

# DIVORCE MEDIATION— LIMITING THE PROFESSION TO FAMILY/MATRIMONIAL LAWYERS

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## I. INTRODUCTION

Mediation is one of the most commonly used forms of Alternative Dispute Resolution (ADR).<sup>2</sup> It emerged as a form of ADR in the 1970s.<sup>3</sup> Mediation is conducted by a neutral, third-party who serves as a moderator for the parties involved.<sup>4</sup> While mediation may be court-mandated, as it is in many states with divorce mediation,<sup>5</sup> other parties voluntarily opt to use mediation instead of the traditional litigation system in the courts.<sup>6</sup> Another option used by some courts is adding mediation to the litigation process by using court-sponsored/annexed settlement conferences.<sup>7</sup> There are many reasons why parties choose mediation over the court system, including: the desire for a more relaxed environment and process, less formalities of law, the ability for the parties to communicate freely and participate more in the process, the cheaper cost of mediation, and its shorter duration.<sup>8</sup>

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<sup>2</sup> See Larry R. Spain, *Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation Can Be Ethically Incorporated Into the Practice of Law*, 56 BAYLOR L. REV. 141, 148 (2004).

<sup>3</sup> See Matthew Daiker, *No J.D. Required: The Critical Role and Contributions of Non-Lawyer Mediators*, 24 REV. LITIG. 499, 507 (2005) (noting that when mediation first emerged, a variety of different methods were being used).

<sup>4</sup> See Martin A. Frey, *Does ADR Offer Second Class Justice?*, 36 TULSA L.J. 727, 733 (2001).

<sup>5</sup> See *id.*

<sup>6</sup> See generally Spain, *supra* note 2; Frey, *supra* note 4.

<sup>7</sup> See Frey, *supra* note 4, at 733–34 (describing the court-sponsored/annexed settlement conference as one in which a judge, magistrate judge, or adjunct settlement judge acts as the mediator). In this process, the parties must appear at this conference, before this mediator-judge, before they can litigate their dispute in court. One of the purposes of this conference is to give the attorneys of the parties a chance to explore settlement options, and if no settlement can be reached, it serves as a sort of pre-trial conference in which timetables are set and the issues for trial are laid out.

<sup>8</sup> See generally Frey, *supra* note 4; Roger C. Clapp, *Family Law Disputes Cry Out for Mediated Settlements*, 53 DISP. RESOL. J. 34, 35 (1998) (noting that mediators are trained to help clients “reach their own terms”); Nancy Illman Meyers, *Power (Im)balance and the Failure of Impartiality in Attorney-Mediated Divorce*, 27 U. TOL. L. REV. 853, 854 (1996) (“Mediation, as an informal dispute resolution, promised to save couples considerable time, hastening, in theory,

This method of dispute resolution is an interesting way of dealing with legal issues and conflicts, because the third party mediator does not have to be a lawyer. Mediators can be from any profession, and in many states are not even required to possess a graduate degree of any kind.<sup>9</sup> However, this Note will discuss the need to have only family or matrimonial lawyers mediate divorces.

Due to the complex nature of the field of family and matrimonial law,<sup>10</sup> divorce mediation should only be practiced by family/matrimonial lawyers; non-lawyers should not be allowed to mediate divorces. Part II of this Note will discuss background information about divorce law and divorce mediation and why mediation is being used more and more frequently to resolve divorce disputes than the traditional court system. Part III will discuss why it is becoming more common for divorcing couples to use mediation, as opposed to traditional litigation, to resolve their disputes. Part IV will discuss different models of mediation that are frequently used in divorce mediation. Part V will discuss the legitimacy of mediators. Part VI will talk about qualifications for mediators and training and competency of mediators. Part VII will analyze the differences between non-lawyer and lawyer mediators in divorce mediation and conclude that lawyers are better mediators for divorce mediations.

## II. DIVORCE LAW AND DIVORCE MEDIATION: BACKGROUND

Divorce mediation has been around since the 1970s, when mediation programs, in general, first came into existence.<sup>11</sup> There are two ways a couple can enter into divorce mediation; either volunta-

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the moment at which each spouse is free to proceed with his or her life.”); Nicole Pedone, *Lawyer's Duty to Discuss Alternative Dispute Resolution in the Best Interest of the Children*, 36 FAM. & CONCILIATION CTS. REV. 65, 70 (1998) (stating that for divorce mediation, the average duration is two months, compared to one year in the courts); Daiker, *supra* note 3, at 503 (stating that there are no strict procedural rules in mediation).

<sup>9</sup> See Timothy Lohmar, Heidi Gryte & Amy Markel, *Student Projects a Survey of Domestic Mediator Qualifications and Suggestions For a Uniform Paradigm*, 1998 J. DISP. RESOL. 217, 218 (1998) (noting that not all states have a degree requirement to be a mediator, and for those that do, not all require any degree higher than a bachelor's degree).

<sup>10</sup> See Stephanie A. Henning, *A Framework for Developing Mediator Certification Programs*, 4 HARV. NEGOT. L. REV. 189 (1999) (noting that family mediation is a complex specialty).

<sup>11</sup> Joan B. Kelly, *Issues Facing the Family Mediation Field*, 1 PEPP. DISP. RESOL. L.J. 37, 37 (2000) (noting when family mediation began); Daiker, *supra* note 3, at 507 (noting when mediation programs came into existence).

rily or through court order.<sup>12</sup> Some parties opt to try mediation from the beginning in an effort to work out their dispute without using the court system at all.<sup>13</sup> In the 1990s, court-sponsored mediation became prevalent in the United States.<sup>14</sup> In certain states, courts began to institute court-mandated mediation programs for divorcing couples. In an attempt to reduce the court's docket and keep some cases out of court, judges required couples to first attempt to mediate their divorce, and if that did not resolve their disputes, then the couples could bring their cases to court.<sup>15</sup>

The goal of divorce mediation is the same as the goal of divorce in the courts, except that the process is gone about in a different way.<sup>16</sup> One of the main differences is the lack of formality of the laws and procedures in divorce mediation.<sup>17</sup> These are some of the main reasons that divorcing spouses choose to try and mediate their dispute before taking it to court.<sup>18</sup> The way the law would settle a case is not always in the best interests of the parties, and mediation helps to avoid a settlement that would be unfair to one party.<sup>19</sup> Moreover, divorce in the court system tended to escalate conflicts instead of settling them; mediation for divorce was created in order to address this problem, among many others.<sup>20</sup>

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<sup>12</sup> See Frey, *supra* note 4, at 743, 745.

<sup>13</sup> See generally Spain, *supra* note 2; Frey, *supra* note 4.

<sup>14</sup> See Alison Gerencser & Megan Kelly, *Family Mediation: An Alternative to Litigation*, 68 FLA. B.J. 49, 49 (1994) (noting that court-sponsored mediation also became prevalent in foreign countries, such as England and Canada, at this time as well).

<sup>15</sup> See Daiker, *supra* note 3, at 502 ("While disputing parties are sometimes forced to engage in court-ordered mediation, a mediating party always has the right not to settle and to explore alternative remedies.") (citation omitted).

<sup>16</sup> See Meyers, *supra* note 8, at 856 (noting that the goal of both divorce litigation and divorce mediation is to reach a settlement agreement to present to the court and giving examples of how the two processes differ; for example, "[t]he adversarial system regards divorcing spouses as opponents, while mediation casts them as joint-decision makers . . . [r]ather than delegate decision-making power to the court, or preclude direct communication between the parties [as litigation does], the mediation process emphasizes communication [and] cooperation . . .").

<sup>17</sup> See generally Frey, *supra* note 4; Clapp, *supra* note 8; Meyers, *supra* note 8, at 854 (noting that mediation minimizes the role of legal principles and instead focuses more on the relationship between the parties).

<sup>18</sup> See generally Frey, *supra* note 4; Clapp, *supra* note 8; Meyers, *supra* note 8, at 854.

<sup>19</sup> Divorces that are litigated in court tend to result in settlements that are unfair to one of the parties involved. See Gerencser & Kelly, *supra* note 14, at 49:

Mediation is an attractive alternative in family law cases because it empowers the parties to devise their own agreements which meet their discrete and specific needs.

Unlike the adjudicatory process, the emphasis is placed on establishing a workable solution — not on determining who is right or wrong and who wins or loses.

<sup>20</sup> See *id.* ("[E]scalation of conflict caused dissatisfaction with the traditional method of solving family matters through litigation. To address this dissatisfaction, lawyers and therapists offered to help their clients settle cases in a nonadversarial manner.") (citation omitted).

Divorce is different than other areas of the law. It is not like a contractual problem where the parties are finished with each other once the dispute is settled. In a divorce dispute, it is very likely that the spouses will continue to have a relationship with each other long after the divorce is granted.<sup>21</sup> Therefore, these parties need to engage in a dispute resolution process that will cater to their special needs. Mediation focuses on the personal needs and goals of the parties. By contrast, divorce in court is an adversarial process, where one party usually comes out the winner and the other as the loser,<sup>22</sup> and the settlement tends to be harder to enforce due to one party being unhappy with the resolution.<sup>23</sup>

Divorce mediation, then, has many goals, one of the most important being to increase communication between the parties.<sup>24</sup> Another goal is compromise.<sup>25</sup> Compromise is important because it allows the parties to really evaluate the other party's needs and to try and work out the best solution for both, instead of a potentially lopsided one.<sup>26</sup> There are also the typical goals of any mediation, which are to reduce the demand on judicial resources by taking some cases out of court, to reduce the cost of resolving the dispute, and to resolve the dispute in a speedier manner.<sup>27</sup>

Many times litigation can destroy a person's dignity and sense of self; mediation helps to prevent this and helps build and pre-

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<sup>21</sup> See Meyers, *supra* note 8, at 856 (noting that parents continue to share responsibilities regarding their children long after the dispute is over); see also David L. Price, *Client to Client Divorce Mediation*, 44 ORANGE COUNTY LAW. 10, 10 (2002) (noting, for example, that divorcing couples who have children will have to continue their relationship with each other in order to make decisions regarding the children); see also Gerencser & Kelly, *supra* note 14, at 49.

<sup>22</sup> Pedone, *supra* note 8, at 71 (noting that parents usually emerge from a divorce dispute as either the winner or the loser).

<sup>23</sup> See Price, *supra* note 21, at 10 ("[M]ediated settlements have a consistently higher compliance rate than litigated orders.").

<sup>24</sup> See generally Clapp, *supra* note 8 (noting that mediation helps to foster communication between the parties presently and in the future).

<sup>25</sup> See *id.* at 34 ("Lawyers who practice family law know how important *true compromise* can be. A worthy objective in most domestic disputes is to reach an early compromise settlement, for a host of honorable and obvious reasons."). The article also notes that compromise is possible in mediation, but rarely possible in litigation.

<sup>26</sup> See Gerencser & Kelly, *supra* note 14, at 49 ("Mediation . . . empowers the parties to devise their own agreements which meet their discreet and specific needs . . . the emphasis is placed on establishing a workable solution — not on determining who is right or wrong and who wins or loses."); Daiker, *supra* note 3, at 519 (noting that when the mediator is able to better explore the interests of the parties, more possible solutions emerge and there is a greater possibility of achieving a win-win solution instead of a "split-the-difference" compromise).

<sup>27</sup> See Gerencser & Kelly, *supra* note 14, at 49 (stating the common goals of mediation).

serve dignity and respect.<sup>28</sup> It is important for each party to have respect for the other and be able to walk out of the mediation with their self-worth intact. This is sometimes not possible in traditional litigation because each side is out to destroy the other in order to get what they want. Litigation does not embody the idea of compromise and since it is a win-lose situation, it is very likely that one party is going to get hurt in the end. By mediators fostering compromise and communication between the spouses, there is a better chance for the parties to try and work out their differences and come to settlements that benefit both of them as equally as possible.<sup>29</sup>

Although mediation is a less formal process than litigation, and despite the fewer formalities about rules of law and evidence, mediators must still know the substantive law of divorce in order to mediate effectively.<sup>30</sup> Communication and compromise are just one part of divorce mediation. These two things help the process go more smoothly. But, in the end, the goal is for the divorcing couple to terminate their marriage and divide up responsibilities and property, as in divorce litigation.<sup>31</sup> The mediator must be able to guide the parties through the process of divorce. In order to do this, the mediator must know about divorce and the applicable laws. Non-lawyer mediators are at a significant disadvantage to family/matrimonial lawyers in this important aspect.<sup>32</sup> Most non-lawyers have little, if any, exposure to the laws of divorce.<sup>33</sup> A di-

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<sup>28</sup> See Clapp, *supra* note 8, at 35 (“[M]ediation, [which proceeds] in a private settlement setting (where nothing presented is thereby admissible into evidence), usually builds (or at least preserves) respect and dignity, even when no agreement is finalized, so that future communication between the parties is enhanced, not cut off.”).

<sup>29</sup> See *id.* at 34 (noting that although compromise is rarely ever achieved in litigation, mediation is able to achieve compromise between the spouses).

<sup>30</sup> See Kelly, *supra* note 11, at 39–40 (noting that non-lawyer must learn the substantive law in the field of family law in order to mediate effectively).

<sup>31</sup> See Kristi N. Saylor, *Conflicts of Interest in Family Law*, 28 FAM. L.Q. 451, 461 (1994).

<sup>32</sup> See Price, *supra* note 21, at 10, 12 (noting that the role of the mediator is to be able to provide information about what the law is on certain issues and that family lawyers who are mediators have a head start on the law); Dan Trigoboff, *More States Adopting Divorce Mediation: With Nonlawyer Mediators, Some Spouses Will Get Bad Deals, Critics Claim*, 81 A.B.A. J. 32 (1995) (stating the opinion of a critic of nonlawyers serving as family mediators: “[n]onlawyer mediators ‘take a few hours of training but they’re hardly educated in the convolutions of the law. Many are incompetent. They don’t recognize the pitfalls, so obviously they fall into them. And once you make a mistake, it’s too late for the client.’”).

<sup>33</sup> See Kelly, *supra* note 11, at 39–40 (noting that non-lawyers, in order to mediate divorces must “learn substantive family and tax law as well as excellent drafting skills.”) (citation omitted); Daiker, *supra* note 3, at 512 (noting that the training received by non-lawyers is “insufficient to advise a party of their legal obligations, to reality test, or to analyze the legal merits of the cases.”) (citation omitted).

voiced lawyer deals with these laws everyday in his or her practice. Although a non-lawyer, or a lawyer that specializes in a different area of law, could learn about the substantive law of divorce, they will never achieve the level of knowledge that a divorce lawyer has.<sup>34</sup>

### III. WHY MEDIATION (AS OPPOSED TO THE TRADITIONAL COURT SYSTEM) IS USED IN DIVORCE DISPUTES

Mediation evolved due to the unhappiness with the adversarial system of litigation. Parties were unhappy with litigating issues in court with the strict formalities of the court system and the “win-lose” atmosphere fostered in court. Couples wanted to be able to have more of a say in the outcomes of their disputes, especially in divorce situations.<sup>35</sup>

Mediation is used to address many types of legal problems, and is used in various settings to produce different results. One of the benefits of mediation is that the parties can try to mediate their dispute, but if they are not happy with the outcome, or feel that the mediation is not working for them, they can end the mediation and try a different route to resolve their issues.<sup>36</sup> This is also possible because the mediator has no authority to impose an outcome on the parties.<sup>37</sup>

### IV. MODELS AND TECHNIQUES OF MEDIATION

There are three common models used in mediation: facilitative, transformative, and evaluative.<sup>38</sup> Different mediators use different models, and some models fit certain disputes better than

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<sup>34</sup> See Trigoboff, *supra* note 32 (stating the comment of a critic of mediation by nonlawyers, saying that he does not oppose the idea of divorce mediation if it is done by lawyers. He stated that “[i]nsight is not gleaned from a three-week course. It’s gleaned from practice in courts, and out.” He also noted that even inexperienced lawyers “[have] attended three years of law school and [have] met the requirement[s] for a license.”).

<sup>35</sup> See Daiker, *supra* note 3, at 525 (stating that one of the central reasons mediation programs were established was to reduce the adversarial atmosphere in dispute resolution).

<sup>36</sup> See *id.* at 502 (stating that the parties have the right not to settle their dispute and to explore other avenues of dispute resolution).

<sup>37</sup> *Id.* at 504 (noting that mediators are not like judges or arbitrators in that they have no authority to impose outcomes on the parties).

<sup>38</sup> *Id.* at 507 (noting the most *common* methods of mediation).

others. The mediator needs to find a model that will fit the parties personally, and fit the particular dispute's issues.<sup>39</sup>

a. The Facilitative Model

Facilitative mediators attempt to foster an environment in which a mutually agreeable solution can be found.<sup>40</sup> The mediator “[tries] to confirm and normalize the views of each party while exploring the underlying interests for the positions taken.”<sup>41</sup> The mediators “attempt to create an environment where the conflicting parties can reach a mutually agreeable solution.”<sup>42</sup> The mediator tries to get the parties to think of and analyze possible solutions to their problems, instead of the mediator coming up with the solutions.<sup>43</sup> This model of mediation allows the parties to have a very high level of involvement in resolving their dispute, the main idea behind it being that the mediator “is in charge of the process while the parties are in charge of the outcome.”<sup>44</sup>

b. The Transformative Model

The Transformative Model of mediation focuses on empowerment and recognition.<sup>45</sup> The mediator plays a very neutral role (even more neutral than a facilitative mediator)<sup>46</sup> and the mediator attempts to have the parties achieve enough power so they can guide themselves through the process and find their own solutions.<sup>47</sup> An important aspect of this model is that the parties must “recognize the interests, needs, and values of the other party.”<sup>48</sup> This model fosters better communication between the parties and has the goal of transforming the relationship of the parties to the

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<sup>39</sup> See *id.* at 507–11.

<sup>40</sup> See *id.* at 508.

<sup>41</sup> See Daiker, *supra* note 3, at 508.

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

<sup>43</sup> See *id.* (noting that the mediator does not offer recommendations to the parties for solutions to their issues and the mediator does not give the parties his opinions on the issues, which forces the parties to generate their own solutions).

<sup>44</sup> *Id.* at 509 (internal quotation and citation omitted).

<sup>45</sup> *Id.* (noting that this is the goal of the transformative model according to its two founders, Robert Baruch Bush and Joseph Fogler).

<sup>46</sup> See *id.* (comparing the different mediation techniques throughout this section).

<sup>47</sup> See Daiker, *supra* note 3, at 509.

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

point where they recognize each others' needs and better understand each others' interests.<sup>49</sup>

### c. The Evaluative Model

The Evaluative Model embodies the most aspects of a traditional litigation out of the three models.<sup>50</sup> It is very different from the previous two models in that the mediator takes a much more active role.<sup>51</sup> The evaluative mediator actively involves himself or herself in the discussion by giving the parties his or her opinions and advice on the issues.<sup>52</sup> This allows parties to find out what the probable outcome of their case would be if it had gone to trial or if it will have to eventually go to trial.<sup>53</sup> This method is helpful because it might give the parties an incentive to work things out in mediation if the probable result at trial is not as favorable. Knowing how the trial might come out based on strict rules of law might make the parties more agreeable to working things out with less formal rules in mediation.

### d. The Technique of Reality Testing

A popular technique used by mediators is "reality testing."<sup>54</sup> This technique is an active form of engagement by the mediator in which he or she openly analyzes the issues and what the potential problems of litigating those issues would be in court.<sup>55</sup> Not all mediators use this technique, but when it is used, it is typically used at a time when there is a standstill in the mediation and the parties

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<sup>49</sup> See *id.* (noting that the founders of the transformative model of mediation feel that "the transformative nature resulting from the mediation itself matters as much as, if not more than, the parties reaching a settlement.") (citation omitted).

<sup>50</sup> See *id.* at 510 (noting that the evaluative model of mediation is modeled after settlement conferences held in court by judges); Spain, *supra* note 2, at 148 (noting that some believe the use of evaluative mediation "can be attributed to the significant influx of neutrals from the legal profession who are unable to abandon their directive, problem-solving orientation.") (citation omitted).

<sup>51</sup> See Daiker, *supra* note 3, at 510.

<sup>52</sup> See *id.*

<sup>53</sup> See *id.* (noting that the assessment of the legal arguments by the evaluative mediator is not only helpful, but might also be necessary to resolve the dispute).

<sup>54</sup> See *id.* at 504.

<sup>55</sup> *Id.*



are having problems communicating and reaching a solution.<sup>56</sup> It is a wake-up call to the parties that they should try working together better because many of their issues might not be solved as nicely in court. Since the goals of mediation are for parties to work out their issues with their best interests in mind, rather than what the law states should happen,<sup>57</sup> reality testing is a good way to break a mediation stalemate. This is because it allows the parties to refocus their attention on trying to work out a solution after realizing the law might not go in their favor in the courtroom.

#### e. Eleventh-Hour Divorce Facilitation

Divorce mediation is typically initiated at the beginning of the dispute, far in advance of a trial date.<sup>58</sup> Another type of divorce mediation is called “eleventh-hour divorce facilitation.”<sup>59</sup> This type of mediation occurs further along in the process, usually very close to the actual trial date.<sup>60</sup> This mediation is helpful for parties and attorneys who are too emotionally involved in the dispute and are having problems settling their issues and therefore will probably end up having to go to trial.<sup>61</sup> Bringing in a neutral third-party mediator who is new to the dispute helps to bring a different perspective to the table and potentially bring a creative problem-solving technique to the table which might help the parties settle their dispute without having to go to trial.<sup>62</sup> The best type of mediator to use for eleventh-hour divorce facilitation is a mediator who uses

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<sup>56</sup> See *id.* at 505 (noting that “[this] more active mediation method[ ] [has] proven helpful in reducing unrealistic party expectations and fostering further communication.”) (citation omitted).

<sup>57</sup> See Meyers, *supra* note 8; Steven C. Bowman, *Idaho’s Decision on Divorce Mediation*, 26 IDAHO L. REV. 547 (1990). These describe how mediation allows parties to decide what is fair instead of the court and the law deciding the issues, and allows the parties to create a settlement based upon their own values and priorities.

<sup>58</sup> See Curtis J. Romanowski, *Eleventh-Hour Divorce Facilitation*, 21 NO. 9 MATRIM. STRATEGIST 3 (2003) (noting that most forms of alternative dispute resolution, including mediation, are used before engaging in litigation).

<sup>59</sup> See *id.* (noting that this is different than traditional mediation, and typically involves the clients attending with their lawyers, as opposed to mediation that is conducted early on in the process which is commonly done without lawyers present).

<sup>60</sup> See *id.*

<sup>61</sup> See *id.*

<sup>62</sup> See *id.*

the evaluative technique of mediation, which is a lawyer mediator.<sup>63</sup>

#### f. Comparison and Considerations

It is important to look at the different mediation models and techniques available to see what type of mediator would be best for a particular area of law. For the facilitative and evaluative models, one of the most important qualities of the mediator is being able to act neutral and foster communication between the parties. Although many critics of mediating attorneys claim it is difficult for a lawyer to change roles from advocating one party's side to being neutral, this is a concern that can be assuaged and resolved through training.<sup>64</sup> Non-lawyers are not necessarily more neutral by nature, so lawyers are not at a total disadvantage. Lawyers are capable of learning new methods of problem solving and new methods of communication,<sup>65</sup> which would allow them to be successful facilitative and transformative mediators.

Evaluative mediation is different from the other two models. The role of an evaluative mediator is to analyze and advise the clients on their claims, issues, and possibly on questions of law involved in their dispute.<sup>66</sup> Non-lawyer mediators cannot effectively practice evaluative mediation. They do not have the legal training in divorce law; therefore they cannot effectively advise the parties as to questions of law and how the court would decide an issue.<sup>67</sup>

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<sup>63</sup> See *id.* (stating that “[e]valuative mediators take a more direct approach [than facilitative mediators], and participate actively in the resolution of the issues. This is particularly true where the mediator is a family lawyer. Generally, evaluative mediators are the most effective in a case that is going to mediation on the 11th hour.”); *infra* Part IV.f. (in this section, the conclusion is arrived at that since lawyers are the most effective at the evaluative technique of mediation, then it follows that lawyers are the most effective at 11th hour divorce facilitation).

<sup>64</sup> See Price, *supra* note 21, at 12 (“Family law lawyers can be trained to be good mediators, and there is excellent training available.”); Kelly, *supra* note 11, at 39.

<sup>65</sup> See Price, *supra* note 21, at 12:

The ability to listen, to convey sensitivity to each parties’ feelings, to sort through the emotions, validate them, but also get to the issues to be dealt with can be difficult for attorneys used to dealing only with one client and one side of an issue. Family law lawyers can be trained to be good mediators, and there is excellent training available.

<sup>66</sup> See Daiker, *supra* note 3, at 510–11 (discussing the technique of evaluative mediation and the role of the evaluative mediator).

<sup>67</sup> See *id.* at 512 (“[W]hile the mediation training received by non-lawyers may include some education of the rights of parties participating in mediation, the training is insufficient to advise a party of their legal obligations, to reality test, or to analyze the legal merits of the cases.”) (citation omitted).

This is also a problem for lawyers who do not practice family/matrimonial law. For divorce mediation, then, evaluative mediation is best practiced by a family/matrimonial lawyer who has experience with divorce issues on a day-to-day basis.

Another problem for non-lawyers with evaluative mediation is the issue of whether providing this type of advice is considered the unauthorized practice of law.<sup>68</sup> Reality testing, then, would also be problematic for both non-lawyers and potentially lawyers who are not familiar with divorce law, because this technique requires competence in speculating how certain issues would play out in court under the law.<sup>69</sup>

## V. LEGITIMACY OF MEDIATORS

There is no uniform regulation of mediators in the United States;<sup>70</sup> each state and local jurisdiction regulates their own mediation programs however they choose.<sup>71</sup> Surprisingly, the federal Alternative Dispute Resolution Act says nothing about specific qualification requirements for mediators.<sup>72</sup> Some examples of qualifications that different programs have required are advanced degrees (such as a J.D. or Masters Degree),<sup>73</sup> training,<sup>74</sup> appren-

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<sup>68</sup> See *id.* (noting that some legal experts say that providing the type of advice in evaluative mediation is considered the practice of law, which only licensed attorneys may do).

<sup>69</sup> See *id.* (noting that non-lawyers are less effective at reality testing).

<sup>70</sup> Just because there are national standards, does not mean there is true uniform regulation of mediators; this is because the state and local rules carry great weight in the field of mediation. See Loretta W. Moore, *Lawyer Mediators: Meeting the Ethical Challenges*, 30 FAM. L.Q. 679, 681 (1996):

The most recent national standards, called *The Standards of Conduct for Mediators (Mediation Standards)* were formulated by the American Bar Association, SPIDR [Society of Professionals in Dispute Resolution], and the American Arbitration Association. These *Mediation Standards* are quite general, detailing the fundamental principles of mediation-self-determination of the parties, neutrality of the mediator, and the fairness and quintessence of the outcome. For specific guidance, lawyers must continue to look to their state laws and local court rules. (internal citations omitted).

<sup>71</sup> See Daiker, *supra* note 3, at 505–06 (“Although numerous states and municipalities impose minimum requirements for mediators, perhaps the only qualification these entities share is some form of ‘mediation training.’”) (citation omitted).

<sup>72</sup> See *id.* at 506 (noting that the Act only requires “‘each person serving as a neutral in an alternative dispute resolution process should be qualified and trained to serve as a neutral in the appropriate alternative resolution process.’”) (citation omitted).

<sup>73</sup> See Bobby Marzine Hargas, *Mediator Qualifications: The Trend Toward Professionalization*, 1997 BYU L. REV. 687, 695 (1997) (citing statutes to states that regulate child custody and

ticeship with an experienced mediator,<sup>75</sup> and certification.<sup>76</sup> Certification is a major topic of interest in the area of family law recently.<sup>77</sup> Those involved in divorce mediation (scholars, lawyers, mediators, etc.) have been analyzing whether or not certification of mediators would be beneficial to the profession and whether or not it is necessary.<sup>78</sup>

A problem in the field of divorce mediation is that many lawyers will not advise their clients to try mediation because they feel many mediators are not qualified, especially those mediators that are part of unregulated mediation programs.<sup>79</sup> The lawyer's attitude toward mediation is important, because unless the mediation is court-mandated, many clients will not choose the mediation path on their own; they will only consider mediation if their lawyer advises them to do so.<sup>80</sup> This is why family/matrimonial lawyers should be the only ones acting as divorce mediators. There is no telling when and if there will ever be a nationwide mediation certification or regulation passed, and until then, people need to be able

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visitation mediation (which are part of divorce mediation) and which require the mediator to have either a J.D. or an advanced degree).

<sup>74</sup> See Kelly, *supra* note 11, at 39 (noting that specialized training in family mediation is essential, regardless of the experience and intellect the person possesses).

<sup>75</sup> See Daiker, *supra* note 3, at 506 (noting one type of training required by some programs to be qualified to serve as a mediator).

<sup>76</sup> See Gerencser & Kelly, *supra* note 14, at 50 (noting that in Florida, the mediator does not have to be a lawyer, but must be certified. In order to be certified, the person "must have a master's degree or doctorate in social work, mental health, behavioral or social sciences, or be a physician certified to practice adult or child psychiatry; or must be an attorney; or must be a certified public accountant.").

<sup>77</sup> See, e.g., Henning, *supra* note 10; Nancy J. Foster & Joan B. Kelly, *Divorce Mediation, Who Should be Certified?*, 30 U.S.F. L. Rev. 665, 665 (1996) (noting that in the certification discussion, "there is a gnawing question as to whether those who mediate comprehensive divorces should be required to have a law degree or another professional license."); Kelly, *supra* note 11, at 41 (discussing the increased desire for certification for mediators in order to protect the public from incompetent mediators); Ellen A. Waldman, *The Challenge of Certification: How to Ensure Mediator Competence While Preserving Diversity*, 30 U.S.F. L. Rev. 723 (1996).

<sup>78</sup> See, e.g., Henning, *supra* note 10; Foster & Kelly, *supra* note 77, at 670-71 (discussing that there is a concern by those who promote that both nonlawyers and lawyers should be allowed to mediate divorces that if certification is required, it may shut out certain types of professions which could hurt the mediation field more than it helps); Kelly, *supra* note 11, at 41 (arguing that the public interest in certification is very important, but also noting that when developing certification guidelines, care must be taken not to allow certification to lead to the exclusion of non-attorneys from the practice of mediation); Waldman, *supra* note 77.

<sup>79</sup> See Henning, *supra* note 10, at 196; Linda C. Neilson, *Mediators' and Lawyers' Perceptions of Education and Training in Family Mediation*, 12 MEDIATION Q. 165, 179 (1994).

<sup>80</sup> See Henning, *supra* note 10, at 196.

to feel confident in their mediator in order for mediation to continue to grow as an alternative to traditional litigation.<sup>81</sup>

On the other hand, lawyers may be more prone to advise their clients to try mediation if the mediator is a lawyer in their specialized field. This is because the lawyer knows the type of training and the day-to-day practical experience that the mediator would have. The lawyers can feel more confident that their clients would be getting accurate legal advice. Although non-lawyers or lawyers in other practice areas can be trained in divorce law, someone who deals with divorce issues on a day-to-day basis will have better knowledge of the law than mere mediation training can provide.<sup>82</sup>

## VI. QUALIFICATIONS NECESSARY TO BE A DIVORCE MEDIATOR

Although there is no uniform regulation of mediators in the United States,<sup>83</sup> and regulation or certification of mediators is not required, many states have statutes prescribing criteria that must be in order to be a domestic mediator.<sup>84</sup> Only a minority of states have no statutory provisions regarding domestic mediator qualifications.<sup>85</sup> Some states' statutes refer to domestic mediation in general, while others specifically delineate qualifications for certain types of domestic mediation.<sup>86</sup> Since divorce is one specific type of domestic mediation, these general requirements included in state statutes are relevant here to see what states believe are qualities a mediator should possess.

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<sup>81</sup> See Teresa V. Carrey, *Credentialing For Mediators — To Be or Not to Be?*, 30 U.S.F. L. REV. 635, 638 (1996) (noting that without a system to determine the competence of a mediator, parties will tend to rely on judges and lawyers because they know that they at least have a minimal degree of competency in the law).

<sup>82</sup> See Daiker, *supra* note 3, at 512 (noting that education influences the process of mediation and that regular training for non-lawyers is insufficient in many areas involved in the mediation as compared to the training that lawyers have).

<sup>83</sup> See Donald T. Weckstein, *In Praise of Party Empowerment — And of Mediator Activism*, 33 WILLAMETTE L. REV. 501, 529 (1997) (providing evidence that ethically and regulation-wise, there are no uniform guidelines for mediators by noting that although there are rules of ethics, state and local bar associations also issue opinions to guide lawyer mediators, but that these opinions may conflict with opinions from other jurisdictions).

<sup>84</sup> See Lohmar et al., *supra* note 9, at 217 (noting that many states in which courts provide referrals to parties for mediation services have enacted legislation regarding requirements to be a mediator in order to ensure competence).

<sup>85</sup> *Id.* The term "domestic" refers to family disputes, which include visitation, custody, divorce, etc.

<sup>86</sup> See *id.* at 217–18.

A common requirement in many state statutes regarding general knowledge mandates that mediators have “basic knowledge of court procedures, family law issues, and an awareness of other resources in the community offering assistance for domestic matters.”<sup>87</sup> These basic requirements are easily met by a family lawyer, without requiring any additional training or education. In addition, family lawyers are very familiar with the local court system and family law issues, and most likely will know about community services regarding domestic issues, assuming they deal with domestic issues in their practice daily. Non-lawyers, on the other hand, would probably need to be trained in court procedures and family law issues.

There are some states that have degree requirements in order to be a mediator; some states require at minimum a bachelor’s degree, while other states require a graduate degree.<sup>88</sup> Some states require a professional license or professional certification.<sup>89</sup>

Some states may require a potential mediator to observe or participate in a mediation with an experienced mediator before becoming certified or allowed to mediate on their own.<sup>90</sup> Some states also require that the mediator have had some prior experience in fields such as family law, ADR, or counseling before becoming a mediator.<sup>91</sup>

Mediation training is a very common part of the statutory requirements.<sup>92</sup> While there is no uniformity across the states on the amount of training required, most states require between twenty and forty hours of training.<sup>93</sup> There are mediators who believe that forty hours is an insufficient amount of time to properly train a

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<sup>87</sup> See *id.* at 218, citing part of Michigan’s statute on domestic relations mediation:

A domestic relations mediator who performs mediation under this act shall have all of the following minimum qualifications: . . . (b) Knowledge of the court system of this state and the procedures used in domestic relations matters and (c) Knowledge of other resources in the community to which the parties to a domestic relations matter can be referred for assistance. (citation omitted).

<sup>88</sup> See *id.* at 218–19 (noting that Missouri “obligates its mediators to have a graduate degree in the fields of ‘psychiatry, psychology, social work, counseling, or other behavioral science substantially related to marriage and family interpersonal relationships.’”) (citation omitted).

<sup>89</sup> See *id.* at 219 (“Typically, statutes in this genre require domestic mediators to hold a license or certification as an attorney, psychiatrist, psychologist, social worker, or family counselor.”).

<sup>90</sup> See Lohmar et al., *supra* note 9, at 221.

<sup>91</sup> See *id.* at 219–20 (“The majority of states within this group require at least 3 years of the particular statutorily prescribed experience.”) (citation omitted).

<sup>92</sup> See *id.* at 220.

<sup>93</sup> See *id.*

mediator<sup>94</sup> and others who believe that the focus should not be on the number of hours of training, but instead on training the mediator on the specific issues involved in family mediation.<sup>95</sup> Family lawyers would be best at mastering the issues involved in family mediation since they already know about the substantive law involved.

Finally, continuing education is an important consideration when evaluating qualifications of mediators.<sup>96</sup> Becoming certified or qualified to do a job does not mean that a person knows everything there is to know. All it means is that they know enough to do a satisfactory job. Family law mediators would already have a head start on this continuing education if it were a requirement, since they are required as a lawyer to attend CLE (Continuing Legal Education) lectures and seminars. By attending these sessions, the lawyers are kept up to date on what is going on in the practice area. Continuing education would be an additional burden for a non-lawyer mediator since they are not currently required to attend these types of sessions for their profession (other than as a mediator).

For those states or jurisdictions that do not have any specific qualifications or certification requirements in order to be a mediator, family and matrimonial lawyers would be the best mediators for divorce mediation, because they have the most knowledge about the field before getting any training. Therefore, if no specific training is required, at least the parties can be confident that the family lawyer/mediator has sufficient and practical knowledge in the area of divorce law.

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<sup>94</sup> See *id.* at 228 (noting that mediators who were surveyed about training said that they would suggest a minimum of around 120 hours of training instead of twenty to forty).

<sup>95</sup> See *id.* at 229 (stating that it is more important to focus on “the mediator’s mastery of issues central to family mediation” rather than focusing on “training by the hour”) (citation omitted).

<sup>96</sup> See Lohmar et al., *supra* note 9, at 220–21, 230 (noting that some states require mediators to continually educate themselves, and also the authors suggest that states should require mediators to receive continuing education in order to stay on top of ever-changing issues in the law, behavioral sciences, and ADR techniques).

## VII. NON-LAWYER MEDIATORS V. FAMILY/MATRIMONIAL LAWYER MEDIATORS

Currently, divorce mediators can come from any profession,<sup>97</sup> subject to certain restrictions depending on mediation programs and state and local regulations.<sup>98</sup> Some people who have studied divorce mediation have said that the field should be composed of a mix of professionals (lawyers and non-lawyers),<sup>99</sup> whereas others argue that only lawyers should be divorce mediators.<sup>100</sup> There are also those who contend that only non-lawyers should be mediators.<sup>101</sup> In order to evaluate who makes the best divorce mediator, the pros and cons of the non-lawyer as divorce mediator and the pros and cons of the family/matrimonial lawyer as divorce mediator need to be analyzed. Although there is credible evidence that both lawyers and non-lawyers can effectively serve as divorce mediators,<sup>102</sup> this Note focuses on how family/matrimonial lawyers

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<sup>97</sup> See Forrest S. Mosten, *Institutionalization of Mediation*, 42 FAM. CT. REV. 292, 294 (2004) ("There are currently lawyer-mediators, therapist-mediators, lay-mediators, and mediators from virtually every discipline serving in governmental and private sector work."); see generally Lohmar et al., *supra* note 9.

<sup>98</sup> See generally Lohmar et al., *supra* note 9; Mosten, *supra* note 97.

<sup>99</sup> See generally Kelly, *supra* note 11 (noting that the goal for the future should be to keep divorce mediation a multidisciplinary field); see also Henning, *supra* note 10, at 208 (noting that "nonlawyers have played a significant role in the development and growth of mediation as a hybrid profession. To exclude [nonlawyers] . . . threatens the loss of the qualities that have made mediation attractive." (citation omitted). Also noting that "[i]t is one of the 'major tenets' of the mediation movement that mediation should not be just for lawyers.").

<sup>100</sup> See, e.g., Henning, *supra* note 10; Nichol M. Schoenfeld, *Turf Battles and Professional Biases: An Analysis of Mediator Qualifications In Child Custody Disputes*, 11 OHIO ST. J. ON DISP. RESOL. 469 (1996); Trigoboff, *supra* note 32 (stating the opinions of those who believe nonlawyer mediation is inappropriate for divorce and family law disputes. For many of these family law practitioners, the only mediation they would approve for family disputes would be mediation conducted by a lawyer); Foster & Kelly, *supra* note 77, at 669–70. Part of this article discussed the argument that nonlawyers should not be certified as divorce mediators:

Parties choosing divorce mediation often want to avoid lawyers and the legal process. However, what parties want and what they need are not always compatible, and it has been argued that parties need some objective measure of fairness, such as the law, which goes beyond their subjective beliefs about what is fair. In light of the need for an objective means of fairness, parties need to have competent information about the law when negotiating their decisions about their dissolution of marriage. (internal citations omitted).

<sup>101</sup> See generally Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988) (discussing generally the advantages over non-lawyer mediators, especially those in the helping professions, due to the poor training and adversarial mentality of lawyers which makes them unsuited to act as divorce mediators).

<sup>102</sup> See Henning, *supra* note 10, at 204 (noting the fact that studies have been done and have found no conclusive evidence on whether legal training and legal skills make a lawyer a more or



are *better* suited for divorce mediation than non-lawyers, and therefore should be the only ones serving as divorce mediators.

a. Pros of the Non-Lawyer as Mediator

One of the most common reasons why a couple may choose mediation to resolve their divorce instead of traditional litigation in the courts is that they want to avoid the adversarial nature of the court system.<sup>103</sup> Because of this, many couples tend to avoid choosing a lawyer as their mediator, and instead opt to use someone from a different profession, such as a psychologist.<sup>104</sup> Non-lawyer mediators seem attractive to many couples just by virtue of the fact that they are not lawyers, regardless of their profession.<sup>105</sup>

Lawyers are trained to be adversarial and to be zealous advocates of their client's wishes.<sup>106</sup> Non-lawyers, such as psychologists, receive different kinds of training, such as training in dealing with highly emotional issues.<sup>107</sup> Not only is their training different, but those in the helping professions, such as psychologists and social workers, also have a different attitude toward divorce and how to deal with the dispute, which focuses more on reducing or avoiding conflict than a lawyer would.<sup>108</sup> In general, the mindset of a non-

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less effective mediator than a non-lawyer. Instead, the studies revealed that lawyers and nonlawyers just use different styles and have different focuses when mediating.).

<sup>103</sup> See Foster & Kelly, *supra* note 77, at 670 (noting that mediation "is a valid alternative to the adversarial process.").

<sup>104</sup> See *id.* (noting that there are couples who prefer mediators with psychological expertise, as opposed to those with expertise in the legal field).

<sup>105</sup> See *id.* at 671 (1996):

Some parties in divorce mediation do not want to work with attorneys at all, and many resist consulting with or hiring an attorney to represent them . . . [p]arties have significant suspicion, dislike, and fear of both attorneys and the adversarial process. They fear that if an attorney is involved in their divorce, they will lose control of the process, the results, and the cost.

<sup>106</sup> See Daiker, *supra* note 3, at 518 (noting that legal training tends to create an adversarial mentality).

<sup>107</sup> See Foster & Kelly, *supra* note 77, at 672 (noting that certain aspects of divorce, such as custody disputes, are highly emotional, and that there are many lawyers who do not have objections to mental health professionals taking care of this aspect of mediation due to the level of emotions involved).

<sup>108</sup> See Fineman, *supra* note 101, at 756.

The helping professions' ideal process avoids or reduces conflict and is typified by mediation. Helping professionals believe that mediation, employing a therapeutic process, is within their exclusive domain because lawyers, unlike social workers, ignore the underlying causes of divorce and give little regard to the real reason for the

lawyer tends to be more neutral and less combative than that of a lawyer.<sup>109</sup>

Mediation is most effective when it takes place in an informal environment.<sup>110</sup> Non-lawyer mediators are able to provide a much more informal environment than a lawyer mediator.<sup>111</sup> This in turn helps them to mediate more effectively and allow the parties to concentrate on their problems and be free to come up with creative solutions to these problems.<sup>112</sup> By not being constrained by legal rules, and by not even knowing many legal rules, non-lawyer mediators are able to work with the issues at hand more effectively and to be better able to find a solution that is workable for both parties, instead of a solution that favors one party over the other.<sup>113</sup>

A major advantage of having a non-lawyer as mediator is the great extent to which non-lawyers allow the parties to participate in their mediation.<sup>114</sup> This gives the parties a greater feeling of control and involvement, which allows the parties to be more satisfied with the mediation and more likely to comply with the settlement agreement.<sup>115</sup>

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split-up. Therapeutic skills can facilitate acceptance of the divorce and foster a positive approach to the crisis. (internal citations and quotations omitted).

<sup>109</sup> See Daiker, *supra* note 3, at 518–19 (contrasting the adversarial and antagonistic mindset created in a lawyer from his legal training with the less combative and antagonistic mindset of a non-lawyer).

<sup>110</sup> See *id.* at 517 (noting that agreement, which contributes to the success of mediation sessions, is best when there is free-flowing communication and that an informal mediation environment can only help the free flow of communication).

<sup>111</sup> See *id.* (“[T]he very fact that they have not had legal training better enables non-lawyer mediators to remove the rigid formalities and legal rules that often infect and hinder mediation.”) (citation omitted).

<sup>112</sup> See *id.* (noting that when the rigid formalities are done away with, and the environment is more informal, “the disputing parties are free to concentrate on the issues at hand and to explore unique solutions that courts are unable to consider.”) (citation omitted).

<sup>113</sup> See *id.* at 517–18 (illustrating the benefit of the non-lawyer not being predisposed to allowing strict laws to determine the outcome of the issue. An example of a boundary dispute between neighbors is used to illustrate this: a court would normally use strict property rules to decide the dispute, with one party coming out the winner and the other party completely losing; whereas had the dispute been mediated by a non-lawyer, there is less of a probability of a one-side only win because the strict rules of property would not dominate the mediation since the mediator is not familiar with those rules, and there is a much higher probability of a solution that works for each party).

<sup>114</sup> See *id.* at 520 (noting that non-lawyer mediators tend to allow the parties to personally participate in their mediation much more than lawyer mediators who tend to communicate with the parties’ attorneys as opposed to the parties themselves).

<sup>115</sup> See Daiker, *supra* note 3, at 520–21 (discussing the effect of greater participation by the parties and the effect of this participation on feelings toward the outcome of the mediation and stating that parties who are more involved in creating their settlement agreement, as opposed to a court-ordered settlement, are more likely to comply and follow through with the agreement).

b. Cons of the Non-Lawyer as Mediator

A major hindrance to the mediator being a non-lawyer is the ability of the mediator to advise and inform the parties of their legal rights and obligations.<sup>116</sup> In any type of law proceeding, whether it be in court or in mediation, parties must be acting with informed consent, and with knowledge of their legal rights before abdicating them.<sup>117</sup> Therefore, it is important that the mediator be able to fully apprise the parties of their rights in order to have the parties' informed consent and have them understand what they are giving up or giving into when making agreements in their mediation sessions. Also, if a non-lawyer is acting as mediator, the parties could end up reaching an agreement that the court will refuse to enforce.<sup>118</sup> There is a much lower risk of wasting time and money if an experienced divorce lawyer is the mediator, because he or she will presumably know what types of agreements courts are willing to accept.<sup>119</sup>

Although non-lawyers can receive training in legal issues, this training is insufficient to raise a non-lawyer to the level of a lawyer with respect to legal knowledge.<sup>120</sup> Even if the non-lawyer is able to receive enough training to adequately be able to inform the client of his or her legal rights, non-lawyers are not allowed to analyze legal positions because that constitutes giving legal advice, which is the unauthorized practice of law.<sup>121</sup>

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<sup>116</sup> See *id.* at 511–12 (noting that legal training would be helpful in informing parties of their legal rights and obligations).

<sup>117</sup> See Henning, *supra* note 10, at 205 (noting that they are entitled to know their legal rights because “[i]f parties are not so informed [*sic*], they are exercising their autonomy without full knowledge, which interferes with the informed consent that is essential to the integrity of the mediation.”).

<sup>118</sup> See *id.* (noting that legal knowledge is important to have when creating an agreement in mediation in order for the court to enforce the agreement); see also Foster & Kelly, *supra* note 77.

<sup>119</sup> See Price, *supra* note 21, at 11 (noting that “[i]n mediations conducted by experienced family law attorneys very few of the agreements between the clients are revoked based on the advice of their attorney . . . .” This reflects the idea that family law attorneys do not revoke the agreements because they know these agreements would most likely be acceptable to a court).

<sup>120</sup> See Daiker, *supra* note 3, at 512 (stating that the training non-lawyers would receive “is insufficient to advise a party of their legal obligations, to reality test, or to analyze the legal merits of the cases.”) (citation omitted).

<sup>121</sup> See *id.* (noting that legal advice may only be given to the parties by licensed attorneys, not non-lawyers).

Another con of the non-lawyer mediator is that he or she has no drafting experience.<sup>122</sup> An effective divorce mediator must be able to draft custody and/or other agreements such as property division agreements.<sup>123</sup> If the non-lawyer mediator is unable to draft these agreements, outside counsel will have to be obtained, which will unnecessarily increase the cost of the mediation. If the mediator is an experienced family/matrimonial lawyer, there would be no extra cost for outside counsel, because he or she would be able to draft all of the agreements for the parties.

In mediation, parties have the choice of having counsel present at the mediation sessions. There is great potential in mediation for counsel to try and manipulate the proceedings.<sup>124</sup> This “subtle lawyering” is hard to recognize, especially for someone who is not involved in adversarial lawyering on a day-to-day basis, namely a non-lawyer.<sup>125</sup> Even experienced lawyers sometimes are unable to pick up on this tactic, but lawyers have the advantage over non-lawyers of seeing more of this type of conduct and thus have a better chance of recognizing it when it happens.<sup>126</sup>

Another common occurrence in divorce mediation that puts a non-lawyer mediator at a disadvantage is the necessity to level positions of strength between the parties.<sup>127</sup> Parties in divorce proceedings tend to be in unequal bargaining positions.<sup>128</sup> The goal of mediation is to have the parties communicate and to be able to reach an agreement that takes into account both parties’ goals, needs, and interests;<sup>129</sup> this is very difficult to do when one party is in a significantly greater position of strength than the other

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<sup>122</sup> See Kelly, *supra* note 11, at 39–40 (noting that non-lawyer professionals must be able to acquire excellent drafting skills to be a successful divorce mediator).

<sup>123</sup> See *id.* (noting that in order to be an effective divorce mediator, a psychologist must learn excellent drafting skills).

<sup>124</sup> See Daiker, *supra* note 3, at 513–14 (noting that when counsel for a party is present, there is potential for “subtle lawyering,” where the lawyer tries to manipulate the session in his or her client’s favor).

<sup>125</sup> *Id.* at 514 (noting that “subtle lawyering” is difficult to recognize, even for an experienced lawyer).

<sup>126</sup> See *id.* (discussing a potential problem that can arise in mediation — manipulation by attorneys representing the parties).

<sup>127</sup> *Id.* at 515–16 (noting that leveling the positions of strength between the parties in divorce mediation is a challenge facing a non-lawyer mediator).

<sup>128</sup> *Id.* (describing examples of when the parties might be in unequal bargaining positions: two people who used to be in an intimate relationship and who lived together, one person knowing more about the mediation process, or one person being more powerful by virtue of having been the more powerful one in the relationship all along).

<sup>129</sup> See generally Clapp, *supra* note 8.

party.<sup>130</sup> It can be difficult for a non-lawyer mediator to recognize these unequal positions, which could end up harming the progress of the mediation.<sup>131</sup>

A family or matrimonial lawyer, on the other hand, is exposed to these types of situations everyday, where one party has significantly higher bargaining power/position of strength than the other party, thereby being able to easier notice this problem and address it by leveling the positions of the parties.<sup>132</sup> Non-lawyer mediators have to overcome the problem of recognizing the unequal positions and then of having to dealing with it despite their inexperience.<sup>133</sup>

### c. Pros of the Family/Matrimonial Lawyer as Mediator

In order for a divorce to become finalized, orders must be submitted to the court regarding settlement of aspects such as custody and division of assets. Lawyers are allowed to draft these agreements.<sup>134</sup> The benefits of having a matrimonial lawyer as the mediator are that the agreements will be prepared by someone with experience drafting these types of agreements<sup>135</sup> and are more likely to be accepted by the parties' counsel<sup>136</sup> and the judge.<sup>137</sup>

There are many procedural aspects of mediation that parties tend to have questions about and expect the mediator to be able to answer, such as defining the process of mediation and how it works

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<sup>130</sup> See Daiker, *supra* note 3, at 515–16 (identifying unequal positions of strength as a factor that might inhibit achieving the goals of mediation if it is not recognized and adjusted); *see also* Clapp, *supra* note 8, at 35 (recognizing the need for the mediator to be able to deal with power imbalances between the parties).

<sup>131</sup> See Daiker, *supra* note 3, at 515–16:

And as Professor Marsha Freeman has observed, one party usually has influence over the other, though this control can be difficult to recognize. Professor Freeman states that a non-lawyer mediator may never catch on to the underlying posturing or be at a loss to significantly affect the results without totally derailing the mediation. (internal citations and quotations omitted).

<sup>132</sup> See *id.* at 516.

<sup>133</sup> See *id.* at 515–16 (noting that it is very difficult for nonlawyers to be able to do this).

<sup>134</sup> See Henning, *supra* note 10; Schoenfield, *supra* note 100, at 471–72 (stating that one of the main advantages of having a lawyer as the mediator is the ability to draft and review custody agreements).

<sup>135</sup> See Henning, *supra* note 10, at 205; Schoenfield, *supra* note 100.

<sup>136</sup> Price, *supra* note 21, at 11 (noting that when an experienced family lawyer conducts the mediator, “very few of the agreements between the clients are revoked based on the advice of their attorney . . .”).

<sup>137</sup> Henning, *supra* note 10.

and the types of issue that will be addressed in the mediation.<sup>138</sup> These are questions that can be answered by anyone with basic mediation training; mediators are trained in the actual process of mediation and how it works and the issues involved which depend on the type of mediation that will be conducted (which area of law is involved). The harder questions are the ones that make it necessary for divorce mediation to be conducted by family or matrimonial lawyers. Parties are likely to ask the mediator questions such as how the issues would be handled in court and what the law is on certain issues involved in their dispute.<sup>139</sup> Mediators who are non-lawyers or lawyers in other practice areas may be unable to answer questions about the relevant law regarding divorce.

Even though it is possible to receive training on the substantive law of divorce, family and matrimonial lawyers who practice divorce law on an everyday basis are more likely to be able to answer these questions coherently and accurately.<sup>140</sup> Parties can be more confident that they are receiving accurate information when they know that their mediator is well versed in the topic area and involved in practicing divorce law as their main profession.<sup>141</sup>

One of the goals of mediation is swifter resolution of the conflict.<sup>142</sup> Therefore, it is more convenient and efficient to have a family/matrimonial lawyer as the mediator since they do not have to look to outside sources for the answers to many divorce questions that the parties might have. Non-lawyers or lawyers who practice in other areas might have to do more research, and while nothing is wrong with having to do research, it is time consuming and will only unnecessarily prolong the mediation further.

As will be discussed in the next section,<sup>143</sup> some people worry about lawyers acting as mediators because of conflicts in regulations and rules for lawyers and mediators.<sup>144</sup> Family lawyers do not have to worry about this as much as lawyers who practice in other

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<sup>138</sup> Price, *supra* note 21, at 10 (discussing the common types of information parties expect to receive from a mediator in a divorce mediation).

<sup>139</sup> *Id.* (discussing the role of the mediator and what is usually expected of a mediator in a divorce mediation).

<sup>140</sup> See Trigoboff, *supra* note 32 (noting that the few hours of training provided for nonlawyer mediators is insufficient and they are not adequately trained in the substantive law, whereas lawyers have more training, including law school and everyday practice).

<sup>141</sup> See *id.* (noting that lawyer mediators have court experience and training from school).

<sup>142</sup> Gerencser & Kelly, *supra* note 14, at 49 (noting that parties wished for their disputes to be resolved more quickly, and that is one of the reasons divorce mediation emerged).

<sup>143</sup> *Infra* Part VII.d. Cons of the Family/Matrimonial Lawyer as Mediator

<sup>144</sup> See Moore, *supra* note 70, at 681 (noting the possibility of conflicts arising between obligations as a lawyer and as a mediator).

areas because the American Bar Association (ABA) adopted a specific set of standards for family lawyer mediators.<sup>145</sup> These standards provide family lawyer mediators with guidelines on how to act, which allows them to perform better professionally. It is important for all professions, especially lawyers and lawyers acting as mediators, to know the boundaries of what they can ethically and professionally do.

#### d. Cons of the Family/Matrimonial Lawyer as Mediator

The possession of a legal degree can sometimes be a hindrance to effective mediation, as opposed to being helpful.<sup>146</sup> The training received by lawyers can also be problematic in a mediation setting; lawyers are trained to be adversarial and to advocate for one side of a dispute only; they have very little experience in being a neutral third-party or taking into account the interests of the parties on both sides.<sup>147</sup> Although this is a highly valued trait in the courts, it is not very helpful in a mediation setting. The goal of mediation is

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<sup>145</sup> See Weckstein, *supra* note 83, at 528 (noting that although as of the time this article was written the ABA had not yet adopted professional conduct rules to apply to lawyer mediators, the ABA has adopted standards for family law lawyers).

<sup>146</sup> See Daiker, *supra* note 3, at 522–23 (“[L]awyers . . . because they have a legal degree, believe that they may weigh in on every legal issue they are presented with, including when they are functioning as a mediator. This practice often causes lawyer mediators to offer legal ‘advice’ when they are only permitted to offer legal ‘information.’”) (internal citations omitted). The possession of a degree may cause a lawyer mediator to go beyond his permitted duties as a mediator and slip into the role of a regular lawyer.

<sup>147</sup> Henning, *supra* note 10, at 203–04:

Training and experience as an advocate—presenting things from one perspective, arguing for one side and one outcome—may make lawyers particularly unsuited for a role as a neutral, whose chief qualities should be impartiality and the ability to problem-solve creatively. There is a risk that lawyers, trained in the law, will miss more creative solutions . . . [t]hese predispositions lead some to claim that experience as a lawyer is just as likely to be an impediment as an asset to a mediator. (internal citations omitted).

Daiker, *supra* note 3, at 518:

Lawyer mediators, even when they assume a role as a neutral, often have trouble finding common ground where both sides experience a positive result. This stems in part from the legal training that lawyer mediators receive, which often creates an adversarial mentality, where one side stands in stark contrast to the opposing side. Conversely, non-lawyer mediators may have a much less combative and antagonistic mindset. (internal citations omitted).

See Fineman, *supra* note 101, at 755 (noting that lawyers and judges tend to use a type of advocacy, called “militant tunnel-vision advocacy;” this type of training makes them poorly suited to deal with psychological aspects of divorce).

to try and resolve the dispute amicably and to try and meet the goals of both parties.<sup>148</sup>

Another disadvantage of a lawyer acting as mediator is that the parties may lose out on the ability to effectively participate in the mediation. This is a disadvantage for those who choose mediation in order to have more of a say than they would have in a traditional court setting.<sup>149</sup>

In mediation, as well as in traditional litigation, conflicts of interest must be avoided. A potential problem for a lawyer acting as mediator is being accused of creating a conflict of interest by providing legal services to both sides of the mediation dispute.<sup>150</sup> Although conflict of interest is a serious problem in the legal field, this issue can be taken care of if the lawyer mediator takes some cautionary steps to avoid falling into this problem; “[t]o reduce the risk of conflicts, the attorney-mediator should fully explain the advantages, risks, and consequences of mediation, and should present each client with a written contract containing all warnings, waivers, and informed consents.”<sup>151</sup>

Another possible problem for lawyers acting as mediators is ethical dilemmas.<sup>152</sup> The professional responsibilities and ethical rules governing lawyers are not the same as the ethical obligations of mediators.<sup>153</sup> Although mediation does not have to necessarily

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<sup>148</sup> See Pedone, *supra* note 8, at 70 (“Mediation has been championed for its power to devise agreements that meet the parents’ . . . specific needs and for its ability to encourage parties to work together, eventually leading to stable agreements.”); Daiker, *supra* note 3, at 502 (“The goal of mediation is to isolate contentious issues so that the parties can contemplate possible solutions and arrive at a consensual settlement.”) (citation omitted); Gerencser & Kelly, *supra* note 14, at 49 (noting that one of the goals of mediation is to improve the relationships between the parties).

<sup>149</sup> See Daiker, *supra* note 3, at 520 (noting that lawyer mediators tend to communicate with the parties’ lawyers instead of with the parties themselves).

<sup>150</sup> Saylors, *supra* note 31, at 461–62 (noting that because the mediator is working with both sides during the mediation, there is a potential issue of conflict of interest by providing legal services to both parties).

<sup>151</sup> See *id.* at 462. Also noting that:

[s]uch a contract should include a warning that the clients’ interests are presumed to be in conflict, and that by engaging in the mediation they are waiving any objections to the conflict of interest. The contract should also include a disclosure that the lawyer will not represent either party, or both, before the court in connection with the matter, that neither client will receive private legal advice, and that the mediation will produce an agreement which will be binding and enforceable to the extent of local law. (internal citations omitted).

<sup>152</sup> See generally Moore, *supra* note 70.

<sup>153</sup> See *id.* at 681 (noting that there is the possibility for these responsibilities and obligations to conflict and stating that if they were to conflict, lawyer mediators must reconcile these issues in order to mediate successfully, legally, and ethically).



involve the giving of legal advice, when a lawyer is acting as mediator, they may end up giving the parties legal advice, which constitutes the practice of law.<sup>154</sup> There is also the possibility that by giving legal advice, the lawyer mediator might end up losing his or her neutrality.<sup>155</sup> Although some lawyer-mediators may fall into a trap like this, a well-trained lawyer mediator will be able to overcome these issues, act professionally, and be able to do their job.<sup>156</sup>

One final disadvantage of the lawyer serving as mediator could stem from improper training as a mediator. Many lawyers, especially family lawyers, may believe that they already have all the tools they need to be mediators and the mediation can suffer if they neglect to get specialized training.<sup>157</sup>

#### e. Divorce Mediation as a Hybrid Mix of Lawyers and Non-Lawyers as Mediators

There are many people who believe that the field of divorce mediation should consist of both lawyers and non-lawyers.<sup>158</sup> Mediation emerged from a multidisciplinary background; it began

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<sup>154</sup> See *id.*, *supra* note 70, at 688–89 (discussing the paradox that arises for the lawyer mediator who gives legal advice to the parties. Since giving legal advice constitutes the practice of law, rules that govern lawyers then apply and must be followed); see also Weckstein, *supra* note 83, at 528–29 (noting the existence of Model Rule 5.7, which is entitled “Responsibilities Regarding Law-Related Services” and that “[a] lawyer who serves as a mediator (which may constitute law-related services under [Rule 5.7]), in circumstances that do not clearly separate the mediation services from his or her law practice, will subject the lawyer’s performance as a mediator to all other provisions of the Model Rules.”) (citation omitted).

<sup>155</sup> See Moore, *supra* note 70, at 688–89 (“[A]ny legal advice or evaluation the lawyer-mediator gives will most likely serve to benefit one party and disadvantage the other and, in the process, impair the mediator’s appearance of impartiality.”).

<sup>156</sup> See *id.* at 681 (noting that where the rules governing lawyers and mediators conflict, the lawyer mediator must reconcile his or her professional responsibilities as a lawyer with his or her ethical obligations as a mediator. By understanding the rules involved, this reconciliation can be achieved by a competent lawyer.)

<sup>157</sup> See Kelly, *supra* note 11, at 40:

One of the roadblocks to achieving competence as a family mediator is the belief expressed by many family law attorneys that they already know how to mediate, because they negotiate all the time, with opposing counsel. Therefore, they do not perceive the need for specialized family mediation training. This failure to understand the vast differences between these two negotiation processes leads some family law attorneys to transport the adversarial process into the family mediation. Evaluative mediation . . . is one such example. (citation omitted) (internal quotations omitted).

<sup>158</sup> See Henning, *supra* note 10, at 201 (noting that a “major tenet” of the mediation movement is that it is not just for lawyers — that it is for those of other professional backgrounds as well).

from a combination of professionals from both legal and non-legal backgrounds.<sup>159</sup> People who advocate divorce mediation as a hybrid profession do so because they believe that both lawyers and non-lawyers have important things to contribute to divorce mediation. For example, family/matrimonial lawyers know the substantive law really well and are able to draft agreements, whereas non-lawyers, such as mental health professionals have a better capacity to deal with the highly emotional aspects of a divorce.<sup>160</sup>

#### f. Comparisons and Considerations

Although divorce mediation did not grow out of the legal profession alone,<sup>161</sup> it does not mean that requirements for mediators cannot change to now require divorce mediators to be family/matrimonial lawyers. In order to determine who is best suited to be a divorce mediator, the pros and cons of each type of mediator must be weighed against each other. Those who would advocate a hybrid mix of lawyers and non-lawyers as divorce mediators would argue that the perfect mix is established by having the pros of one type balance out the cons of the other type of mediator.<sup>162</sup> Although this might seem true on the surface, when one really looks at all of the goals of divorce mediation as a whole, family/matrimonial lawyers are the most qualified mediators for this field and should be the only ones serving as divorce mediators.

Although non-lawyers bring to the table the ability to create an informal environment and engage the parties more personally into the mediation and it is harder for lawyer mediators to do this

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<sup>159</sup> *Id.* at 208 (noting that divorce mediation is a hybrid field, with an overlap of many different professions).

<sup>160</sup> See Pedone, *supra* note 8, at 70 (noting that mediation “is both proper and beneficial in the family law arena, due to the high emotional impact involved, since not only will these issues involve the usual facts and law, but now feelings are also involved.”) (citation omitted).

<sup>161</sup> See Henning, *supra* note 10.

<sup>162</sup> See Kelly, *supra* note 11, at 37–38 (noting that mediation grew out of the fields of social work, law, psychology, labor negotiations, and education and that “[t]his cross-fertilization of frameworks, substantive knowledge, and techniques, from the fields of communication, social psychology (conflict and power research), divorce and child development research, family systems theory, negotiations, and law, created much of the appeal of the family mediation process to practitioners and participants.”); see also Henning, *supra* note 10, at 208 (noting that it is important to include mediators from a variety of backgrounds because mediation is a hybrid field that emerged from a multi-disciplinary background).

because of their legal training,<sup>163</sup> it is possible for lawyers to receive other training to combat their adversarial nature.<sup>164</sup> Training is a common requirement<sup>165</sup> to be a mediator, regardless of professional background.<sup>166</sup> Therefore, the skills that a non-lawyer mediator has can be taught to a lawyer mediator through training. Substantive law is more difficult to learn than how to be a neutral mediator. Lawyers train for three years in law school before being able to practice law. But, their learning does not end there; legal knowledge is acquired on a continually ongoing basis.<sup>167</sup> Family/matrimonial law is one of the more complex areas of law,<sup>168</sup> thereby making it even harder to teach the law to unfamiliar non-lawyers. With more and more courts mandating divorce mediation, and the increasing trend for couples to voluntarily enter into divorce mediation without a court order increasing, more divorce mediators will be needed. To keep the profession of divorce mediation credible and useful, only qualified mediators should be allowed to mediate divorces. Allowing only family/matrimonial lawyers to be divorce mediators would keep the profession credible by knowing that people will not get cheated by a mediator who is not competent in the divorce law arena.

### VIII. CONCLUSION

Divorce mediation is becoming a very popular trend in the legal world. Many courts are beginning to mandate the use of mediation before bringing a divorce dispute to court and many potential

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<sup>163</sup> See Daiker, *supra* note 3, at 517 (noting that legal training makes lawyers more adversarial, as compared with non-lawyers who are less adversarial).

<sup>164</sup> See Price, *supra* note 21, at 12 ("Family law lawyers can be trained to be good mediators, and there is excellent training available.").

<sup>165</sup> See Kelly, *supra* note 11, at 40 (noting that although mediation training has been endorsed by the Academy of Family Mediators and by the Society for Professionals in Dispute Resolution (SPIDR), there are many state and local bar associations that do not have specific training requirements).

<sup>166</sup> See Henning, *supra* note 10, at 221–22 (providing an example of the type of training that might be required to be a family mediator: "[t]he Academy of Family Mediators requires its certified practitioners to attain knowledge through five hours of training in each of the following topics: the psychological issues of separation, divorce, and family dynamics; issues and needs of children in divorce; family economics; and conflict resolution theory and mediation process.") (citation omitted) (internal quotation omitted); see also Lohmar et al., *supra* note 9, at 220 ("Many states require applicants to have completed a minimum number of hours of training in order to become qualified domestic mediators.").

<sup>167</sup> For example, through Continuing Legal Education classes and through everyday work.

<sup>168</sup> Henning, *supra* note 10, at 216 (noting that family mediation is a complex specialty).

litigants are choosing to try mediation without being mandated to do so by the courts. The attraction to mediation as opposed to traditional litigation in the court system is due to many factors. Resolutions are achieved much quicker in divorce mediations than in actual court. Mediation is also much cheaper than litigation. Those who are weary of the adversarial court system can settle their divorce dispute without ever having to step foot in court. While mediation may work for some couples, for others it might not be the correct route to go. But, there is no harm in trying mediation first, because if it does not work out, the couple can always go into court afterwards and resolve their divorce dispute in the traditional manner.

Since divorce mediation emerged, the field has been practiced by all different types of professionals, including both lawyers and non-lawyers. There are pros and cons for both lawyer and non-lawyer mediators, but the pros for the family/matrimonial lawyer mediator and the cons for the non-lawyer mediator outweigh the pros for the non-lawyer mediator and the cons for the family/matrimonial lawyer mediator. By virtue of being in the field of family and/or matrimonial law, the lawyer mediator is a big step ahead of the non-lawyer mediator and of the lawyer mediator whose practice area is not family/matrimonial law. The family/matrimonial lawyer is accustomed to the types of disputes that arise from a divorce and knows how to effectively deal with these issues. They do not need training in the substantive area of the law, and the knowledge that they possess is very helpful and both time- and cost-saving to the parties involved in the mediation. And while there are certain cons for the family lawyer as divorce mediator, that are considered pros for the non-lawyer as mediator, almost all of these cons can be taken care of with training, which is required of all mediators, regardless of whether they are a lawyer or not.

There are too many law-specific aspects of a divorce to allow a divorce mediation to be conducted by someone who is not a family/matrimonial lawyer and especially for someone who is not a lawyer at all. Although divorce mediation began as a multidisciplinary field composed of lawyers and non-lawyers, now that divorce mediation is much more common and is now court-mandated in many states, divorce mediation should only be conducted by family or matrimonial lawyers.