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Mediation in Domestic Relations in the United States

Asma Saeed Hussain

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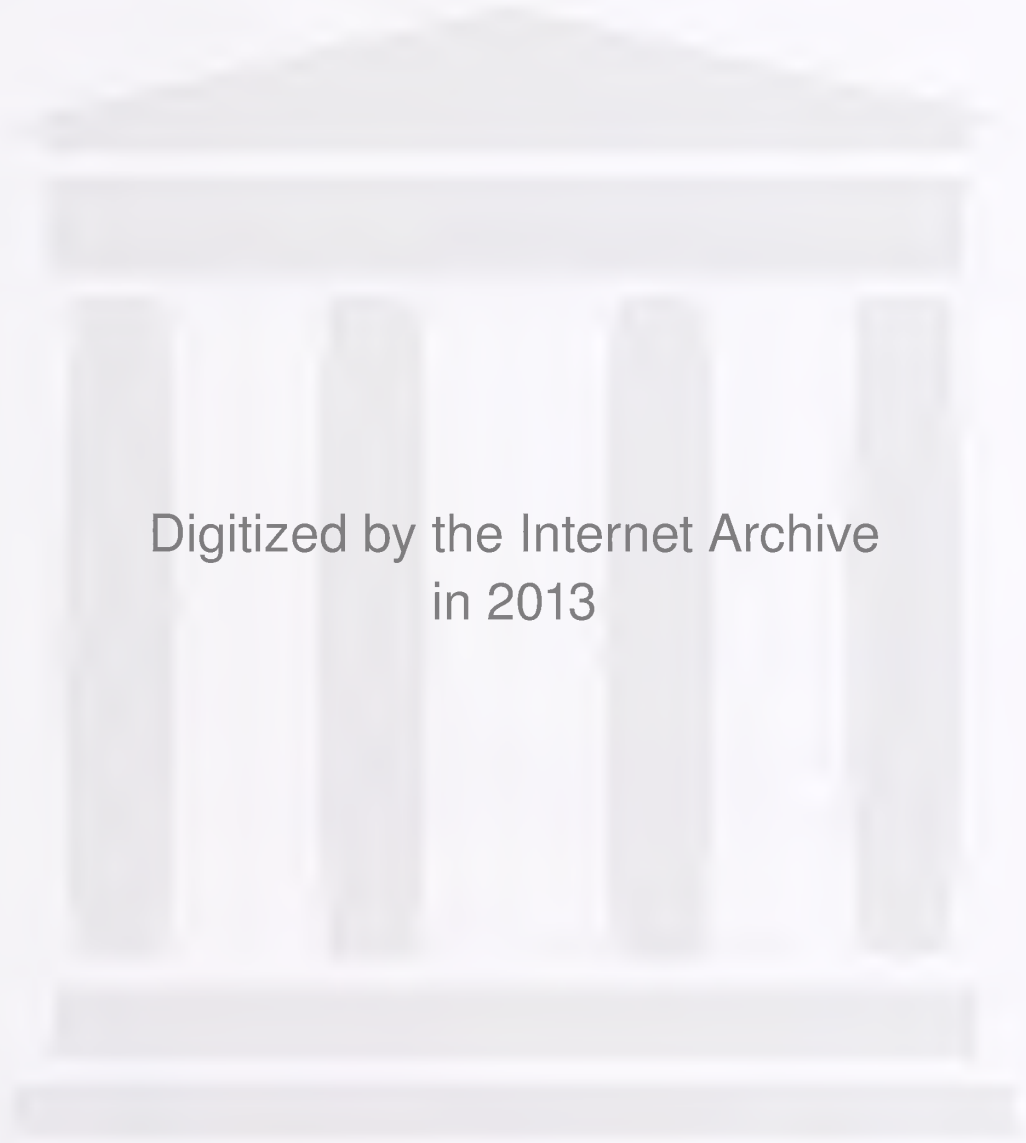

MEDIATION IN DOMESTIC RELATIONS IN THE UNITED STATES

by

ASMA SAEED HUSSAIN
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Asma Saeed Hussain

Approved:

Major Professor

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Date

Chairman, Reading Committee

7-6-98

Date

Approved:

Dean of the Graduate School

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Date

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CHAPTER I

INTRODUCTION

A) Introduction

"Discourage litigation. Persuade neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser in fees, expenses, and a waste of time. As a peacemaker the lawyer has a superior opportunity of becoming a good (person)."[1]

The term Alternative Dispute Resolution covers several dispute resolution techniques as mediation, arbitration, summary jury trials, early neutral evaluation, and minitrials as well as negotiations in general.[2]

This thesis will first discuss the advantages of mediation in contrast to the traditional court-litigation in divorce cases, which cannot satisfactorily solve the complex issues in this emotionally exceptional situation. It will then focus on the mediation process and describe the variety of alternative dispute resolution techniques mediators can use to facilitate the settlement discussions between the divorcing spouses and help them to work out a final agreement that is adapted to their individual situation.

The main part of the thesis deals with the weaknesses of mediation in cases of severe power imbalance between husband and wife and suggests limitations to mediation in certain cases. Finally it will address ethical problems with attorney

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[1] Abraham Lincoln, Notes for a law lecture, July 1, 1850, taken from Steven C. Bowman, *Idaho's Decision on Divorce Mediation*, 26 Idaho L. Rev. 547, Fn 1 referring to F. Hill, Lincoln The Lawyer, 102 (Century, 1906), reprinted in Comment, *The Mediator Lawyer: Implications for the Practice of Law*, 34 UCLA L REV 507, 507 (1986).

[2] Lynn A. Kerbeshian, *ADR: To Be Or...?*, 70 N.D.L. Rev. 381, 382 (1994).

participation in mediating divorce cases and discuss several models to reconcile the difference between lawyer - mediators and non- lawyer mediators.

The thesis will conclude with a broad discussion of a hotly disputed issue, namely the protection of confidentiality of information which parties disclose during the mediation process.

B) Historical Outline - The beginning of Mediation

Several stages of development of Alternative Dispute Resolution methods led to the mediation technique as known today in the United States. Mediation originated in labor disputes, which were settled by mediators in the U.S. but also in England[3]. The history of mediation in domestic relations however dates back to the 19th century, when churches and other social organizations as schools and communities offered mediation for spouses who were about to dissolve their relationship.[4]

However, it was not until 1930 that divorce courts more and more realized the difficulties and inefficiency of the traditional adversarial litigation system in family matters, which are highly emotional and complex. The primary alternatives to a court litigated process in divorce cases are mediation and arbitration, which promote the discussions between divorcing couples and help them to tackle post - divorce issues in a less aggressive and more cooperative way.[5] Consequently courts started to recommend mediation to divorcing couples as a voluntary and effective alternative to the costly litigation process.[6]

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[3] John S. Murray, Alan Scott Rau, Edward F. Sherman, *Processes of Dispute Resolution, The Role of Lawyers*, 295 (1996).

[4] *Id.* at 296.

[5] Daniel J. Guttman, *For Better Or Worse, Till ADR Do Us Part: Using Antenuptial Agreements to Compel Alternatives To Traditionel Adversarial Litigation,* 12 Ohio St. J. on Dispute Resolution, 175, 181 (1996).

[6] John S. Murray, Alan Scott Rau, Edward F. Sherman, *Processes of Dispute Resolution, The Role of Lawyers,* 296/297 (1996).

California was the most progressive state in the U.S. to develop statutes for mediators.[7] In 1939 it established a Conciliation Court for usually undisputed divorces in which parties got the opportunity to settle their matters in a non - adversarial way.[8] In the 1980s finally, because of the growing number of divorced couples and the liberalization of family law (no - fault - divorce) California mandated mediation for child custody matters[9]. It is no longer optional for couples to try to reach an agreement on child custody in pre - court settlements; instead it has become a presupposition for litigating this matter in court.

The development of no - fault divorce and the popularity of mediation in domestic relations were the consequence of a changed public opinion on divorce. The desire to get divorced was no longer regarded as a morally questionable decision and law should no longer serve as a punishment for the spouse who was willing to get divorced. It was time to remove condemnation, shame and guilt from divorce.[10]

The nationwide popularity of mediation as an Alternative Dispute Resolution method in divorce cases, however, came with O.J. Coogler's Family Mediation Center in Atlanta in the 1980s.[11] Coogler's book, *Structured Mediation in Divorce Settlement,*[12] was the first publication in this field and paved the way for establishing family mediation centers all over the United States.

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7 Ellen A. Waldman, *The Challenge of Certification: How to Ensure Mediator Competence while Preserving Diversity,* 30 U.S.F.L. Rev. 723 (1996).

8 John S. Murray, Alan Scott Rau, Edward F. Sherman, *Processes of Dispute Resolution, the Role of Lawyers,* 296\297 (1996).

9 *Id.*

10 Nancy Illman Meyers, *Power (Im) Balance And The Failure Of Impartiality In Attorney - Mediated Divorce,* 27 U.Tol.L. Rev. 853, 854 (1996); Judith M. Wolf, *Sex, Lies and Divorce Mediation*, 33 - Nov Ariz. Att'y 25 (1996).

11 Ellen Waldman, *The Role of Legal Norms In Divorce Mediation, An Argument for Inclusion,* Va. J. Soc. Pol'y & L. 87 (1993).

12 O.J. Coogler, *Structured Mediation in Divorce Settlement* (1978).

At present almost all states in the United States offer a public mediation service that is closely connected to family courts, which ask divorcing couples to attend mediation sessions either in voluntary or in mandatory form.[13] The creative approach of Coogler was to bring divorcing parties together and to help them to reach an agreement under the Marital Mediation Rules – guidelines that were substantially developed from revised statutes that some states had established after the reform of the divorce law.[14] Coogler's rules, which offered a guideline for settlement of material issues, like marital property and maintenance, have been basically adopted from existing domestic relations statutes.[15]

C) The traditional adversarial model and mediation - a comparative analysis

The traditional litigation model views divorcing couples "as opponents", whereas in the mediation process they are "joint - decision makers".[16] Attorneys have the role of "soldiers of fortune" in a war about money, property and custody, whereas the mediator rather has the role of a diplomat.[17] The mediation process promotes communication between spouses and encourages cooperation instead of

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13 Susan Meyers et al., *Court Sponsored Mediation of Divorce, Custody, Visitation, and Support: Resolving Policy Issues*, St. Ct. J., Winter 1989, 25, Fn 6; Ellen Waldman, *The Role of Legal Norms In Divorce Mediation, An Argument for Inclusion,* Va. J. Soc. Pol'y & L. 87, 88 (1993).

14 Ellen Waldman, *The Role of Legal Norms In Divorce Mediation, An Argument for Inclusion,* Va. J. Soc. Pol'y & L. 87, 93 (1993).

15 Doris Jonas Freed & Timothy B. Walker, *Family Law in the Fifty States: An Overview,* 8 Fam. L. Q. 369, 393 (1985); Ellen Waldman, *The Role of Legal Norms In Divorce Mediation, An Argument for Inclusion,* Va. J. Soc. Pol'y & L. 87, 94 (1993).

16 Nancy Illman Meyers, *Power (Im) Balance And The Failure Of Impartiality In Attorney - Mediated Divorce,* 27 U. Tol. L. Rev. 853, 856 (1996).

17 *Id.* at 855; KENNETH KRESSEL, *THE PROCESS OF DIVORCE: HOW PROFESSIONALS AND COUPLES NEGOTIATE SETTLEMENTS,* 143 (1985).

confrontation.[18] The adversary process is rather a "zero - sum game, one plus for you, is one minus for me" and vice versa. [19] The mediation process however is based on the assumption that the marital pie can be enlarged: One plus for me can be one plus for you, too. For example, in child custody cases, in which parents mediate cooperatively and reach a fair solution, they benefit from this fair outcome which promotes the child's well - being. In the mediation process the mediator assumes the parties take their lives into their own hands and are able to tailor an arrangement that fits their personal needs and allows creative problem solving.

In the traditional adversarial model (litigation or adversarial negotiation) attorneys are the key figures, who communicate with each other and negotiate a settlement rather than the parties[20] who are affected by the outcome. In the litigation process the judge makes a decision which is based on "normative predictions" [21] and not adapted to the special needs and circumstances of divorcing couples. Because of litigation's adversarial nature the lawyers focus on winning the game rather than trying to reach a long – lasting solution that is fair and satisfying to both parties.[22] This "winner gets all" and "loser loses all" mentality, based on maximizing their own victory is likely to enforce the polarization between the divorcing partners, which are already in a hostile and non - cooperative mood by nature of the divorce situation, with which they

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18 *Id* at 855; Daniel J. Guttman, *For Better or Worse, Till ADR Do Us Part: Using Antenuptial Agreements To Compel Alternatives To Traditional Adversarial Litigation*, 12 Ohio St. on Disp. Resol. 175, 176 (1996); Lynn A. Kerbeshian, *ADR: To Be Or...?*, 70 N.D.L.Rev. 381, 386 (1994); Thomas J. Stipanowich, *The Quiet Revolution comes to Kentucky: A Case Study in Community Mediation,* 81 Ky. L. J. 855, 870 (1993).

19 Carrie Menkel – Meadow, *Toward Another View Of Legal Negotiation: The Structure of Problem Solving,* UCLA Law Review, Vol. 31:754, 765 (1984).

20 Nancy Illman Meyers, *Power (Im) Balance And The Failure Of Impartiality In Attorney - Mediated Divorce,* 27 U.Tol.L. Rev. 853, 856 (1996).

21 *Id.* at 855; Steven C. Bowman, *Idaho's Decision on Divorce Mediation,* 26 IDAHO L. REV. 547, 549 - 550 (1990).

22 Carrie Menkel – Meadow, *Toward Another View Of Legal Negotiation: The Structure of Problem Solving*, UCLA Law Review, Vol. 31: 754, 765 (1984).

are confronted.[23] The basic assumption behind this adversarial concept is that both divorcing parties have exactly the same goals, values, and interests and that a conflict over the division of these limited resources is inevitable.[24]

When negotiating or litigating the issues of divorcing couples, lawyers and parties in the adversarial model typically focus on one issue at a time, e.g., child custody, maintenance or property division; consequently they fail to master polycentric issues with more than one problem to solve. Because of the underlying assumption of the adversarial model, that the resources of the divorcing couple are limited, parties tend to take extreme positions during the negotiations, which leads to a polarization of positions, with no opportunity to develop creative alternatives to complex issues. The adversarial model intimidates parties, who principally would like to cooperate, by its aggressive and one - sided approach to find a solution. Consequently, it leads to increased hostility and suspicion and fails to result in an agreement satisfactory to both parties.[25] In divorce litigation, the strict rules of civil procedure, which narrow the issues and outcome, are a far too formal approach to issues as complex as dissolving a marriage, and therefore increase the social distance between judge and litigating spouses.[26]

The mediator, on the other hand, accepts that individuals have their own values and standards which influence their decision.[27] It is not the task and the aim of the mediator to reconcile adverse positions; rather the mediator promotes the discussion and

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[23] Terenia Urban Guill, *A Framework For Understanding And Using ADR,* 71 Tul. L. Rev. 1313, 1323 (1997).

[24] Carrie Menkel – Meadow, *Toward Another View Of Legal Negotiation: The Structure of Problem Solving,* UCLA Law Review, Vol. 31:754, 765 (1984).

[25] *Id.*

[26] Nancy Illman Meyers, *Power (Im) Balance And The Failure Of Impartiality In Attorney- Mediated Divorce,* 27 U. Tol. L. Rev. 853, 856 -58 (1996).

[27] *Id.*

agreement by creating a "supportive atmosphere", "classifying issues", "helping to define the areas of conflict" and "helping to develop options for mutual agreement together with the parties."[28]

Consequently, he rarely considers the conflict presented to him as a zero - sum game, but rather as a conflict with an open end, a pie that is not yet fixed, but can be enlarged for both parties.[29] The mediator is not the representative of the mediating parties, in contrast to an attorney in the traditional adversarial negotiation or litigation. Because in the adversary process spouses in a divorce situation are considered to be enemies or at least opponents, this process increases hostility between them.[30] Mediation, however focuses on the future relationship between the divorced couple and a possible reconciliation rather than on the past behavior and misunderstandings between the spouses. The role of emotions in mediation is considerably more important than in the litigation process. Mediation is a "measure of emotional catharsis", [31] which is prohibited by the "procedural formality" of the traditional litigation process. In mediation the primary goal is to reconcile emotions by providing a "therapeutic approach" to the settlement discussions, however, without being marriage counseling.[32] Emotions can be expressed and parties are invited to work on personnel issues and problems in their relationship.[33] Non - legal issues like promotion of communication[34] among family members are important goals in family mediation, which should help to

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[28] *Id.* at 856; Stephen K. Erickson, *ADR And Family Law*, 12 Hamline J. Pub. L. & Pol'y 5, 6 (1991).

[29] *Id.*; John S. Murray, Alan Scott Rau, Edward F. Sherman, *Processes Of Dispute Resolution*, 117 (1996).

[30] *Id.*

[31] Nancy Illman Meyers, *Power (Im) Balance And The Failure Of Impartiality In Attorney – Mediated Divorce,* 27 U. Tol. L. Rev. 853, 857 (1996).

[32] John S. Murray, Alan Scott Rau, Edward F. Sherman, *Processes Of Dispute Resolution*, 297 (1996).

[33] *Id.*

[34] *Id.*

resolve the complex issues of child custody, property division, maintenance, alimony, and future relationship in a smooth and open way, as well as help to tailor a flexible and individual solution to the parties' needs.[35]

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[35] Joel M. Douglas, Lynn J. Maier, *Bringing The Parties Apart,* 49 SEP Disp.Resol.J. 29 (1994); Carrie Menkel -Meadow, *When Dispute Resolution Begets Disputes Of Its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. Rev. 1871, 1872 (1997).

CHAPTER II

THE MEDIATION PROCESS

The mediator starts the discussion between the divorcing couple with introductory remarks on the alternative character of mediation,[36] the goals of this process, the procedure to reach a settlement, the confidentiality issues and the costs of this dispute resolution process. Furthermore he familiarizes the parties with basic rules, which have to be accepted by them throughout the discussions and ensures his neutrality as a mediator.[37]

The parties begin the mediation process by defining and describing the post – marital problems from their personal point of view and finally by setting an agenda to solve these issues.[38] The task of the mediator at the beginning of the mediation session is to gather all information necessary for him to provide the parties with the assistance they need to reach an agreement. The discussions cover the reasons for the conflict, and provide an opportunity to vent anger and frustration;[39] in addition the mediator helps the parties to develop options to resolve complex post - marital issues.

After defining the issues parties analyze individual and common interests and needs, as well as the issues that can be resolved by a compromise and others that they have to give up[40] or at least postpone. However, the divorcing couple alone decides

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[36] John S. Murray, Alan S. Rau, & Edward F. Sherman, *Dispute Resolution: Materials for Continuing Legal Education III – 7 – 9* (National Institute for Dispute Resolution (1991)).

[37] John S. Murray, Alan Scott Rau, Edward F. Sherman, *Processes Of Dispute Resolution* (1996).

[38] *Id.* at 302.

[39] *Id.*

[40] *Id.*

which issues are most important to each of them and discusses whether they can commit to resolve these issues with mutual agreement.[41]

The next step for them is to develop problem - solving options, discover alternatives and possibilities of compromises to complex issues. The role of the mediator at this stage is to facilitate the discussion, smooth difficulties in communication, encourage the parties to lead a fair debate about the issues at hand, and to assist them in bargaining and negotiating a final agreement by exploring the pros and cons of the various solutions.[42] The mediator can profit from his experience with other divorce cases and may help the couple to discover their individual resources to tailor a solution, which is responsive to their individual needs.[43]

A) Two common settlement approaches in mediation

1) The Building Block Approach to Settlement[44]

The Building Block Approach to Settlement requires the mediator to fraction a complex main issue, such as, post – marital situation into several sub - issues, which are more manageable, e.g., child custody, maintenance, alimony, property division, future relationship etc. The couple tries to find a solution to each sub - issue and in case they cannot reach an agreement, the mediator simply draws their attention to another sub – issue which might be easier to deal with.

The reason why mediators frequently use this settlement approach is that the couple can handle complex issues easier when they are separated and disconnected to prevent a blockade in discussion.[45] Especially when mediating parties can participate in

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41 *Id.*

42 *Id.*

43 *Id.*

44 Christopher W. Moore, *The Mediation Process,* 204 – 206, 212 – 216 (1986).

45 Moore, *id.* at 306.

dividing the main issue and defining the sub – issues, the mediator can promote their understanding of the settlement process and therefore more commitment to it.[46]

At the end, the several sub – issues or "blocks" to which parties could find a solution are summed up to a whole settlement agreement, which can be drafted and executed.

2) The Agreement in Principle Approach to Settlement[47]

The second common approach to settlement, the Agreement in Principle Approach to Settlement requires the mediator to define bargaining principles and general rules that will help to shape the final outcome in mediation.[48] Instead of fractioning a main issue into smaller sub - issues, the mediator first draws parties' attention to their similarities and common interests, rather than their differences and later works on the specific details.[49] Especially in cases, in which divorcing couples have the same basic values and goals, the focus on similarities can be effective and promote a successful discussion.[50]

By using several settlement procedures during the mediation process the mediator can include the parties into the process of option generation and separate this stage of discussion from the final stage of evaluating the agreement reached by the parties.[51] The advantage of this separation is that parties have to open their minds and reflect all options and alternatives that could settle their conflict without blocking the mediation process by hasty judgments and rejections of alternatives.[52]

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46 *Id.*

47 *Id.* at 307.

48 *Id.*

49 *Id.*

50 *Id.*

51 *Id.* at 307 /308.

52 *Id.* at 308.

B) Common Techniques for Option - Generation

The most frequent techniques mediators use to generate options for settlement are Brainstorming, Developing Hypothetical Plausible Scenarios, and Using Outside Resources.[53]

1) Brainstorming

Brainstorming is a settlement procedure in which the mediator presents an unsolved issue as a problem and asks the couple how a possible solution to this problem might look.[54] The parties then suggest a variety of alternative options, modify and develop the suggestions of the other spouse and try to work on these ideas as long as they can agree to a compromise solution.[55]

Brainstorming can be conducted in a joint session of both spouses, but also in caucus with the mediator if both spouses don't trust each other or feel insecure to openly discuss alternatives that they first only want to communicate to the mediator in order not to disclose too much information[56] to the other spouse.

2) Developing Hypothetical Plausible Scenarios

By developing hypothetical scenarios the mediator asks the spouses to suggest options for settlement by describing possible hypothetical scenarios and what the solution of a problem in practice could look like.[57] Parties have to analyze in detail, what the "procedural, substantive, and psychological outcome" of the process would be and how the spouses could master the way from the status – quo to the hypothetical situation.[58] After the parties have brainstormed about the effects of each scenario, they

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53 *Id.* at 308/ 09.

54 *Id.* at 308.

55 *Id.*

56 *Id.* at 308.

57 *Id.* at 309.

58 *Id.*

begin to evaluate these outcomes by listing the pros and cons as well as possible alternatives to improve this outcome.[59]

3) Using Outside Resources

Using outside resources is another successful means to focus parties' attention on possible settlement options. Parties in mediation are often frustrated by the subjective view of their problems and lack objective data to generate more options.[60] The mediator in these situations can encourage them to use outside resources, e.g., information by other experts, special literature on divorce issues, or simply to get in touch with other divorced couples who had the same financial, custodial, or other post – divorce issues to solve.[61] Attorneys, tax experts, and governmental officials can provide additional useful information.[62] Eventually the mediator assists the parties in writing the final agreement and often helps them in executing it.[63]

In summary, the mediator is a neutral third party and not an advocate of particular interests and goals. Therefore, he can help to change the usual social pattern in a conflict relationship. He persuades the parties to give up extreme and unrealistic goals and to cooperate instead of confronting the other side with extreme positions and therefore provoke severe opposition and hostility.[64]

Unlike a litigated process or an attorney - led negotiation, the mediator leaves the final decision on the outcome up to the parties, who have to adapt their lives to the conditions agreed upon in the final settlement.

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[59] *Id.*

[60] *Id.*

[61] *Id.* at 310.

[62] *Id.*

[63] *Id.* at 309/310.

[64] *Id.* at 307.

CHAPTER III

POWER IMBALANCE AND THE FEMINIST CRITIQUE

A) Power Imbalance in Divorce Cases – a General Overview

Inequality in bargaining power normally leads to inequality in the mediated outcome.[65] The central question, however, is to analyze what is power and how it is defined.

"Power held by one spouse in relation to the other represents the ability to control resources, or the access to resources, that the other (spouse) wants or needs."[66] Or in other words power is "the possibility of imposing one's will upon the behavior of other persons".[67] Feminist critique on the mediation process in divorce cases is based on two potential dangers for the less powerful spouse. The first is to be taken advantage of by the intellectually, economically or emotionally stronger spouse,[68] the second is the danger of a strong and prejudiced mediator who defines his role as a neutral third party but dominates the mediation process and imposes his own values on the spouse with less self confidence, which according to these feminist critiques often happens to be the female spouse.[69]

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65 Scott Hughes, *Elizabeth's Story: Exploring Power Imbalance In Divorce Mediation,* 8 Geo.J. Legal Ethics 553, 579 (1995).

66 Hughes, *id.* at 574.

67 MAX WEBER, *LAW IN ECONOMY AND SOCIETY* 323 (1954).

68 Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution,* Wis. L. Rev. 1359, 1398 (1985); Ellen Waldman, *The Role of Legal Norms In Divorce Mediation: An Argument for Inclusion,* 1Va.J.Soc. Pol'y & L. 87, 116 (1993).

69 Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking,* 101 Harv. L. Rev. 727, 765 – 68 (1988); Trina Grillo, *The Mediation Alternative:*

The different powers in a relationship are intellectual, physical, emotional and procedural power.[70] Emotional power in a relationship means "the ability to control the other partner through threats or intimidation".[71] The more the threatened spouse is unwilling to withdraw from the destructive influence and dissolve the relationship, the more significant the threats and intimidation can become. The procedural power, according to feminist critics, enables the more powerful spouse to control the process, the length of a dispute, and its settlement[72] by deciding on the evaluations and the timing of the settlement process.[73]

The focus of the mediator in this situation of serious inequality in bargaining power, therefore, must be on the possibilities to smooth these differences and prevent seriously unequal outcomes. In the traditional adversarial process this issue is resolved by procedural principles and rules, e.g., "the burden of proof" and the "rules of evidence", which can shift and balance power between unequally powerful parties.[74]

The ways the neutral third party can effectively tackle this issue is to explain the advantages of the mediation process to empower the weaker spouse.[75] The mediation process with its open discussions but firm ground rules of mutual respect is especially

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Process Dangers for Women, 100 Yale L. J. 1545,1560 – 62, 1569-72 (1991); Eric Yamamoto, *ADR: Where Have The Critics Gone?* 36 Santa Clara L. Rev. 1055, 1058-60 (1996).

70 John R. P. French, Jr. & Bertram Raven, *The Basis of Social Power,* in STUDIES IN SOCIAL POWER 150, 155 – 56 (1959); John M. Haynes, *DIVORCE MEDIATION: A PRACTICAL GUIDE FOR THERAPISTS AND COUNSELORS* 49, 277, 291 – 93 (1981); Scott Hughes, *Elizabeth's Story: Exploring Power Imbalance In Divorce Mediation,* 8 Geo. J. Legal Ethics 553, 575 (1995).

71 Scott Hughes, *id.* at 573.

72 *Id.* at 575.

73 *Id.*

74 Terenia Urban Guill, *A Framework For Understanding And Using ADR,* 71 Tul. L. Rev. 1313, 1325 (1997).

75 Albie M. Davis, Richard A. Salem, *Dealing with Power Imbalances in the Mediation of Interpersonal Disputes,* MEDIATION QUARTERLY, No. 6 at 17-26 (December 1984) (10 pp.), taken from American Bar Association, Family Law Section Special Committee on Dispute Resolution, *DIVORCE MEDIATION: READINGS,* 171, 172 ABA (1985).

suited in cases of severe power imbalance.[76] In these situations the mediator can model the behavior he expects from the couple by listening carefully, treating each spouse with respect, and considering carefully of what each party has to contribute to the mediation process. This atmosphere empowers the spouse with a lower self esteem by respecting her dignity.[77] Furthermore the mediator has to remind the parties to use their own intellectual capacity in evaluating the quality of an agreement, rather than relying on the judgment of a lawyer or the judge in a court - litigation. Thereby the weaker spouse is challenged to overcome her feelings of powerlessness and to take responsibility for her own future.[78]

The power imbalance between spouses, however, does not necessarily lead to an unequal outcome, as long as the more powerful spouse is ready to refrain from taking advantage of the weaker spouse.[79] The motives for this altruism of the stronger spouse might be the interest in a good long - term relationship with his former partner and his children. In this situation the power imbalance is not reflected in the final outcome of mediation, but remains merely theoretical.[80]

In the majority of cases, however, the more powerful spouse exerts his influence during the mediation process and finally reaches a settlement which mirrors the inequality in bargaining power.[81] The more equally the power between spouses is divided, the more balanced the mediation process and final outcome will be.

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[76] *Id.*

[77] *Id.*

[78] *Id* at 173.

[79] Scott Hughes, *Elizabeth's Story: Exploring Power Imbalances In Divorce Mediation,* 8 Geo. J. Legal Ethics, 553, 578 (1995).

[80] *Id.* at 578.

[81] *Id.;* Kelly Rowe, *The Limits Of The Neighborhood Justice Center: Why Domestic Violence Cases Should Not Be Mediated,* Emory L. J. 855, 861 – 63 (1985).

Consequently the lack of a mechanism in mediation to balance the unequal power normally disfavors the weaker spouse.[82]

To sum up the critique of feminist on the mediation process in divorce cases, these authors assume that Alternative Dispute Resolution is a fair alternative to the traditional adversarial model only if the bargaining power of a divorcing couple is balanced.[83] The traditional divorce litigation, with its strict application of procedural and substantive law, is considered to be a highly necessary protection of the weaker spouse who can easily be taken advantage of in the mediation process, in which the neutral third party normally does not interfere in the discussion of the divorcing couple, in order to enable them to make their own decisions. In a litigated process, according to these feminist commentators, the weaker spouse would get full protection by her attorney, who is necessarily partial and supportive, as well as the protection of a neutral judge who makes his decision based on a normative basis, and not according to the expression of power by the stronger spouse.

B) The Challenges in Mediating Divorce Cases

Commentators often assume that divorcing couples are not able to tackle effectively the emotional, financial, and psychological problems linked with dissolving a marriage.[84] The protection of one's own interests demands a personality which is trained to deal with problems in an effective and sovereign way. However, as a "result of abuse, inexperience",[85] and consequentially lack of self confidence, it is often hard for women to define and protect own positions and interests.

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[82] *Id.* at 577; Gary L. Welton, *Power Balancing,* 105, 106 (1991).

[83] Steven C. Bowman, *Idaho's Decision On Divorce Mediation*, 26 Idaho L. Rev. 547, 559 (1989).

[84] Scott H. Hughes, *Elizabeth's Story: Exploring Power Imbalances in Divorce Mediation,* 8 Geo. J. Legal Ethics 553, 562-63 (1995).

[85] Terenia Urban Guill, *A Framework For Understanding And Using ADR,* 71 Tul. L. Rev. 1313, 1323 – 26 (1997).

1) Mediation in divorce cases and the inequality of bargaining power

Well – known feminists like **Trina Grillo** and **Penelope Bryan** assume that mediation is by its nature a threat to divorcing women, because it is based on the assumption that both parties start the mediation discussions with equal power whereas in reality women are permanently disfavored and therefore have no equal bargaining power.[86] Women, according to these feminist critics of divorce mediation, are disadvantaged against their male spouses psychologically, socially, legally, and financially.[87]

a) Psychologically women in divorce situations are considered to be depressive, less convinced to reach a solution to their post - marital problems by a tough and adversarial conflict resolution, and more likely to compromise because of a lower self esteem.[88] Frequently, due to this lower self esteem women in general tend to "fear achieving" their aims and especially abused wives are emotionally completely dependent on their husbands.[89]

b) Other reasons why women are frequently disfavored in negotiations are differences in education, traditional roles,[90] and socialization.[91]

Intellectual skills and educational background determine the outcome of a negotiation. Even if normally men and women tend to marry a partner with a similar educational background, in marriages with unequally educated spouses men usually

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86 Carol Lefcourt, *Women, Mediation and Family Law,* 18 Clearinghouse Rev. 267-69 (1984); Ellen Waldman, *The Role Of Legal Norms In Divorce Mediation: An Argument For Inclusion,* 1 Va.J.Soc. Pol'y & L. 87, 115 - 19 (1993).

87 Penelope Bryan, *The Coercion of Women In Divorce Settlement Negotiation,* Denver University Law Review, Vol. 74:4, 931 (1997).

88 *Id.* at 933.

89 *Id.*

90 *Id.;* M. Laurie Leitch, *The Politics of Compromise: A Feminist Perspective on Mediation*, Mediation Q., Winter 1986/ Spring 1987, 163, 169; Ellen Waldman, *The Role Of Legal Norms In Divorce Mediation: An Argument For Inclusion,* 1 Va.J.Soc.Pol'y & L. 87, 116 -19 (1993).

91 Carol Gilligan, *In a Different Voice* 10-11 (1982); Ellen Waldman, *id.* at 117.

have a superior education.[92] A higher education of the male spouse, especially in a relevant field like legal rights and tax law, which is accessible for lawyers, consultants and business people in general, but also basic educational training in negotiation, accessible for salesperson, provides the spouse with a higher chance to get the bigger piece of the marital pie.

Because men have greater access to tangible resources, they normally win the negotiation game during mediation.[93] The probable emotional and psychological dependency of husbands on their wives, which provides the female spouse with a certain security of loyalty during the marriage loses its relevancy during the divorce process. The power which might have been equal during marriage in a divorce situation clearly shifts to the husband who can dominate the ex - spouse in negotiating divorce issues.

Socially women are caregivers to children and husband; that means they have from the very beginning of their marriage the tasks of self - sacrifice and service.[94] Women normally try to approach conflicts by cooperation and communication;[95] they define their role more from exterior circumstances, e.g., the relations to other family members, friends and colleges etc., than by an interior definition of themselves as individuals.[96] Their bargaining pattern, therefore, is basically cooperative and altruistic,

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92 Penelope E. Bryan, *Killing Us Softly: Divorce Mediation And The Politics Of Power,* 40 Buff. L. Rev. 441, 451 (1992).

93 *Id.*

94 Penelope E. Bryan, *The Coercion Of Women in Divorce Settlement Negotiation,* Denver University Law Review, Vol. 74: 4, 931, 933 (1997); M. Laurie Leitch, *The Politics of Compromise: A Feminist Perspective on Mediation,* Mediation Q., Winter 1986/Spring 1987, 163, 169; Ellen Waldman, *The Role Of Legal Norms In Divorce Mediation: An Argument For Inclusion,* 1Va. J. Soc. Pol'y & L. 87, 118 - 20 (1993).

95 Deborah M. Kolb & Gloria G. Coolidge, *Her Place at the Table: A Consideration of Gender Issues in Negotiation,* in *Negotiation Theory and Practice,* 261, 266 (1991); Ellen Waldman, *id.* at 115.

96 Deborah M. Kolb & Gloria G. Coolidge, *id.* at 264 (1991).

focused more on joint than on "individual success",[97] whereas men tend to be "individualistic" and "competitive",[98] demanding and assertive.

Another reason why women in a divorce situation are handicapped to freely negotiate is their strong desire to keep custody of their children, which for most mothers, used to the role of caregivers, is of vital importance for their self definition.[99]

c) Some feminists even argue that divorce law, in special circumstances where child custody is at stake, can become unfavorable for every woman trying to reach a fair outcome in a negotiation with her spouse. The custody law of most states, with its vague "best interest of the child" criteria for deciding custody issues and the lack of sufficient and detailed statutes in child custody law, leaves a lot of space for clever husbands to pursue high financial interests in a divorce situation and, advised by their legal experts, to offer an exchange of child custody for more financial concessions by their wives.[100]

Furthermore the indefinite statutes on spousal maintenance law and the rhetoric of "formal equality" of men and women in domestic relations pervades divorce law and in the end favors men, who usually are already in a better economic position.[101] Since normally it is the husband who earns the money or at least has a higher income than his wife, frequently only he can afford to pay those highly specialized and excellent lawyers who are best familiar with the advantages and deficiencies of family law and know how to achieve the best financial outcome in a divorce negotiation.

d) Another reason why most women need a partial counselor in divorce situations - an attorney and not a mediator - is their lack of financial know how and

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97 Kolb & Coolidge, *id.* at 269.

98 Ellen Waldman, *The Role of Legal Norms in Divorce Mediation: An Argument for Inclusion,* 1 Va. J. Soc. Pol'y & L. 87, 116 - 20 (1993).

99 Penelope E. Bryan, *The Coercion of Women In Divorce Negotiation,* Denver University Law Review, Vol. 74: 4, 931, 933 (1997).

100 *Id.*

101 *Id.*

consequently their long term financial interests.[102] Especially among low income spouses, the financial responsibility and control of the income are often in the hand of the male spouse and more than in any other social group women in low - income marriages lack basic financial knowledge. Therefore they can be easily taken advantage of in negotiations with their husbands.[103]

e) Closely related to the lack of financial knowledge is the fact that most women still lack financial independence due to their lives as housewives.[104] Financially wives and children are often dependent on the male spouse. Due to the frequent lack of a personal income, women are often ready to agree to whatever settlement suggestion the divorcing husband makes. Frequently women in lower social classes lack financial security which would enable them to wait till a satisfactory outcome is reached.[105] This phenomenon of "starving out"[106] the female spouse to reach a better financial outcome for the husband is widespread in divorce negotiation and intensifies the difficulties wives have to deal with during the mediation session.

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[102] Ellen Waldman, *The Role Of Legal Norms In Divorce Mediation: An Argument For Inclusion,* 1 Va. J. Soc. Pol'y & L. 87, 118 - 19 (1993).

[103] Desmond Ellis, *Marital Conflict Mediation and Post – Separation Wife Abuse,* 8 Law & Ineq. J. 317 (1990).

[104] M. Laurie Leitch, *The Politics of Compromise: A Feminist Perspective on Mediation,* Mediation Q. Winter 1986/ Spring 1987, at 163, 169.

[105] Penelope E. Bryan, *The Coercion Of Women in Divorce Negotiation,* Denver University Law Review, Vol. 74:4, 931 (1997); Howard S. Erlanger et al., *Participation and Flexibility in Informal Processes: Cautions from the Divorce Context*, 21 Law & Soc'y Rev. 585, 597 (1987); Ellen Waldman, *The Role Of Legal Norms In Divorce Mediation: An Argument for Inclusion,* 1 Va. J. Soc. Pol'y L. 87, 119 (1993).

[106] Penelope E. Bryan, *The Coercion Of Women in Divorce Negotation,* Denver University Law Review, Vol. 74:4, 931 (1997).

2) Power as the access to tangible and intangible resources

Power, according to some feminist critics of mediation, is defined as the access to tangible and intangible resources.[107] According to them, men usually have the better access to tangible resources as income, education, and profession,[108] as well as intangible resources as status and dominance, resulting from a higher self confidence and self respect.[109]

a) Tangible Resources

The most important tangible resource of "income" enables the spouse with the higher income to hire better experts who can tailor an agreement adapted to his interests only. This spouse has the opportunity to very easily maximize his part of the marital pie by diminishing the one of the other spouse. The general rule is that in the U.S. men have by far higher incomes than women, performing the same job, and that 50% of the married women have no earnings at all.[110]

Finally, because most women define themselves as mothers and caretakers, they often fall victims to "strategic bargaining".[111] Husbands, who are aware of the fact that the majority of women would willingly give up other interests if they can keep child custody, often take advantage of their ex wives and successfully reduce the amount of child support and maintenance for "giving up" joint or sole custody.[112] This scenario, according to feminists who refuse mediation, is unlikely to occur in the traditional

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107 Penelope E. Bryan, *Killing Us Softly: Divorce Mediation And The Politics Of Power,* 40 Buff. L. Rev. 441, 447 (1992).

108 *Id.*

109 *Id.*

110 *Id.* at 447; JEAN LIPMAN-BLUMEN, GENDER ROLES AND POWER 163 (1984).

111 Melvin A. Eisenberg, *Private Ordering Through Negotiation: Dispute – Settlement and Rulemaking,* 89 Harv. L. Rev. 637, 638 (1976); Ellen Waldman, *The Role of Legal Norms in Divorce Mediation: An Argument for Inclusionm,* Va. J. Soc. Pol'y & L. 87, 119 – 20 (1993).

112 Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed,* 3 Yale L. & Pol'y Rev. 168, 177(1984).

adversarial process in which the "best interest of the child" is frequently interpreted as child custody for the mother.[113] Another group of feminists, however, refuses this criteria as vague and disfavoring women.[114]

b) Intangible Resources

Among the intangible resources "status and dominance" as positive resources and

"depression" as negative resource have the most powerful impact on the divorce negotiation itself and finally on the fairness of the outcome.[115]

Some intangible factors differ in each individual marriage, but not between husbands and wives in general, e.g., intangible factors like guilt because of being the one who suggested the break up, lack of self esteem caused by rejection and "risk aversiveness".[116] However, other intangible factors do differ between husbands and wives in general and determine the final outcome of the divorce negotiation.

The male spouse usually has a higher status than his wife, defined by a better educational and financial background as well as his gender and "occupational rank".[117] The higher the status of a spouse, the more persuasive his authority,[118] and the better and more subtle his influence on the weaker spouse.[119] Women's usually lower status in society is partly due to the smaller percentage of women with a profession other than

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113 Lenore E. Walker, *The Battered Woman Syndrome Study, in The Dark Side of Families: Current Family Violence Research* 31, 42 – 43 (1983).

114 *See* page 21/22 of this thesis.

115 Penelope E. Bryan, *Killing Us Softly: Divorce Mediation And The Politics Of Power,* 40 Buff. L. Rev. 441, 457 – 71 (1992).

116 *Id.*

117 Id.

118 Alice H. Eagly, *Gender and Social Influence*, 38 AM. PSYCHOLOGIST 971 (1983).

119 Eagly, *id.*

housewife. The higher status of men enables them to exert more influence on the negotiation partner while women with their lesser status, are highly influenceable.[120]

The impact of status on male behavior is measurable in the extent of dominant behavior toward the other spouse. On the other hand, the usually lower status of women can cause a certain inferiority and inhibited reaction to an intimidating and dominant approach of the male spouse during divorce negotiations. [121]

Depression: The lower status of women, combined with depression in a divorce situation leads to a lower self esteem in negotiation. This lack of proper self confidence finally can lead to the acceptance of an highly one - sided and unfavorable outcome, just to maintain peace in an ongoing relationship.[122] The sources of gaining more self esteem and respect (society, profession and environment) normally are outside of women's daily life as housewives, except for the case, when women voluntarily prefer to stay at home with their families.[123]

Reward Expectation: The higher the goals and the aspiration the better normally the outcome of a negotiation.[124] Women, because of their lower status in society and the "structural and ideological inequality"[125] are generally satisfied with less than their husbands. One reason for this lack of high aspiration is the tendency of women, based

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[120] Penelope E. Bryan, *Killing Us Softly: Divorce Mediation And The Politics Of Power,* 40 Buff. L. Rev. 441, 462 (1992); Alice H. Eagly, *Sex Differences in Influenceability*, 85 PSYCHOL. BULL. 86 - 89 (1978); Alice H. Eagly, *Gender and Social Influence,* 38 AM. PSYCHOLOGIST 971, 976 – 977 (1983).

[121] Penelope E. Bryan, *id.* at 465.

[122] *Id.* at 466 – 75.

[123] *Id* at 471 – 77.

[124] *Id.* at 475 - 77.

[125] John F. Stolte, *The Legitimation of Structural Inequality: Reformulation and Test of the Self – Evaluation Argument,* 48 AM. SOC. REV. 331, 332 (1983).

on their social background, to compare themselves with other women rather than to men.[126]

Fear of achievement: Although the mediation process by its nature is rather cooperative than competitive, the distribution of limited resources can lead to a highly competitive bargaining situation.[127] In these situations, according to research, women tend to be more accommodative, and compromising; instead of using the same competitive negotiation strategies as their husbands, they tend to apply "facilitative" dispute resolution styles.[128]

In the majority of cases the more powerful spouse exerts his influence during the mediation process and finally reaches a settlement which mirrors the inequality in the bargaining power between ex – husband and wife,[129] whereas equal power usually leads to fair outcomes.[130]

In contrast to the feminists who criticize the present divorce law for its disadvantages for women,[131] another group of feminist focuses on the character of mediation as informal and outside of the traditional adversarial court litigation.[132] The lack of an objective standard and control, measured by legal norms and secured by the

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126 Penelope E. Bryan, *id.* at 475 - 77; Brenda Major & Blythe Forcey, *Social Comparisons and Pay Evaluations: Preferences for Same- Sex and Same – Job Wage Comparison,* 21 J. EXPERIMENTAL SOC. PSYCHOL. 393, 394 (1985).

127 Penelope E. Bryan, *id.* at 477 - 81; Barbara J. Lonsdorf, *Coercion: A Factor Affecting Women's Inferior Outcome in Divorce,* 3 AM. J. FAM. L. 281, 288 (1989).

128 Penelope E. Bryan, *id.* at 478 - 81; Leonard H. Chusmir & Joan Mills, *Gender Differences in Conflict Resolution Styles of Managers: At Work and At Home,* 20 SEX ROLES 149, 151 (1989).

129 Scott H. Hughes, *Elizabeth's Story: Exploring Power Imbalances In Divorce Mediation,* 8 Geo. J. Legal Ethics 553, 580 - 81 (1995).

130 *Id.*; Gary L. Welton, *Paties in Conflict: Their Characteristics and Perceptions, in COMMUNITY MEDIATION: A HANDBOOK FOR PRACTITIONERS AND RESEARCHERS,* 105, 107 (1991).

131 *See* above, page 21/22 of this thesis.

132 Ellen Waldman, *The Role of Legal Norms in Divorce Mediation: An Argument For Inclusion,* 1 Va. J. Soc. Pol'y & L. 87, 115 (1993).

judge as a neutral and powerful third person, would enable the stronger spouse to take advantage of the unequal bargaining power.[133]

These feminists argue that the mediation technique is contradictory to women's rights and the acknowledgment of the "no - fault" divorce:[134] While judges and legislators have recognized the importance of women's rights and are more and more willing to change substantial and procedural law in favor of them, mediation by its nature as an alternative dispute resolution method sets women outside of this safety mechanism and intentionally disregards the parameters of legal rules.[135]

C) Power Imbalance and Mediation as a Solution

The feminist critique of mediation is justified in cases of severe abuse only. Frequently, mediation as the cooperative and reconciling approach to solve problems helps to smooth power imbalances by promoting communication of ideas and helping parties to reduce tension and hostility.[136] The procedural guidelines, which are often provided for the mediation process itself, can help to equalize the bargaining position of every party by giving them equal chances to define the issues and to contribute to problem - solving.[137]

Some methods of equalizing the power imbalance are to rearrange the seating order to

prevent direct eye contact between the spouses, and to enable them just to have eye

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133 *Id.*

134 *Id.*; Carol Lefcourt, *Women, Mediation and Family Law,* 18 Clearinghouse Rev. 269 (1984).

135 Lefcourt, *id.* at 267-68.

136 Scott H. Hughes, *Elizabeth's Story: Exploring Power Imbalances In Divorce Mediation,* 8 Geo. J. Legal Ethics 553, 581 (1995).

137 *Id.*

contact with the mediator.[138]

Another method is to direct both parties to a blackboard on which the mediator writes down the information they have gathered and reflects the progress the parties have made.[139] The mediation process can definitely become more equalized if the mediator meets with both parties separately in caucus,[140] and allows the weaker spouse to express freely her fears, anger and suspicion of unfairness. This approach has the advantage to prevent the more powerful spouse from dominating the mediation process by subtly or clearly making destructive comments.[141] Even if the effects of these mediation tools on the emotional power imbalance are often only temporary, as long as the parties are under the supervision of a neutral mediator, they are in a more or less equal position, and the intellectual and physical power imbalance can be diminished.[142]

However, the important "emotional " power imbalance is far more difficult to tackle because emotional fears, which are deeply rooted in one spouse's personality cannot be diminished in a short process.[143] After the mediation session ends the spouses with severely unequal power tend to assume the roles they had played before they started mediating their marital problems. Sometimes emotional barriers also lead to a serious intellectual power imbalance, because the emotional blockade prevents the weaker spouse from comprehending the information to which she has equal access.[144]

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138 *Id.* at 579 - 81; JOHN BLADES, *FAMILY MEDIATION: COOPERATIVE DIVORCE SETTLEMENT,* 40 (1985).

139 Scott H. Hughes, *id.* at 580.

140 Christopher W. Moore, *The Caucus: Private Meetings That Promote Settlement*, 16 Mediation Q. 87, 89 (1987).

141 Scott H. Hughes, *Elizabeth's Story: Exploring Power Imbalances In Divorce Mediation,* 8 Geo. J. Legal Ethics 553, 579 - 80 (1995); Christopher Moore, *id.* at 88-89.

142 Scott H. Hughes, *id.* at 581.

143 *Id* at 581.

144 *Id* at 581.

Finally, it is critical to realize that even a mediator is limited in his abilities to smooth long lasting power imbalances and that it would be naïve to assume that emotional equality between spouses can be achieved after emotional disturbances caused by abuse and humiliation in the marital and post–marital relationship.[145]

D) The Shift of Power

Whether economic, procedural, intellectual or psychological power, it is rarely constant and static throughout a relationship or throughout the divorce mediation, but often shifts from one party to the other.[146]

Factors, which influence the power distribution between the parties can be the order, in which they present the main issues in the divorce process and their personal point of view on the problems involved.[147] Another important factor for the power distribution among the divorcing couple is the role of the mediator, and his and the parties' ethnic identification.[148] Another reason why power can shift during mediation is the sense of having been wrong in the past and the burden of guilt or simply the deficiency in knowledge on a particular issue.[149]

The power and its significant impact on the other party depends largely on how power is perceived and reacted upon by the other spouse as well as this spouse's

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[145] *Id.*

[146] William L.F. Felstiner & Austin W. Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer - Client Interactions,* 77 CORNELL L. REV. 1447, 1454 (1992); David A. Lax & James K. Sebenius, *The Manager as Negotiator* 119 – 44 (1988).

[147] Craig A. Mcewen, Nancy H. Rogers, Richard J. Maiman, *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation,* 79 Minn. L. Rev., 1317, 1336 (1995); Janet Rifkin et al., *Towawrd A New Discourse for Mediation: A Critique of Neutrality,* 9 Mediation Q. 151 (1991).

[148] Michele Hermann et al., *The Metro Court Final Report,* 137 - 48 (1993).

[149] Craig A. Mcewen, Nancy H. Rogers, Richard J. Maiman, *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation,* 79 Minn. L. Rev., 1317, 1337 (1995).

awareness of his or her power.[150] Consequently, one efficient way for the weaker spouse to withdraw from the overwhelming power of the other spouse is to learn to perceive the own powerful resources and to use these resources to bring forward and represent her own interests in the divorce mediation process.

E) Limits of Mediation in Divorce Cases

To avoid power imbalances that significantly contribute to an unequal outcome, it is necessary to exclude certain categories of cases from mediation. Statutes in several states concerning mediation and the limitations to it aim at protecting parties who are highly vulnerable and unable to resist pressure exerted either by the mediator or by the other spouse.[151] Examples of these categories are victims of domestic violence, patients of mental health illnesses, or people who suffered from substantial abuse.

Furthermore, people who are substantially inferior in bargaining and asserting their own interests should be excluded from the mediation program.[152] The difficulties in restricting mediation by excluding these cases from the mediation process are to accurately predict whether a certain case involves a party susceptible to mediation pressure or bargaining inferiority.[153]

The difficulties in excluding domestic violence cases from the mediation process even by statutes or court rules are diverse. The statutes aiming at excluding domestic violence cases from mediation differentiate between "categorical prohibition", "case -

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150 Scott H. Hughes, *Elizabeth's Story: Exploring Power Imbalances in Divorce Mediation,* 8 Geo. J. Legal Ethics, 553, 576 (1995).

151 Craig A. Mcewen, Nancy H. Rogers, Richard J. Maiman, *Bring In The Lawyers: Challenging The Dominant Approaches To Ensuring Fairness In Divorce Mediation,* 79 Minn. L. Rev. 1317, 1335 – 36 (1995).

152 Ariz. Rev. Stat. Ann. s 25-381.23 (West 1991); Garry J. Friedman, *A Case Of Abuse,* 221, 241 in: *A Guide to Divorce Mediation* (1993).

153 Craig A. Mcewen, Nancy H. Rogers, Richard J. Maiman, *Bring In The Lawyers: Challenging The Dominant Approaches To Ensuring Fairness In Divorce Mediation, 79* Minn. L.Rev. 1317, 1336 (1995).

by case screening by the court"[154] and exclusion of the case by the judge, if a party claims it and has a special proof.[155]

1) Categorical Exclusion

Categorical exclusion of domestic violence cases from the mediation process leads to an "underinclusion"[156] of these cases, especially if these exclusions have to be based on court pleadings only.[157] Research of custody cases in Ohio and interviews with couples in other states have shown that the percentage of people who admitted that violence had occurred in their marriage was much higher when interviewed by employees of the court than the percentage of people who alleged it in court pleadings.[158]

Procedural difficulties imposed by legislators to prevent an overexclusion of cases from the mediation process for fear of a misuse lead to a further reduction of divorce cases which could be excluded from the mediation process.[159] Examples of these procedural hurdles are that a mere report of violence is not sufficient[160], or that an exclusion of a violence case from mediation is possible only if parties falsely alleging domestic violence are threatened by a penalty of perjury.[161] These substantial and

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154 Okla. R. & Proc. for Disp. Resol. Act app. A, reported in Okla. Stat. Ann. tit. 12, s 37 app. (West 1993).

155 N.C. Gen. Stat. s 50 – 13.1 © (Supp. 1994).

156 Craig Mcewen, Nancy H. Rogers, Richard J. Maiman, *Bring in the Lawyers: Challenging The Dominant Approaches To Ensuring Fairness In Divorce Mediation,* 79 Minn. L. Rev. 1317, 1338 - 40 (1995).

157 Maine Court Mediation Serv., *Mediation in Cases of Domestic Abuse: Helpful Option or Unacceptable Risks, The Final Report of the Domestic Abuse and Mediation Project* 26-29 (1992).

158 Jeanne Clement et al., *Descriptive Study of Children Whose Divorcing Parents Are Participating in Voluntary, Mandatory or No Custody/Visitation Mediation* 16, 20-21 (1993).

159 Craig Mcewen, Nancy H. Rogers, Richard J. Maiman, *Bring in the Lawyers: Challenging The Dominant Approaches To Ensuring Fairness In Divorce Mediation,* 79 Minn. L. Rev. 1317, 1336 - 39 (1995).

160 Minn. Stat. s 518.619(2) (1994).

161 Cal. Fam. Code s 318 (a) (West 1994).

procedural hurdles for an exclusion of domestic violence cases from the mediation process enlarge the gap between the number of actual violence cases and those excluded from mediation.[162]

On the other hand the categorical exclusion of cases from the mediation process just on the basis of a party's statement can lead to the other extreme of "overexclusion" of cases from the mediation process,[163] especially in cases where the presence and assistance of lawyers can diminish the imbalance of power.

2) Individual Case Assessment

The individual case assessment is another possible means to balance power in divorce mediation. However, it is not only costly and likely to delay the divorce process but also highly probable to cause either over - or underexclusion of cases from the mediation process.[164] In addition the individual case assessment suffers from the same insufficiency as the "categorical exclusion", because it is highly difficult to predict whether substantial bargaining inequality in the individual case will cause inequality in the outcome of the process,[165] even though usually unequal power leads to unequal outcomes.

3) Issue Limitation

This approach to reduce power imbalance in divorce mediation tries to tackle the problem by separating economic from custodial issues.[166] The reason for this separation is the assumption that linking economic and custodial issues in mediation can lead the

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[162] Craig A. Mcewen, Nancy H. Rogers, Richard J. Maiman, *Bring In The Lawyers: Challenging The Dominant Approaches To Ensuring Fairness In Divorce Mediation,* 1317, 1338 - 39 (1995).

[163] *Id.* at 1337.

[164] *Id.* at 1339.

[165] Linda Girdner, *Mediation Triage: Screening for Spouse Abuse in Divorce Mediation,* 7 Mediation Q. 365, 376 (1990).

[166] Craig A. Mcewen, Nancy H. Rogers, Richard J. Maiman, *Bring In The Lawyers: Challenging The Dominant Approaches to Ensuring Fairness In Divorce Mediation,* 79 Minn. L. Rev. 1317, 1340 (1995).

more powerful parent to ask for more economic concessions before giving up child custody in exchange.[167]By separating these two issues during mediation commentators assume that this "trade - off"[168] can be prevented. In addition to the separation of issues, critics underline that parties who are less familiar with legal issues can be taken advantage of by the more informed, educated or experienced spouse.[169]

Some states have reacted to this inappropriate link between economic issues and custodial issues by mandating mediation only for cases in which child custody matters or visitation issues are excluded.[170] Other states have reacted by separating the economic matters from the rest of divorce issues and by developing a special mediation program for the sensitive issues of economic interests of spouses, which is led by attorney-mediators only.[171]

However this "issue limitation" approach to balance power cannot be considered as an overall solution.[172] First, the statutes separating custodial and economic issues actually cannot prevent the parties from linking them.[173] In child custody cases it is highly probable that mediation will, sooner or later, bring up the economic topic of child support during child custody mediation.[174]

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167 Ann Milne, *Mediation – A Promising Alternative for Family Courts,* 1991 Juv. & Fam.Cts. J.61, 68 (1991).

168 Craig A. Mcewen, Nancy H. Rogers, Richard J. Maiman, *Bring In The Lawyers: Challenging The Dominant Approaches to Ensuring Fairness In Divorce Mediation,* 79 Minn. L. Rev. 1317, 1340 - 42 (1995).

169 *Id.*

170 Cal. Fam. Code s 3170 (West 1994).

171 Craig A. Mcewen, Nancy H. Rogers, Richard J. Maiman, *Bring In The Lawyers: Challenging The Dominant Approaches to Ensuring Fairness In Divorce Mediation,* 79 Minn. L. Rev. 1317, 1340 - 42 (1995).

172 *Id.*

173 *Id.*

174 Susan Myers et al., *Court – Sponsored Mediation of Divorce, Custody, Visitation and Support: Resolving Policy Issues,* 13 State Ct. J. 24 (1989).

Other critics point out that the financial obligations involved when deciding on joint custody and the fact that often the mediator and the parties wrongfully assume equal financial obligations in joint custody cases makes it doubtful whether you can really separate these two issues.[175]

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[175] Trina Grillo, *The Mediation Alternative: Process Dangers For Women,* 100 Yale L.J. 1545, 1571 - 72 (1991).

CHAPTER IV

THE ROLE OF LEGAL NORMS

As O. J. Coogler had already discovered in the beginning of the divorce mediation movement, mediators should acquire basic legal knowledge, in addition to their educational training in behavioral science.[176]

Commentators on this issue often expect mediators to have legal training on the issues of child support and maintenance,[177] to provide divorcing couples with a comparison to the outcome in an adversarial court – litigation. Consequently parties have the proper information to decide whether in their individual case mediation is the more favorable dispute resolution method.[178] Legal norms in divorce mediation, therefore, have the function of providing a measurement[179] for the quality of the mediated outcome and to give the parties a guideline for negotiating divorce issues. Some commentators even insist on a broader knowledge mediators should have on legal issues, trial practice and procedure, as well as legal terminology, in order to enable them to work with parties within the parameters of the legal system.[180]

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176 O.J. Coogler, *Structured Mediation in Divorce Settlement,* 77 (1980).

177 John Allen Lemmon, *Divorce Mediation: Optimal Scope and Practice Issues,* Mediation Q., September 1983, 45, 48.

178 Lemmon, *id.* at 51.

179 Daniel G. Brown, *Divorce and Family Mediation: History, Review, Future Directions, Conciliation Cts. Rev.,* December 1982, 1, 23 (1982).

180 Christopher W. Moore, *Training Mediators for Family Dispute Resolution,* Mediation Q., December 1983, at 79, 83-84.

Other commentators and practitioners underline the alternative character of mediation to the court - litigated process, which is necessarily based on legal norms:[181] The different problem - solving approach in mediation, which allows parties to follow their own perceptions of justice, instead of relying on a fixed assumption of who should get which part of the marital pie, requires different guidelines than the legal norms. The ***American Bar Association (ABA) Family Law Section Standards of Practice for Family Mediators***[182] provides guidelines for divorce mediators to ensure that parties have an appropriate base of legal information that can help them to tailor a solution which is not beyond any "reasonable" standard. Furthermore, it requires mediators to end the process if a fair and reasonable outcome in mediation is unlikely.[183] These standards don't have the quality of statutes and therefore lack binding character, but they are established to influence the mediators in their practical work. However, they are heavily criticized by both commentators and mediators,[184] who consider them threat to the alternative character of mediation.

John Lande was one of the most profiled critics of the ABA standards. According to him mediation is based on cooperation and a personal conception of what is just and fair.[185] Legal norms, however, are means to handle a conflict in a competing, adversarial dispute resolution like court litigated divorce.[186] Mediation, according to Lande, is based on the power and right of self - determination of each spouse. The process itself is thereby the expression of the parties personal values and not an

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181 *Id.*

182 *ABA Family Law Section, Standards of Practice for Family Mediators* (1983), reprinted in 17 Fam. L. Q. 455 (1984).

183 Id. Standard IV ©, V (A).

184 Ellen Waldman, *The Role of Legal Norms In Divorce Mediation: An Argument For Inclusion,* 1 Va. J. Soc. Pol'y & L. 87, 96 - 99 (1993).

185 John Lande, *Mediation Paradigms and Professional Identities*, Mediation Q., June 1984, at 40.

186 Lande, *id.* at 19.

objective search for a fair outcome.[187] Therefore the ABA standards, advising mediators to terminate the process if the outcome obviously is unfair, are detrimental to the objectives underlying the mediation process.[188] Lande maintains that "substantive justice" requires the acknowledgment of parties' particular interests, purposes,[189] and philosophies of life, instead of imposing an objective system of values and prefabricated "fair outcome" on them.

Other commentators point out that it is unproductive to impose legal norms on mediating spouses because they distract parties and mediators from the central issue of the Alternative Dispute Resolution, namely the difference in approach not only in the process but also in the outcome of mediation.[190]

Another approach to evaluate the role of legal norms in mediation denies even this "instrumental value" of legal norms in divorce mediation.[191] Commentators who appreciate the role of mediators as mere facilitators of a discussion among divorcing couples and the mediation process as the search for an agreement that reflects best both parties particular needs and interests reject legal norms for their "arbitrary and divisive"[192]character. Instead of allowing the parties to meet their personal needs and tailor a specific and individual solution, legal norms would invite them to speculate over a potential outcome in a subsequent litigation.[193] In the adversarial process, it is the

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187 Lande, *id.* at 36.

188 *Id.*

189 Lande, id. at 37.

190 Nichol M. Schoenfield, *Turf Battles And Professional Biases: An Analysis Of Mediator Qulifications in Child Custody Disputes,* 11 Ohio St. J. On Disp. Resol. 469, 474 - 75 (1996).

191 Ellen Waldman, *The Role of Legal Norms In Divorce Mediation: An Argument for Inclusion,* 1 Va. J. Soc. Pol'y & L. 87, 96 - 99 (1993).

192 *Id.*

193 *Id.*

lawyer who communicates to his client what is fair according to the law, whereas in the mediation process the parties are their own interpreters of fairness.[194]

Other commentators point out that legal norms are too static and rigid to offer solutions for complex and multi -layered psychological concerns and other problems in the divorce process.[195] A complex system like the family cannot be analyzed and intervened into by a strictly rational and logical legal concept[196] but understood only when the mediator stops categorizing the problems into a prefabricated order.

As another critic points out, the legal system is based on the perception that you can achieve absolute justice and that for every wrong there is a just remedy.[197] However, mediation represents the notion of "situational or relational fairness"[198] Justice is what the parties perceive to be just, which is the notion of individually perceived justice.

A very free concept of mediation provides the mediator with the right to judge whether and how much of the legal system he wants to introduce to the parties.[199] According to these commentators, it is up to the mediator in every individual case to decide whether the knowledge of legal norms would be a facilitator in the discussion.

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[194] Stephen K. Erickson, *The Legal Dimension of Divorce Mediation,* in *Divorce Mediation: Theory and Practice,* 105-06 (1988).

[195] Robert D. Benjamin, *The Physics of Mediation: Reflections of Scientific Theory in Professional Mediation Practice*, 8 Mediation Q. 91-92 (1990).

[196] *Id.*

[197] Benjamin, *id.* at 102.

[198] *Id.*

[199] *Id.*

A) The Two - Tiered Model[200] -

Mediation as combination of legal and psychological help

This model is based on the assumption that divorcing parties not only need legal advice in mediation, but that each spouse should seek legal counseling in addition to the help provided within the mediation process.[201] The outside counsel does not assist each party during the mediation session, but he counsels his clients after an agreement in mediation is reached and provides him with the comparison between the mediated outcome and a potential subsequent court - litigated dispute.[202] Attorneys, assisting parties after the mediation process offer a final check and "safety net"[203] against being taken advantage of by the other spouse or prejudiced mediators and thereby reduce the danger of a seriously unequal outcome, that might tempt the "losing" spouse not to keep her promise that she made in the mediated settlement.[204]

Even though the involvement of attorneys in the mediation process is hotly disputed, the basic idea of the two - tiered model appears in different standards to regulate mediation, e.g., the ***Standards of the Association of Family and Conciliation Courts (AFCC)***, the ***American Arbitration Association (AAA)*** and the ***American Bar***

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200 *Ellen Waldman, The Role of Legal Norms In Divorce Mediation: An Argument For Inclusion,* 1 Va. J. Soc. Pol'y & L. 87, 99 - 101 (1993).

201 *Id.;* Alison E. Gerencser, *Family Mediation: Screening For Domestic Abuse,* 23 Fla. St. U. L. Rev. 43, 62 (1996); Craig Mc Ewen & Nancy H. Rogers, "Bring the Lawyers into Divorce Mediation", 101 - SP - RESOL. 8 (1994); Scott H. Hughes, *Elizabeth's Story: Exploring Power Imbalances In Divorce Mediation,* 8 Geo. J. Legal Ethics 553, 594 – 95 (1995).

202 Steven C. Bowman, *Idaho's Decision On Divorce Mediation,* 26 Idaho L. Rev. 547, 555 – 57 (1989); Russell M. Coombs, *Noncourt - Connected Mediation and Counseling in Child - Custody Disputes,* 17 FAM. L. Q. 469, 471 (1984); Hugh McIsaac, *The Role of the Attorney in Resolving Custody Disputes,* Conciliation Cts. Rev., December 1988, at 9, 12.

203 Ellen Waldman, *The Role of Legal Norms In Divorce Mediation: An Argument For Inclusion,* 1 Va. J. Soc. Pol'y & L. 87, 102 (1993).

204 Scott H. Hughes, *Elizabeth's Story: Exploring Power Imbalances In Divorce Mediation,* 8 Geo. J. Legal Ethics 553, 594 - 95 (1995).

Association (ABA) Family Law Section standards set up for family mediation cases.[205]

The AFCC model standards of 1984 advise mediators to check the limits of their professional education and to recommend to their clients additional legal help by an outside attorney.[206] Especially in cases in which legal rights and obligations might have an impact on the outcome in mediation, mediators are asked to encourage their clients to seek professional legal assistance prior to settling the issue.[207] The AAA model standards additionally encourage to lead legal discussions in a forum outside of the mediation program itself whenever legal problems arise.[208] Consequently, the American Arbitration Association in its Family Mediation Rules supports the Two - Tiered Model of an independent legal counsel outside of the mediation process itself.[209]

The most detailed model standards, set up by the ABA Family Law Section, point out that parties should seek independent attorney assistance during the whole mediation process, and not only if legal problems arise or an agreement has to be drafted.[210] The family and divorce mediators are encouraged to recommend that their clients seek professional legal help from the very beginning of a mediation process and especially before they agree to any outcome in the mediation session.[211]

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205 Ellen Waldman, *The Role of Legal Norms In Divorce Mediation: An Argument For Inclusion,* 1 Va. J. Soc. Pol'y & L. 87, 102 (1993).

206 Association of Family and Conciliation Courts, *Model Standards of Practice for Family and Divorce Mediation*, reprinted in Divorce Mediation: *Theory and Practice*, at 419 (1988).

207 *Id.*

208 American Arbitration Association, *Family Mediation Rules.*

209 American Arbitration Association, *Family Mediation Rules,* # 4; Joel M. Douglas, Lynn J. Maier, *Bringing The Parties Apart,* 49 - SEP Disp. Resol. J. 29, 33 (1994).

210 Ellen A. Waldman, *The Role Of Legal Norms In Divorce Mediation: An Argument For Inclusion,* 1 Va. J. Soc. Pol'y & L. 87, 103 - 107 (1993).

211 *Id.*

This Two - Tiered Model of mediation with an additional legal counseling has been widely accepted in the publications on mediation[212] and the public institutional practice,[213] as well as private[214] and court - affiliated[215] mediation centers.[216] The outside counsel is considered to be a guarantee or at least a security means against prejudiced, or inexperienced, or simply bad mediators and guarantees that every spouse will have a basic understanding of his or her legal rights and obligations before she commits to a mediated long - term agreement.[217]

The Two - Tiered Model is based on the assumption that even though mediation is the expression of parties' autonomy and control over the settlement process, they need, or at least should be advised to seek, legal assistance from an advocate who is partial and gives them advice based on the personal interests and goals of each spouse.[218] Thereby the Two - Tiered Model tries to combine the advantages of mediation with the traditional adversarial negotiation model. The underlying idea is that only a party who is well informed about her legal rights and obligations can be an autonomous and serious partner for mediating a long term agreement in a cooperative and problem solving way.

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[212] Russell M. Coombs, *Noncourt – Connected Mediation and Counseling in Child – Custody Disputes,* 17 Fam. L. Q. 469, 489 (1984).

[213] Ellen A. Waldman, *The Role of Legal Norms In Divorce Mediation: An Argument For Inclusion,* 1 Va.J. Soc. Pol'y & L. 87, 103 – 107 (1993).

[214] Henry M. Elson, *Setting Up a Private "Mediation" Practice,* in *Alternative Means of Family Dispute Resolution,* 173, 178 – 79 (1982).

[215] James C. Melamed, *New Oregon House Bill 2225*, in *ABA Standing Comm. On Dispute Resolution, Family Dispute Resolution Options for All Ages* 147, 149.

[216] Ellen A. Waldman, *The Role of Legal Norms In Divorce Mediation: An Argument For Inclusion,* 1 Va.J. Soc. Pol'y & L. 87, 103 – 107 (1993).

[217] Thomas A. Bishop, *The Standards of Practice for Family Mediators: An Individual Interpretation and Comments,* 17 Fam. L. Q. 46, 467-68 (1984);

[218] Ellen Waldman, *The Role of Legal Norms In Divorce Mediation: An Argument For Inclusion,* 1 Va. J. Soc. Pol'y & L. 87, 103 - 107 (1993).

However, the advantage of this combined model is at the same time a major point of criticism. Commentators see the role of attorneys in the Two - Tiered model as being the "watchdogs",[219] who have to provide a guarantee against bad mediators. They consider this model as damaging to the reputation of mediators, who should be well trained to consider each party's rights without being partial.[220] Mediators, according to the critics, should be able to inform their clients about the basic legal norms that affect their case and should not be encouraged to delegate responsibility for a fair outcome to an outside legal counsel[221]

B) Inclusion of Legal Norms into the Mediation Process

The "Inclusion of Legal Norms into the Mediation Process" model is based on the assumption that mediators will acquire the basic knowledge of legal rules and concepts necessary for them to provide a fully satisfactory service to the divorcing couple.[222] Because mediator functions range from gathering facts, and helping parties to brainstorm and work on potential solutions to evaluating these options and drafting of parties' final agreement,[223] mediators are better able to meet these demands if they are familiar with family law, precedent cases and procedural law.[224] The knowledge of tax law, for example, can help the mediator to suggest a favorable property division or other

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219 *Id.*

220 *Id.*

221 *Id.*

222 *Id.* at 107; Nancy J. Foster & Joan B. Kelly, *Divorce Mediation: Who Should Be Certified?* 30 U.S.F.L. Rev. 665, 668 - 69 (1996); Ellen A. Waldman, *The Challenge Of Certification: How To Ensure Mediator Competence While Preserving Diversity,* 30 U. S. F. L. Rev. 723, 738 – 739 (1996).

223 Jay Folberg & Alison Taylor, *Mediation—A Comprehensive Guide to Resolving Conflicts Without Litigation* 7 (1984); Ellen A. Waldman, *The Role Of Legal Norms In Divorce Mediation: An Argument For Inclusion,* 1 Va. J. Soc. Pol'y & L. 87, 107 (1993).

224 *Id.* at 107; Ellen A. Waldman, *The Challenge Of Certification: How To Ensure Mediator Competence While Preserving Diversity,* 30 U. S. F. L. Rev. 723, 738 - 740 (1996).

financial transactions.[225] By exploring different options to divide the limited resources, the couple can enlarge "the marital pie"[226] and thereby reduce the financial burden that both partners have to carry after divorce. The categorization of financial support decides which tax law will apply to the case.[227] Furthermore, the decision of who will keep the marital property is important for the capital gains taxes[228] that will have to be paid by the "favored" spouse. Especially in divorce cases, where couples have highly disparate incomes, the division and distribution of property and other financial resources can seriously affect the tax consequences.[229]

Regarding non - financial issues in divorce cases, such as custodial arrangements, a mediator's knowledge of family law or of creative solutions that courts or attorneys have suggested for frequent problems, can be of vital importance.[230]

The classic dispute between divorcing couples, the child custody issue, can be solved by suggesting different "levels of participation"[231] of the non - custodial parent in the upbringing of the child.[232] One option to let the non - custodial parent participate in the child's life is to make important decisions concerning the education or medical treatment of the child jointly,[233] while minor decisions don't need the involvement of the non - custodial parent.[234]

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225 Ellen A. Waldman, *The Role Of Legal Norms In Divorce Mediation: An Argument For Inclusion,* 1 Va. J. Soc. Pol'y & L. 87, 107 -110 (1993).

226 *Id.*

227 *Id.*

228 *Id.*

229 *Id.*

230 *Id.*

231 *Id.*

232 *Id.*, at 110.

233 *Id.*

234 *Id.*

Finally, a consideration of the likely results of judicial review of mediated settlements can help parties and mediators save time and money by negotiating what is realistic and will be accepted by the judge after mediation is finished.[235]

Different from the Two – Tiered Model, the supporters of the inclusion of legal norms into the mediation process strictly reject the involvement of outside attorneys in the mediation process.[236] A mediator who has to interrupt the mediation process every time a legal issue arises risks the success of the whole process and renders a disservice to his clients.[237] Instead of a continuous and informed negotiation he offers a series of interrupted discussions.[238]

Finally, the knowledge of legal principles and concepts can also help the mediator to overcome obstacles, if the mediation process is stuck and both parties refuse to compromise on certain issues.[239] As the classic theory of "principled negotiation"[240] points out, this situation asks for the application of objective criteria. If both spouses are unwilling to agree on a certain custodial or financial agreement, the mediator can promote communication by referring to the legal positions of both spouses in a court - litigated divorce process.

The knowledge of the parties' BATNA (Best Alternative To A Negotiated Agreement) or their WATNA (Worst Alternative To A Negotiated Agreement)[241] can promote further negotiations in the mediation process, because both divorcing spouses know the facts to decide whether the continuation of mediation is more favorable to

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235 *Id.*

236 *Id.*

237 *Id.*

238 *Id.*

239 *Id.*

240 Roger Fisher & William Ury, *Getting to Yes: Negotiating Agreement Without Giving In,* 85 (1981).

241 Fisher & Ury, *id,* 104 -05.

litigation in court or whether they could get more of the "marital pie" by relying on the legal system, rather than tailoring their own solution.

Supporters of this last theory underline that well informed mediators can best balance power between spouses during the mediation process.[242] To prevent the intellectually or emotionally stronger spouse from dominating the weaker partner, the mediator has to be familiar with legal norms, precedent divorce cases and court decisions, as well as with legislative plans with potential influence on the actual divorce case.[243]

Whereas the legally trained mediator can support the weaker spouse and provide the necessary information to balance the power between the divorcing husband and wife, the review of a drafted settlement by an attorney only after the parties have come to an agreement provokes legitimate criticism by feminists[244] that this method is informal and outside of the traditional adversarial court - litigation.[245]

C) The Third Model

The advocates of the "Third Model" suggest the participation of lawyers in every mediation session for reducing existing power imbalances between divorcing spouses.[246] These "third model" advocates object to the legal regulation of the

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242 Ellen A. Waldman, *The Challenge Of Certification: How to Ensure Mediator Competence While Preserving Diversity,* 30 U.S.F.L. Rev. 723, 738 - 40 (1996).

243 Ellen A. Waldman, *The Role Of Legal Norms In Divorce Mediation: An Argument For Inclusion,* 1 Va. J. Soc. Pol'y & L. 87, 107 – 115 (1993).

244 *Id.*

245 *Id.*

246 Joel M. Douglas, Lynn J. Maier, *Bringing The Parties Apart,* 49 - SEP Disp. Resol. J. 29, 33 (1994); Thomas J. Stipanowich, *The Quiet Revolution Comes To Kentucky: A Case Study In Community Mediation,* 81 Ky. L. J. 855, 903 (1993).

mediation process because of its "rigid and categorical obligations",[247] which lead to inflexible outcomes. In addition, the presence of both lawyers and mediators adds unnecessarily high costs.[248]

1) The regulatory approach

The regulatory approach of mediation is based on the participation of lawyers in the mediation process and is a contribution to more fairness among the parties.[249] More lawyer participation can be achieved by legal rules, which abolish the exclusion of lawyers from the mediation process and encourage their participation by increasing the variety of topics to be discussed in the mediation session, such as property division, alimony, maintenance and other financial issues, which make legal advice necessary.[250]

Another contribution to increasing fairness in mandated mediation sessions is the inclusion of "court review of mediated agreements", as well as the exclusion of the mediator's recommendation to the court. The fairness concerns in mandatory mediation can be met by increased lawyer participation or the "judicial review of agreements", and the exclusion of pressure on the parties to reach an agreement.[251] By lawyer presence in the mediation process, added by the modification of some ground rules, the power imbalance between spouses can be met effectively.[252] The unpredictable and often changing circumstances during the divorce process which can lead to unpredictable power changes can also be met effectively by the presence of lawyers who can balance

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247 Craig A. Mcewen, Nancy H. Rogers, Richard J. Maiman, *Bring In The Lawyers: Challenging The Dominant Approaches To Ensuring Fairness In Divorce Mediation,* 79 Minn.L.Rev. 1317, 1376 - 78 (1995).

248 *Id.*

249 *Id.* at 1374; Joel M. Douglas, Lynn J. Maier, *Bringing The Parties Apart,* 49 - SEP Disp. Resol. J. 29, 33 (1994).

250 Craig A. Mcewen, Nancy H. Rogers, Richard J. Maiman, *Bring In The Lawyers: Challenging The Dominant Approaches To Ensuring Fairness In Divorce Mediation,* 79 Minn.L.Rev. 1317, 1375 (1995).

251 *Id.*

252 Joel M. Douglas, Lynn J. Maier, *Bringing The Parties Apart,* 49 - SEP Disp. Resol. J. 29, 33 (1994).

and offer assistance when these unforeseen changes happen.[253] Even in situations in which one spouse largely dominates the process, the presence of a powerful "spokesperson" for the weaker spouse can increase the fairness of the discussion.[254] In domestic violence cases the lawyers can prevent or at least diminish a direct encounter with the abusing spouse and thereby largely prevent an unfair discussion.[255]

Some effective means used by lawyers in these abuse cases are to separate the parties and to deal with each one alone by allowing generous "time outs"[256]. In cases of past abuse, lawyers can warn their clients against agreements that are too one sided, or simply not very likely to be upheld and followed over a long period.[257]

When lawyer attendance during mediation is guaranteed, the difficult approach of "issue limitation" to meet the power imbalance becomes unnecessary: The danger that the powerful party links several different issues such as child custody in exchange for a more favorable economic outcome, is excluded because lawyers can effectively advise on these issues.[258] The absence of lawyers in mediation often leaves the parties alone with a mediator who is not legally trained and cannot discover unfair and one sided settlements.[259] Lawyers have to compensate for weak mediators.[260]

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253 Craig A. Mcewen, Nancy H. Rogers, Richard J. Maiman, *Bring In The Lawyers: Challenging The Dominant Approaches To Ensuring Fairness In Divorce Mediation,* 79 Minn.L.Rev. 1317, 1376 (1995).

254 *Id.*

255 *Id.* at 1376 - 78.

256 *Id.*

257 *Id.*

258 *Id.*

259 *Id.*

260 *Id.*

2) The "Voluntary Participation" approach

In the voluntary participation approach the assistance of lawyers in the mediation process is not mandatory but possible.[261] In this approach, however, lawyers face the daunting task of predicting difficulties and unfairness in the individual process, and attending only those sessions where problems are anticipated. Because these predictions can be false, the "voluntary participation" approach is very risky.[262] Voluntary participation of lawyers can also lead to increased costs, if parties are responsible for paying the fees. As a study in Ohio has proven, mediation in these cases is a dispute resolution method for wealthy couples only.[263]

3) Critics of the "Lawyer - Participating" approach in mandatory mediation

The critics of mandatory mediation with regulated lawyer participation target diverse issues.[264] When mediation is mandated, is there any difference from the traditional lawyer- lead negotiation? Critics of lawyer - participated mediation question whether this kind of mediation really differs from the traditional negotiation lead by lawyers. Many attorneys, however, underline the positive contribution of mediation to the traditionally negotiated process[265] because it leads to more efficiency, smoothes the difficulties in communication, provides parties with the opportunity to get involved in the settlement process[266] and influences it actively.[267]

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261 *Id. at* 1347; Andre G. Gagnon, *Ending Mandatory Divorce Mediation For Battered Women,* 15 Harv. Women's L. J. 272, 272-73 (1992).

262 *Id.*

263 *Id.;* Jeanne Clement et al., *Descriptive Study of Children Whose' Parents Are Participating in Volunteer, Mandatory or No Custody/ Visitation Mediation* 16, 17 (1993).

264 Craig A. Mcewen, Nancy H. Rogers, Richard J. Maiman, *Bring In The Lawyers: Challenging The Dominant Approaches To Ensuring Fairness In Divorce Mediation,* 79 Minn. L. Rev. 1317, 1376 – 78 (1995).

265 *Id.*

266 *Id.*

267 Steven C. Bowman, *Idaho's Decision On Divorce Mediation,* 26 Idaho L. Rev. 547, 555 - 57 (1989); Lawrence D. Gaughan, *Divorce Mediation: A Lawyer's View,* 9 FAM ADVOC 34, 36 (Summer 1986).

By bringing both parties together for discussion of their issues, the normally very long procedure of settlement negotiations can be shortened[268] because the conciliatory approach of mediation diminishes the confrontation which is inherent in every adversarial dispute resolution.

In summary, the participation of lawyers in mediation helps both the parties and the lawyers. Often parties in a lawyer - lead negotiation feel ignored, not informed about the latest development,[269] and mere observers of their own cases, waiting for the attorneys to shape the outcome. In mediation the lawyer gets in touch with the opposite party herself and gets direct information, which might be neglected or hidden in negotiation with the opposite attorney.[270]In addition, the discussion with the opposite party gives the lawyer a new, more objective view on his own client's story; he can reevaluate this story and add or correct some facts that his client might have omitted purposefully or simply forgotten to mention.[271]

It is not only the lawyer but also the client who profits from the direct contact with the opposite party. The parties not only have the opportunity to communicate with the other spouse, which is the essential idea of mediation versus litigation, but they also get the opportunity to talk to the opposite counsel. As many divorce clients have reported, this opportunity to talk directly to the other party's advocate gives them the sense of "telling their story" to someone "official".[272]

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268 Craig A. Mcewen, Nancy H. Rogers, Richard J. Maiman, *Bring In The Lawyers: Challenging The Dominant Approaches To Ensuring Fairness In Divorce Mediation,* 79 Minn. L. Rev. 1317, 1378 - 79 (1995).

269 *Id.* at 1380 - 82.

270 Thomas J. Stipanowich, *The Quiet Revolution Comes To Kentucky: A Case Study In Community Mediation,* 81 Ky. L. J. 855, 900-903 (1993).

271 Craig A. Mcewen, Nancy H. Rogers, Richard J. Maiman, *Bring In The Lawyers: Challenging The Dominant Approaches To Ensuring Fairness In Divorce Mediation,* 79 Minn. L. Rev. 1317, 1380 - 82 (1995).

272 *Id.* at 1382 - 84.

A long - term effect on lawyers by bringing them into the mediation process is to improve their poor reputation and their behavior, which is often considered to be uncompromising and confrontational.[273]

4) Does self - determination of parties in the mediation process necessarily exclude lawyer participation?

Lawyer participated mandatory mediation can conflict with the goal of self - determination of clients. Mandated mediation cases become an unwanted hurdle before litigation in court, which parties sometimes might favor.[274] Still mandated mediation has many advantages in comparison to the voluntary approach, one of which is that parties in mandated mediation are required to think independently about the issues of their case, what goals they pursue, and whether these goals are realistic.[275]

5) Does mandated lawyer participation lead to increased costs of the mediation process? One of the main concerns resulting from lawyer - participation in mediation sessions is the possibility of increased costs,[276] whereas mediation has the reputation of a low cost dispute resolution method.

According to one research study, lawyers disagree about the cost of attorney participation in mediation.[277] Some interviewees underline that mediation session costs can be reduced if the session does not cover all divorce issues[278] and the lawyers help to tackle issues early in the mediation process.[279]

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273 *Id.*

274 *Id.* at 1384 - 86.

275 *Id.* at 1386 - 88.

276 *Id.* at 1388 - 90.

277 *Id.*

278 *Id.*

279 *Id.*

In addition, many parties, even without mandated lawyer – presence, at some stage of the mediation process, need legal counseling, which only lawyers can provide, and which can tremendously increase the costs parties have to cover after mediation, if this consultation is given by lawyers outside of the mediation process.[280] Another significant advantage of lawyer - attended mediation is that courts have a lesser burden to analyze and evaluate cases before assigning them to be mediated.[281] These procedures involve party attendance and sometimes attorney participation.[282] On the other hand, lawyers assisting in the mediation process make legal assessment of the mediated outcome unnecessary. Even if the parties in the mediation process cannot agree to a settlement, the participation of lawyers can help to analyze the problems, define issues and thereby help the parties and judges in a litigated process after mediation has failed.[283] Mandated mediation is, therefore, not an additional hurdle to litigation, but a significant factor which changes the structure of the traditional litigation in court substantially by providing more efficiency and decreasing costs.[284] In summary, research suggests mandatory mediation assisted by lawyers does not lead to higher costs,[285] but even after an unsuccessful mediation paves the way for a fast and efficient litigation in court.

It is time - effective[286] and at least not more expensive than mediation with a post- mediation lawyer participation. The difference from the mediation cases without lawyer participation is only that in the former cases the fees that parties accrue in the

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280 *Id.*

281 *Id.*

282 *Id.* at 1388.

283 *Id.*

284 *Id.*

285 *Id.*

286 *Id.* at 1392; Jane Orbeton & Paul G. Charbonneau, *Comparing the Results of Mediated Domestic Relations Cases*, Mediation Q., Winter 1988, 61, 64-67.

divorce process, are shared between mediator and lawyer.[287] Finally, mediators, who normally have no law degree, often need the assistance of legally trained experts, who can help to balance the power between parties and thereby contribute to more fairness in the divorce process.[288]

D) Mediation in Child Custody Disputes

Critics of the traditional adversarial model have increasingly highlighted failures of this model in the sensitive child custody issue because it increases conflicts and hostility between parents, which have devastating effects upon the child's well - being.[289]

In contrast, the mediation alternative is less formalized and more focused on the individual cases than on the setting or analyzing of rules.[290] Therefore, non-economic interests of the disputants, their emotional well - being, especially in the post-divorce period and the long-term relationship among parents and children are much more in the center of the mediation process than in the traditional adversarial concept.[291]

Another advantage of mediation in child custody disputes is the involvement of mental health professionals that are sensitive to the emotional difficulties divorcing parents have in communicating with each other about child custody. One hotly disputed

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[287] *Id.*

[288] *Id.*

[289] Andrew Shepard, *Taking Children Seriously, Promoting Cooperative Custody After Divorce,* 64 Tex. L. Rev. 687, 734 - 35 (1985); Kenneth J. Rigby, *Family Law: Alternative Dispute Resolution,* 44 LA. L. REV. 1725, 1727 (1984); Nichol M. Schoenfield, *Turf Battles And Professional Biases: An Analysis Of Mediator Qualifications In Child Custody Disputes,* 11 Ohio St. J. on Disp. Resol. 469 – 70 (1996).

[290] Judy C. Cohn, *Custody Disputes: The Case For Independent Lawyer - Mediators,* 10 Ga. St. U. L. Rev. 487, 491 – 93 (1994); Donald T. Saposnek, *Strategies in Child Custody Mediation: A Family System Appraoch,* 29, in *Divorce Mediation Readings* at 145 (1985); Leonard L. Riskin, *Mediation and Lawyers,* 43 OHIO ST. L.J. 29, 34 (1982).

[291] Nichol M. Schoenfield, *Turf Battles And Professional Biases: An Analysis Of Mediator Qualifications In Child Custody Disputes,* 11 Ohio St. J. on Disp. Resol. 469 - 70 (1996).

issue is whether legal or mental health experts are the better mediators in child custody disputes.

1) Attorneys as mediators in child custody disputes

Attorney - mediators have the role of neutral third parties, who consciously refrain from taking sides with one party.[292] However, attorney - mediators can be classified into two distinct groups, those who counsel both parties and those who give legal advice to neither. The first group of attorney - mediators simply explains to the parties whether or not they considered their adverse claims and interests as realistic under the presuppositions established by law.

The second group views their role as a mere neutral third party, who gives no legal advice during the mediation process at all, but has only the function to stimulate and facilitate discussion between the ex - spouses on a rational basis. Often these mediators advise both parties to have legal counseling outside the mediation process.[293]

2) The advantages of an attorney – mediators in child custody cases

The major advantage which attorney - mediators have in contrast to mediators without a legal education is the possibility of advising parties or at least informing them[294] about legal issues of child custody, to review the final settlement after mediation[295] and ensure more confidentiality than can be offered by non - lawyer mediation.[296]

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[292] *Id.* at 470 - 71.

[293] Russell M. Coombs, *Noncourt – Connected Mediation and Counseling in Child – Custody Disputes,* 17 FAM. L. Q. 469, 475 (1984).

[294] Mary Pat Treuthart, *In Harm's Way? Family Mediation and the Role of the Attorney Advocate,* 23 GOLDEN GATE U.L.REV. 717, 742 (1993).

[295] Nichol M. Schoenfield, *Turf Battles And Professional Biases: An Analysis Of Mediator Qualifications In Child Custody Disputes,* 11 Ohio St. J. on Disp. Resol. 469, 470 – 71 (1996).

[296] Russell M. Coombs, *Noncourt – Connected Mediation and Counseling in Child - Custody Disputes,* 17 FAM. L. Q. 469, 491(1984).

In child custody cases the lawyer - mediators can point out the legal rights that spouses have under the law of the state and the legal meaning of an agreement on child custody.[297] Informed about their legal situation parties in a divorce process can better decide which their starting position in negotiation is and whether it is worth insisting on positions and goals which are legally not realistic.[298]

Finally, if parties are informed about their legal rights, the probability that they will accept the final custodial outcome over a long term and act according to their obligations is much higher than if they finally discover that they would have gained a much better arrangement by litigating the child custody issue.[299] A major advantage of having an attorney mediating the divorce case is the likelihood that an agreement reached by the parties will be accepted by the courts in the final divorce decree. Parties will not waste time negotiating on an agreement that has no chance to survive the final judicial review.[300] Additionally, despite the non - therapeutic nature of mediation, its parties have a better opportunity to vent anger and let steam off than in litigation. However, this approach is not aimed at dealing with psychological problems; rather it favors an external data gathering and dispute resolution, an aim attorneys are more familiar with than many other experts.[301] Finally, the confidentiality of clients' data is more ensured with lawyer – mediators, who have ethical responsibilities towards their clients, than with other professionals.[302]

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297 *Id.*

298 Susan C. Kuhn, *Comment: Mandatory Mediation: California Civil Code Section 4607,* 33 EMORY L. J. 733, 766 (1984).

299 Kuhn, *id.*

300 Nichol M. Schoenfield, *Turf Battles And Professional Biases: An Analysis Of Mediator Qualifications In Child Custody Disputes,* 11 Ohio St. J. on Disp. Resol. 469, 472 - 73 (1996).

301 *Id.*

302 *Id.*

3) Dangers of lawyer – mediators in child custody disputes

There are, however, some weak points attorney - mediators might have in contrast to other experts as mediators in child custody cases.[303] The mediation process has the inherent nature of reconciliation rather than of confrontation while legal education is traditionally based on the adversarial problem solving method, which is detrimental to the cooperative problem - solving approach in mediation.[304]

Another risk which might arise from the adversarial system is the increase of power imbalance, if it had already existed in the marital relationship.[305] A lawyer – mediator, due to his training in the adversarial dispute resolution method, may be less likely than a non - lawyer to discover these imbalances, and to help the weaker spouse to define and assert her position. Especially in child custody disputes critics emphasize the tendency of lawyers to ignore the emotional difficulties of their clients and to focus on facts and exterior problems more than on the emotions involved when fighting over a child.[306] According to this opinion, lawyers are much more interested in reaching an agreement that they can take to court for approval than getting involved in unresolved and complex emotional issues.[307]

However, many lawyers' lack in psychological training or behavioral science is not necessarily a hurdle to become a good mediator. The aim of mediation is not to reconcile the parties but to work in a fair atmosphere and to find a balanced agreement that both parties can live with.[308] Family lawyers usually possess the skills necessary to

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303 *Id.* at 474.

304 *Id.*

305 *Id.*

306 *Id.*

307 Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking,* HARV. L. REV. 727, 757 (1988).

308 Nichol M. Schoenfield, *Turf Battles And Professional Biases: An Analysis Of Mediator Qualification in Child Custody Disputes,* 11 Ohio St. J. On Disp. Resol. 469, 476 - 77 (1996).

mediate child custody disputes, namely a good knowledge of people, well developed and convincing counseling ability and a sense of what is realistic in a negotiation.[309] The lack of psychological skills, however, is a serious argument as far as the power imbalance between spouses is concerned. Lawyers are often so concerned with reaching a settlement and increasing their reputation as being successful counselors, that they may fail to recognize the weaker position of one party - and worse, they may recognize but ignore it when the proper course may have been to terminate the mediation session and advise the weaker spouse to start a court - litigation.[310]

E) The regulation of mediation in Georgia – statutes and rules

Courts all over the U.S. have recognized the significance of ADR. However the statutes set up by the states to regulate the mediation process, the selection of mediators, and their responsibility are quite diverse.

Georgia has a widespread use of Alternative Dispute Resolution, especially mediation.[311] In 1992 the Supreme Court of Georgia adopted the recommendations of the Joint Commission on ADR giving every trial court the possibility to employ ADR processes.[312] The courts however developed their own program, which refers only certain types of cases to ADR and sets up a certain type of ADR - procedure for these cases.[313]

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309 Lawrence D. Gaughan, *Divorce Mediation: An Important New Role for Lawyers,* VA. B.A.J., Summer 1986, at 10.

310 Leonard L.Riskin, *Mediation and Lawyers,* 43 OHIO ST. L.J. 29, 40 (1982).

311 Peter S. Chantilis, *Mediation U.S.A.,* 26 U. Mem. L. Rev., 1031, 1045 - (1996).

312 *Id.* at 1045; Melissa Lee Himes, *Georgia Court – Annexed Alternative Dispute Resolution Act: Create and Fund Alternative Dispute Resolution Programs in Each Country in Georgia,* 10 Ga. St. U. L. Rev. 91 (1993).

313 Chantilis, *id.*

Furthermore the Supreme Court founded the Georgia Commission on Dispute Resolution.[314] This commission set up standards for the qualification of neutrals as mediators in the court - administered program.[315] The requirement basically consists of a theoretical training and observation of a mediation process in domestic relations. Family mediators need a training of 45 hours.[316] For becoming a mediator in divorce and custody cases a special additional training in domestic violence is required.

The courts in Georgia are provided with special model mediation rules as guidelines.[317] Remarkably Georgia is the only state in the U.S. which has acknowledged the significance of ADR for the legal system: all lawyers in Georgia are required to get continuing legal education in ADR.[318] According to Georgia's Code of Professional Responsibility the lawyers in Georgia have the legal duty to advise potential clients about Alternative Dispute Resolution.[319]

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314 Melissa Lee Himes, *Georgia Court – Annexed Alternative Dispute Resolution Act: Create and Fund Alternative Dispute Resolution Programs in Each County in Georgia*, 10 Ga. St. U. L. Rev. 93 (1993).

315 Peter S. Chantilis, *Mediation U.S.A.*, 26 U. Mem. L. Rev., 1031, 1048 (1996).

316 *Id.*

317 Judy C. Cohn, *Custody Disputes: The Case for Independent Lawyer – Mediators,* 10 Ga.St.U. L. Rev. 487, 492 - 93 (1994).

318 Peter S. Chantilis, *Mediation U.S.A.*, 26 U. Mem. L. Rev., 1031, 1048 (1996).

319 *Id.*

CHAPTER V

CONFIDENTIALITY IN MEDIATION

A) Confidentiality in Mediation

Confidentiality in mediation is essential for its success. In divorce cases where parties often prefer to mediate the issues rather than litigate them in court, the importance of non-disclosure of confidential information is higher than in other cases of protection of secret information. The question of confidentiality becomes relevant if one party tries to use information which was disclosed during a mediation session in a later court litigation against the other spouse if mediation could not lead to a satisfactory outcome.[320] The issue of confidentiality can also come up if one spouse tries to subpoena the mediator or the information the mediator got in joint or private session with the parties, either to sue the mediator for malpractice or to support her point of view in a subsequent litigation against the other spouse. Even after the parties have reached an agreement in mediation, one spouse might be interested in using secret information, gathered during the mediation process in a subsequent court - litigation to enforce this agreement or when spouses later disagree about what the outcome of the mediation process was.[321] Especially in these situations the party who relied on the confidentiality of the information disclosed during mediation needs protection from unwanted disclosure.

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[320] John S. Murray, Alan Scott Rau, Edward F. Sherman, *Processes Of Dispute Resolution*, 379 (1996).

[321] *Id.*

1) Effective mediation requires confidentiality[322]

Mediators in divorce cases have to help the couple to identify issues and the underlying reasons for their conflicts, in order to promote a long-lasting post-marital agreement. Therefore they help to promote a discussion about possible alternative solutions to problems which arise after divorce. They have to bring the divorcing spouses together, help them to reach an agreement on post - divorce issues and ensure that this final settlement will be carried out. Because parties necessarily have to disclose their deeper interests, as well as their goals during mediation, the perspective that these secrets can be disclosed in a subsequent court litigation can tempt parties to be dishonest and mislead their spouse during mediation.[323] Compromises in negotiations often require the disclosure of facts that are unfavorable and therefore would not be disclosed in an adversarial litigation process.[324]

2) Fairness in mediation requires confidentiality

In the traditional litigation process, rules of evidence and procedure, as well as the legal advice by attorneys, protect parties and limit disclosure.[325] Parties in mediation rely on the confidentiality of the information given and often don't consider that these communications might be disclosed later. Because the weaker and less sophisticated spouse can easily be taken advantage of, a disclosure of secret information by the other spouse would be seriously unfair to her.[326] A clever and sophisticated spouse could easily use this situation for the purpose of discovery of secret information that he can use against the intellectually weaker spouse in court.[327]

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322 *Id.* at 380; Jay Folberg, *Confidentiality and Privilege in Divorce Mediation,* in *divorce mediation,* edited by Jay Folberg & Ann Milne, 320 (1988).

323 John S. Murray, Alan Scott Rau, Edward F. Sherman, *Processes Of Dispute Resolution,* 380 (1996).

324 *Id.*

325 *Id.*

326 *Id.*

327 *Id.*

3) Confidentiality and mediator's neutrality

The danger that the mediator, who should be neutral and unbiased, could become an adversary in a subsequent litigation process would prevent most parties from openly discussing interests and problems during the mediation process.[328] The party who might be disfavored by the mediator's testimony in court could feel taken advantage of by a biased and partial mediator.[329] This fear alone, that the mediator could be biased and favor one party by disclosing confidential information of the other party during a potential subsequent litigation, could from the very beginning destroy the confidence between the mediator and his clients and would make the mediation process inefficient.[330]

4) Confidentiality as a major reason to favor mediation to litigation

Many divorcing spouses decide to mediate their disputes rather than litigate them because they do not want to "air the dirty laundry"[331] in the public and prefer to settle a dispute without paying the price of damaging one's reputation. Therefore, if confidential information can be disclosed, the mediation process looses this major advantage to the traditional court – litigated divorce.

5) Mediators need confidentiality

Lack of confidentiality in mediation is not only risky for divorcing spouses but frequent subpoenas to testify about the outcomes of mediation can also frustrate enthusiastic mediators and prevent them from volunteer work in this field.[332] In addition, many mediators who are uncertain about having to testify in court and about

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328 *Id.*

329 *Id.*

330 *Id.*

331 *Id.;* Jay Folberg, *Confidentiality and Privilege in Divorce Mediation,* in *divorce mediation*, edited by Jay Folberg & Ann Milne, at 326 (1988).

332 John S. Murray, Alan Scott Rau, Edward F. Sherman, *Processes Of Dispute Resolution,* 380 (1996).

the confidentiality of their records, might destroy these documents to protect confidentiality.[333]

B) Restrictions to confidentiality

The critics of a broad assumption of confidentiality in mediation claim that the right to "every man's evidence"[334] as a basic procedural rule can only be limited in a certain number of cases.[335]An attempt to reconcile these two extreme positions of complete disclosure and full confidentiality of the information is to categorize the issues which have to remain confidential. One solution could be to keep confidential the facts, whether a settlement was reached, its conditions, the documents parties have disclosed during mediation, the impressions and opinions of the mediator and his suggestions to the parties,[336] Another category of confidential information protects the persons who should be able to enforce confidentiality, such as the main participants in the mediation process and courts, as well as witnesses.[337] The persons who could be obliged to keep information confidential are the parties, the mediator and private or public third parties.[338]

To sum up, confidentiality should be granted when a party in mediation in her own interests tries to subpoena statements, documents or opinions of the mediator or the other party in a subsequent litigation process over the same legal matter and against the same person as in mediation; however, interests of third parties or the public should not be involved.[339]

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333 *Id.* at 381.

334 *Id.*

335 *Id.*

336 Eric D. Green, *A Heretical View of a Mediation Privilege*, 2 Ohio St. J. Dispute Res. 1, 32 (1986).

337 John S. Murray, Alan Scott Rau, Edward F. Sherman, *Processes Of Dispute Resolution,* 380 (1996).

338 *Id.*

339 *Id.*

C) Judicial or Statutory Protection of Confidentiality

Some jurisdictions recognize a mediation privilege, imposed either by court or by statute.[340] However, to provide full evidence in court the number of privileges established by common law has gradually been reduced.[341]

1) Judicially created privilege

Some courts have accepted certain conditions as the presuppositions of any privilege in court. The parties must have confidence that the information given during the mediation process will not be disclosed.[342] This confidence must be essential for the maintaining of a good relationship between the parties; furthermore, this relationship must be one of high value and therefore has to be protected in the interest of the community.[343] Finally, comparing the benefits of disclosure and the benefits to it to the injury it might cause, the benefit must be greater than the injury of disclosing confidential information.[344]

However, whether the relationship between divorcing parties and mediators always fulfills these criteria is questionable.[345]

The first criteria of parties' confidence in the mediator not to disclose secret information is normally fulfilled. However, according to the Federal Rules of Evidence a privilege can only be granted if it is meets "the principles of the common law in the light of reason and experience."[346] To meet this criteria of a "reasonable" confidence the details of every confidentiality agreement between the parties and the mediator can

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340 *Id.* at 393.

341 *Id.*

342 *Id.* at 394.

343 *Id.*

344 *Id.*

345 *Id.* at 396.

346 Federal Rules of Evidence, Rule 401.

become important.[347] In most cases courts are willing to protect parties only if an agreement in written form exists.

The second presupposition of a mediation privilege, that confidentiality is of vital importance for the relationship between the parties and their mediator, is often more difficult to fulfill.[348] Some commentators argue against a mediation privilege by pointing out that many states have successful mediation without a privilege and even if a mediation privilege should be essential for the quality of this relationship, they assume, that a "limited rather than absolute privilege, is sufficient."[349]

Other commentators question whether non - privilege in mediation would really harm the profession of mediators. They assume that even if doctors, lawyers or mediators have to disclose confidential information, they would not be out of work, because their service would still be needed.[350] Even though the mediator - client relationship is based on confidence, the parties in this process will normally not terminate their relationship just because of the danger of unpleasant disclosure.[351] However, commentators in favor of a mediation privilege emphasize that confidentiality is a precondition to parties to open up and discuss freely without fear, that secrets will become public[352] and accessible to friends, family members, and employers.

Finally, the mediation privilege could further frustrate the purpose of potential litigants who decide to mediate before litigation, and to subpoena the mediator and his

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347 John S. Murray, Alan Scott Rau, Edward F. Sherman, *Processes of Dispute Resolution, The Role of the Lawyers,* 394 (1996).

348 *Id.*

349 Eric D. Green, *A Heretical View of the Mediation Privilege*, 2 Ohio St. J. on Dispute Resolution 1, 32 (1986).

350 John S. Murray, Alan Scott Rau, Edward F. Sherman, *Processes of Dispute Resolution, The Role of the Lawyers,* 394 (1996).

351 *Id.*

352 *Id.*

documents into a subsequent litigation process.[353] Consequently, parties will consider seriously the pros and cons of a pre - litigation mediation session, and whether they should spend time in mediation, which in their case could be too time - consuming and therefore less effective.[354]

Another critic of the mediation privilege emphasizes that because of this privilege parties can hide the truth in court.[355] However, even the testimony of a mediator is not a guarantee for the truth:[356] The mediator can lie in court and the prospect that the parties can subpoena him, and force him to testify about details of the mediation process, as well as some statements made by the divorcing couple, might tempt one or both spouses to lie during mediation.[357] The mediator consequently, in good faith or otherwise, would expose these lies in court.[358]

Another argument against a mediator's testimony in court is the different conception of dispute resolution in mediation and litigation. A court litigation is necessarily adversarial and the mediator, who is used to approach a conflict in a cooperative, problem - solving way, might not be a good witness in a competitive and adversarial litigation process.[359]

It is debated among mediators and in courts whether the last two presuppositions for the recognition of a mediation privilege are fulfilled - whether the community is interested in maintaining the relationship between the mediator and his clients, and whether the benefits of disclosing confidential information outweigh the disadvantages.

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353 *Id.* at 395.

354 *Id.*

355 *Id.*

356 *Id.*

357 *Id.*

358 *Id.*

359 *Id.*

It is doubtful whether judges who have to decide on a mediation privilege in court will make a positive decision and uphold confidentiality of information which was disclosed during the mediation sessions.[360]

2) Statutory regulation of confidentiality

Mediation legislation in the last few years has dealt widely with confidentiality issues.[361]

Meanwhile, a number of jurisdictions permits several exceptions to confidentiality requirements.

a) Contractual Agreement to Disclose Information

An important statutory exception from confidentiality, recognized by a number of states,[362] is based on the contractual agreement between the parties and mediator that information disclosed during the mediation process can be disclosed in a subsequent litigation process.[363]

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360 Eric D. Green, *A Heretical View of the Mediation Privilege,* 2 Ohio St. J. on Dispute Res. 1, 34 (1986).

361 Carol Izumi, *Symposium on Standards of Professional Conduct in Alternative Dispute Resolution, 1995 J. of Dispute Resolution 95.*

362 Izumi, *id.* referring to e.g., Ariz.Rev.Stat.Ann. Section 12 - 2238 (b)(1)(1993); Ark.Code Ann. Section 2-7-202(b) (Michie 1993); Cal.Evid.Code Section 1152.5(a)(4) (West 1994); Colo.Rev.Stat. Section 13-22-307 (2)(a) (1993); Fla.Stat.Ann. Section 44.102 (3) (West 1994); Ind.Code Ann. Section 4-6-9-4(b)(2) (West 1994); Mich.Comp.Laws Section 691.- 1557(1)(a) (1993); Miss.Code Ann. Section 69-2-47 (1993); Mo.Rev.Stat. Section 17.06 (a) (1991); Mont.Code Ann. Section 26-1-811 (1993); Neb.Rev.Stat. Section 25-2914 (1994); N.H.Rev.Stat.Ann. Section 328:C (9) (1993); N.D.Cent.Code Section 31-04-11 (1993); Or.Rev.Stat. Section 36.205 (1991); Tenn.Code Ann. Section 36-4-130 (b) (1993); Tex.Code Ann. Section 154.073 (b) (West 1994); Utah Code Ann. Section 78-31b-7(1)(1993); Va.Code Ann. Section 8.01-581.22 (Michie 1993); Wash.Rev.Code Section 5.60.070 (1)(a)(1994); Wis.Stat.Ann. Section 904.085(4)(b) (West 1994); Wyo.Stat. Section 1.43-103 (1993).

363 Izumi, *id.*

b) Disciplinary actions against the mediator

The second exception from confidentiality, accepted in several states, arises in disciplinary actions against the mediator[364] in order to prove a breach of his duties,[365] or when parties seek damages in a subsequent action against the mediator.[366]

c) Integrity of the mediation process

Some states allow the disclosure of confidential information to preserve the integrity of the mediation process itself.[367] The purpose might be to enforce the actual agreement to mediate[368] or to enforce the mediated agreement itself[369] or to prove the validity of the mediated agreement.[370] An agreement might be invalid due to fraud, duress or misrepresentation.[371]

d) Administration of Justice

Besides other exceptions that are of minor importance in divorce cases, some states have established the right to disclose information in order to maintain the "administration of justice",[372]for example, to prove the prejudice of a witness.[373]

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364 Izumi, *id.* referring to Fla.Stat.Ann. Section 44.102 (4) (West 1994).

365 Izumi, *id.* referring to Ariz.Rev.Stat.Ann. Section 12-2238 (b)(2) (1993); Colo.Rev.Stat. Section 13-22-307 (2)(d) (1993); N.D.Cent.Code Section 31-04-11 (1993).

366 Izumi, *id.* referring to, e.g., Mich.Comp.Laws Section 691.-1557(1)(b) (1993); Neb.Rev.Stat. Section 25 - 2914 (1994); Okla.Stat.Ann. tit. 12, Section 1805 (f) (West 1994); Or.Rev.Stat. Section 36.205(2)(b) (1991); Tenn.Code Ann. Section 36-4-130 (b) (2) (1993); Va.Code Ann. Section 8.01-581.22 (Michie 1993); Wash.Rev.Code Section 5.60.070(g) (1994).

367 Izumi, *id.*

368 Izumi, *id.* referring to Ariz.Rev.Stat.Ann. Section 12-2238 (b)(4)(1993).

369 Izumi, *id.* referring to Wyo.Stat. Section 1.43-103 © (v)(1993).

370 Izumi, *id.* referring to N.D.Cent.Code Section 31-04-11 (1993).

371 Carol Izumi, *id.*

372 *Id.*

373 Izumi, *id.* referring to, e.g., Haw.Rev.Stat. Section 408 (1993); N.C.Gen.Stat. Section 7a-38(8)© (1993); Wis.Stat.Ann. Section 904.085 (4)(e)(1994).

3) Contractual Agreements to protect Confidentiality

Prior to mediation parties and the mediator can agree that all information disclosed in joint or in separate mediation sessions will remain confidential and that the parties will not subpoena the mediator or his notes of the mediation process in a possible subsequent litigation.[374] Many mediation programs, such as the ABA Standards of Practice for Lawyer Mediators in Family Disputes, frequently ask parties and mediators to sign an agreement of confidentiality.[375] To be valid, this agreement must be in written form, clear and specific enough to show mutual consent.[376]However, an agreement between the mediator and the parties not to disclose information unless all participants in the mediation process agree to it, can conflict with public policy not to suppress evidence in litigation.[377] In Simrin v. Simrin the California Court of Appeals upheld the confidentiality agreement between two spouses and a marriage counselor, even though it conflicted with public policy, because this counseling was aimed at preserving the marriage, and therefore an open and fearless discussion about private problems was of vital importance.[378] When husband and wife are attending a marriage counseling session they want to express their inner feelings and concerns, as well as their interest in preserving the marital bond; otherwise "the purpose of counseling is frustrated."[379]

However, there is a significant difference between cases of marriage counseling and confidentiality issues on the one hand and divorce mediation on the other hand. The

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374 Kent L. Brown, *Confidentiality In Mediation: Status And Implications,* 1991 J. Disp. Resol. 307, 318 (1991); John S. Murray, Alan Scott Rau, Edward F. Sherman, *Processes Of Dispute Resolution,* 415 (1996).

375 *ABA Standards of Practice for Lawyer Mediators in Family Disputes,* sec. II. A.

376 John S. Murray, Alan Scott Rau, Edward F. Sherman, *Processes Of Dispute Resolution*, 416 (1996).

377 Simrin v. Simrin, 233 Cal. App. 2d 90, 43 Cal. Rptr. 376 (1964).

378 *Id.*

379 *Id.*

agreement of confidentiality in Simrin v. Simrin concerned a situation in which both partners tried to preserve their marriage, whereas in divorce mediation parties have already decided to get divorced and only try to reconcile differences as to the post - marital financial, custodial and property issues.

It is therefore doubtful whether a court would generally uphold an agreement between the parties and the mediator that is contrary to public policy.[380]

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[380] John S. Murray, Alan Scott Rau, Edward F. Sherman, *Processes Of Dispute Resolution,* 419 (1996).

CHAPTER VI

CONCLUSION

The divorce process is highly emotional and complex; the "rigidity" of the court system[381] is not appropriate to meet the "emotional dynamics"[382] of every divorce process. The adversary, highly formal and strict procedural approach to a complex and multi - centered issue can even enlarge the gap and polarize the positions between the divorcing spouses.[383] The issues parties are facing after they decide to dissolve their marital bond are diverse; and so are the emotional challenges.

Mediators can have educational backgrounds other than law, e.g., social and behavioral sciences, psychology and therapy,[384] and therefore are often better prepared to deal with the complex emotional issues in divorce cases. Lawyer – mediators, however, can have the advantage of knowing the probable outcome in a court - litigated divorce process and they can provide the parties with a comparison of a mediated and litigated process. However, lawyer - mediators rarely have additional degrees in social and behavioral sciences.[385] Nevertheless, according to scientific research, the most important qualities a mediator should have are "personality traits", [386] enhanced by the

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381 Terenia Urban Guill, *A Framework For Understanding And Using ADR,* 71 Tul. L. Rev. 1323 (1997).

382 *Id.* at 1323 – 1327.

383 *Id.*

384 Scott Hughes, *Elizabeth's Story: Exploring Power Imbalances In Divorce Mediation,* 8 Geo. J. Legal Ethics 553, 571 (1995).

385 *Id.*

386 Jessica Pearson et al., *A Portrait of Divorce Mediation Services in the Public and Private Sector*, 21 CONCILIATION CTS. REV. 1, 22 (1983).

ability to be objective and credible; knowledge as well as experience are of less importance.

Books and articles on mediation, as well as other ADR methods, will continue to flood law libraries. Alternative processes of dispute resolution are now part of optional training in law schools. However, even if mediation is by its nature an alternative to the adversarial court – litigated process, legal rules and principles will play a larger role in future. A process which does not provide a security net for the severely weaker party with significantly less bargaining power will otherwise support "the survival of the fittest". Even though the mediation process is a form of "private ordering"[387], which by its nature provides the possibility of tailoring an agreement adapted to the parties' individual perception of justice, the mediation process in general takes place "in the shadow of the law"[388]. Even though the many divorce cases can successfully and time-efficiently be settled in mediation, cases of abuse and severe power imbalance have to be excluded from mediation and settled in court, where rules of civil procedure and a powerful judge can secure equal rights to share the marital pie after divorce.

In summary, mediation in divorce cases has been highly successful and enabled divorcing couples to resolve their disputes in a fair, time- and cost-effective way. Legislature and courts are working on the improvement of the mediation programs and will further legitimize this technique in family disputes, especially in divorce cases.

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387 John S. Murray, Alan Scott Rau, Edward F. Sherman, Processes of Dispute Resolution, 310 (1996).

388 Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case for Divorce,* 88 Yale L. J. 950, 968 (1979).

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