

2. THE PROBLEM WITH FAIRNESS IN FAMILY LAW

TRINA GRILLO, THE MEDIATION ALTERNATIVE: PROCESS DANGERS FOR WOMEN

100 Yale L.J. 1545, 1549-50, 1600-08, 1610 (1991)

[Editor's Note: California is one of numerous states that require mediation of disputed child custody issues in divorce cases. CAL. CIV. CODE § 4607(a) (West Supp.1990). In this excerpt, Professor Trina Grillo—at the time of this writing an active family mediator handling private, voluntary cases—criticizes California's mandatory system, which often excludes lawyers from the mediation sessions.]

Custody mediation under the California system] provides neither a more just nor a more humane alternative to the adversarial system of adjudication of custody, and, therefore, does not fulfill its promises. In particular * * * mandatory mediation can be destructive to many women and some men because it requires them to speak in a setting they have not chosen and often imposes a rigid orthodoxy as to how they should speak, make decisions, and be. This orthodoxy is imposed through subtle and not-so-subtle messages about appropriate conduct and about what may be said in mediation. It is an orthodoxy that often excludes the possibility of the parties speaking with their authentic voices.

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III. MANDATORY MEDIATION AND THE DANGERS OF FORCED ENGAGEMENT

Emma has been in a marriage which in its early years seemed to be a good one for both Emma and her husband. She has been the primary caretaker of the children, and she is very committed to them. She has lived much of her life through her husband and her children, and has not worked outside her home. Increasingly, however, she has begun to feel that she and her husband have grown apart, and that he does not see her as a person but rather as a repository of various roles. After much agony, she has decided to end her marriage. Her departure from the marriage is a first step toward seeing her life as having separate dimensions from her husband's and children's, but her right to individuation does not seem clear to her; in fact, there are many times when it seems selfish and wrong. It is hard for her even to find the language to describe what is propelling her to turn her life, and her children's lives, upside down, but propelling she is. The marital separation was an early step toward defining her own physical and psychological boundaries. She now finds herself, however, feeling guilty, frightened, and unsure of how she will survive in the world alone.

Joan has been in a marriage in which she has been physically abused for ten years. She and her husband David have two children, whom David has never abused. She is afraid, however, that if she leaves David, he will begin to abuse the children whenever he is caring for them. Joan has been afraid to leave her marriage because David has threatened to harm her if she does so. When she separated briefly from him previously, he followed her and continually harassed her. Each time David beats Joan he shows great remorse afterwards and promises never to do it again. He is a man of considerable charm, and she has often believed him on these occasions. Nonetheless, Joan has finally decided to leave her husband. She is worried about what will happen, economically and physically, to her children and herself.

It might be that mediation would help Emma's family disengage and discover ways of relating to one another. Mediation could be useful, even transformative, during the divorce process. Significant possibilities of damage to Emma also exist, however. For example, she might find herself traumatized by a forced engagement with her husband. Or, in the intimate mediation setting, she might find it difficult to withstand criticism of how she is conducting herself in life or in the mediation.

For Joan, the direct confrontation with her husband, with the safety of her children and herself at stake, would surely be psychologically traumatizing and might also put her in physical danger. Because of these possibilities, the chance—even the substantial one—of a beneficial result cannot justify the sort of intrusion by the state that occurs when mediation is mandatory.

While some of mandatory mediation's dangers affect men and women equally, others fall disproportionately on women. A study that compared people who chose to mediate with those who rejected the opportunity found that 44% of the reasons given by women who rejected mediation services offered to them center around their mistrust of, fear of, or desire to avoid their ex-spouse. In contrast, those men who rejected mediation appeared to do so because they were skeptical of the mediation process or convinced they could win in court. Thus, the requirement of mandatory mediation that the parties meet personally with one another, usually without a lawyer present, presents troubling issues for women. Feminist analyses, looked at alone and together, clarify why this is so.

A. The Ethic of Care in Mediation

As discussed earlier, several feminist scholars have suggested that women have a more "relational" sense of self than do men. The most influential of these researchers, Carol Gilligan, describes two different, gendered modes of thought. The female mode is characterized by an "ethic of care" which emphasizes nurturance, connection with others, and contextual thinking. The male mode is characterized by an "ethic of

justice" which emphasizes individualism, the use of rules to resolve moral dilemmas, and equality. Under Gilligan's view, the male mode leads one to strive for individualism and autonomy, while the female mode leads one to strive for connection with and caring for others. Some writers, seeing a positive virtue in the ethic of care, have applied Gilligan's work to the legal system. * * *

The "ethic of care" has also been viewed as the manifestation of a system of gender domination. Nevertheless, it is clear that those who operate in a "female mode"—whether biologically male or female—will respond more "selflessly" to the demands of mediation.

Whether the ethic of care is to be enshrined as a positive virtue, or criticized as a characteristic not belonging to all women and contributing to their oppression, one truth emerges: many women see themselves, and judge their own worth, primarily in terms of relationships. This perspective on themselves has consequences for how they function in mediation.

Carrie Menkel-Meadow has suggested that the ethic of care can and should be brought into the practice of law—that the world of lawyering would look very different from the perspective of that ethic. Some commentators have identified mediation as a way to incorporate the ethic of care into the legal system and thereby modify the harshness of the adversary process. And, indeed, at first glance, mediation in the context of divorce might be seen as a way of bringing the woman-identified values of intimacy, nurturance, and care into a legal system that is concerned with the most fundamental aspects of women's and men's lives.

If mediation does not successfully introduce an ethic of care, however, but instead merely sells itself on that promise while delivering something coercive in its place, the consequences will be disastrous for a woman who embraces a relational sense of self. If she is easily persuaded to be cooperative, but her partner is not, she can only lose. If it is indeed her disposition to be caring and focused on relationships, and she has been rewarded for that focus and characterized as "unfeminine" when she departs from it, the language of relationship, caring, and cooperation will be appealing to her and make her vulnerable. Moreover, the intimation that she is not being cooperative and caring, that she is thinking of herself instead of thinking selflessly of the children can shatter self-esteem and make her lose faith in herself. In short, in mediation, such a woman may be encouraged to repeat exactly those behaviors that have proven hazardous to her in the past.

In the story above, Emma is asked to undergo a forced engagement with the very person from whom she is trying to differentiate herself at a difficult stage in her life. She may find it impossible to think of herself as a separate entity during mediation, while her husband may easily be able

to act on behalf of his separate self. "When a separate self must be asserted, women have trouble asserting it. Women's separation from the other in adult life, and the tension between that separation and our fundamental state of connection, is felt most acutely when a woman must make choices, and when she must speak the truth."¹²²

Emma will be asked to talk about her needs and feelings, and respond to her husband's needs and feelings. Although in the past her valuing relationships above all else may have worked to the detriment of her separate self, Emma will now be urged to work on the future relationship between herself and her ex-husband. Above all, she will be asked to put the well-being of the children before her own, as if she and her children's well-being were entirely separate. Her problem in addressing her future alone, however, may be that she reflexively puts her children before herself, even when she truly needs to take care of herself in order to take care of her children. For Emma, mediation may play on what are already her vulnerable spots, and put her at a disadvantage. She may begin to think of herself as unfeminine, or simply bad, if she puts her own needs forward. Emma may feel the need to couch every proposal she makes in terms of the needs of her children. In sum, if she articulates her needs accurately, she may end up feeling guilty, selfish, confused, and embarrassed; if she does not, she will be moving backwards to the unbounded self that is at the source of her difficulties.

For Joan, the prescription of mediation might be disastrous. She has always been susceptible to her husband's charm, and has believed him when he has said that he would stop abusing her. She has always been afraid of him. She is likely, in mediation, to be susceptible and afraid once again. She may continue to care for her husband, and to think that she was responsible for his behavior toward her. Joan, and not her husband, will be susceptible to any pressure to compromise, and to compromise in her situation might be very dangerous for both her and her children.

B. Sexual Domination and Judicial Violence

Women who have been through mandatory mediation often describe it as an experience of sexual domination, comparing mandatory mediation to rape. Catharine MacKinnon's work provides a basis for explaining why, for some women, this characterization is appropriate. MacKinnon has analyzed gender as a system of power relations, evidenced primarily with respect to the control of women's sexuality. While MacKinnon recognizes the sense in which women are fundamentally connected to others, she does not celebrate it. Rather, she sees the potential for connection as invasive and intrusive. It is precisely the potential for physical connection that permits invasion into the integrity of women's bodies. It is precisely

¹²² West, *Jurisprudence and Gender*, 55 U.CHI.L.REV. 1, 55 (1988).

the potential for emotional connection that permits intrusion into the integrity of women's lives.

Men do not experience this same fear of sexual domination, according to MacKinnon; they do not live in constant fear of having the very integrity of their lives intruded upon. Men may not comprehend their role in this system of sexual domination any more than women may be able to articulate the source of their feeling of disempowerment. Yet both of these dynamics are at work in the mediation setting. It may seem a large leap, from acts of physical violence and invasion to the apparently simple requirement that a woman sit in a room with her spouse working toward the resolution of an issue of mutual concern. But that which may be at stake in a court-ordered custody mediation—access to one's children—may be the main reason one has for living, as well as all one's hope for the future. And because mandatory mediation is a *forced* engagement, ordinarily without attorneys or even friends or supporters present, it may amount to a form of "psychic breaking and entering" or, put another way, psychic rape.

There is always the potential for violence in the legal system: "a judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life . . . When interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence."¹²³

The reality of this background of judicial violence cannot be discounted when measuring the potential trauma of the mandatory mediation setting. Although the mediation system is purportedly designed in part to help participants *avoid* contact with the violence that must come from judicial decisions, in significant ways the violence of the contact is more direct. Since the parties are obliged to speak for themselves in a setting to which the culture has not introduced them and in which the rules are not clear (and in fact vary from mediator to mediator), the potential violence of the legal result, combined with the invasiveness of the setting, may indeed end up feeling to the unwilling participant very much like a kind of rape. Moreover, in judging, it is understood that the critical view of the quarrel is that of the judge, the professional third party. Mediation is described as a form of intervention that reflects the *disputants'* view of the quarrel. But having the mediation take place on court premises with a mediator who might or might not inject her prejudices into the process may make it unlikely that the disputants' view will control. Thus, a further sense of violation may arise from having another person's view of the dispute characterized and treated as one's own.

¹²³ Cover, *Violence and the Word*, 95 Yale L.J. 1601, 1601 (1986).

That many reportedly find mediation helpful does not mean everyone does. Consensual sex may take place in a certain setting in one instance but that does not make all sex in that setting consensual; sometimes it is rape. And sometimes it may only seem to be consensual because forced sex is considered par for the course—that is, it is all we know or can imagine.

When I have suggested to mediators that even being forced to sit across the table and negotiate, unassisted, with a spouse might be traumatic, their reaction has been almost uniformly dismissive. Some mediators have denied that this could possibly be the case. Even mediators who acknowledge the possibility of trauma have said, in effect, "So what?" A few hours of discomfort seems not so much to ask in return for a system that, to their mind, serves the courts and the children much better than the alternative. But a few hours of discomfort may not be all that is at stake; the trauma inflicted upon a vulnerable party during mediation can be as great as that which occurs in other psychologically violent confrontations. As such, it should not be minimized. People frequently take months or years to recover from physical or mental abuse, rape, and other traumatic events. Given the psychological vulnerability of people at the time of a divorce, it is likely that some people may be similarly debilitated by a mandatory mediation process.

Moreover, because the mandatory mediation system is more problematic for women than for men, forcing unwilling women to take part in a process which involves much personal exposure sends a powerful social message: it is permissible to discount the real experience of women in the service of someone else's idea of what will be good for them, good for their children, or good for the system.

IV. ALTERNATIVES TO MANDATORY MEDIATION

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With respect to institutional changes, an adequate mediation scheme should not only be voluntary rather than mandatory, but should also allow people's emotions to be part of the process, allow their values and principles to matter in the discussion, allow parties' attorneys to participate if requested by the parties, allow parties to choose a mediator and the location for the mediation, allow parties to choose the issues to mediate, and require that divorcing couples be educated about the availability and logistics of mediation so as to enable them to make an intelligent choice as to whether to engage in it.

The second aspect of reform represents more of a personal dynamic, one which is harder to institutionalize or to regulate. But the mediator must learn to respect each client's struggles, including her timing, anger, and resistance to having certain issues mediated, and also learn to

refrain, to the extent he is capable, from imposing his own substantive agenda on the mediation.

CONCLUSION

Although mediation can be useful and empowering, it presents some serious process dangers that need to be addressed, rather than ignored. When mediation is imposed rather than voluntarily engaged in, its virtues are lost. More than lost: mediation becomes a wolf in sheep's clothing. It relies on force and disregards the context of the dispute, while masquerading as a gentler, more empowering alternative to adversarial litigation. Sadly, when mediation is mandatory it becomes like the patriarchal paradigm of law it is supposed to supplant. Seen in this light, mandatory mediation is especially harmful: its messages disproportionately affect those who are already subordinated in our society, those to whom society has already given the message, in far too many ways, that they are not leading proper lives.

Of course, subordinated people can go to court and lose; in fact, they usually do. But if mediation is to be introduced into the court system, it should provide a better alternative. It is not enough to say that the adversary system is so flawed that even a misguided, intrusive, and disempowering system of mediation should be embraced. If mediation as currently instituted constitutes a fundamentally flawed process in the way I have described, it is more, not less, disempowering than the adversary system—for it is then a process in which people are told they are being empowered, but in fact are being forced to acquiesce in their oppression.

NOTE

Professor Joshua D. Rosenberg, a colleague of Professor Grillo's and formerly a mediator in a mandatory court mediation program in California, provides an extensive rebuttal to Grillo's argument. A short excerpt follows:

JOSHUA D. ROSENBERG, IN DEFENSE OF MEDIATION

33 Ariz. L. Rev. 467, 468-69, 492-500, 503-05 (1991)*

Professor Grillo's article paints a very effective and very dramatic picture of mediation as a misguided and destructive process. As both a teacher and a student of mediation, I have found that the process is supportive, empowering and enlightening to the participants. Helping parties to feel better about themselves and their interests is one of the most important and most valued of skills among mediators. Studies regularly show that people who go through mandatory mediation are pleased with the process.

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How does my colleague's picture of mediation as a monster emerge? Professor Grillo's article distorts the mediation process in four ways: (1) the article tells stories about mediation that are the equivalent of using a series of stories about physicians' rape of patients to paint a picture of the practice of medicine in this country; (2) the article subjects mediation to a series of double-binds, in which anything a mediator does is characterized as bad; (3) mediation is blamed for problems which existed long before mediation; and (4) the article portrays mediation as being both more powerful and more dangerous than it really is.

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Indeed, most of Professor Grillo's mediation horror stories are not from mediation at all. Instead, they involve mediation/evaluation, a process in which the "mediator" also functions as an evaluator and quasi-decision-maker. This process is often more like an informal arbitration or settlement conference than like mediation, a process in which the mediator has no decision-making authority at all. An overwhelming percentage of the mandatory participants (especially the women) prefer even mediation/evaluation to litigation. Nonetheless, it is significantly different from mediation.

* * *

GIVING IN

Another criticism of mediation stems from Professor Grillo's assertion that women are more "relational" than men. In essence, Professor Grillo asserts that women are more concerned with relating to and working with people, while men are often more concerned with dominating other people. Indeed, while Professor Grillo talks about psychological history as a basis for this difference, there is also biological evidence to support the proposition that some of men's tendencies toward dominance and aggression are hormonal. The truth of this proposition, however, does not lead, directly or indirectly, to the conclusion that mandatory mediation should be abandoned.

* * *

While it is true that one parent may do "better" than the other in mediation, it is equally true that the same parent is likely to do better in non-mediated settlements. Indeed, it is likely that during the entire marriage that spouse got things his or her way to a greater extent. Of course, the same reasoning is not limited to marriage. We all know some people who are more strong-willed and who seem able to get what they want; and we know others who, though perhaps equally or more capable, and perhaps more worthy, seem always to just miss getting what they want. Several surveys indicate that negotiating success correlates more

highly with certain personality constructs (usually referred to as those that make someone "strong-willed") than it does with intelligence. It was suggested long ago that life is not fair, but it is more fair to those who stand up for what they want.

While it may not be news to suggest that life is not fair, it is no answer for Professor Grillo to suggest that the state should, as a result, be content to sit by and let things proceed unfairly. The state has an undeniably strong interest in intervening to change pre-existing power imbalances (indeed, that is what the state does every time it acts). An action between divorcing spouses engaged in child custody determinations, therefore, might simply be one of many occasions when state intervention is appropriate. An objective analysis of the situation, however, would indicate that it is not. In all relationships, and, as a result, in all marriages, there is, to a greater or lesser extent, some power imbalance caused solely by personality differences (in addition to whatever situation specific external power imbalances might also exist). These imbalances are often most dramatic in intact marriages, because the very filing for divorce is often a sign of change in the power imbalance, and it often acts to drastically realign relationships even more. Despite the relatively high divorce rate of recent years, many people go through years or an entire lifetime feeling stuck in relationships they find oppressive. Either because of feared financial hardship, or because they are afraid of what else might happen if they leave their spouses, people often endure relationships which give them little of what they want or need, and in which they feel at the mercy of their spouses. This kind of relationship is both intolerable for the person and potentially harmful to children of the marriage.

People who remain in these relationships need more assistance in asserting themselves than do people who are leaving them, or than people who are divorcing for other reasons. Unfortunately, this same lack of assertiveness, combined with a lack of understanding of its true roots and consequences, prevents those individuals most in need of assistance from obtaining it. Absent actual or threatened physical abuse, the state does not even consider intervening to help in these cases, where help may be most needed.

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Professor Grillo asserts that some people will nonetheless feel compelled to abide by a tentative agreement. If so, it is only because the mediator does not adequately explain the party's options and the mediator's expectation that the party will take care to evaluate the tentative agreement outside of the mediation session. Concern that a mediator make that expectation clear is appropriate and helpful. To

suggest that mandatory mediation ought to be eliminated because of a mediator might not do so is too drastic a remedy.

Professor Grillo suggests that some women may, nonetheless, resist mediation because they fear that they will give in. These women need protection because once in mediation, they will feel obligated to reach an agreement, and once having reached an agreement, they will feel obligated to stick to it regardless of whether or not it is actually binding at that point. In fact, those who become aware prior to mediation of a self-defeating tendency to acquiesce become less likely to actually capitulate once in the mediation. Anyone who is sufficiently aware of her tendency to give in so that she would, if given the opportunity, refuse to participate in mediation, is unlikely to feel compelled to adhere to an admittedly tentative agreement when she is directly advised that she ought to consider the agreement only tentative. This may happen on rare occasions, but to eliminate mandatory mediation would be to take drastic action that affects numerous individuals, to provide only limited benefit for a very small number of individuals who likely need assistance in many areas.

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Finally, even if mediation were impermissible, there would be no guarantee that a court would order a more fair or just result in court. Court determinations on a given set of facts depend on the particular judge and on the quality of the attorney representing each party. Since there is as much fluctuation in the quality and the negotiating ability of attorneys as there is among non-attorneys, judicial results are subject to the same kinds of variation that result from bargaining between the parties.

FORCED ENGAGEMENT AS HORROR

Professor Grillo's final criticism of mandatory mediation is that the very experience of sitting in a room with her former husband may be awful for some women, and the state ought not to require women to go through that experience. Women would have to negotiate with their husbands over the future of their children even in the absence of state intervention, but they might not otherwise have to come in close physical proximity to them in a setting in which they are encouraged to be open and honest, so that mandatory mediation does, in this respect, affirmatively create a problem for some women. The problem, suggests Professor Grillo, is that women are expected to sit across from their husbands, expose their desires, needs and feelings, and listen to the desires, needs and feelings of their husbands. They are also expected to absorb an assortment of judgments from their husbands and the mediator about their ways of being inside and outside the mediation process.

Indeed, goes the argument, some women will find mediation traumatic and will experience it as being as terrible as rape. * * * The analogy of mandatory mediation to rape is somewhat less than compelling. First of all, while mandatory mediation may require a woman to sit in the same room as her husband, it cannot be merely the physical proximity that makes the session feel like rape. If it were, the judicial hearing with the parties present would have the same result. What makes the situation so oppressive, according to Professor Grillo, is that a woman may subject herself to listening to and absorbing her husband's concerns and may feel guilty about standing up for her own desires. The choices available to the woman, according to Professor Grillo, are to either stand up for herself and feel intolerably guilty, or to give in and thereby give up what is most important to her—another classic double-bind. Fortunately, much more appealing alternatives are not only available, but are likely. The woman who cooperates for the good of the children is likely to feel good about herself for being concerned with her children and their best interests. She may, for the first time in her life, find her more relational stance being validated and even adopted, and her husband's competitive and noncommunicative stance being rejected by the mediator, a representative of the state. She may be encouraged, for the first time in her life, to stand up to her husband for the good of herself and her children. Her assertion (as opposed to watching someone else attempt to stand up for her) may be a transformative experience. Indeed, if the mediator is any good, the woman will find that she can stand up for herself *and* have her relational stance validated at the same time. If the mother is angry, the mediation is likely to allow her to feel justified in being angry and to encourage her to protect herself in the future.

* * *

Professor Grillo suggests that, at least in court, each party expects that the proceedings will be rough. Each party is therefore likely to have her guard up and be less vulnerable to the judicial violence. In a mediation session, however, the expectation is of cooperation. There, the woman is more likely to be hit with her defenses down. Of course, the woman who is getting divorced and fighting with her husband about child custody is less than likely to go into any kind of session aimed at resolving custody disputes expecting only cooperation and pleasantness. Hopefully, the mediator will be able to de-escalate conflict and allow cooperation to emerge in time. However, neither party is likely [to] be surprised to confront a spouse who is hostile in the beginning of the session, or even a spouse who remains hostile throughout.

Admittedly, one significant difference between court hearings and most mediation sessions is the presence of attorneys at one and not the other. The attorney's presence in court, claims Professor Grillo, protects the women from the psychological damage that a mediation session might

cause. Initially, it is important to note that the role of an attorney is limited in a hearing. While she can object to certain questions from the other side, she can do so only for the reasons provided in the rules of evidence, not simply because the questions may cause some psychological harm to her client. Indeed, if anything, the mediator is generally more aware of the parties' psychological states than is a judge. The mediator is trained to attend to that state rather than to the rules of evidence in determining how far to allow questioning to go.

Nor is the presence of an attorney always a good thing for the person who habitually accommodates herself to the wishes of others. The woman who would accommodate the former husband who now opposes her is even more likely to accommodate the wishes of the attorney who is represented as her savior. * * *

On the other hand, the best of both worlds exists when the parties can better negotiate with help from a third party, who sees her role as both protecting the parties and facilitating creative problem-solving, and can also consult with their attorneys prior to making any commitments. This process allows the parties to explore solutions, and to adequately consider those proposed solutions before committing to them.

WHY MANDATORY

The vast majority of women who participate in mandatory mediation are satisfied with the experience and are glad that they have gone through mediation as opposed to a judicial hearing. Nor is there any indication that these women are somehow being duped. They come out with agreements that they believe are good for themselves and for their children. Statistics indicate that court hearings are likely to bring about arrangements that are worse. Not only do fathers "win" contested cases as often as do women, but also even those cases that women "win" are not as tailored or as personalized as are mediated agreements. In addition, mediated agreements are more likely to remain satisfactory to the parties and to continue to be respected and followed than are court-mandated arrangements.

But, goes the argument, if mediation is good, it should not have to be mandatory. All we need to do is tell people about it, or show them a videotape, and those for whom it is helpful will choose it. The unfortunate truth about human behavior, however, is that left to our own devices, we often choose to act in ways that are not profoundly wise. * * *

To the extent that people's views about mediation are subject to influence outside of the judicial system, it is not the educational media, but the opinions of their lawyers, that seems to impact most noticeably. Where mediation is not mandatory, it is likely to be chosen by those whose lawyers recommend it and likely to be rejected by those advised by their attorneys to do so.

In addition, if mediation is not mandatory, it is not then voluntary in any real sense of the word. Instead, under a system of non-mandatory mediation, either parent could force the case to trial by refusing to mediate, regardless of the other party's preference. Evidence indicates that women would not be more likely than men to opt out of mediation. Instead, those most likely to reject mediation are those who are unfamiliar with the process and are generally hesitant to try anything new. Whether those represented by attorneys are likely to accept or reject mediation seems to depend more on the attitudes of the local bar than on any insight on the parties' part. Studies have shown that while in some areas one third of divorcing parents would reject mediation if given the opportunity, when those parents are required to mediate, 75% to 80% of them are satisfied with the process and glad they were ordered to participate. Courts satisfy about half that many. Many people find custody mediation to be tense and unpleasant. These same people find court more tense and more unpleasant, and of those who find the mediation process unpleasant, over three-quarters nonetheless remain satisfied with the process.

NOTES AND QUESTIONS

1. Notice that Professor Grillo is condemning a particular child custody mediation program with certain characteristics: the mediation is mandatory, the parties have little or no choice of mediators, the mediators have little time to spend on each case and often make recommendations to the court, and lawyers usually are excluded from the mediation sessions. Currently, custody mediation programs in California display great variety. See Joan B. Kelly, *Family Mediation Research: Is There Empirical Support for the Field?*, Conflict Resol. Q., Fall-Winter 2004, at 3. Kelly reports that "in thirty-four of California's fifty-eight counties (C. Depner, personal communication, Dec. 8, 2003), mediators are authorized to make recommendations to the court for custody and visitation when parents are at impasse." *Id.* at 5. Donald T. Saposnek, explaining the difficulty of doing empirical research on such programs, states that

[w]ithin the court system, the definition of and the actual current practices of what is called mediation have parted ways, resulting in serious theoretical and practical inconsistencies. The mandate to mediate is being interpreted and implemented in practice as if the statute read: *Parties in dispute must attend a session with a court counselor who may mediate, arbitrate, recommend, refer or terminate the case.*

Donald T. Saposnek, *Commentary: The Future of the History of Family Mediation Research*, Conflict Resol. Q., Fall 2004, at 37, 43 (2004) (Emphasis in original). And although parties have a right to legal representation, in more than half of such cases, at least one parent does not have legal counsel. Kelly, *supra* at 6. In one brief study, in 76 percent of cases at least one parent

reported "interparental violence." *Id.* According to Kelly, "[s]ubsequent legislation provided for separate sessions, opt-outs for parents, and special assessment for families where domestic violence was alleged or had occurred." *Id.* at 5. Would such changes make mediation less objectionable to Grillo? To you? What other changes might you want?

Because of the great variety in mediation processes, in this and other settings, the question of whether a particular dispute ought to be mediated cannot be addressed without considering the types of mediation that might be available.

2. Professors Grillo and Rosenberg may have been talking about different types of mediation. But setting that aside, do you think Professor Rosenberg would have found Professor Grillo's conclusions less objectionable if she had hedged her language more? Here is the second to last paragraph of that article into which we have inserted qualifiers in brackets:

Although mediation can be useful and empowering, it presents some serious process dangers that need to be addressed, rather than ignored. When mediation is imposed rather than voluntarily engaged in, its virtues are [often] lost. More than lost: mediation becomes [can become; sometimes becomes] a wolf in sheep's clothing. It relies on force and [often] disregards [can disregard] the context of the dispute, while masquerading as a gentler, more empowering alternative to adversarial litigation. Sadly, when mediation is mandatory it becomes [can become] like the patriarchal paradigm of law it is supposed to supplant. Seen in that light, mandatory mediation is [has the potential to be] especially harmful: its messages [may] disproportionately affect those who are already subordinated in our society, those to whom society has already given the message, in far too many ways, that they are not leading proper lives.

Rosenberg, 33 Ariz. L. Rev., at 505.

In suggesting these modifications are the authors of this book trying to mediate between Professors Grillo and Rosenberg? Does the proposed solution cover up real differences in their beliefs or only create the opportunity to find some "play in the joints?"

3. For an elaboration of the risks of women's participation in divorce mediation, see Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 Buff. L. Rev. 441 (1992). For a review of studies dealing with whether women tend to be more risk averse and more altruistic than men, see Margaret F. Brinig, *Does Mediation Systematically Disadvantage Women?*, 2 Wm. & Mary J. Women & L. 1 (1995). Professor Brinig concludes that

[b]ecause mediation is swifter, less expensive and easier on children, it is a good alternative to litigation in many divorce cases. Many women who have tried mediation liked it. However, congested courts cannot justify mandatory mediation in cases where one spouse holds a monopoly on

marital power. No one should order mediation when there has been abuse within the family, substance abuse, or systematic hiding of assets.

Id. at 34.

4. Professor Nancy Ver Steegh, writing in the context of the mediation of divorces for couples that have encountered domestic abuse, suggests ways in which a divorce mediator can address problems of power imbalance:

In some cases, the power imbalance is too severe for mediation to take place. However, in less extreme cases, skilled mediators are equipped to deal with moderate power differentials. One way that mediators deal with power imbalance is through their own exercise of power. The mediator controls the process by:

1. Creating the ground rules.
2. Choosing the topic.
3. Deciding who may speak.
4. Controlling the length of time each person may speak.
5. Allowing and timing the person's response.
6. Determining which spouse may present a proposal to the other.
7. Presenting an interpretation of what the spouse said.
8. Ending the discussion.
9. Writing down the agreement.

The mediator gradually transfers power from himself or herself to the divorcing couple as they become able to use it appropriately. If the mediator retains too much power the couple will not "own" the agreement, but if the mediator relinquishes power prematurely, sessions are unproductive and, in the case of domestic violence, potentially dangerous. Because knowledge is a form of power, special care is taken to share information and verify facts. Power can also be balanced in a neutral fashion by asking probing questions and validating the concerns of the less powerful party. Separate caucuses give the mediator a chance to obtain direct feedback on power and safety issues.

Mediators watch for specific behaviors that indicate power imbalances. These include but are not limited to tone of voice, glaring, insults, passivity, threats, outbursts, and refusal to speak. In addition to behavioral cues, mediators watch for lopsided agreements. "Even if we concede that a mediator will not be able to see how the husband is maneuvering his wife to where he wants to get her, it is simply impossible for the mediator not to see where her husband has brought her."

Additional safeguards in such situations include independent legal advice and, to some extent, judicial review. If necessary, the mediator can end the mediation "on behalf" of the less empowered person.

Some have argued that mediators cannot deal with power imbalance without jeopardizing their neutrality and impartiality. Mediators do remain neutral with respect to the outcome of the mediation but they are not "value-free" with respect to the process and the safety of the participants. For example, as a part of the process of balancing power, mediators ask probing questions and suggest that legal counsel be sought to ensure that the parties are equally informed and fully understand the implications of agreements being considered. The alternative to ignoring power imbalances would essentially amount to siding with the more powerful party. Obviously, the experience of the mediator is key.

Nancy Ver Steegh, *Yes, No, and Maybe: Informed Decision Making about Divorce Mediation in the Presence of Domestic Violence*, 9 *Wm & Mary J. Women & L.* 145, 186-88 (2003).

She concludes this extensive study as follows:

Should abuse victims mediate their divorces? In some cases, the answer is "no." In others, the answer is "maybe" but only on a voluntary basis with a highly skilled mediator using a specialized procedure. Even then, the decision regarding mediation must be made with regard for the victim's particular situation and the options realistically available. * * *

Thus, mediation should be offered as one option among many. Abuse survivors must be informed of choices, educated about the advantages and disadvantages of each, and counseled with respect to what might work for them. They and their families deserve no less.

Id. at 204. We deal more extensively with this issue in Chapter VI, *infra*.

5. A study by psychologist Joan Kelly compared attitudes of couples who mediated all their divorce issues (not just the custody issues as in the mandatory custody mediation program that was the subject of the Grillo-Rosenberg debate) with those who used a traditional "adversary" process with two lawyers. On most measures, the mediation groups tended to be happier with its process and outcomes than the adversarial group. Here is an excerpt from that study:

On a separate, global measure of satisfaction, the mediation group was significantly more satisfied with the mediation process and outcomes than the adversarial group was with the adversarial process. At final divorce, 69 percent of mediation respondents were somewhat to very satisfied, compared to only 47 percent of adversarial men and women. There were no significant sex differences.

Discussion

The findings reported in this chapter consistently favor mediation as a method for reaching comprehensive divorce agreements when compared to the adversarial process. All but two of the eighteen significant group differences indicated that those in mediation had more

positive perceptions of and greater satisfaction with their divorce experience. Men and women in the adversarial group did not report their divorce process as better, fairer, smoother, more empowering, or more satisfactory on any measure.

In this study, mediation spouses believed that the mediation process had a more beneficial effect on their ability to be reasonable and communicative with each other compared to adversarial respondents who used attorneys. . . . The respondents in the current study also perceived that the mediators had led them to more workable compromises. Whether these perceptions of improved communication will result in reduced conflict and enhanced coparental communication and cooperation postdivorce will be determined in future analyses. We have reported elsewhere (Kelly, Gigy, and Hausman, 1988) that the mediation intervention resulted in greater increases in cooperation between mediation spouses at time 2 than did the adversarial experience. Pearson, Thoennes, and Vanderkooi and Emery and Jackson have also found small improvements in the parental relationship reported by mediation respondents. Preliminary time-3 analyses indicate that while mediation and adversarial clients do not differ in their level of anger at their spouses at final divorce, the mediation group reported less conflict during the divorce, were significantly more cooperative, and perceived their spouses as less angry than did the adversarial group.

The absence of significant group differences on a number of crucial process variables begins to address some of the criticisms leveled against mediation by those who believe that divorcing spouses will be disadvantaged unless they have the legal representation inherent to the adversarial process. The questions assessing adequacy of information produced in the mediation process indicated that, in these particular mediation interventions, mediation respondents did not feel any less informed, unprotected, or heard than did the adversarial group; neither did they believe that their spouses had an advantage over them in the negotiations.

With the exception of child support agreements, the mediation group was more satisfied with all of the outcomes reached. Fairer spousal support, more satisfactory property agreements, and better custody and visiting agreements were more often reported by the mediation group, when compared to the adversarial group. There were no significant sex differences or interaction effects for these variables. The finding that the mediation group was significantly more likely to perceive that they had equal influence over the terms of these agreements compared to adversarial men and women suggests that the mediators did a competent job of balancing power and spouses' needs. Clearly, for some adversarial respondents, the presumed condition of equal power through legal representation was not met.

* * *

Much opposition to mediation currently expressed by legal and political advocates for women derives from the belief that women are less powerful and knowledgeable than men and therefore likely to be disadvantaged in all types of divorce mediation. The findings of this study do not support these concerns. On no single items measuring process or outcome did adversarial women express more satisfaction or more favorable perception of their attorneys, their divorce process, or their agreements. Mediation women are significantly more satisfied than adversarial women on eighteen process and outcome items. Further, women in mediation were equally as satisfied as men with the overall process, mediator impartiality, adequacy and clarity of data, and various mediator techniques.

Joan B. Kelly, *Mediated and Adversarial Divorce: Respondents' Perceptions of Their Processes and Outcomes*, *Mediation Q.*, Summer 1989, at 71, 84-86.

Social scientist Jessica Pearson interviewed more than 300 people who mediated at least some of the issues in their divorce (the other issues were resolved by a judge, by negotiations between the parties' lawyers or by negotiations directly between the parties); all of these respondents—both those in public and in private mediation efforts—were enrolled in programs that were open to mediating more than just the custody issue. Jessica Pearson, *The Equity of Mediated Divorce Agreements*, *Mediation Q.*, Winter 1991, at 179, 180. One of her goals was to determine whether adversarial processes or mediation "produce more equitable results for women"—an issue on which studies had produced conflicting results. Pearson concluded that "mediation is not worse than adversarial and independent decision-making in generating agreements that are perceived to be equitable and fair." *Id.* at 192-93.

6. For further reading on exceptions to compelled participation in mediation, with special relevance to domestic relations and violence, as well as provisions for appropriate screening for intimate partner abuse, see Chapter VI, *infra*.

7. What other types of cases are likely to involve legal and personal relationships as intimate and difficult as those found in the domestic relations context? What about employment-related disputes such as discrimination or bullying in the workplace? Elder law matters? Disputes between business partners or co-authors? Special education issues? Medical malpractice claims? Disputes between neighbors?

8. Lawyers did not participate in the mediations discussed by Grillo and Rosenberg. In most parts of the U.S., even when divorcing parties have retained lawyers, the lawyers typically do not attend the divorce or custody mediations. Their attendance may even be precluded by statute or court rule in some jurisdictions. Writing in opposition to this practice, Craig McEwen, Nancy Rogers, and Richard Maiman contend that allowing lawyers to

participate in the mediation process provides low power parties sufficient protections in mandatory divorce mediations to justify the process.

Lawyers prevent or moderate the effects of a face to face encounter with an abuser, thus diminishing the likelihood of unfairness in domestic violence cases. Maine lawyers attending mediation sessions with their clients report arranging separate sessions, time-outs, and other measures to protect their clients. Past violence, which may be a key factor in determining whether the parties will submit to an unfair settlement or will be forced into a frightening situation, becomes less of a bargaining factor if the parties attend with their lawyers. Lawyers can advise clients to avoid settlements that will allow further opportunities for abuse, or that are unlikely to be obeyed, or that are bad deals. Lawyers can also advise their clients to terminate mediation sessions.

Craig A. McEwen, Nancy H. Rogers & Richard J. Maiman, *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 70 Minn. L. Rev. 1317, 1376 (1995).

The authors also suggest that other forms of regulation, such as issue limitations, would also be unnecessary if lawyers are permitted to participate and that "bringing lawyers into the room" would also mitigate concerns about the mediators, such as their qualifications and the impacts of any legal evaluations they may make. *Id.* at 1377. Still, they concede domestic violence victims should "probably" be allowed to "opt out of joint sessions," and that the mediator should not be permitted to make recommendations to the court. *Id.*

What do you think? Does "bringing in the lawyers" solve the problems we have identified in these cases? If not, what remedies would you suggest?

9. If you were a member of a state supreme court committee charged with developing proposals for establishing divorce mediation programs, how would you answer the following questions:

- a. Should participation be voluntary or mandatory? If mandatory, should some kinds of cases be excluded?
- b. Who should pay for such services—the parties or the courts?
- c. Should the mediation include financial and property issues or only child custody issues?
- d. Should the participation of lawyers in mediation sessions be encouraged or discouraged?
- e. Should all meetings be joint, or should private caucuses be routine?
- f. Should mediators evaluate, i.e., make predictions about what would happen in court? Would your answer depend on whether the mediator was a lawyer? Whether the parties had lawyers? Whether the lawyers attended the mediation?

g. Would your views on the above questions differ if you were a divorce lawyer? A divorce mediator in private practice?

10. For an argument that state statutes and court rules barring lawyers from attending court-annexed mediations are unconstitutional, see Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. Rev. 949, 1079–82 (2000).

E. MEDIATION EXERCISES

1. THE RED DEVIL DOG MEDIATION ROLE PLAY*

General Information for the Mediator

You are an attorney in private practice and have agreed to mediate a dispute between a commercial landlord and a prospective tenant. The referral came from the landlord's lawyer. The landlord will pay for the first two hours of mediation. The prospective tenant, who apparently has no lawyer, has agreed to attend, as long as the landlord does not bring a lawyer. Piecing together information provided by the referring lawyer and the prospective tenant, you surmise that the prospective tenant had agreed to rent the premises to operate a local franchise of the well-known Red Devil Dog Restaurant chain. The lease provides for payment of \$1,000 per month plus 3 percent of gross sales for a 5-year period. After the landlord made \$2,500 in modifications and the tenant moved in boxes of equipment, the news broke that the Red Devil Dog chain had filed for bankruptcy. The prospective tenant then called to cancel the lease and the landlord responded with a letter demanding \$80,000. The mediation has been scheduled in the early evening because the prospective tenant works days as a nurse. Your secretary reports that the prospective tenant sounded angry.

Before you begin the mediation, think out your approach. Do you expect any bargaining imbalances? If so, should your approach change in any way? If the disputing parties are angry, how can you get them to focus on possible solutions?

* This role play was prepared by Professor Nancy Rogers and is based on the facts of Videotape III in the *Dispute Resolution and Lawyers Videotape Series* (West Publishing Co. 1991) and Dale A. Whitman, *The Missing Tenant: A Negotiation Exercise for Property Law*, in LEONARD L. RISKIN AND JAMES E. WESTBROOK, *INSTRUCTOR'S MANUAL FOR DISPUTE RESOLUTION AND LAWYERS*, 3rd ed. (2005). Confidential information for the landlord and the tenant may be found in the Instructor's Manual for this book, in the Instructor's Manual for Videotape III, *supra*, at 43 and on the casebook's TWEN web site at www.lawschool.westlaw.com.