summarize and reframe the parties' statements in ways that are less inflammatory and more likely to help the parties hear and understand one another. In doing so, the mediator can aid the parties' communication, thus helping the parties move beyond blame and faultfinding to focus their minds on how they can together resolve the issues moving forward.[64]

Additionally, in the facilitative process there is a greater focus on party self-determination and on aiding the parties in developing their own creative options. Most facilitative mediators are hesitant, if not adamantly opposed, to offering evaluations of the parties' case or even offering active suggestions for compromise. Facilitative mediators are generally hesitant to apply any pressure at all, instead honoring and deferring to the parties' ultimate decision-making power.[65] This is not to

61. *See* Marjorie Corman Aaron, *Do's and Don'ts for Mediation Practice*, DISP. RESOL. MAG., Winter 2005, at 19, 22.

62. COLE ET AL., *supra* note 56, § 3:3.

63. *Id.* ("Facilitative mediators rely heavily on joint sessions . . . .").

64. *See* ALFINI ET AL., *supra* note 3, at 118–28.

65. Exon, *supra* note 56, at 591–92; Kidner, *supra* note 55, at 174–75; Roberts, *supra* note

say that facilitative mediation is not effective at aiding the parties in reaching settlement. Rather, this style focuses more heavily on helping the parties develop their own mutually agreeable solutions, which solutions can be broader in scope, more creative, and more tailor-made to the parties' individual situations than those solutions that may be suggested by an evaluative mediator or handed down by a court. In this process, facilitative mediators help the parties evaluate each option in realistic terms, taking into account the uncertainty and costs of litigation so that a party can determine for him or herself whether and upon what terms to settle the case.

Lastly, in the facilitative mediation style, there is generally no firm expectation that the mediation should wrap up in only one session. This flexibility is also part of honoring party self-determination. If the parties desire additional sessions, or simply want to do further research on specific issues prior to making a decision, such can happen in a facilitative framework. Based in part on the above characteristics, facilitative mediation has been characterized as a more "therapeutic" approach to resolving party disputes.[66]

There is an ongoing debate among mediators as to the appropriateness or effectiveness of different mediation styles.[67] Some even argue that so-called "evaluative" mediation should not be called "mediation" at all because it fails to achieve what these critics believe are the central goals or tenets of the mediation process.[68] A more measured approach to this debate, however, is to acknowledge the variability of styles that exist within the field of mediation while recognizing that not all styles or behaviors are appropriate or effective for all cases. It is imperative that attorneys and parties become better at matching the appropriate mediation style or mediator to each individual case. Evaluative techniques, while arguably appropriate for cases in which there is little to no relationship between the parties and the main issue is a monetary settlement, may not be appropriate for family disputes, especially those involving children. Rather, most family disputes would

---

59, at 193–94.

66. Roberts, *supra* note 59, at 193.

67. Ellen A. Waldman, *The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence*, 82 MARQ. L. REV. 155, 155 (1998) ("Of the numerous controversies surrounding mediation today, none has generated quite as much heat as the propriety of mediator evaluation.") (citing Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. REV. 1871, 1887 (1997); Joseph B. Stulberg, *Facilitative Versus Evaluation Mediator Orientations: Piercing the "Grid" Lock*, 24 FLA. ST. U. L. REV. 985, 986 (1997)).

68. *Id.* at 155 ("Advocates of a pure facilitative style maintain that evaluative mediation is oxymoronic[,]" because it fails to "encourage[] disputants' unfettered autonomy[,] . . . vitiates [mediator] neutrality and destroys the rapport necessary for truly productive interactions.").

benefit from the application of a facilitative framework that encourages direct communication, encourages the development of multiple and custom-made options, and allows the parties to choose among those options without undue pressure.

The dangers of applying an evaluative approach to a typical divorce involving the custody of children are easily observable in view of the three characteristics of the process noted above. First and foremost, if both parents are intending to stay actively involved in rearing their children, the quality of their ongoing communication is crucial. This ongoing communication is only becoming more significant as more and more parents are opting for joint parenting arrangements post-divorce. The potential effects of litigation on party communication in these cases have already been noted.[69] When seeking an alternative to the negative effects of litigation, it does not seem useful to choose an alternative that similarly limits communication between the parties. If divorcing spouses are to transform their relationship into that of co-parents who must work together to make joint decisions regarding their children, exchange the children frequently, and make frequent adjustments to ongoing parent-time schedules, these parents will require a high degree of ongoing communication and cooperation. At the same time, many of these parents, when in the throes of divorce or separation, find that their communication has broken down significantly or that they have ceased communicating altogether. Putting them into a mediation process which, at the outset, continues this pattern by keeping them separate for the duration of the mediation is a poor way to help them learn to accomplish improved communication moving into the future. Rather, mediation, when done appropriately, can become a first step and a model in teaching the parties improved communication techniques. Not only can the subject of communication itself be a topic of discussion in the course of the mediation, but also the practice of sitting down face-to-face and discussing difficult issues with the aid of a skilled mediator can teach parties how to engage each other more effectively in the future. At the very least, many parties realize it is possible to communicate effectively with each other without it becoming a shouting match. Thus, in the absence of violence or safety concerns, parties should be aided and encouraged in speaking directly with one another in the course of the mediation process.

Secondly, the use of authoritative evaluations and undue pressure should be discouraged, especially when dealing with issues regarding children in family disputes. Mediator evaluations tend to be overly

69. *Supra* Part I.

legalistic, which poses a number of potential problems for the quality of the mediation process. By first focusing on legal norms and potential court-imposed outcomes and then applying pressure on the parties to accept the same, the mediator may guide or pressure the parties to accept an outcome not far different than what might happen in court. This result is problematic in that, as discussed above, court-directed outcomes are generally less than ideal, especially when dealing with highly individualized arrangements regarding children.[70] Furthermore, family law statutes and regulations often present far from definitive rules or predictable outcomes, preferring to give judges loose guidelines to allow them wide discretion in individual cases.[71] Thus, not only could a mediator's evaluation be highly subjective and not necessarily represent how a judge would decide, but it may also foreclose or limit party-created solutions that more adequately fit the parties' individual situations, though they may diverge somewhat from the legal guidelines. Finally, relying on evaluative mediators in family cases can have the effect of limiting the field of mediation as a whole to the use of attorneys and judges as mediators, thus limiting the use of other counseling and mental health professionals who may actually be better suited to dealing with family disputes and aiding parents in their communication and issues concerning the care of their children.

The facilitative framework's greater emphasis on party self-determination rather than mediator evaluation is also important. By avoiding pushing the parties toward, or even intentionally deemphasizing, legally driven outcomes, a facilitative mediator can help the parties develop their own options and customized solutions. This method is particularly important in light of the fact that many parties, whether by reading the statutes themselves or being informed by a lawyer, already have their own ideas about what might happen in court or what they are "entitled" to under the law. These personal evaluations, often inaccurate, tend to solidify the parties in their positions, often making it difficult to move them toward agreement. Deemphasizing potential legal outcomes, which are often unknown, and refocusing the parties on solutions that meet both of their interests and circumstances tends to be more helpful in coming to mutually beneficial and satisfactory agreements. This focus lets the parties know that, ultimately, the outcome is up to them and their discretion, rather than that of a court

70. *Supra* Part I.

71. *See* UTAH CODE ANN. §§ 30-3-34, -35 (West 2011) (indicating that the court has discretion to determine which parent-time schedules are in the "best interests of the child," and establishing a rebuttable presumption that the suggested schedules provide the minimum time that should be allocated to the noncustodial parent).

or statutory scheme.

Finally, the evaluative style's tendency to try to hash out all issues in one session and the overemphasis on "agreement at all costs" is not useful in the family context. While the parties may end up with an agreement, sometimes through pressure applied by the mediator and/or sheer exhaustion, the agreement may not ultimately serve the parties well moving into the future. This is particularly true if the method of obtaining the agreement and flaws in the agreement itself engender future conflicts between the parties, leading them to court again and again on post-divorce modification actions. Rather, the emphasis should be on quality agreements that have been well considered and evaluated by the parties without undue pressure or imaginary time constraints.[72] A significant relationship that may have lasted over the course of years cannot generally be sorted out in a matter of hours or a day. In addition, custody and parent-time issues are emotionally laden. Discussing these issues for hours on end is exhausting, and it is difficult for many parents to quickly make reasoned decisions regarding these matters. A facilitative approach that relies on multiple sessions, to the extent needed, allows the parties the time needed to research information, think over potential options, and ultimately helps the parties come to wiser agreements. In addition, when working with parenting schedules, for instance, parties often need to try out different ideas to see what will work long term. It is advisable for parties to be allowed the opportunity to come back to mediation after a trial period to discuss necessary changes. Ultimately, when parties are afforded the time needed to make crucial decisions regarding their children, they will generally be more comfortable with the agreements they come to and more likely to abide by them in the future.[73]

For purposes of comparison and brevity, this discussion has focused on just the above practices in both the facilitative and evaluative styles. Those behaviors that fall generally under the facilitative rubric have many benefits for domestic relations cases over an evaluative approach. This is not to say that evaluative techniques are never appropriate for family cases—a somewhat more evaluative or "directive" approach can often be effective when discussing division of property and debts, for

72. Waldman, *supra* note 67, at 164 ("When facilitative mediators defend their mediation methodology, they stress the benefits to disputants in making their own decisions, free of coercive influences.").

73. The Family Relationship Centers ("FRCs") in Australia, which Patrick Parkinson describes in his book, advocate this model. The book notes that "ongoing family mediation is part of the philosophy of the FRCs," because "[t]here is really no such thing as final arrangements with children." Thus, parties are free to come back to mediation at critical junctures to reassess their parenting arrangements. PARKINSON, *supra* note 27, at 191–92, 200.

example. However, as discussed in more detail below, a problem arises if individuals mediating family cases are untrained in facilitative techniques, or if the attorneys employing such mediators are unaware of the existence or benefits of these techniques. In general, a greater emphasis on facilitative mediation techniques in family cases will be more effective at enhancing party communication, aiding parties in developing more customized parenting arrangements and other solutions, and, ultimately, limiting ongoing disputes between the parties.

IV. CONCERNS AND RECOMMENDATIONS FOR FUTURE USE OF FACILITATIVE MEDIATION

Despite the many benefits of facilitative mediation, the application of this style of mediation to family cases is far from uniform. There is both anecdotal and empirical evidence to suggest that the evaluative style of mediation, so prevalent in commercial cases, is being imported into family cases on a regular basis in many markets. Recent studies indicate that attorneys, who are most often the consumers of mediation services, do not favor the facilitative style. One study found "strong support for evaluative mediation techniques," indicating that "95% of attorney respondents favored mediator analysis of strengths and weaknesses of cases, 60% favored predictions about likely court outcomes, 84% approved of recommendations of a specific settlement, and 74% supported application of 'some pressure to accept a particular solution.'"[74] Other studies have found that lawyers are more likely to assess mediation as "more fair" when mediators suggest possible settlement options and when they evaluate the merits of the case,[75] and that almost 70% of lawyers preferred that mediators evaluate the merits of medical malpractice cases.[76] While these studies do not specify whether their findings are uniform for all types of cases, they support the author's observations with regard to the use of evaluative techniques in family cases in the Utah market. There is anecdotal evidence to suggest that many attorneys who practice family law have a similar preference for evaluative mediators, particularly retired judges and experienced

74. COLE ET AL., *supra* note 56, § 3:3 (citing ABA SECTION ON DISPUTE RESOLUTION, *Task Force on Improving Mediation Quality: Final Report* 14–16 (2008), http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/finaltaskforcemediation.authcheckdam.pdf).

75. Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 684–85 (2002).

76. Thomas B. Metzloff et al., *Empirical Perspectives on Mediation and Malpractice*, 60 LAW & CONTEMP. PROBS. 107, 144–45 (1997).

attorneys, among whom the evaluative style tends to predominate.[77]

Attorney selection of and preference for evaluative mediators occurs for many reasons and is having a great impact on shaping the mediation market. As noted above, attorneys are largely the consumers of mediation services. While some parties remain pro se, most who enter litigation feel compelled to hire attorneys to guide them through the process. "[T]here is every reason to expect that disputants will be greatly influenced by their attorney's advice and will have little or no role in the selection of the mediator."[78] As such, "attorneys 'increasingly are the gatekeepers to ADR [alternative dispute resolution] processes.'"[79]

The empirical research indicating attorney preference for evaluative mediation is significant and may have several explanations. In the first instance, inasmuch as mediation has risen to prominence in a relatively short timeframe, there are many attorneys who are simply unacquainted with the differences in mediator styles and competencies. In the absence of any specific training on the subject, many attorneys are apt to rely on word-of-mouth from other attorneys and flock to those mediators who have high name recognition—usually retired judges or other attorney mediators who have practiced for a long time in the same market.[80] Some researchers have found evidence to indicate that attorneys' preferred conflict management styles also influence their choice of mediators and their behavior when acting as mediators themselves.[81] Attorneys' and judges' comfort with rule-based regimes and tendencies toward analytical thinking and emotional distance all predispose them to prefer an evaluative style over a more facilitative one, which requires more flexibility, creativity, and therapeutic listening and questioning skills.[82]

---

77. Jeffrey H. Goldfien & Jennifer K. Robbennolt, *What if the Lawyers Have Their Way? An Empirical Assessment of Conflict Strategies and Attitudes Toward Mediation Styles*, 22 OHIO ST. J. ON DISP. RESOL. 277, 314 (2007) ("There is evidence that lawyers have a tendency to gravitate toward evaluative or directive techniques in mediation—both as mediators and as advocates.") (citations omitted); John Lande, *Judging Judges and Dispute Resolution Processes*, 7 NEV. L.J. 457, 465 (2007). Some researchers "argue that disputants (or, more commonly, their lawyers) prefer retired judges as mediators (who often use evaluative approaches in mediation)." *Id.*

78. Goldfien & Robbennolt, *supra* note 77, at 282–83.

79. *Id.* at 283 (alteration in original) (quoting Barbara McAdoo & Nancy Welsh, *Does ADR Really Have a Place in the Lawyers' Philosophical Map?*, 18 HAMLINE J. PUB. L. & POL'Y 376, 391 (1997)).

80. *Id.* at 286 ("As is likely the case with any effort to procure professional services, a variety of factors are likely to come into play in selecting a mediator, including considerations of cost, experience, expertise, reputation, or the recommendations of colleagues.") (citing John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839, 848–49 (1997)).

81. *Id.* at 314 (quoting Chris Guthrie, *The Lawyer's Philosophical Map and the Disputant's Perceptual Map: Impediments to Facilitative Mediation and Lawyering*, 6 HARV. NEGOT. L. REV. 145, 163–64 (2001)).

82. *Id.*

Finally, attorney preference in mediator selection may affect the behavior of the mediators themselves. Even those mediators who may be inclined toward facilitative techniques may feel some pressure to adopt more evaluative practices in order to manage relationships with lawyers who are "repeat buyers of their services."[83] For all of these reasons, the field of mediation is being skewed in favor of evaluative techniques, often without sufficient consideration of whether the style is appropriate for any given case.

Thus, although facilitative mediation can have many benefits for family cases, it appears that the style may be underappreciated and underutilized by many attorneys. In view of this problem, there are some suggested measures that can be taken in terms of both education and legislation that may help stem the evaluative tide. First and foremost, if attorneys are the gatekeepers of mediation processes, it is incumbent upon attorneys to ensure that they are well informed about the processes that they are choosing and advising their clients to use. As noted above, attorneys are often too little acquainted with the nuances of mediator style. Much could be done in terms of better educating attorneys as to their mediation options. This is already happening to some extent as law schools expand their mediation curricula and ADR programs.[84] Many law students graduating today are far better informed about mediation than law students of a decade or more ago. Law schools must ensure that they continue to offer basic mediation training to law students. Given the prevalence of mediation and other ADR processes today, some consideration should be given as to whether to make a basic mediation course mandatory for all law students. At the very least, offerings in basic mediation should ensure that students are well informed as to different mediator techniques and behaviors; they should also allow students to consider what techniques are most appropriate for different types of cases and clients.

In terms of continuing education, once out of law school, it is advisable to require a portion of new lawyer continuing legal education (CLE) training to include similar subject matter on mediation styles and techniques. Utah, for example, has a new lawyer training mentorship that a lawyer must complete during the first year of his or her practice.[85] It would be a simple matter to include mediation training as part of this requirement, at least for those attorneys who will routinely use mediation in their chosen fields. Additional CLE offerings that focus on mediation

83. *Id.* at 313; *see also* Exon, *supra* note 56, at 596.

84. *See supra* note 11.

85. UTAH R. OF JUD. ADMIN. 14-404, -808.

for practicing attorneys are routinely offered, but more focus on the differences in mediator techniques would be useful as the subject is little addressed in typical discussions regarding mediation. Inasmuch as most states' rules of professional responsibility require attorneys to "inform the[ir] client[s] of forms of dispute resolution that might constitute reasonable alternatives to litigation,"[86] it behooves every attorney whose practice involves litigation to adequately inform himself or herself as to what those alternatives really are and which forms and practices are most appropriate for a given case or client.

In addition to education, legislators and other rule-making bodies can have a significant impact on the practice of mediation. Requirements or guidelines for both mediator training and mediator behavior during mediation can help encourage the use of facilitative techniques in family cases, especially those cases that involve the custody of children. In Utah, for example, while there are strict hourly training requirements that must be completed in order to be included on the court roster of divorce mediators, there are very few guidelines regarding the content of such training. After completing a forty-hour basic mediation training and other requirements, the rules simply require an additional thirty-two-hour training in divorce mediation and a short mentorship to be included on the roster for qualified divorce mediators.[87] There are no other specific requirements regarding previous professional experience or certifications, and other than requiring some ethics content and training on domestic violence, there are few specific content requirements for training programs. In particular, there is no language regarding training on particular skills or behaviors that would be appropriate for family cases versus any other type of case.[88] Additionally, while Utah does have a requirement that all divorce mediations must be conducted by a court-qualified divorce mediator,[89] this requirement is poorly enforced and many mediators conduct divorce mediations without attaining divorce roster status. Thus, many do not receive court-approved mediation training of any type prior to practicing divorce mediation.

In comparison, some states have included far more specific mediator qualifications and training language that would favor a facilitative approach. For example, in Michigan, in order to be a domestic relations

86. MODEL RULES OF PROF'L CONDUCT R. 1.4, 2.1 cmt. 5 (2010). The ABA website indicates that 40 states have adopted the model rules with the comments. *State Adoption of the Model Rules of Professional Conduct and Comments*, AM. BAR ASS'N (May 23, 2011), http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/comments.authcheckdam.pdf.

87. UTAH R. OF JUD. ADMIN. 4-510(3)(B)-(C); *see supra* note 53.

88. UTAH R. OF JUD. ADMIN. 4-510(4)(A); *see supra* note 53.

89. UTAH CODE ANN. § 30-3-39(3) (West 2011).

mediator an individual must "be a licensed attorney, a licensed or limited licensed psychologist, a licensed professional counselor, or a licensed marriage and family therapist; [or] have a masters degree in counseling, social work, or marriage and family therapy."[90] In the alternative, an individual may instead "have a graduate degree in a behavioral science; or [] have 5 years [of] experience in family counseling."[91] This scheme shows a clear preference for mental health professionals and others with therapeutic experience to engage as mediators in family cases. In Minnesota, a mediator "who performs mediation in contested child custody matters" must have "knowledge of child development, clinical issues relating to children, the effects of marriage dissolution on children, and child custody research," among other requirements.[92] In addition, training for mediators conducting civil mediations, which is specifically termed a "facilitative" process,[93] must include training in "[c]onflict resolution and mediation theory, including causes of conflict and interest-based versus positional bargaining and models of conflict resolution," in addition to "[m]ediation skills and techniques, including information gathering skills, communication skills, problem solving skills, interaction skills, conflict management skills, negotiation techniques, caucusing, cultural and gender issues and power balancing."[94] The statutory scheme has still other training requirements for "family law facilitative neutrals," including hourly training requirements in "conflict resolution theory," "psychological issues related to separation and divorce, and family dynamics," "issues and needs of children in divorce," "family law," and "family economics."[95] The mediator qualification and training scheme in Minnesota as a whole indicates a preference for facilitative techniques, especially in family cases, and provides very specific training requirements for facilitative mediators.

Finally, in addition to more specific training and qualification requirements, some states have actually experimented with requiring a particular style of mediation for certain types of cases. The North Carolina Supreme Court's Standards of Professional Conduct for

90. MICH. CT. R.3.216(G)(1); *see supra* note 53.

91. MICH. CT. R.3.216(G)(1); *see supra* note 52.

92. MINN. STAT. ANN. § 518.619(4) (West 2011).

93. *Id.* § 114.02(a)(7). This provision defines mediation under the title of "Facilitative Processes" as "[a] forum in which a neutral third party facilitates communication between parties to promote settlement. A mediator may not impose his or her own judgment on the issues for that of the parties." So-called "evaluative" or "adjudicative" processes do not include mediation. *See id.* § 114.02(a)(1)-(6).

94. *Id.* § 114.13(a)(1)-(2).

95. *Id.* § 114.13(c).

Mediators discourages the use of evaluative mediation for all types of cases. These rules state that a "mediator shall not impose his/her opinion about the merits of the dispute or about the acceptability of any proposed option for settlement."[96] Further, a "mediator should resist giving his /her opinions about the dispute and options for settlement even when he/she is requested to do so by a party or attorney."[97] Florida has a similar provision, which states that, although a mediator may "point out possible outcomes of the case and discuss the merits of a claim or defense[,]" "[a] mediator shall not offer a personal or professional opinion as to how the court in which the case has been filed will resolve the dispute."[98] Such provisions specifically limit the use of evaluative techniques in mediation. Likewise, mediation provisions in Michigan self-consciously distinguish between "mediation," which is defined as a "facilitative" process, and "case evaluation," which is a separate ADR process utilizing more evaluative techniques.[99] Additionally, in domestic mediations, an "evaluative mediation" process is distinguished from the usual facilitative mediation process wherein parties must specifically request "evaluative mediation" if they desire it either prior to, or in the event they fail to reach full agreement during, the normal mediation process.[100] Local county rules in Cook County Illinois specify that mediation in child protective cases "typically utilizes a facilitative co-mediation model which involves: an orientation by one of the mediators; brief opening statements by each of the participants; open discussions facilitated by the mediators; and caucuses with select individuals in various combinations as needed."[101] Other states have made similar distinctions, or emphasized the use of facilitative techniques without specific reference to or requirement for a certain type of mediation.[102]

---

96. THE SUPREME COURT OF N.C., STANDARDS OF PROF'L CONDUCT FOR MEDIATORS, § V(C) (2012), *available at* http://www.nccourts.org/Courts/CRS/Councils/DRC/Documents/StandardsConduct.pdf.

97. *Id.*

98. FLA. R. FOR CERTIFIED & COURT APPOINTED MEDIATORS 10.370(c).

99. MICH. CT. R. 2.411 cmt. (The "amendments of MCR 2.403, 2.404, 2.405, 2.501, 2.502 and 2.503 are mainly to change terminology, replacing 'mediation,' as used in current MCR 2.403, with the term 'case evaluation.' 'Mediation' will be used to describe the facilitative process established in MCR 2.411, in keeping with the generally accepted usage of the term.").

100. MICH. CT. R. 3.216(I).

101. ILL. COOK COUNTY CIR. CT. R. 19A.19(iv)(b). Illinois' First Judicial Circuit Court rule 7.2, which governs that district's family program, defines mediation as "a cooperative process for resolving conflict with the assistance of a trained court appointed neutral third party, or mediator, whose role is to facilitate communication, help define issues, and assist the parties in identifying and negotiating fair solutions. Fundamental to the mediation process are principles of safety, self-determination, procedural informality, privacy and confidentiality." ILL. FIRST JUD. CIR. CT. R. 7.2. Again, the focus is on characteristics that are generally seen as part of the facilitative model of mediation.

102. *See, e.g.*, FLA. R. FOR CERTIFIED & COURT APPOINTED MEDIATORS 10.310

The above listing is not meant to give a comprehensive or specific scheme for regulating mediation in Utah or any other state. Rather, it is presented for the purpose of generating ideas to ensure that mediators and attorneys are well educated and adequately trained in facilitative techniques where appropriate. Although these types of requirements have their critics and may not guarantee that facilitative techniques are used (nor would they be desirable if applied too broadly), these, or similar provisions, can act as a teaching tool signaling to attorneys and others that there are important differences in the way mediation is practiced and that there are techniques that might be more effective in the family context. In addition, such requirements would show an intent on the part of rule-making bodies that facilitative techniques are favored and desirable in the family context for policy and other reasons. At the very least, Utah's rules governing mediator training for divorce mediators would benefit from more guidance in course content requirements that emphasize facilitative mediation skills and techniques. In conjunction with such requirements, more attention should be paid to enforcing Utah's mandate that divorcing parties use a court-qualified divorce mediator to mediate their disputes. This would ensure that any individuals holding themselves out as divorce mediators have received at least some training in facilitative techniques. Overall, more emphasis on facilitative mediation techniques in attorney education, mediator training requirements, and guidelines for mediator behavior in family mediation will help mediation realize its full potential in effectively aiding families undergoing the trauma of divorce or separation.

V. CONCLUSION

Mediation has many important benefits for family cases, but it will fail to realize them unless some uniformity of practice can be achieved for these cases. Facilitative techniques, as opposed to evaluative techniques, are far more conducive to encouraging party communication and cooperation and limiting future conflicts between co-parents. In view of attorneys' preferences for an evaluative model, measures should be taken to encourage the use of facilitative mediation in family cases.

(emphasizing self-determination of parties and stating that a "mediator shall not coerce or improperly influence any party to make a decision or unwillingly participate in a mediation"); MONT. CODE ANN. § 40-4-302 (2011) (stating that the "mediator may not use coercive measures to effect the settlement"); WASH. REV. CODE ANN. § 26.12.802 (2005) (Washington's family court pilot program distinguishes between evaluative and facilitative techniques, stating that the program should have an "emphasis on providing nonadversarial methods of dispute resolution such as a settlement conference, evaluative mediation by attorney mediators, and facilitative mediation by nonattorney mediators.").

Measures to educate attorneys as to differences in mediator styles in addition to legislation encouraging facilitative techniques for family mediators would be helpful in this regard. With a more informed bar, stricter training guidelines for mediators, and new legislation or rules governing mediation in family cases, family mediation will be better able to achieve its ideals. Most importantly, parents, who are increasingly recognizing the indissoluble nature of their parenting relationship, will be better aided in transforming that relationship and working together for the benefit of their children.