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# LAWYER COLONIZATION OF FAMILY MEDIATION: CONSEQUENCES AND IMPLICATIONS

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## I. INTRODUCTION

The relationships among divorcing spouses, lawyers, and the courts have undergone significant changes over the past fifty years. The advent of no-fault divorce promoted experimentation with mechanisms that enhanced “private ordering”<sup>1</sup> encouraged by the legal system in divorce cases. In particular, court-sponsored family mediation programs became fairly common across the United States. The mediators who served in these programs came from a number of disciplines, particularly the mental health professions and law. Parties have also turned, and cases have also been referred, with increasing frequency to family mediators in the private sector.

This Article discusses and analyzes trends in family mediation over the past three decades, with a particular focus on the interdisciplinary<sup>2</sup> character of the family mediation field. Part II of this Article traces the history of family mediation. Part III explores current trends and looks

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1. For a comprehensive discussion and analysis of “private ordering” in divorce cases, see Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

2. A number of those interviewed for this article questioned whether the family mediation field has ever been truly interdisciplinary in that there was relatively little collaboration in the field among mediators from different disciplines. In this sense, the field might be more accurately characterized as “multidisciplinary.” See BERNARD S. MAYER, *BEYOND NEUTRALITY: CONFRONTING THE CRISIS IN CONFLICT RESOLUTION* 69 (2004). That is, individuals from numerous disciplines worked in the field but there were relatively few efforts at cross-disciplinary collaboration. However, we will continue to use the term “interdisciplinary” in this article because of its widespread use.

at experiences with this dispute resolution alternative in three states (Texas, Florida, and Illinois). Finally, Part IV discusses some of the more salient themes that emerged from our research and concludes that the growth of family mediation, and particularly its interdisciplinary character, has been influenced by numerous factors. Most prominent among these influences have been fiscal constraints, judicial preferences, and lawyer colonization.

Many of the observations and analyses in this Article were informed by extensive interviews with prominent family mediators, lawyers, and academics. Interviewees are listed in the Appendix to this Article. Although most of the interviewees are located in Texas, Florida, and Illinois, a number of those interviewed are from other jurisdictions and were chosen to offer a national perspective.<sup>3</sup>

## II. HISTORY OF FAMILY MEDIATION

Mediation techniques have been applied to domestic disputes for a considerable amount of time, albeit initially, they were used to assist the parties in reconciling rather than to facilitate their divorce.<sup>4</sup> In the early twentieth century, legal aid organizations and various components of the justice system began using them.<sup>5</sup> Several states initiated conciliation services; the first to do so was California. In 1939, California set up court-connected conciliation services geared toward helping discontented couples save their troubled marriages.<sup>6</sup> The individuals facilitating the reconciliation process at these courts were among the first to engage in what we now consider to be mediation.<sup>7</sup> When reconciliation did not work, the process shifted to divorce counseling and mediation for any applicable custody issues.<sup>8</sup> In the 1960s, divorce

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3. Transcripts and notes of the interviews are on file with the authors. All interviewees were sent a draft of the article and asked to either verify or change quotes that were attributed to them. All of those interviewed complied with this request. The authors would like to thank those who contributed their thoughts to this enterprise for their time and their patience. *See* Appendix.

4. *See* Jessica Pearson, *An Evaluation of Alternatives to Court Adjudication*, 7 JUST. SYS. J. 420, 422 (1982).

5. *Id.*

6. Ann L. Milne, Jay Folberg & Peter Salem, *The Evolution of Divorce and Family Mediation: An Overview*, in *DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS* 3, 5 (Jay Folberg et al. eds., 2004).

7. CONNIE J.A. BECK & BRUCE D. SALES, *FAMILY MEDIATION: FACTS, MYTHS, AND FUTURE PROSPECTS* 7 (2001).

8. *Id.*

and custody mediation began to come to fruition when more employees within the family court system began experimenting with various dispute resolution methodologies.<sup>9</sup>

The real shift toward the use of dispute resolution techniques, however, did not take place for another decade. The catalyst for the big shift was a rise in divorce rates due primarily to the advent of no-fault divorce in the 1970s.<sup>10</sup> At this time, there was a steady increase in the use of mediation because of a gradual cultural acceptance of divorce by a higher percentage of the population, the enactment of no-fault statutes, and the encouragement of “private ordering” in divorce law.<sup>11</sup>

This increase in divorce rates led many states to adopt formal family mediation programs in their court systems. For instance, in the early 1970s, formal processes were developed in California, Minnesota, and Wisconsin.<sup>12</sup> Many states eventually followed, with 1975 being the average year when such programs originated.<sup>13</sup> The increased prevalence of court-based mediation programs led to concurrent growth in private-sector mediation. In 1974, O.J. Coogler set up the first private sector family mediation center in Atlanta, Georgia.<sup>14</sup> As mediation programs gained acceptance and started to yield positive results, states began to make mediation a prerequisite. This trend started in 1980, when California began to require that parents attempt to resolve custody issues and visitation disputes through mediation.<sup>15</sup>

The family mediation movement was genuinely interdisciplinary when it began, although mental health professionals predominated.<sup>16</sup> Family and divorce mediation evolved from diverse fields such as counseling, social psychology, communications, labor mediation, negotiation, law, anthropology, and education.<sup>17</sup> Therapists, social

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9. *Id.* at 5.

10. *Id.*

11. *Id.* at 5–7; Elena B. Langan, “We Can Work It Out”: Using Comparative Mediation— a Blend of Collaborative Law and Traditional Mediation—to Resolve Divorce Disputes, 30 REV. LITIG. 245, 250 (2011); Mnookin & Kornhauser, *supra* note 1, at 953–54.

12. See Isolina Ricci, *Court-Based Mandatory Mediation: Special Considerations*, in DIVORCE AND FAMILY MEDIATION, *supra* note 6, at 397, 398.

13. Jessica Pearson et al., *A Portrait of Divorce Mediation Services in the Public and Private Sectors*, 21 CONCILIATION CTS. REV. 1, 2 (1983).

14. Milne et al., *supra* note 6, at 5.

15. *Id.*

16. Interview with Peter Salem, Exec. Dir, AFCC, in Orlando, Fla. (June 3, 2011); Milne et al., *supra* note 6, at 9, 12.

17. Nancy J. Foster & Joan B. Kelly, *Divorce Mediation: Who Should Be Certified?*, 30

workers, child development experts, educators, lawyers, accountants, and family court personnel were all strongly involved in the family mediation movement.<sup>18</sup> The Association of Family and Conciliation Courts (AFCC), one of the largest associations dedicated to the resolution of family conflict, was founded as an interdisciplinary association nearly fifty years ago, prior to the emergence of the family mediation movement.<sup>19</sup> AFCC is comprised of diverse professionals from public, private, and nonprofit sectors. Its members have always, and still do, include mental health professionals, family court judges, family lawyers, child development experts, and financial planners. Numerous organizations emerged from the family mediation movement. One such organization was the Academy of Family Mediators (AFM). AFM was founded in 1981 by an interdisciplinary group of mediators, including mental health professionals, lawyers, educators, and business people.<sup>20</sup>

In the early 1980s, individuals falling under the broad spectrum of mental health professional represented nearly 80% of the family mediators in the private sector.<sup>21</sup> The percentage was even higher in the public sector, with 90% of the mediators being mental health practitioners.<sup>22</sup> The percentage of mediators who were lawyers at the time was minimal.<sup>23</sup> In the public sector, the percentage of attorneys was staggeringly low.<sup>24</sup> Attorneys made up only 1% of the family mediators at the time.<sup>25</sup> During the 1990s, there was a paradigm shift away from using mental health professionals. According to Nancy Foster and Joan Kelly, by 1996 39% of the membership of the AFM were attorneys.<sup>26</sup>

In 1984, the first set of Model Standards of Practice for Family and

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U.S.F. L. REV. 665, 666 (1996).

18. MAYER, *supra* note 2, at 69.

19. See *History*, ASS'N OF FAM. AND CONCILIATION CTS., <http://www.afccnet.org/About/History> (last visited Mar. 14, 2012).

20. Foster & Kelly, *supra* note 17, at 666. In 2001, the Academy of Family Mediators merged with the Society of Professionals in Dispute Resolution (SPIDR) and other organizations to form the Association for Conflict Resolution (ACR). Milne et al., *supra* note 6, at 6.

21. Milne et al., *supra* note 6, at 9.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*; see also Pearson et al., *supra* note 13, at 4 (noting that the public sector “relie[d] almost exclusively on social workers and marriage and family therapists”).

26. Foster & Kelly, *supra* note 17, at 666.

Divorce Mediation were promulgated as a result of a series of symposia facilitated by AFCC.<sup>27</sup> The Model Standards of Practice for Family and Divorce Mediation (Model Standards) were designed to serve as a guide for family mediators and to promote public confidence in the process.<sup>28</sup> At the same time, the ABA Family Law Section designed its own set of Model Standards aimed specifically at lawyer-mediators.<sup>29</sup> The goal of the lawyer-based ABA Standards was to permit lawyers to serve as mediators, despite the ethical bar against lawyers representing both the husband and wife in a divorce.<sup>30</sup> The operational language used in both standards concerning the mediation process, however, was very similar.<sup>31</sup> The two standards were in place until approximately 2000 when leadership from various organizations decided that there needed to be one, revised set of standards applicable to all mediators.<sup>32</sup> AFCC convened a symposium and invited all constituencies to come together to draft a revised set of standards.<sup>33</sup> A number of dispute resolution organizations joined the AFCC at meetings held over a period of two years, providing input from mental health professionals, community mediators, non-attorney mediators, and attorneys.<sup>34</sup> Thus, a diverse group of professionals had a hand in crafting the current set of standards. In 2001, the Model Standards were adopted by a majority of dispute resolution organizations and they are still in use today.

The 2001 Model Standards represent an additional step in the acceptance and refinement of a burgeoning field that has been developing for decades. The number of formal mediation certification programs continues to grow, and the use of mediation to resolve family disputes has emerged as a standard practice for resolving disputes.

In drafting model standards of practice for family and divorce

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27. See MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION ii (2001) (working draft).

28. *Id.*

29. *Id.*

30. Interview with Andrew Schepard, Dir., Hofstra Law Sch. Ctr. for Children, Families, and the Law, in Orlando, Fla. (June 3, 2011)

31. *Id.*

32. *Id.*; see also Andrew Schepard, *An Introduction to the Model Standards of Practice for Family and Divorce Mediation*, 35 FAM. L.Q. 1, 11 (2001) [hereinafter Schepard, *Introduction*].

33. Schepard, *Introduction*, *supra* note 32, at 11–12; see also Interview with Andrew Schepard, *supra* note 30.

34. Schepard, *Introduction*, *supra* note 32, at 11–12; see also Interview with Andrew Schepard, *supra* note 30.

mediation, organizations and leaders in the family mediation field have been mindful of criticisms that have surfaced concerning the use of family mediation. In her influential article, *The Mediation Alternative: Process Dangers for Women*, Professor Trina Grillo argued against mandatory divorce mediation.<sup>35</sup> Among Grillo's concerns were that mandatory mediation puts a woman, as the more "relational" party, at a disadvantage by forcing her to speak in a setting she has not chosen and at a time she has not chosen, and that mandatory mediation imposes a "rigid orthodoxy" as to how she should speak and make decisions, thus exacerbating the imbalance of power between the woman and her divorcing spouse.<sup>36</sup> Attempts by the mediator to correct this situation would be problematic because it would force the mediator into an evaluative role (to recognize and act on the imbalance of power), and a mediator may not have enough information or skill to do this effectively without compromising her image of impartiality.

Concerns over power imbalances in family mediation have been addressed in the Model Standards, particularly when there is a history of spousal or child abuse.<sup>37</sup> Standards IX, X, and XI of the Model Standards seem to be specifically aimed at addressing such situations. Standard IX provides: "A family mediator shall recognize a family situation involving child abuse or neglect and take appropriate steps to shape the mediation process accordingly;"<sup>38</sup> Standard X provides: "A family mediator shall recognize a family situation involving domestic abuse and take appropriate steps to shape the mediation process accordingly;"<sup>39</sup> and Standard XI provides: "A family mediator shall suspend or terminate the mediation process when the mediator reasonably believes that a participant is unable to effectively participate or for other compelling reason."<sup>40</sup> These standards stress the need for

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35. Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1549 (1991).

36. *Id.* at 1549-50. For related critiques of family mediation and ADR generally, see Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992); and Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359.

37. For concerns about power imbalances in these areas, see, e.g., Andree G. Gagnon, *Ending Mandatory Divorce Mediation for Battered Women*, 15 HARV. WOMEN'S L.J. 272 (1992).

38. MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION IX, reprinted in 35 FAM. L.Q. 27, 27-40 (2001).

39. *Id.* Standard X.

40. *Id.* Standard XI.

“appropriate and adequate training” of the mediator before a mediator undertakes a mediation where there has been child or domestic abuse.<sup>41</sup> Even the attorney family mediators that we interviewed expressed a concern that not only are lawyers generally ill-equipped to deal with such situations, but they are also ill-equipped to recognize child or domestic abuse if the court or other agency has not conducted pre-mediation screening for them.

Regardless of their abilities to deal with such sensitive issues, it is clear that lawyers are entering the family mediation field in larger numbers. Indeed, this lawyer colonization of the family mediation field has been facilitated, in some jurisdictions, by bar associations charging non-lawyer family mediators with the unauthorized practice of law (UPL).<sup>42</sup> The biggest areas of risk for a non-lawyer mediator involve applying the law to a specific set of facts and drafting documents that can have a legally binding effect. Most UPL prosecutions are directed at divorce mediators for drafting divorce settlement agreements.<sup>43</sup> Although the prosecution of non-lawyer family mediator for UPL has been relatively rare, it has been argued that because there have been cases where non-lawyer divorce mediators have been prosecuted for UPL, non-lawyer mediation practice operates under the “shadow or threat of UPL regulations rather than under an active enforcement regime.”<sup>44</sup> Operating under this shadow may put non-lawyers at a disadvantage when competing with lawyers for family mediation cases.

### III. CURRENT TRENDS IN FAMILY MEDIATION

#### *A. General Trends*

In considering general trends in family mediation, it is important to distinguish between two different types of mediators: private family mediators on the one hand, and on the other, court-based mediators who are either employees of the courts or contracted out on an as-needed basis by the court. Historically, court-based mediators

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41. *Id.* Standards IX cmt.B & X cmt.B.

42. David A. Hoffman & Natasha A. Affolder, *Mediation and UPL: Do Mediators Have a Well-Founded Fear of Prosecution?*, DISP. RESOL. MAG., Winter 2000, at 20.

43. *Id.*; Telephone Interview with David Hoffman, Founding Member, Bos. Law Collaborative, LLC (Sept. 16, 2011).

44. Jacqueline M. Nolan-Haley, *Lawyers, Non-Lawyers, and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective*, 7 HARV. NEGOT. L. REV. 235, 269–70 (2002).

dominated in family cases. Some mediation experts have estimated that the vast majority of court-based mediators in the late 1980s were mental health professionals.<sup>45</sup> According to Peter Salem, Executive Director of AFCC, one of the reasons for the dominance of mental health professionals at this time was that “many family court offices evolved from family court counseling agencies, which often required a mental health background as a condition of employment.”<sup>46</sup>

Today, many mediators in court-connected settings are still mental health professionals, including social workers and psychologists.<sup>47</sup> In fact, numerous court-connected programs have very few mediators with legal backgrounds on their staffs.<sup>48</sup> The main reason that mental health professionals continue to dominate is that, indeed, many court-based mediation programs tend to focus on custody issues rather than property division.<sup>49</sup> Some court-connected mediation services are limited to parenting plans only.<sup>50</sup> Attorneys still appear on the rosters of court-appointed mediators, but the extent varies based on the financial incentives provided within different jurisdictions.<sup>51</sup> In some jurisdictions, attorney-mediators make considerably less money mediating for the courts than they could in private practice.<sup>52</sup> While there is no evidence that lawyer-mediators are more effective than non-lawyer mediators, it is the lawyers who are building successful private family mediation practices.<sup>53</sup>

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45. Interview with Peter Salem, *supra* note 16.

46. *Id.*

47. Milne et al., *supra* note 6, at 9. Some states, including California, require child custody mediators to be mental health professionals because they often take on multiple tasks, including custody evaluation. *See, e.g.*, CAL. FAM. CODE § 1815 (West 2004 & 2012 Supp.).

48. *See* MAYER, *supra* note 2, at 70.

49. *Id.*

50. Milne et al., *supra* note 6, at 10.

51. Urška Velikonja, *Making Peace and Making Money: Economic Analysis of the Market for Mediators in Private Practice*, 72 ALB. L. REV. 257, 286 (2009) (noting that fees for mediators on court rosters vary by geography).

52. *Id.* at 281 (stating that lawyer-mediators make less money mediating than from doing “other legal work”).

53. *See* MAYER, *supra* note 2, at 70; *see also* Velikonja, *supra* note 51, at 281 (noting that “the majority of full-time mediators in private practice are lawyers”); Interview with Bernard Mayer, Ph.D., Resident Professor of Conflict, Werner Inst. of Negotiation and Disp. Resol., in Orlando, Fla. (June 3, 2011). Mayer believes that it is increasingly difficult for non-attorney mediators to succeed in private practice, particularly in the family arena. However, he notes a distinction in certain areas such as community, environmental, and international mediation where attorneys are not as dominant. *Id.*

When family mediation began decades ago, “it was a new field and everyone was jockeying for it.”<sup>54</sup> However, some lawyers were initially opposed to family mediation.<sup>55</sup> One main reason accounted for this early pushback from attorneys: They feared that mediation would cause them to lose business.<sup>56</sup> However, many initially skeptical lawyers started to mediate when they discovered that mediation could lead to a happier client with a bill paid in full.<sup>57</sup> Another particularly important factor leading to an explosion of attorney involvement was the promulgation of statutes and rules mandating mediation.<sup>58</sup> With the promulgation of these rules came increased support from the bar for mediation.<sup>59</sup> Mediation also became a way for attorneys to supplement their incomes and perhaps reduce the tension between the parties by trying to resolve disputes in a less adversarial manner.<sup>60</sup> The present dominance of lawyers in private-sector mediation is also partially due “to the fact that lawyers are the major referral source for private mediators,” and in some circumstances, even judges have been unwilling to refer cases to non-lawyers.<sup>61</sup> Bernard Mayer perhaps summed up the chain of events most succinctly by noting that “[t]he law profession at first resisted mediation and then co-opted it.”<sup>62</sup> This article focuses on these trends in three states: Florida, Illinois, and Texas. These three states provide a good sampling to examine these trends more specifically because each has a distinct history of involvement with mediators of different disciplines in civil cases. Also, the authors had established contacts in the family mediation community in each of the three states, thus facilitating the interview process.

### *B. Trends in Three States*

#### 1. Texas

The State of Texas sets forth its policy “to encourage the peaceable resolution of disputes” through ADR in the Texas Civil Practice and

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54. Interview with Bernard Mayer, *supra* note 53.

55. Telephone Interview with Nancy Palmer, Family Lawyer and Mediator (June 9, 2011).

56. *Id.*; Velikonja, *supra* note 51, at 283.

57. Interview with Nancy Palmer, *supra* note 55.

58. *Id.*

59. See Milne et al., *supra* note 6, at 12.

60. See *id.*

61. See MAYER, *supra* note 2, at 69.

62. Interview with Bernard Mayer, *supra* note 53.

Remedies Code, first adopted in 1987.<sup>63</sup> The Code outlines the responsibilities of the courts to carry out procedures in support of the state policy.<sup>64</sup> Recognizing the special nature of family cases, the Texas Family Code allows for mediation of specific family issues by agreement of the parties or by court order.<sup>65</sup> Depending on the nature of the issue and a county's available services, mediation of family cases may be handled by either a private mediator, a Dispute Resolution Center (DRC), or through a Domestic Relations Office (DRO).<sup>66</sup> The mediation services offered through these sources must be offered at a reasonable cost to the parties.<sup>67</sup> These provisions in Texas law are intended to ensure that courts and parties utilize ADR to amicably resolve family conflicts prior to litigation.

Generally, Texas courts refer family cases to mediation before setting trial dates. Many counties require mediation of family cases,<sup>68</sup> while others give preferential treatment to mediated cases when scheduling hearings.<sup>69</sup> To facilitate mediation, larger counties commonly establish both a DRC and a DRO to provide low cost mediation to residents.<sup>70</sup> County DRCs utilize volunteer mediators who have met the training requirements established by the state.<sup>71</sup> Mediators who wish to be on court rosters in Texas must have forty hours of classroom training in dispute resolution techniques.<sup>72</sup> To mediate family disputes, "an additional 24 hours of training in the fields of family dynamics, child

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63. TEX. CIV. PRAC. & REM. CODE ANN. § 154.002 (West 2011).

64. *Id.* § 154.003.

65. TEX. FAM. CODE ANN. § 6.602 (West 2006).

66. TEX. CIV. PRAC. & REM. CODE ANN. § 152.002; *see also* TEX. FAM. CODE ANN. §§ 203.001–.007 (describing the establishment of DRO's in Texas).

67. TEX. CIV. PRAC. & REM. CODE ANN. § 152.006; *see also* TEX. FAM. CODE ANN. § 203.005 (West 2008) (indicating that fees for DRO services must be reasonable).

68. MIDLAND CNTY., TEX., R. 2.4(b); *see also* JEFFERSON CNTY., TEX., R. 3(A), *available at* [www.co.jefferson.tx.us/dclerk/rules.htm](http://www.co.jefferson.tx.us/dclerk/rules.htm); LUBBOCK CNTY., TEX., R. 4.45(B); TRAVIS CNTY., TEX., R. 8.8(a).

69. HARRIS CNTY., TEX., FAM. R. 3.2.2, *available at* <http://www.justex.net/Courts/Family/LocalRules.aspx>.

70. Some examples of large counties with both DRCs and DROs are Harris, Dallas, Tarrant, Bexar, Travis, El Paso. *See, e.g.,* EL PASO CNTY., TEX., R. 3.16(C), *available at* <http://www.epcounty.com/councilofjudges/documents/part3.pdf> (referring to local DRC); *Domestic Relations Office*, EPCOUNTY.COM, <http://www.epcounty.com/DRO/> (last visited Apr. 11, 2012).

71. *See FAQ's (Frequently Asked Questions)*, DISP. RESOL. CENTER, <http://www.austindrc.org/information-resources/faqs.php> (last visited Mar. 14, 2012).

72. TEX. CIV. PRAC. & REM. CODE ANN. § 154.052.

development, and family law” is required.<sup>73</sup> DRC mediators may be professionals of any type, so long as they have met the training requirements.<sup>74</sup> In contrast, county DRO mediators are paid staff members,<sup>75</sup> who are mental health professionals or attorneys, and they only handle issues relating to the parent–child relationship.<sup>76</sup>

Although public sector mediation (i.e., the DRC and DRO) is still somewhat professionally diverse in Texas, the field of private family mediation is dominated by members of the bar. Like many other states, family mediation gained popularity in Texas in the 1980s. While the field included more of a diverse group of professionals when it began, today almost all successful private family mediators in Texas are former judges and experienced attorneys.<sup>77</sup> It appears that there are very few private non-attorney family mediators in Texas who are able to sustain a successful practice.<sup>78</sup> In fact, several attorneys that wish to remain anonymous stated that they do not know of any family attorneys who have ever suggested using a non-attorney mediator. The overwhelming majority of the time, attorneys will only choose family mediators who are also attorneys. The rare instances in which attorneys may send clients to mental health professional mediators are when a case involves a degree of high emotion or conflict that a mental health professional is particularly qualified to address.<sup>79</sup> In Texas, like in many other states, attorneys and parties can choose their own mediators for court-appointed cases.<sup>80</sup> If the parties are unable to select a mediator, then the judge appoints one. In Texas, judges tend to prefer attorney-mediators

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73. *Id.*

74. A distinct exception is the Harris County DRC, sponsored by the Houston Bar Association and funded through Harris County, which has specific requirements for its family mediators. At the Harris County DRC, non-attorneys are not allowed to mediate family cases on their own. Rather, they are required to co-mediate with an attorney. Telephone Interview with Nick Hall, Dir., Harris Cnty. Disp. Resol. Ctr. (May 18, 2011).

75. Telephone Interview with Duane Gallup, former Alt. Disp. Resol. Coordinator, Dall. Cnty., Tex. (July 6, 2011); *see also* Telephone Interview with Megan Ultis, Intake Coordinator, Harris Cnty. Domestic Relations Office (July 8, 2011).

76. Interview with Megan Ultis, *supra* note 75; *see also* TEX. FAM. CODE ANN. § 203.004 (West 2008) (confirming that DROs deal with parent–child relationship issues).

77. Interview with Norma Trusch, Mediator & Collaborative Att’y, Harris Cnty., in Houston, Tex. (May 16, 2011).

78. *Id.*

79. *Id.*

80. *See, e.g.*, EL PASO CNTY., TEX., R. 3.16(C); FRIEND OF THE CT. BUREAU, STATE CT. ADMIN. OFFICE, MICHIGAN CUSTODY GUIDELINES 11; *see also* 16TH JUD. CIR. CT. OF JACKSON CNTY. R. 68.12 (“The parties may jointly and voluntarily select any mediator qualified under Rule 88.05 and thereafter undertake mediation.”).

who “get the cases done.”<sup>81</sup>

Houston, in particular, appears to be one of the Texas communities most committed to attorney family mediators. Several attorneys, who wish to remain anonymous, could not recall any non-attorneys mediating privately or even receiving referrals through the courts. Houston’s extreme position on family mediation is evidenced by the Harris County DRC, which offers free mediation services.<sup>82</sup> In general, most non-profit mediation centers select volunteer mediators from the ranks of all professional backgrounds. However, while 85% of mediators in the Harris County DRC community-based program are not attorneys, all *family* mediators at the DRC are required to be attorneys.<sup>83</sup> It is very unusual to find a free mediation provider that requires all family mediators to be attorneys. At the Houston DRC, if a non-attorney is interested in mediating a family case, he or she is required to co-mediate with an attorney.<sup>84</sup>

Several attorneys in Houston expressed similar sentiments that the field is comprised almost exclusively of attorney-mediators and that non-attorney mediators would simply not get referrals from the court or from other attorneys.<sup>85</sup> In a survey conducted at the South Texas College of Law, the vast majority of respondents said that at least 99% of mediators in their family cases are attorneys.<sup>86</sup> When asked to provide their preferences in choosing a family mediator, 75% said they prefer attorneys.<sup>87</sup>

Barbara Sunderland Manouso is one of the few successful private non-attorney family mediators in Houston that we were able to locate. Manouso, who has a Ph.D. in Conflict Resolution, believes family mediation is “very much an attorney’s business and always has been in

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81. Interview with Norma Trusch, *supra* note 77.

82. DISP. RESOL. CTR. OF HARRIS CNTY., <http://www.co.harris.tx.us/drc/> (last visited Mar. 14, 2012). “Established in 1980, the Dispute Resolution Center . . . is a non-profit corporation sponsored by the Houston Bar Association and funded through Harris County.” *Id.*

83. Telephone Interview with Nick Hall, *supra* note 74.

84. *Id.*

85. Interview with Carel Stith, Att’y-Mediator, Carel L. Stith, P.C., in Hous., Tex. (May 16, 2011) (stating that he was aware of only one non-attorney family mediator and that non-attorney mediators would not get referrals from the court); *see also* Interview with Hon. Bruce Wettman, Dir., Mediation Clinic at S. Tex. Coll. of Law, in Hous., Tex. (May 23, 2011).

86. S. Tex. Coll. of Law Frank Evans Ctr. for Disp. Resol., Family Mediation in Hous. Survey (May 6, 2011) (on file with authors).

87. *Id.*

Houston.”<sup>88</sup> As Manouso explained, “Mediation started from the law so the majority of mediators are attorneys.”<sup>89</sup> Besides herself, Manouso knows of only several other non-attorney family mediators in Houston who have managed to develop a successful practice and earn money mediating.<sup>90</sup>

The one area in Houston where we have located attorney and non-attorney mediators is at the DRO. The DRO has eleven mediators, of which two are full-time attorney-mediators and nine are non-attorney mediators.<sup>91</sup> Although the attorney-mediators conduct a majority of the cases, the non-attorney mediators are also utilized to a great degree.<sup>92</sup> The prevalence of non-attorney mediators appears to be driven by the subject matter of the disputes. Specifically, the DRO only handles cases that involve children.<sup>93</sup>

The Bexar County DRC in San Antonio utilizes attorney-mediators for its litigated family cases. Specifically, it groups its family cases into two categories: community disputes and litigation disputes.<sup>94</sup> Litigation family disputes are those which are already pending in court. In community cases, the mediators are generally not lawyers; however, for its pending litigation family cases, the Bexar County DRC uses a co-mediation model with at least one lawyer-mediator. The circumstances of the case might dictate that one of the mediators is a mental health professional or some other sort of professional with a skill set suited to the nature of the case.<sup>95</sup>

While the Dallas DRC does not require its volunteer family mediators to be attorneys, attorneys there also make up the majority of

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88. Telephone Interview with Barbara Sunderland Manouso, Founder of Manouso Mediation & Alt. Disp. Resol. (May 20, 2011).

89. *Id.*

90. *Id.*

91. Interview with Megan Ultis, *supra* note 75.

92. *Id.*

93. *Id.*

94. Telephone Interview with Nancy Oseasohn, Intake Mediation Manager, Bexar Cnty. Disp. Resol. Ctr. (July 7, 2011).

95. *Id.* Richard Orsinger, a family attorney in San Antonio, noted that in the early 1980s when mediation first became popular in San Antonio, parties were pro se. See Telephone Interview with Richard Orsinger, Att’y, McCurley Orsinger McCurley Nelson & Downing L.L.P (June 18, 2011). These pro se parties would go to attorney-mediators for advice. However, because some saw this as a conflict of interest, this model was replaced by the model most often seen today, namely parties accompanied by counsel who would go to an attorney-mediator who did not give advice. *Id.*

the volunteer family mediators.<sup>96</sup> The office has a total of nineteen family mediators, five of whom are not attorneys. Two of the five are mental health professionals. Similar to Houston, judges in Dallas prefer using lawyers for family mediation.<sup>97</sup> Many practitioners have confirmed the current attorney-driven nature of family mediation in Dallas. Lynelle Yingling, who has a Ph.D. in mental health, explained the evolution over the past several decades. She noted that when she conducted mediation trainings in the 1980s, her trainings were composed primarily of non-attorneys in the basic 40-hour mediation training and half were attorneys in her family mediation training.<sup>98</sup> The interdisciplinary nature of the field began to change with the advent of “settlement week,”<sup>99</sup> which led to an increase in attorneys attending the trainings. Yingling began noticing “attorneys taking over” throughout the 1990s, as they got the message from the courts that “they would either be shut out or have to begin mediating, so they did.”<sup>100</sup> Financial opportunities helped spur the increase of attorneys in the field, which eventually caused Yingling and other mental health professionals to stop mediating because referrals were no longer being given to non-attorneys.<sup>101</sup>

Galveston County, Texas has a similar pro-attorney bias in the mediation arena. Dan Amerson, an ordained member of the clergy, runs a successful full-time mediation practice in Galveston County, Texas. He mediates all types of cases but focuses a significant amount of his attention on family cases. Amerson confirmed that family mediation has certainly become more attorney-driven in Galveston County and in the rest of the state.<sup>102</sup> Over the past decade, he has seen an increasing number of attorneys going into the field, due in part to

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96. Telephone Interview with Kim Martinez, Dir., Disp. Mediation Servs., Inc. (June 21, 2011).

97. *Id.*

98. Telephone Interview with Lynelle Yingling, Ph.D, J&L Human Sys. Dev. (June 21, 2011).

99. Two settlement weeks are required per year in Texas counties with populations of 150,000 or more. TEX CIV. PRAC. & REM. CODE ANN. § 155.001 (West 2011). During settlement week, courts must facilitate voluntary settlements. *See id.* Section 155.003 states that “[a]ny attorney currently licensed in the state may serve as a mediator during the settlement weeks.” *Id.* § 155.003.

100. Interview with Lynelle Yingling, *supra* note 98.

101. *Id.*

102. Telephone Interview with Dan Amerson, Mediator, Galveston Cnty., Tex. (June 20, 2011).

referrals and in part to the fact that attorneys need to supplement their income.<sup>103</sup> Also, there is “simply just a bias towards attorney mediators,” where Texas is still all about the “good old boys system.”<sup>104</sup>

An outlier in the attorney-preferred family mediation process in Texas appears to be Travis County, which includes Austin. The Travis County DRC is not as attorney driven as other jurisdictions. Of the fifty-eight family mediators at the Austin DRC, twenty are attorneys.<sup>105</sup>

There are several factors that appear to account for the trend toward attorney dominated family mediation taking place throughout Texas. First, there was an early incidence of civil case mediation in the state. Mediation styles in civil cases (caucus style shuttle diplomacy) may have influenced the development of family mediation.<sup>106</sup> Indeed, a prominent family mediator in Houston says that the shuttle diplomacy model has become much more common in family cases than in civil cases.<sup>107</sup> In family cases, he explains that the parties are seldom, if ever, brought together in joint session, even at the beginning of the mediation.<sup>108</sup> Second, is tort reform. Attorneys finding it difficult to make a living doing tort litigation post-tort reform have moved over to the family field and brought with them their litigious mindset. Third, several interviewees suggested an additional factor is that Texas is the only state that allows jury trials for custody disputes.<sup>109</sup> Finally, attorneys throughout Texas have expressed their belief that attorneys have cornered the court-appointment process because they provide

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103. *Id.*

104. *Id.* Amerson supported his claim through anecdotal evidence. When he took a forty-hour mediation training in Houston in 1999, he was told that he had just wasted his time and money by taking the training since mediating is “only for attorneys.” *Id.* Amerson, of course, has proved them wrong. *Id.*

105. At the Travis County DRC, the public has a choice between two mediation models for family cases: a community-based mediation model, in which the parties are not guaranteed an attorney-mediator, and a civil litigation mediation (CLM) model where the parties are guaranteed an attorney-mediator. The community-based model only costs \$50 while mediation with a guaranteed attorney-mediator costs \$200. Telephone Interview with David Huang, Case Manager, Travis Cnty. Disp. Resol. Ctr. (June 21, 2011).

106. For discussions of mediation styles in civil cases, see, e.g., James J. Alfani, *Trashing, Bashing, and Hashing It Out: Is This the End of “Good Mediation”?*, 19 FLA. ST. U. L. REV. 47 (1991); Leonard L. Riskin, *Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996); Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1 (2001).

107. Interview with Hon. Bruce Wettman, *supra* note 85.

108. *Id.*

109. See TEX. FAM. CODE ANN. § 105.002 (West 2008).

contributions that help judges get re-elected. The quid pro quo is not something any of these sources have wanted to be identified as saying (nor have we cited to them in any other capacity to make sure that they remain anonymous).

## 2. Florida

The Florida Court System has employed mediation for the past several decades.<sup>110</sup> Since its inception in the state, mediation has flourished as the Florida legislature and judiciary have created one of the most comprehensive court-connected mediation programs in the country.<sup>111</sup> “Prior to 1987, mediation programs for county and family cases were in operation, and legislation authorized . . . judicial referral of cases to family mediation programs.”<sup>112</sup> Court-based family mediation programs have grown from fourteen in 1988, to forty-five presently.<sup>113</sup> “[T]he Florida Statutes were broadened in 1987 to grant trial judges the authority to refer any contested civil matter to mediation.”<sup>114</sup> Today, in circuits in which a family mediation program has been established, courts “shall refer to mediation all or part of custody, visitation, or other parental responsibility issues.”<sup>115</sup>

All mediators in Florida who wish to be selected by the courts to mediate must obtain a rigorous certification by the Florida Supreme Court.<sup>116</sup> What makes Florida unique is that mediator certification is premised on a point system.<sup>117</sup> To qualify as a mediator, an applicant must have enough points for the type of certification sought.<sup>118</sup> Family mediator certification requires a bachelor’s degree and at least 100 points; these points must be obtained through training, experience and education, and mentorship.<sup>119</sup> According to the Dispute Resolution Center, which is housed in the Florida Supreme Court building, there are 2,168 family mediators certified by the

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110. See, e.g., Interview with Hon. Bruce Wettman, *supra* note 85; *Alternative Dispute Resolution*, FLA. STATE CTS., [http://www.flcourts.org/gen\\_public/adr/adrintro.shtml](http://www.flcourts.org/gen_public/adr/adrintro.shtml) (last visited Mar. 14, 2012).

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. FLA. STAT. ANN. § 44.102(2)(c) (West 2003).

116. See FLA. STAT. ANN. § 10.100 (West 2010).

117. *Id.* § 10.105.

118. *Id.* §§ 10.100–10.105.

119. See *id.* §§ 10.100, 10.105.

Florida Supreme Court.<sup>120</sup> Of this total, 1,127 are non-attorneys and 1,041 are attorneys.<sup>121</sup> The DRC Mediator Reporting System shows the following breakdown of the non-attorney family mediators by profession: Mental Health Professional = 398; Business = 80; Teacher/Professor = 93; Accountant = 63; Physician/Dentist = 2; Government Employee/Administrator = 93; Military = 8; Other = 123.<sup>122</sup>

Until recently in Florida, only attorneys were certified to mediate non-family civil cases, while non-attorneys could mediate family cases.<sup>123</sup> Moreover, to become a certified family mediator through the Florida Supreme Court, until recently, one had to be an attorney, have an advanced degree in mental health, or be a certified public accountant.<sup>124</sup>

Family court mediation programs in Florida are staffed by full-time on-site mediators, contract mediators who are used on an as-needed basis, or both.<sup>125</sup> Many courts use contract mediators, since they are less costly than hiring additional full-time staff mediators. Contract mediators are paid a set fee or an hourly fee for each case mediated, unlike other states such as Texas, where mediators on the court rosters charge their own fees.<sup>126</sup>

Court mediation programs in Florida are still a mix of attorneys and non-attorneys (particularly mental health professionals), although it

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120. See *Dispute Resolution Center Mediator Reporting System*, FLA. STATE CTS., [http://199.242.69.70/pls/drc/drc\\_main\\_screen](http://199.242.69.70/pls/drc/drc_main_screen) (last visited Feb. 3, 2012). This number is based on running “search for mediator” “demographics” and then selecting “family” for “mediator type.”

121. *Id.*

122. *Id.*

123. See Proposed Standards of Prof'l Conduct for Certified and Ct.-Appt'd Mediators, 604 So. 2d 764 (Fla. 1992) (approving Fla. R. Certified & Ct.-Appt'd Mediators 10.010 (1992) (codified as amended at FLA. STAT. ANN. § 10.100)).

124. *In re Amendments to the Fla. Rules for Certified & Ct.-Appt'd Mediators*, 762 So. 2d 441, 449 (Fla. 2000); see also SUP. CT. OF FLA., ANNUAL REPORT 17 (2006).

125. See SUP. CT. OF FLA., COMM'N ON TRIAL CT. PERFORMANCE & ACCOUNTABILITY, RECOMMENDATIONS FOR ALTERNATIVE DISPUTE RESOLUTION SERVICES IN FLORIDA'S TRIAL COURTS 43 (2008), available at [http://www.flcourts.org/gen\\_public/court-services/bin/ADRMediationReport08-2008.pdf](http://www.flcourts.org/gen_public/court-services/bin/ADRMediationReport08-2008.pdf).

126. Velikonja, *supra* note 51, at 267 (stating that “[s]ome states regulate mediator fees”); see also FLA. DISP. RESOL. CTR., FLORIDA MEDIATION & ARBITRATION PROGRAMS: A COMPENDIUM 84–86 (Sharon Press ed., 18th ed. 2005) (listing standard fees for mediators in each judicial circuit in Florida); see also Harris Cnty., Tex., Civ. Ct. at Law, No. 4, *Mediation Instructions*, HARRIS CNTY., TEX., CIV. CT. AT LAW NO. 4, <http://www.ccl.hctx.net/civil/4/Mediation%20Instructions%20for%20Case%20Parties.pdf> (last visited Mar. 14, 2012) (stating that mediators on the court rosters in Harris County, Texas can charge up to \$400 per party).

varies by circuit and county. In the 15th Judicial Circuit ADR Program in Palm Beach, there are four full-time staff mediators.<sup>127</sup> Only one of these four is a lawyer, and that lawyer also happens to have a mental health degree.<sup>128</sup> On the other hand, the 15th Judicial Circuit maintains a roster of thirty contract mediators, many of whom are attorneys.<sup>129</sup> These contract mediators are paid approximately \$125 for a two-hour session.<sup>130</sup> In the 9th Judicial Circuit in Orlando, there are twenty-eight contract family mediators, nineteen of whom are attorneys.<sup>131</sup> The other half represents a wide array of professionals, including therapists and CPAs.<sup>132</sup> In some circuits, there are relatively few attorneys mediating through the court. This may be due to the fact that mediators on many of the court rosters are only paid a minimal amount. However, one of the non-monetary benefits of mediating that leads attorneys to join the court rosters is to gain experience.

Though the current breakdown of mediators in Florida is much more interdisciplinary than the mediation breakdown in Texas, the numbers, however, are all relative. Looking at where the mediation breakdown started in Florida shows a dramatic turn toward attorney involvement. Mel Rubin, a prominent attorney-mediator and mediation trainer in Miami explained that family mediation thirty years ago in Florida was “primarily dominated by therapists.”<sup>133</sup> Bill Moreno, ADR Director for the 15th Judicial Circuit, recounted a circumstance remarkably similar to that found in the early days of Texas mediation, namely that attorneys were not nearly as enthusiastic about mediation as their therapist counterparts.<sup>134</sup> The reasons for this lack of enthusiasm are certainly multifaceted, but one of the more interesting ones is the fact that attorneys initially balked at the idea of being told that they would

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127. Telephone Interview with Bill Moreno, Alt. Disp. Resol. Dir., 15th Jud. Cir. Ct. of Fla. (July 14, 2011).

128. *Id.*

129. *Id.*

130. *Id.*

131. 2011 *Family Mediators*, NINTH JUDICIAL CIR. CT. OF FLA., [http://www.ninthcircuit.org/programs-services/dispute-resolution-services/family\\_mediators.shtml](http://www.ninthcircuit.org/programs-services/dispute-resolution-services/family_mediators.shtml) (last visited Apr. 10, 2012); *see also* Telephone Interview with Genie Williams, Dir., 9th Jud. Cir. Ct. of Fla., Disp. Resol. Servs. (July 14, 2011) (confirming the breakdown in professions).

132. NINTH JUD. CIR. CT. OF FLA., *supra* note 131; Interview with Genie Williams, *supra* note 131.

133. Telephone Interview with Mel Rubin, Att’y-Mediator, Miami, Fla. (May 20, 2011); *see also* Telephone Interview with Charles Castagna, Att’y-Mediator, Clearwater, Fla. (July 27, 2011) (confirming that therapists dominated in the early years).

134. Interview with Bill Moreno, *supra* note 127.

need a third party to help them negotiate. It was not until attorneys realized that having a neutral party involved was beneficial that they eventually became interested in mediating themselves.<sup>135</sup>

The shift toward attorney-mediators is reflected in the numbers. Today, there are only 398 mental health professionals on the Florida Supreme Court certified family mediator roster out of a total of 2,168.<sup>136</sup> This is approximately 18%, a major decline since a time not so long ago, when therapists were the driving force in the mediation landscape. While non-attorneys are still heavily involved in the Florida court mediation programs, private family mediation is “top heavy with attorneys.”<sup>137</sup> Mediation experts see a paradigm shift in Florida that is comparable to the direction of Texas, although not quite as extreme. Nevertheless, non-attorney mediators in Florida face tough odds if they want to earn their living from mediation.<sup>138</sup> The majority of mediators, and in particular, non-attorney mediators, “do not quit their day jobs,” says attorney-mediator Helen Stein of Divorce Without War in Miami, Florida.<sup>139</sup> Some experts say there are definitely non-attorney mediators out there but they do not know if they are actually mediating and making money off of it.<sup>140</sup> Other experts believe “it is an exception for non-attorneys to make a living off mediating.”<sup>141</sup>

### 3. Illinois

Similar to Texas and Florida, family mediation has been utilized within the Illinois court system for the past three decades or so.<sup>142</sup> Unlike Texas and Florida, however, the use of family mediation has not been as widespread within the Illinois court system nor has large civil case mediation or private family mediation been as pervasive as it has

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135. *Id.*

136. See *Dispute Resolution Center Mediator Reporting System*, *supra* note 120. The numbers were based on running a search through each occupation under the demographic “search for mediator” function. *Id.*

137. Interview with Bill Moreno, *supra* note 127.

138. Interview with Mel Rubin, *supra* note 133; see also Interview with Charles Castagna, *supra* note 134. These experts were hard pressed to name many non-attorneys who generated substantial income from mediating.

139. Telephone Interview with Helen Stein, Att’y-Mediator, Divorce Without War, in Miami, Fla. (Aug. 1, 2011).

140. *Id.*

141. Interview with Charles Castagna, *supra* note 133.

142. For excellent sources of information on all aspects of court mediation in Illinois, see RESOLUTION SYSTEMS INSTITUTE, <http://www.aboutrsi.org/> (last visited Mar. 14, 2012).

been in the other two states. We discussed this phenomenon with two experienced Illinois mediators, who attributed Illinois' tendency to lag behind to the lack of leadership at the top of the judiciary.<sup>143</sup> When we pointed out to them that there clearly was judicial leadership at the top in Florida but no similar development in Texas,<sup>144</sup> they responded that there had been high level judicial antipathy in Illinois towards mediation at times, but that doesn't seem to be the case at present.<sup>145</sup> Although a professional Illinois mediators group, the Mediation Council of Illinois, has been in existence since 1982, one experienced mediator exclaimed that "the mediation community in Illinois is not a strong one. It is so insular it is amazing."<sup>146</sup>

Family mediation has been extensively used in the Circuit Court of Cook County (Chicago), Illinois since 1982.<sup>147</sup> The Domestic Relations Division of the Circuit Court of Cook County orders virtually all cases involving disputed custody and visitation arrangements to mediation in its Marriage and Family Counseling Service (MFCS).<sup>148</sup> This is a free service provided by the court system and amounts to approximately 2,400 cases each year.<sup>149</sup> MFCS does not mediate financial issues in divorce matters, "largely as a concession to the matrimonial bar back in 1982."<sup>150</sup>

For most of its history, MFCS has been staffed by mediators drawn

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143. Interview with Corinne (Cookie) Levitz, Bd. of Dirs., Ass'n for Conflict Resol., Chi. Chapter, in Chi., Ill. (July 7, 2011); Interview with Susan Yates, Exec. Dir., Resol. Sys. Inst., in Chi., Ill. (June 28, 2011).

144. While the Supreme Court of Texas has not taken an active role in the development or promotion of mediation within the state, it certainly has encouraged other members of the state judiciary to play a leadership role. Most notably, Chief Justice Frank Evans of the First Court of Appeals has been widely considered to be the "father" of ADR in Texas.

145. Interview with Corinne (Cookie) Levitz, *supra* note 143; Interview with Susan Yates, *supra* note 143.

146. Interview with Brigitte Bell, Principal & Founder, Brigitte Schmidt Bell, P.C., in Chi., Ill. (June 30, 2011).

147. See *Illinois Court ADR Sourcebook*, RSI'S CT. ADR RESOURCE CTR., <http://courtdr.org/sourcebook/programs.php?ID=3&b1=proc&b2=65&menuID=69&menuanchor=anchor&submenuID=73&submenuanchor=anchor> (last visited Mar. 14, 2012).

148. For descriptions of the MFCS program, see Sharon Zingery, Corinne (Cookie) Levitz & David Royko, *Screening for Domestic Violence in Family Mediation Cases*, in INNOVATIONS IN COURT SERVICES 41, 41-60 (Cori A. Erickson ed., 2010); and *Illinois Court ADR Sourcebook*, *supra* note 147. The description herein of the MFCS program is drawn from these sources as well as our interview with Corinne (Cookie) Levitz, *supra* note 143.

149. *Illinois Court ADR Sourcebook*, *supra* note 147.

150. Interview with Corinne (Cookie) Levitz, *supra* note 143.

predominantly from the mental health professions.<sup>151</sup> In 1991, Corinne (Cookie) Levitz became the first lawyer-mediator at MFCS.<sup>152</sup> There are approximately nineteen full-time mediators in the MFCS, including five attorneys and fourteen from other professions, mostly mental health.<sup>153</sup> When she was hired, Levitz said, “I was looked at like I was from another planet. There was a perception among mental health professionals who were mediators that they owned family mediation because they understood the divorce dynamic.”<sup>154</sup> Although there was some suspicion towards her at first, she believes that attorney-mediators have generally been accepted over time.<sup>155</sup>

Each MFCS mediator normally handles two cases per day and each mediation session lasts approximately two hours.<sup>156</sup> The expectation is that each case will have an intake session and then two mediation sessions.<sup>157</sup> If necessary, a third session can be scheduled if it is before the court status date.<sup>158</sup> Levitz explained, “We don’t feel pressured to get it done quickly.”<sup>159</sup>

One of the major changes in family mediation that the interviewees noted is a greater sensitivity to domestic violence issues, particularly in the court programs. In the past, when most of the experienced mediators were trained under the “Haynes model,”<sup>160</sup> they were taught to keep the parties together. Levitz recounted an incident that apparently was a turning point in this regard:

In 1989, there was a picket line by a domestic violence advocacy group at the AFCC conference in Chicago demanding that family mediators and others take domestic violence into account before proceeding with family mediation. As a

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151. *Illinois Court ADR Sourcebook*, *supra* note 147.

152. Interview with Corinne (Cookie) Levitz, *supra* note 143.

153. *Illinois Court ADR Sourcebook*, *supra* note 147.

154. Interview with Corinne (Cookie) Levitz, *supra* note 143.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. John Michael Haynes was known by many as the “father” of modern divorce mediation. Haynes was the founding president of the Academy of Family Mediators and has trained over 20,000 mediators worldwide. Paula M. Young, *A Connecticut Mediator in a Kangaroo Court?: Successfully Communicating the “Authorized Practice of Mediation” Paradigm to “Unauthorized Practice of Law” Disciplinary Bodies*, 49 S. TEX. L. REV. 1047, 1055 n.17 (2008).

consequence, MFCS started a domestic violence committee. When I arrived at MFCS, they were very serious about this issue. I am convinced that screening for domestic violence is absolutely essential and am concerned that some lawyer mediators may not do it, but mental health professionals are not necessarily sensitive either. It's really a mediation thing. If you are not trained that way, you don't do it.<sup>161</sup>

Brigitte Bell, a private attorney-mediator with many years of experience and dedication to the field, expressed a similar belief about insensitivity to domestic violence issues and generalized it more broadly to the emerging lawyer family-mediator community:

As more attorneys try to mediate, there is more of a belief that settlement is the main goal and so mediators tend to be more evaluative. But, the lawyers who hold themselves out as mediators are unversed in mediation. They are not sensitive to the need for confidentiality, for example, and certainly not sensitive to the need for domestic violence screening. They don't see the need to screen. They believe they know how to handle [domestic violence].<sup>162</sup>

Bell believes that the number of attorney-mediators has grown considerably and that the term "mediator" has come to be used a bit too loosely: "Back in 1985, no attorneys wanted to do [mediation]. Now, if an attorney is a GAL [(guardian ad litem)], what they do tends to be called 'mediation.'"<sup>163</sup>

The private family mediators we interviewed expressed a belief that the Illinois Family Bar generally was not inclined to refer their cases to mediation: "Family lawyers tend to want to hold on to their cases and do it all."<sup>164</sup> Bell explained further: "The family bar is interested first and foremost in their livelihood. They are not going to send cases to mediation that look good to them. They only send difficult issues that they can't deal with."<sup>165</sup> Bell explained that for this reason, she receives

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161. Interview with Corinne (Cookie) Levitz, *supra* note 143.

162. Interview with Brigitte Bell, *supra* note 146.

163. *Id.*

164. *Id.*

165. *Id.*

very few mediation referrals from family lawyers. She gets most of her mediation referrals from therapists and satisfied clients. However, she noted that there is an increased willingness by lawyers to act as mediators:

They see the need to add another tool to their toolkit, because they are hungry. But, family lawyers don't refer their cases (for mediation) to other family lawyers. There is too much competition for cases. If they do make a referral to another lawyer there is usually a quid pro quo that that lawyer will also refer a case to him or her.<sup>166</sup>

Thus, even though private family mediation apparently is increasing, there still are not a lot of referrals to private family mediators (particularly for cases involving financials) in Illinois (particularly Cook County).

Although she generally agreed with Bell that private divorce mediation has not been widespread in Illinois, Karen Shields, a private mediator who served as a domestic relations court judge for thirteen years, believes that this is changing.<sup>167</sup> She explained that the success of the MFCS program has been a major factor in encouraging the use of private mediation, as well as the education of judges in mediation. Like Bell, she believes that the competition for cases within the divorce bar is an inhibiting factor; she explained this sentiment by asking: "Why would a divorce lawyer take his case to another divorce lawyer to mediate?"<sup>168</sup> Thus, she believes that most of the best-known divorce mediators have been non-lawyers. Shields' success as a family mediator might also, in part, be attributed to the fact that she is not an active member of the family bar, but rather practices family mediation exclusively through JAMS.<sup>169</sup>

Although there clearly is a burgeoning interest in family mediation among Illinois lawyers, particularly in Cook County, it would be premature at best to characterize it as "lawyer colonization" of the

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166. *Id.*

167. Interview with the Honorable Karen Shields, Mediator, JAMS, in Chi., Ill. (June 24, 2011).

168. *Id.*

169. JAMS, Resolution Experts, is, by its own account, "the largest private alternative dispute resolution (ADR) provider in the world." *About JAMS*, JAMS: THE RESOLUTION EXPERTS, [http://www.jamsadr.com/aboutus\\_overview](http://www.jamsadr.com/aboutus_overview) (last visited Mar. 14, 2012).

family mediation field in the same sense that we have used this phrase in connection with developments in Texas and Florida. The staff mediators in the MFCS program are still predominantly non-lawyers and family lawyers are reticent to refer cases for mediation to other family lawyers with mediation training.

In other Illinois counties where there are family mediation programs, other cultures are emerging that may more accurately be seen as “lawyer colonization.” One of the private mediators in Cook County stated: “Lake and DuPage Counties don’t have a MFCS, but they have lists of preapproved mediators and they tend to play favorites.”<sup>170</sup>

Lynn Gaffigan, a prominent family mediator in Lake County, Illinois, presented a more nuanced explanation of family mediation developments in the suburban counties surrounding Chicago, particularly Lake, McHenry, and DuPage Counties.<sup>171</sup> She stated that the courts in these areas became interested in sending divorce cases to mediation in the 1980s and 90s for a variety of reasons, and they turned to the local bar associations to draft rules:<sup>172</sup>

The bar associations naturally looked to provide an opportunity for new business to their members and drafted the rules in a way that only attorneys would be qualified to be mediators. Some of us became concerned. We have always believed very strongly that family mediation benefitted from being an interdisciplinary field, and we advocated for this with the local courts and the bars. They had a reason to feel comfortable with the notion of non-lawyers as family mediators because they had used therapists as custody evaluators.<sup>173</sup>

Thus, the court lists and available pool of family mediators in these counties are currently interdisciplinary, but court appointments are highly dependent upon judicial preferences.

Judges like to appoint people they know. They know attorneys but also might appoint non-lawyers they have come to know as

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170. Interview with Brigitte Bell, *supra* note 146.

171. Telephone Interview with Lynn Gaffigan, Mediator, Lake Cnty., Ill. (Oct. 14, 2011).

172. *Id.* However, Gaffigan also noted that in several counties, mental health mediators were brought onto the early committees involved in establishing the rules. *Id.*

173. *Id.*

custody evaluators. When a case is mandated to mediation by a court early on and there are volatile issues, this might have some judges think in terms of referral to a non-lawyer mediator with a therapy background.<sup>174</sup>

Other factors that may encourage greater lawyer involvement with family mediation in Illinois are the Uniform Mediation Act (IUMA) and the related explosion of local rules governing the mediation of major civil cases in various Illinois circuits. Illinois passed the Uniform Mediation Act in 2002.<sup>175</sup> Section 10 of the IUMA provides as follows: “An attorney or other individual designated by a party may accompany the party to and participate in a mediation.”<sup>176</sup> Pursuant to the IUMA, attorneys may now attend mediations conducted under a court program<sup>177</sup> that may previously have barred or discouraged attorney presence. Moreover, beginning in the mid-1990s, nearly half of the Illinois circuits adopted court-ordered mediation programs for major civil cases.<sup>178</sup> As these programs develop, attorneys most likely will become more familiar (and comfortable) with the mediation process by representing parties in mediation or actually serving as mediators.

Now that the Illinois Supreme Court has mandated that all Illinois circuits adopt local rules for custody mediation, it remains to be seen whether the “downstate” counties will establish an interdisciplinary pool of family mediators. Analogizing to the experiences in some of the suburban Chicago counties, a prominent family mediator and trainer offered the following hunch: “In downstate counties, it will depend on judges’ familiarity with mental health professionals regarding whether the courts turn to lawyers exclusively.”<sup>179</sup>

### *C. Emerging Themes*

In this Part, we discuss and suggest explanations for some of the trends emerging from our research. We have grouped them into five general themes.

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174. *Id.*

175. See Ill. Unif. Mediation Act, 710 ILL. COMP. STAT. 35/1–16 (West 2007).

176. 710 ILL. COMP. STAT. 35/10.

177. *Id.*

178. For a review and critique of the local rules governing these programs, see Suzanne J. Schmitz, *A Critique of the Illinois Circuit Rules Concerning Court-Ordered Mediation*, 36 LOY. U. CHI. L.J. 783 (2005).

179. Interview with Lynn Gaffigan, *supra* note 171.

### 1. Divorce is Ultimately Governed by the Law

The role of a mediator is to help facilitate settlement discussions. Therefore, there has been a generally held belief that mediators do not necessarily “need substantive knowledge of the areas in which they mediate, including the law.”<sup>180</sup> However, that generally held belief has been questioned in the family law field. Some have observed that family disputes are perhaps unique because divorce mediations require mediators to address legal issues.<sup>181</sup> As one commentator noted, the issues that must be resolved in a divorce mediation “‘inevitably involve legal questions.’”<sup>182</sup> Even if the contested issues in a divorce are limited to child custody and visitation, statutory child support guidelines and shared parenting requirements usually come into play. The discussions over these issues and agreements reached in divorce mediations are guided by the law and end with a final decree in the court to finalize the divorce. Accordingly, “[l]egal institutions remain at the center of the family law system.”<sup>183</sup> As Mnookin and Kornhauser observed, parties in a divorce case do not bargain over finances and custody “in a vacuum”; rather, “they bargain in the shadow of the law.”<sup>184</sup> Since there are specified rules that govern the dollar amounts for alimony, child support, and other financial issues, divorcing couples negotiate with a general understanding of what would likely happen if the case went to trial.<sup>185</sup>

Due to the legal considerations throughout the divorce process, the first thing many people think about when they are getting a divorce is that they need a lawyer. It is certainly understandable why parties would feel they need the protection and assistance of a lawyer, given the legally enforceable consequences that follow.<sup>186</sup> Divorcing couples want more than simply assistance with the process.<sup>187</sup> They want to know that what they are agreeing to is consistent with what others have done in

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180. Foster & Kelly, *supra* note 17, at 668.

181. *Id.*

182. 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, 481 (1996) (quoting Russell M. Coombs, *Noncourt-Connected Mediation and Counseling in Child-Custody Disputes*, 17 FAM. L.Q. 469, 493 (1984)).

183. Peter Salem, *Improving Our Family Courts and Services: A Call for Interdisciplinary Collaboration*, UNIFIED FAM. CT. CONNECTION, Winter 2011, at 7, 7.

184. Mnookin & Kornhauser, *supra* note 1, at 968.

185. *See id.*

186. *See* MAYER, *supra* note 2, at 69–70.

187. *See id.* at 70.

similar situations. The parties in a divorce want to be reassured, especially if they are unrepresented. Therefore, many unrepresented parties want attorney-mediators who know the law and, if represented, many represented parties want attorney-mediators who can deal with their lawyers effectively.<sup>188</sup>

The importance of creating an enforceable divorce decree also draws parties to attorney-mediators. If one of the parties violates the decree, it may not be enforceable if the decree was not specific enough or was flawed in some respect.<sup>189</sup> Mediated settlement agreements must also avoid any family code violations.<sup>190</sup> Having an attorney to help navigate these legal issues helps reduce client anxiety.<sup>191</sup>

Given all these legal issues, the prevalence of attorney-mediators may also be the result of non-attorneys leaving the field. Elinor Robin, Ph.D.—a mediator and mediation trainer in Boca Raton, Florida—said, “Some non-lawyers decide to get trained in family mediation because they want to help families in crisis, but ultimately leave when they come to see that there is a legal aspect to the divorce.”<sup>192</sup> She explained that non-lawyer mediators “tend to feel overwhelmed because of their own lack of knowledge in the legal realm, and they may be concerned with unauthorized practice of law charges.”<sup>193</sup> For this reason, family mediation training requirements in some states, such as Florida, require that mediators receive specific training in family law, including child support calculations, equitable distribution, as well as financial training in subjects such as tax considerations in divorce.<sup>194</sup>

Even with enhanced training, however, many non-lawyer mediators come to realize there is indeed a legal aspect to mediating divorce cases, and they may feel unqualified to deal with the law and prepare the necessary legal documents.<sup>195</sup> When parties are represented, the

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188. Interview with Andrew Shepard, *supra* note 30.

189. Interview with Hon. Bruce Wettman, *supra* note 85.

190. Interview with Nick Hall, *supra* note 74.

191. See Paul T. Capuzziello, *An Interdisciplinary Approach to Handling Divorce Cases*, UNIFIED FAM. CT. CONNECTION, Winter 2011, at 2, 4.

192. Interview with Elinor Robin, Ph.D., Mediator and Mediation Trainer, in Orlando, Fla. (June 4, 2011).

193. *Id.*

194. See FLA. DISP. RESOL. CTR., ADR RESOURCE HANDBOOK 139, 168 (July 2011), available at [http://www.flcourts.org/gen\\_public/adr/bin/ResourceHandbook2011/2011ADRHandbookTab5MTSP.pdf](http://www.flcourts.org/gen_public/adr/bin/ResourceHandbook2011/2011ADRHandbookTab5MTSP.pdf).

195. Of course, it should be noted that not all attorney-mediators are necessarily familiar with family law either.

tendency is that lawyers choose attorney-mediators. Therefore, many non-attorney mediators are relegated to mediating pro se cases where the mediator is typically the one to draft the agreement. Robin feels that you must have the ability to draft agreements if you are mediating with pro se parties because there are no lawyer representatives in the room to draft the agreement.<sup>196</sup> This places non-lawyer mediators in a “catch-22” since it is the non-lawyer mediators that end up doing the most drafting.<sup>197</sup>

## 2. Lawyer Territorialism

Historically, lawyers were the last profession to jump on the proverbial mediation bandwagon. Many lawyers originally felt threatened by mediation and feared that it would take away business. Therefore, attorneys initially preferred to take an arms-length approach to mediation. However, as family attorneys became more involved in the private mediation community, they started limiting their referrals to attorney-mediators. More specifically for family mediators, the family law community is comprised of a very close-knit group of practitioners, and they often refer mediations to their fellow colleagues.<sup>198</sup> This phenomenon is a common practice that is not limited to the legal community: “Intra-professional referrals are common because people are more likely to know and trust those in their own network.”<sup>199</sup> For example, mental health mediators may be more likely to receive direct mediation referrals from mental health professionals treating divorcing spouses.<sup>200</sup>

More recently, a larger number of attorneys are entering the ADR field. Due in part to increased ADR programs and course offerings at law schools, more lawyers are now trained in ADR. Exposure to these ADR opportunities in law school also makes new attorneys more aware of the benefits of and avenues available for resolving disputes outside the courtroom. The shift toward a lawyer-centered family mediation

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196. Interview with Elinor Robin, *supra* note 192.

197. *Id.*

198. See Velikonja, *supra* note 51, at 282 (stating that attorneys are the primary source of mediation business).

199. Interview with Peter Salem, *supra* note 16.

200. These mental health mediators may be mediating a higher percentage of cases before parties hire attorneys to review their agreements. E-mail from Gregory Firestone, Ph.D., Dir., U. of S. Fla. Conflict Resol. Collaborative, to author (Nov. 16, 2011) (on file with authors).

pool is also the result of the fact that “the courts are the lawyers’ playground and family mediation is generally dependent on court activity.”<sup>201</sup> Additionally, for many experienced litigators, ADR offers a welcome reprieve from the grind of the litigation process. These attorneys’ exposure to the harms caused by protracted litigation has also led some to genuinely believe in the merits of ADR.<sup>202</sup>

Lawyers tend to control the mediator referral system, particularly when the parties are represented.<sup>203</sup> Some see attorneys as gatekeepers of the mediator selection process.<sup>204</sup> If the parties are represented, the attorneys will almost always choose an attorney-mediator.<sup>205</sup> To generate business, many attorney-mediators make it a point to reach out and network with family attorneys because they are the ones who will refer cases to them. A number of those interviewed indicated that many family lawyers have established family mediation practices through quid pro quo arrangements with other family lawyers seeking to develop a mediation practice.<sup>206</sup>

Furthermore, it is often the case that lawyers want an attorney-mediator to deliver bad news to the clients and help persuade their client to settle. Attorneys seek attorney-mediators so they can provide a reality check to their client and the other side.<sup>207</sup> Attorneys with difficult clients may especially seek out attorney-mediators to assist with this.<sup>208</sup>

### 3. Divorces and Divorce Decrees Have Become More Complicated

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201. *Id.*; see also Interview with Lynn Gaffigan, *supra* note 171.

202. Interview with Bill Moreno, *supra* note 127.

203. Interview with Bernard Mayer, *supra* note 53.

204. Velikonja, *supra* note 51, at 282.

205. Interview with Kim Martinez, *supra* note 96.

206. For example, a family attorney who is trying to develop a mediation practice may ask other family attorneys to refer mediation cases to him or her in exchange for referring mediations to them.

207. Telephone Interview with Perry Itkin, Att’y-Mediator, in Fort Lauderdale, Fla. (Aug. 3, 2011). Itkin went on to say that he disagreed with this practice. “There is a misconception that lawyers have while representing their clients in mediation. They think that attorney-mediators can give legal advice or properly frame probative questions without crossing the line into the ‘unauthorized’ practice of law.”

208. However, others point out that attorneys are sometimes more likely to refer cases involving difficult clients to a mediator with a mental health background as that mediator may possess greater interpersonal skills to successfully conduct the mediation. Gregory Firestone points out that mental health professionals bring valuable skills to the mediation process, and many divorcing couples need or seek mediators with the necessary interpersonal skills to help the parties under a great deal of emotional stress. E-mail from Gregory Firestone, *supra* note 200.

### From a Legal Perspective

Family cases referred to mediation have become increasingly complex. “Compared to disputed divorce cases in the 1980s, contemporary disputed divorce cases . . . involve families with more serious and multiple problems.”<sup>209</sup> In addition, there has been a rise in nontraditional families, and within these nontraditional families, numerous issues have been emerging, such as “allegations of domestic violence, child abuse, and substance abuse.”<sup>210</sup> While the advent of no-fault statutes have simplified the grounds for divorce,<sup>211</sup> the scope and complexity of property and asset distribution has increased, as issues regarding stocks, intangibles, and tax consequences continue to emerge in distinctive forms. In addition, child custody has become more complicated. The default in custody cases used to be that the mother received custody, but that is no longer the case.<sup>212</sup> For instance, as Richard Orsinger has noted about custody decisions in Texas, “we’ve fractured the custodial position by mandating joint managing conservatorship.”<sup>213</sup> It might seem that the move toward awarding joint custody would make the decision easier to manage, since lawyers are less inclined to fight over which parent should receive sole custody. However, the preference for joint custody may just as likely add other complexities associated with how and when decision-making responsibilities will be addressed.<sup>214</sup>

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209. Peter Salem, *The Emergence of Triage in Family Court Services: The Beginning of the End for Mandatory Mediation?*, 47 FAM. CT. REV. 371, 377 (2009) (alteration in original) (quoting Donald T. Saposnek, *Commentary: The Future of the History of Family Mediation Research*, CONFLICT RESOL. Q., 37, 38 (Fall–Winter 2004)).

210. Jessica Pearson, *Court Services: Meeting the Needs of Twenty-First Century Families*, 33 FAM. L.Q. 617, 618–19 (1999).

211. Jill Schachner Chanen, *And Then There Was None*, 96 A.B.A. J., Nov. 2010, at 12, 12 (confirming that all states permit no-fault divorce). Although all states today permit no-fault divorces, divorcing litigants may still plead fault as a basis for requesting a disproportionate award of the community estate or child custody. Barbara Anne Kazen, *Division of Property at the Time of Divorce*, 49 BAYLOR L. REV. 417, 426 (1997).

212. ANDREW I. SCHEPARD, CHILDREN, COURTS, AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 14–19 (2004).

213. Interview with Richard Orsinger, *supra* note 95; *see also* TEX. FAM. CODE ANN. § 153.131(b) (West 2008) (stating that “[i]t is a rebuttable presumption that the appointment of the parents of a child as joint managing conservators is in the best interest of the child”).

214. Alternatively, Richard Orsinger has found that disputes over decision-making responsibilities are fairly easy to resolve. Interview with Richard Orsinger, *supra* note 95. For example, Orsinger explained that

[y]ou can require consent of both parties for a decision to be made, allow either

Mirroring the increased complexity in family cases, the divorce decree itself has become more complicated.<sup>215</sup> Many argue that because divorce decrees are so complicated and lengthy, lawyers are the preferred mediators to navigate the legal requirements and draft the complex decree. For example, the requirements for divorce decrees in Texas are extremely detailed and specific. Texas divorce decrees could be fifty pages or more if children are involved.<sup>216</sup> In addition to the length of the form itself, the language of these forms can be particularly legalistic.<sup>217</sup> While non-attorney mediators with sufficient training may very well be able to navigate these forms, even the appearance of complexity makes it likely that clients will be more inclined to want to rely on an attorney.

#### 4. Increasing Number of Pro Se Parties and Never Married Parents

A big trend in family courts today is the rise in pro se parties. The economic downturn has inevitably led to an increase in pro se parties, as couples seeking divorces simply lack the resources needed to hire attorneys.<sup>218</sup> Also, many couples who use court resources regarding child custody, visitation, and child support are not married.<sup>219</sup> These unmarried parents represent a significant portion of the pro se parties in family courts. According to one Florida attorney, between 60% and 80% of family cases in Florida involve pro se parties.<sup>220</sup> Many parties feel that having one attorney-mediator is cheaper than each party having separate counsel.

Beyond monetary concerns, some pro se parties may seek a lawyer-mediator due to an increased level of comfort. Some argue that lawyer-mediators can add value to the mediation process for pro se parties

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parent to consent, allow either parent to veto, or require the parent with exclusive decision-making authority to consult before making the decision. If consent of both spouses is required, you can have a third party tie-breaker, such as having the child's primary physician's recommendation prevail if the parents disagree.

*Id.*

215. Interview with Andrew Schepard, *supra* note 30.

216. See Interview with Carel Stith, *supra* note 85; Interview with Norma Trusch, *supra* note 77.

217. See Interview with Carel Stith, *supra* note 85; Interview with Norma Trusch, *supra* note 77.

218. See Avi Braz, *Out of Joint: Replacing Joint Representation with Lawyer-Mediation in Friendly Divorces*, 78 S. CAL. L. REV. 323, 361 (2004).

219. See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2011, at 56, available at <http://www.census.gov/prod/2011pubs/11statab/pop.pdf>.

220. Interview with Elaine Silver, Att'y-Mediator, in Orlando, Fla. (June 3, 2011).

because of their legal knowledge and familiarity with the judicial process. Lawyer-mediators are barred from providing legal advice, but they can provide legal education. For example, in a divorce case, an attorney-mediator may provide the parties with information regarding the state's marital property system or inform the parties of the factors a judge might consider if he or she was to render a decision on the case.<sup>221</sup> Thus, as one commentator has noted, the "lawyer-mediator's ability to bring the law—or at least the shadow of the law—to the mediation table is significant."<sup>222</sup> Finally, a lawyer-mediator is in a better position to assist the parties in drafting a mediated settlement agreement that complies with legal requirements.<sup>223</sup> Lawyer-mediators, therefore, could offer pro se parties many of the advantages of separately represented parties without the added costs.

Finally, while a large percentage of families cannot afford legal representation, a significant number of divorcing couples choose to forego the lawyer model for reasons driven by concerns other than cost.<sup>224</sup> Many couples simply do not want to fight, and they see lawyers as destructive and adversarial.<sup>225</sup> As Lynelle Yingling observed, couples often believe that "attorneys tend to escalate the conflict."<sup>226</sup> Similarly, Bernard Mayer noted that many people just do not want attorneys taking over the process.<sup>227</sup> A desire to avoid the lawyer model and proceed pro se has also been caused by "generational" considerations.<sup>228</sup> As Helen Stein explained, "[a]dult children of divorced parents saw the destruction of the adversarial divorce process firsthand, and they want to avoid that."<sup>229</sup>

##### 5. Changes in Mediation Practices Caused by Fiscal Constraints

Many court-sponsored mediation programs have experienced

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221. Braz, *supra* note 218, at 359.

222. *Id.* at 352.

223. However, attorney-mediator Perry Itkin believes that lawyers in their role as family mediator run a serious risk of crossing over into the "unauthorized" practice of law if they draft the mediated settlement agreement and use boilerplate forms they have created for their family practice instead of state-court-sponsored forms. See Interview with Perry Itkin, *supra* note 207.

224. Interview with Elaine Silver, *supra* note 220.

225. *Id.*

226. Interview with Lynelle Yingling, *supra* note 98.

227. Interview with Bernard Mayer, *supra* note 53.

228. Interview with Helen Stein, *supra* note 139.

229. *Id.*

significant cut-backs in recent years. Court service agencies typically provide free mediation services or offer mediation for a nominal fee. An AFCC survey conducted between 1998 and 2004 “found that 92[%] of family court service agencies offered mediation.”<sup>230</sup> However, many court-connected mediation programs are challenged by limited resources from budget cuts, leading them to struggle with reduced staff and growing caseloads of increasing complexity.<sup>231</sup> In the same survey, “[48%] of family court service programs surveyed reported increased workload for staff . . . ; 39[%] experienced a reduction in direct service staff; 31[%] reduced administrative staff; and 24[%] reduced supervisory staff.”<sup>232</sup>

While many court programs have full-time, on-site staff mediators, financial restraints simply do not allow many programs to continue to hire enough full-time staff to keep up with their caseloads. Therefore, courts will likely contract out to local mediators and pay them a minimal flat fee for their services. In fact, some court mediation programs have turned solely to contract mediators to reduce costs. A second approach that states have taken when the available funds are not sufficient to hire contract mediators is to use state employees who may not have sufficient time and experience mediating.<sup>233</sup>

Regardless of who is chosen to mediate, financial considerations may also have an impact on court-connected mediation sessions by limiting the amount of time available for any one mediation.<sup>234</sup> This shortened time frame can have a significant impact on the resolution of the dispute. As one commentator noted with regard to court trends limiting child custody mediation to one session, “more difficult cases with multiple serious issues most likely will not be given sufficient opportunity to settle.”<sup>235</sup> Thus, paradoxically, by shortening mediation session, courts may have to incur increased costs of litigation because

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230. Salem, *supra* note 209, at 373, 377 (citing Barbara A. Babb, George Ferrick & Stephen R. Grant, Presentation at the Annual Conference of the Association of Family and Conciliation Courts, Seattle, Wash.: AFCC Ct. Servs. Task Force Report (2005)).

231. *Id.* at 377.

232. *Id.*

233. Interview with Susan Berg, Fam. Ct. Manager, 5th Jud. Cir., in Orlando, Fla. (June 3, 2011) (explaining how this has happened in some areas of Florida).

234. In Florida, court subsidized mediation sessions are limited to two to three hours. SUP. CT. OF FLA., COMM’N ON TRIAL CT. PERFORMANCE & ACCOUNTABILITY, *supra* note 125, at 6.

235. Salem, *supra* note 209, at 378 (quoting Joan B. Kelly, *Family Mediation Research: Is There Empirical Support for the Field?*, 22 CONFLICT RESOL. Q. 3, 29 (2004)).

the parties had insufficient time to work out the dispute in mediation sessions. The increasing complexity of cases also increases the chances that one mediation session will not be sufficient. Almost half of the family cases in court (about 10% of all divorcing families) involve high conflict families who cannot settle their disputes in a brief mandated mediation session and who consume a disproportionate share of family court service staff hours.<sup>236</sup>

Because of the need to settle disputes in more limited mediation sessions, there is an “increasing pressure to be deal cutters” even though most mediators were trained in the facilitative approach.<sup>237</sup> To deal with more cases and shorter mediation sessions, court mediators thus have become increasingly directive.<sup>238</sup> The pressure to quickly settle cases may lead to what has been referred to as a muscle mediation process in which the mediator essentially shapes the agreement rather than empowering the parties to do so.<sup>239</sup> “[B]ehind closed doors, many court-connected mediators acknowledge that they cannot conduct a facilitative mediation process if they are to meet the expectations of their workplace.”<sup>240</sup> These mediators express concern at “being caught between a rock and a hard place” because they are forced to provide quality mediations in a condensed time frame that they believe is not enough to do their job effectively.<sup>241</sup> So while their title is officially mediator, some argue that the process employed “certainly isn’t real mediation.”<sup>242</sup>

Because private sector family mediation is now primarily attorney driven in many regions, inevitably it has become more evaluative,<sup>243</sup> with

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236. *See id.* at 381.

237. Interview with Bernard Mayer, *supra* note 53.

238. *Id.*

239. *Id.*

240. Salem, *supra* note 209, at 378.

241. *Id.*

242. *Id.* (quoting an unnamed mediator and court services supervisor).

243. *See* Chris Guthrie, *The Lawyer’s Philosophical Map and the Disputant’s Perceptual Map: Impediments to Facilitative Mediation and Lawyering*, 6 HARV. NEGOT. L. REV. 145, 180 (2001) (“[L]awyers operate according to a standard philosophical map that predisposes them to practice law and mediation in an evaluative rather than a facilitative way.”); *see also* Interview with Mel Rubin, *supra* note 133. Rubin, an attorney-mediator in Miami, believes that ethnicity also plays a role in mediation styles. For example, he believes that parents who are Latino have a habit of setting up the mediator to be more evaluative. They tend to refer to attorney-mediators as “Doctor,” and they want an opinion similar to one they would get from a doctor.

attorney-mediators separating the parties from the beginning.<sup>244</sup> These general trends can be seen in the specific practices in individual states. For example, Yingling has estimated that in the Dallas area, the parents in private family cases only see each other face to face in approximately 10% of mediations.<sup>245</sup> In terms of private mediators' styles, Florida appears to mirror Texas. While joint conferencing used to be common practice, now people have to argue for it.<sup>246</sup> Given these common circumstances, it is understandable why many people believe that family mediation today, particularly among private attorney-mediators, more closely resembles settlement conferencing. The goal is simply to get an agreement done, and unfortunately, this task-based goal has become the driving force in many mediations.

The reasons for a shift to an evaluative approach are not just limited to the background of the mediator. The attorneys representing the clients have also played a critical role in shaping the current mediation styles used by mediators. Lawyers representing the clients tend to dictate how the mediation will run. Many attorneys are reticent to keep the parties together in the same room and will demand that the mediator separate the parties from the beginning. While numerous attorney-mediators prefer to use an evaluative style, other mediators, who might prefer a less directive style of mediation, succumb to the attorneys' requests because they want to be hired again. In addition to demanding a certain mediation style, some mediators report that attorneys have the mediator assist with discovery during the first half of mediation sessions.<sup>247</sup> Some attorneys come to mediation sessions with boxes of discovery materials in hand, as if they were preparing to go to trial.<sup>248</sup> Such activities seemingly convert "mediation into litigation without rules,"<sup>249</sup> with lawyers acting as "a star player" rather than "as a coach."<sup>250</sup>

According to one mediator who wishes to remain anonymous,

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244. Interview with Hon. Bruce Wettman, *supra* note 85.

245. Interview with Lynelle Yingling, *supra* note 98. In the early 1990s when Yingling began seeing more attorneys in her trainings, she had an eye opening experience when an attorney basically verbally attacked her saying that she did not know how to mediate because she "wanted to keep the parties together in the same room." *Id.*

246. Interview with Mel Rubin, *supra* note 133.

247. Interview with Norma Trusch, *supra* note 77.

248. *Id.*

249. Interview with Lynelle Yingling, *supra* note 98.

250. See Schepard, *Introduction*, *supra* note 32, at 24.

“family mediation is no longer client based mediation focused on party empowerment, but rather, it has become an attorney-driven process.” The client-centered process, which is the cornerstone of “pure” mediation, has been lost. To some extent, it appears that family mediation has lost its distinctiveness and has become nothing more than a case evaluation forum.

#### IV. CONCLUSION

These trends and emerging themes in family mediation point toward a more lawyer-dominated process and away from a party-centric process. Particularly in the private sector, lawyers are colonizing the mediation field. Lawyers and judges are referring cases to attorney-mediators and generally shunning mediators from other professions. Ostensibly succumbing to expressed preferences of lawyer representatives, these lawyer-mediators have tended to adopt a more directive or evaluative orientation that relies on shuttle diplomacy and marginalizes the joint session. In this setting, the divorcing spouses have less of an opportunity to express themselves and will need to rely on their lawyers to reach an agreement. Mediation will thus offer a lessened opportunity to realize its full potential as a dispute resolution alternative.<sup>251</sup>

As the family mediation field loses its interdisciplinary character, it will also become less distinctive in the public sector. Although court-sponsored custody mediation programs may continue to be staffed primarily by mediators from the mental health professions, fiscal constraints may lead to the elimination or downsizing of many of these programs. Parties and their lawyer representatives will most likely turn to lawyer-mediators in the private sector or rely on other court-sponsored alternatives to resolve their differences. If resource-strapped courts develop “triage” models,<sup>252</sup> fewer parties are likely to be offered mediation. Moreover, those that are offered mediation may be provided with abbreviated mediation sessions that are no less likely to add value to the communications of the parties than private-sector

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251. See, e.g., Art Hinshaw, *Mediators as Mandatory Reporters of Child Abuse: Preserving Mediation's Core Values*, 34 FLA. ST. U. L. REV. 271, 276 (2007) (“[T]he greatest benefit of using mediation in divorce and child custody cases is its ability to increase the quality of the parties’ communication to address emotionally charged issues.”).

252. For a trenchant analysis of the use of triage in family courts, see Salem, *supra* note 209.

mediations offered by lawyer-mediators.<sup>253</sup>

Thus, lawyer colonization of the mediation field is likely to result in a less distinctive dispute resolution alternative and a lessened adherence to mediation's core values, particularly party self-determination. Once seen as the primary means for assisting in the private ordering of divorce disputes, family mediation may be relegated to a secondary role. If family mediation is to continue to be viewed as a viable dispute resolution mechanism, lawyer-mediators should feel challenged to offer something more than a settlement conference. Otherwise, divorcing spouses and their lawyers may choose alternative services such as collaborative law, early neutral evaluation, parenting coordination, or cooperative negotiation agreements.<sup>254</sup>

The future of family mediation may thus be closely tied to the future of lawyering. To the extent that a return to mediation's core values will be seen as the key to maintaining mediation's primacy, the lawyer who is trained in a collaborative, problem solving tradition is most likely to have the capability to meet this challenge. These future lawyers most likely will also be inclined to be supportive and encouraging of the inclusion of mediators from other professions in the family mediation field.

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253. On the other hand, it is possible that those who are offered mediation as an alternative may actually have a better process if fewer mediations are being conducted overall.

254. See generally Salem, *supra* note 209 (identifying these and other alternatives in the divorce context, notably triage).

## APPENDIX

*List of Interviewees*

Dan Amerson	Galveston, Texas
Robert A. Badgley	Chicago, Illinois
Brigitte Bell	Evanston, Illinois
Susan Berg	Tavares, Florida
Charles Castagna	Tampa, Florida
Janice Fleischer	Tallahassee, Florida
Gregory Firestone	Tampa, Florida
Lynn Gaffigan	Lake Bluff, Illinois
Duane Gallop	Dallas, Texas
Lorri Meraz Graboswki	Houston, Texas
Nick Hall	Houston, Texas
David Hoffman	Boston, Massachusetts
David Huang	Austin, Texas
Perry Itkin	Fort Lauderdale, Florida
Corinne (Cookie) Levitz	Chicago, Illinois
Kimberlee Kovach	Austin, Texas
Barbara Sunderland Manousso	Houston, Texas
Kim Martinez	Dallas, Texas
Bernard Mayer	Omaha, Nebraska
Bill Moreno	Palm Beach, Florida
Richard Orsinger	San Antonio, Texas
Nancy Oseasohn	San Antonio, Texas
Nancy Palmer	Daytona Beach, Florida
Sharon Press	St. Paul, Minnesota
Kenneth Rempell	Short Hills, New Jersey
Elinor Robin	Boca Raton, Florida
Mel Rubin	Miami, Florida
Peter Salem	Madison, Wisconsin
Arnie Shienvold	Harrisburg, Pennsylvania
Andrew Schepard	New York, New York
Karen Shields	Chicago, Illinois
Elaine Silver	Lake Mary, Florida
Carel Stith	Houston, Texas
Helen Stein	Miami, Florida

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Norma Trusch	Houston, Texas
Megan Ultis	Houston, Texas
Hon. Bruce Wettman	Houston, Texas
Genie Williams	Orlando, Florida
Susan Yates	Chicago, Illinois
Lynelle Yingling	Dallas, Texas