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Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation

Craig A. McEwen, Nancy H. Rogers, and Richard J. Maiman*

Introduction ............................................ 1319
I. The “Fairness” Debate .............................. 1323
II. Evaluating the Two Dominant Statutory Approaches ........................................ 1329
   A. The “Regulatory Approach” ...................... 1330
      1. Mediator Duties Regarding Fairness ........ 1332
      2. Case Selection .................................. 1335
      3. Issue Limitations ............................ 1340
      4. Mediator Qualifications ...................... 1343
      5. Lawyer and Court Review of Mediated Agreements .................................. 1345
      6. No Recommendation by the Mediator to the Court ........................................ 1347
   B. The “Voluntary Participation” Approach ........ 1348
III. Assumptions Underlying the Dominant Approaches . 1350
   A. The Disappearing Lawyer ....................... 1351
   B. Mediation as Monolith .......................... 1353
   C. Lawyers as Spoilers ............................ 1354

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D. Mandated Mediation Versus Trial

IV. The Assumptions Underlying the Dominant Approaches Are Myths: A Case Study of Maine's Mandatory Divorce Mediation Involving Lawyers

A. The Study of Divorce Lawyers and Mediation in Maine

B. The Assumptions Prove to be Myths in Maine

1. The Disappearing Lawyer
   a. Lawyer Participation in Maine Mediation Sessions and Divorce Cases
   b. Lawyer Advocacy in Maine Divorce Mediation

2. Mediation as Monolith

3. Lawyers as Spoilers
   a. Settlement and Lawyer Participation
   b. Encouraging Reasonable Positions and Behavior in Mediation
   c. Spoiling Mediation for Clients

4. Mandatory Mediation Versus Trial: Mediation Substitutes for or Supplements Negotiation

5. Conclusions: The Myths and Maine Mediation

V. Bring in the Lawyers

A. Compared to the "Regulatory" Approach

B. Compared to the "Voluntary Participation" Approach

C. Concerns about the "Lawyer-Participant" Approach

1. Mediation Versus Negotiation

2. Mandated Lawyered Mediation and Self-Determination

3. Cost and Lawyer Presence

4. Fairness for Unrepresented Parties

5. Is This "Real Mediation?"

Conclusion

Appendix A: Jurisdictions with Regulated Mandatory Mediation

Appendix B: Jurisdictions with Voluntary Participation or Less Regulated Mandatory Mediation
INTRODUCTION

Mandatory divorce mediation is under attack. According to some critical commentators, divorce mediation reinforces bargaining imbalances between parties and places women at a disadvantage. Professor Penelope Bryan, for example, concludes that there is an "insidious nature of mediation" for divorcing women and that "those who structure court affiliated programs, as well as mediators, now should recognize their complicity in the continued oppression of women and their dependent children." She and other critics charge that mandatory mediation programs represent an unnecessary step that leaves divorcing parents unprotected by lawyers and makes the divorce process less fair. Bryan claims that mediation "exploits wives by denigrating their legal entitlements, stripping them of authority, encouraging unwarranted compromise, isolating them from needed support, and placing them across the table from their more powerful husbands and demanding that they fend for themselves."  

1. Commentators define mediation as a process in which a person not involved in a dispute helps the disputing parties negotiate a settlement. The mediator has no authority to issue a binding award in the event that the parties do not reach a settlement. JAY FOLBERG & ALISON TAYLOR, MEDIATION 7-9 (1984); NANCY H. ROGERS & RICHARD A. SALEM, A STUDENT'S GUIDE TO MEDIATION AND THE LAW 3 (1987).


3. Bryan, supra note 2, at 523; see also Woods, supra note 2, at 435 (arguing that mediation trivializes domestic disputes and removes legal protection for battered women).


5. Bryan, supra note 2, at 523.
Professor Trina Grillo contrasts mediation with the litigation process, in which she says people believe that "what transpires is at least partially a matter of right and justice." As a consequence, critics argue, the courts should never mandate divorce mediation.

Mediation proponents respond that mandatory mediation can produce results as fair as or more fair than those achieved through a traditional divorce system, and they praise mediation's benefits as compared to litigation. To insure fairness, however, proponents sometimes advocate regulation.

6. Grillo, supra note 2, at 1559.

7. See supra note 2 and accompanying text (citing critics who assert that mediation reinforces power differentials to the detriment of women).


9. Richard A. Gardner, Family Evaluation in Child Custody Mediation, Arbitration, and Litigation 513-16 (1989); Diane Neumann, How Medi-
this view, the elaborate scheme of statutes and court rules enacted to ensure that mediation is "done right" should produce uniformly high quality, and thus fair mandatory divorce mediation. This "regulatory" approach to mandated mediation often includes mediator duties to assure fairness (such as a duty to assure a balanced dialogue); exemption of some cases from compulsory mediation; limitation of the scope of discussion during sessions to custody and visitation issues; requirement of advanced degrees and mediation training for mediators; requirement that the parties’ lawyers and the court review mediated agreements; and prohibitions against the mediator making recommendations to the court.11

This “regulatory” approach to assuring fairness in divorce mediation contrasts with the “voluntary participation” approach often favored by those most critical of mediation.12 Unlike the “regulatory” approach, the “voluntary participation” approach leaves courts without authority to compel the parties to attend mediation sessions.13 Under this approach, the parties presum-
ably decide whether to go to mediation based upon how well they believe they will fare. The assurance of fairness then rests on their ability to choose. Thus, the "voluntary participation" approach sometimes entails very little regulation of the mediation process.

In this Article, we argue that the debate about fairness in divorce mediation, as well as the resulting legal schemes based on either the "regulatory" or "voluntary participation" approaches, results from the view that one must choose between a "lawyered" process ending in the courtroom, and an informal, problem-solving process involving parties but not lawyers in the mediation room. In our view, this dichotomy has unnecessarily narrowed the policy choices underlying mediation schemes, because it assumes that lawyers either cause conflict or act as mouthpieces for clients with a cause;\textsuperscript{14} that the divorce process is one in which, absent mediation (where lawyers do not appear), aggressive lawyers contest custody cases at hearings;\textsuperscript{15} and that mediators either protect parties' interests or pressure them toward a particular (and sometimes unjust) settlement.\textsuperscript{16}

We challenge these assumptions and the two approaches in statutes and court rules that follow from them—the "regulatory" and the "voluntary participation" approaches. We argue that the mediation scheme in Maine, where attorneys participate regularly and vigorously in mandated divorce mediation, provides a third avenue—one we call the "lawyer-participant" approach. Research evidence about this third approach undermines the assumptions that have confined the debate about fairness.\textsuperscript{17} Although several jurisdictions have employed the "lawyer-participant" approach,\textsuperscript{18} it has not been considered

\textsuperscript{14} See infra text accompanying notes 216-221 (discussing the "lawyers as spoilers" assumption).
\textsuperscript{15} See infra text accompanying notes 191-208 (discussing the "disappearing lawyer" assumption); infra text accompanying notes 222-234 (discussing the "mediation versus trial" assumption).
\textsuperscript{16} See infra text accompanying notes 209-215 (discussing the "mediation as monolith" assumption).
\textsuperscript{17} See infra note 243 and accompanying text (describing study of Maine divorce lawyers).
\textsuperscript{18} The National Center for State Courts in Williamsburg, Virginia, maintains a State ADR Program Database [hereinafter NCSC Database] that includes responses to standardized reporting forms of directors of approximately
viable because of the widely shared, but flawed, assumptions about mediation and the divorce process. In this Article we critique these assumptions and seek to demonstrate that the "lawyer-participant" approach in fact promotes fairness more effectively than the two dominant legal schemes for divorce mediation.

Part I reviews in greater depth the debate about fairness in divorce mediation. In Part II, we examine the merits and weaknesses of the two primary contending approaches in mediation statutes, the "regulatory" and "voluntary participation" approaches. In Part III, we identify in detail the four "myths" that confine the debate to the two dominant approaches, and, in Part IV, we examine the perceptions and experiences of Maine divorce lawyers in an effort to challenge these myths. Ultimately, in Part V, we reject as flawed both the "regulatory" and the "voluntary participation" approaches to protecting fairness in divorce mediation and instead advocate Maine's "lawyer-participant" approach. In doing so, we side with the mediation critics in their skepticism about the capacity of the regulatory approach to insure fairness, but we also side with mediation advocates who believe that mediation holds promise for improving the divorce negotiation process without sacrificing fairness.

I. THE "FAIRNESS" DEBATE

Mediation critics claim that mandatory mediation, even if regulated, is less fair than trial.\textsuperscript{19} In contrast, mediation proponents contend that the judicial system is itself destructive and thus introduces an unfairness of sorts.\textsuperscript{20} For instance, mediator John Haynes begins his book, \textit{Divorce Mediation}, with the assertion, "The pain, anger, and frustration of divorce are frequently exacerbated by the legal process as it presently works."\textsuperscript{21} Furthermore, he argues, "[m]uch of the decision making is taken out of the hands of the clients, as the attorneys engage in battle..."
within the legal system.” Similarly, Dean Jay Folberg argues that family law and court procedures are often used “coercively to supplant family self-determination.” He states, by contrast, that mediation enhances “self determination,” and public support for it affirms “the dignity and importance of the family.”

Empirical studies provide little help in resolving the debate whether mediation is fair. Professor Grillo, for example, dismisses as inadequate studies of party perceptions of fairness. Instead, Professors Grillo and Bryan point to research about women's inferior societal position or gender roles and power and infer that mediation places women at a disadvantage. Alternatively, they cite egregious examples of divorce mediation in which parties, particularly women, are isolated from counsel and face pressures and threats from both their spouses and the mediator. They contend that mediators, intent upon settlement, force the weaker party to concede to facilitate agreement. Under this view, inequalities in power and exposure to settlement pressures in an informal process such as mediation promote coerced and unfair outcomes. Mediation critics also claim that mediators favor joint custody and press for solutions that split the children's lives between the parents, leaving unsettled the division of economic benefits. Under this view, because one party (presumably the mother) will actually take major responsibility for the children, even equal division of child support typically is economically unfair to the woman. The critics seem to believe that these arguments should shift the

22. Id. at 5.
24. Id.; see also Vroom et al., supra note 20, at 5-7 (noting growing support for mediation and its positive impact on the family).
26. Grillo, supra note 2, at 1548-49.
27. Id. at 1601-07; see also Bryan, supra note 2, at 481-98 (discussing how sex role ideology affects divorce mediation).
28. See Bryan, supra note 2, at 491-93; Grillo, supra note 2.
29. Bryan, supra note 2, at 446-98, 523; Grillo, supra note 2, at 1610.
30. FINEMAN, supra note 2, at 146-48; Bryan, supra note 2, at 491-95.
burden of persuasion in the fairness debate to advocates of mandatory mediation. In their view, advocates have not met this burden and mediation should be completely voluntary, if it is used at all.\textsuperscript{32}

Mediation advocates, however, confidently refer to the empirical evidence regarding parties' perceptions of mediation and dismiss the critics' examples as exceptional and not reflective of good mediation practice.\textsuperscript{33} Using anecdotes, they contend that well-trained, sensitive, ethical mediators compensate for power imbalances between parties, do not exert pressures to settle, and remain impartial, freeing the parties to accept or reject agreements.\textsuperscript{34} "Good" mediation practice, according to Professor Joshua Rosenberg, does not permit mediators to advise judges how to decide cases that do not settle, because doing so would exert settlement pressure on the parties.\textsuperscript{35}

Although they believe that mediation is usually fair, many mediation proponents take seriously concerns about the exceptional dangers of unfairness. They advocate assuring fairness in mediation by regulating the process to assure qualified mediators use appropriate procedures.\textsuperscript{36} Regulation is seen as the "fail-safe" mechanism of mandatory mediation, the safety net that provides the final protection against unfairness.

What do mediation critics and proponents mean by "fairness" in the context of divorce mediation? They seem to refer to several aspects of procedural fairness, and appear to link them to outcome fairness. Procedural aspects of fairness in divorce mediation\textsuperscript{37} commonly include balanced bargaining between parties,\textsuperscript{38} a "level playing field" in the mediation process;\textsuperscript{39} self-

\textsuperscript{32} Gagnon, supra note 2, at 291; Grillo, supra note 2, at 1610.
\textsuperscript{33} E.g., Duryee, supra note 8, at 507-11, 513-16; Rosenberg, supra note 8, at 467-73, 504-06.
\textsuperscript{34} Linda K. Girdner, Custody Mediation in the United States: Empowerment or Social Control, 3 CAN. J. WOMEN & L. 134, 152-54 (1989); see also Duryee, supra note 8, at 513-15 (discussing training only).
\textsuperscript{35} Rosenberg, supra note 8, at 473.
\textsuperscript{36} GARDNER, supra note 9, at 513-16, 607; Ann Milne & Jay Folberg, The Theory and Practice of Divorce Mediation: An Overview, in DIVORCE MEDIATION: THEORY AND PRACTICE 19-20 (Jay Folberg & Ann Milne eds., 1988); Neumann, supra note 9, at 231-32; Shaw, supra note 9, at 125.
\textsuperscript{37} Jay Folberg, Divorce Mediation: Promises and Problems, in GOLDBERG ET AL., supra note 8, at 308, 309-10.
\textsuperscript{38} Gagnon, supra note 2, at 274; Geffner & Pagelow, supra note 2, at 155-157; Treuthart, supra note 2, at 719, 728-29; see also Robert H. Mnookin, Divorce Bargaining: The Limits on Private Ordering, 18 U. Mich. J.L. Ref. 1015, 1017 (1985) (posing questions designed to address bargaining imbalances).
\textsuperscript{39} SAPOSNEK, CUSTODY DISPUTES, supra note 8, at 257-78.
determination by parties without undue settlement pressures or imposition of a mediator's values;\textsuperscript{40} and consideration of the children's interests.\textsuperscript{41} Commentators on divorce mediation seem especially concerned with those bargaining imbalances that may reflect differences in power between men and women, because these may lead to negotiated results that favor men.\textsuperscript{42} Bargaining imbalances thus produce "unfair results" unless mediators can overcome them.\textsuperscript{43} If mediators intervene too strongly to balance differences between parties, however, they may actually tilt the "level playing field" that "neutral" mediators arguably establish.\textsuperscript{44} When the circumstances of mediation permit a mediator to impose his or her preferences for an outcome on the parties—as when mediators make recommendations to the triers of fact—settlement pressures not only violate the principle of self-determination, but also may destroy a "level playing field" and produce unfair results, at least when these pressures affect parties differently.\textsuperscript{45} Court procedures that penalize the recalcitrant party or that impose costs that one party can bear with more ease than the other can also lead to arbitrary and unequal pressures to capitulate.\textsuperscript{46}

\textsuperscript{40} Gwynn Davis & Marian Roberts, Access to Agreement: A Consumer Study of Mediation in Family Dispute 74-75 (1988); Robert Dingwall, Empowerment or Enforcement? Some Questions About Power and Control in Divorce Mediation, in Divorce Mediation, supra note 10, at 150; Gagnon, supra note 2, at 274; Geffner & Pagelow, supra note 2, at 155-57; Girdner, supra note 34, at 152; Grillo, supra note 2, at 1593. But see Bryan, supra note 2, at 515 (asserting that parties will not reach a fair settlement in abuse cases unless monitored by the court).

\textsuperscript{41} Saposnek, Custody Disputes, supra note 8, at 118-34, 257-78. Some statutes require mediators to discuss or advocate the children's interests in mediation. Mnookin, supra note 38, at 1017.

\textsuperscript{42} Examples of bargaining imbalances include different knowledge of finances, different experience in negotiation, and intimidation of one by the other. These differences are said to lead to unfair apportionment of property and custody arrangements that favor one party. Folberg, supra note 8, at 12, 26; Treuthart, supra note 2, at 728-29.

\textsuperscript{43} Unfortunately, there is little agreement about how to define bargaining imbalances, identify them in practice, or understand the degree to which they relate to such characteristics as gender differences among parties in conflict. For example, Erickson and Erickson argue that power and power imbalances are largely in the eye of the beholder. Erickson & Erickson, supra note 8, 173-93.


\textsuperscript{45} Bryan, supra note 2, at 523; Grillo, supra note 2, at 1610.

\textsuperscript{46} See Gagnon, supra note 2, at 286-87, 292.
Although an unfair process would produce unfair outcomes, commentators differ sharply about whether there exist standards for evaluating the fairness of outcomes. For some mediation advocates, fair outcomes are in the eyes of the beholder—if parties believe the outcome to be fair, then it is. For others, fair settlements must creatively incorporate a variety of values and goals, rather than exclusively legal ones, and parties should arrive at them without pressure. Some would also add that fair results work in favor of children’s interests. For some mediation critics, however, fair settlements mirror likely court rulings rendered after a contested hearing. Any outcome departing from that standard means that one party relinquished too much.

Sometimes, commentators include “party empowerment” as another aspect of fairness, but they differ on how to achieve it. For mediation critics, legal advocacy and court hearings equalize power and diminish pressures for settlement. They view lawyers particularly as buffers between demanding spouses and intimidated clients. Lawyers insure that parties understand the alternatives to settlement. For some mediation advocates, however, legal advocacy and decision making diminish party autonomy and freedom—and thus “empowerment”—by allowing lawyers and courts to shape decisions using legal rules in a way that may have little relationship to the parties’ priorities, needs, and interests.

47. See Rosenberg, supra note 8, at 487-88 (asserting that mediators are able to guide parties to an appropriate understanding of fairness).


49. Mnookin, supra note 38, at 1031-35; Saposnek, Mandatory Mediation, supra note 8, at 491-93.

50. See Woods, supra note 2, at 435-36.

51. GARDNER, supra note 9, at 504; Girdner, supra note 34, at 141-42, 147-51.

52. For a challenge to the concepts of empowerment in mediation, see JONATHON G. SHAILOR, EMPOWERMENT IN DISPUTE MEDIATION 135-36 (1994).

53. Gagnon, supra note 2, at 273.

54. Grilo, supra note 2, at 1597.

55. Erickson, supra note 48, at 106; Fiske, supra note 9, at 59; see also Diane Trombetta, Custody Evaluation and Custody Mediation: A Comparison of Two Dispute Interventions, in THERAPISTS, LAWYERS, AND DIVORCING SPOUSES
At the extremes, these two views of outcome fairness and empowerment lead mediation critics to advocate against settlement and mediation proponents to oppose trials. An intermediate position, typically supported by commentators from both camps, involves determining how far a settlement departs from one that informed, unpressured parties would have reached absent mediation.

Because comparisons with adjudication are difficult, a rough comparison to settlement resulting from negotiation outside mediation represents a practical definition of fairness. In fact, the benchmark standard of fairness used by some commentators is the lawyer-to-lawyer negotiation. For example, Professor Bryan states that "lawyers have a professional obligation to pursue and protect the client's interests during negotiations. The lawyer advocate also insulates the disadvantaged wife from her husband and prevents the tangible, intangible, and sex role differences between them from dictating the terms of the agreement." Women's rights advocate Laurie Woods notes that negotiations between lawyers take place with access to applicable laws and knowledge of both the capacity to secure discovery and the alternatives to settlement. Academics point out the role of lawyers as effective advocates for battered wo-


56. Similarly, if one demands complete equality between parties as a prerequisite for fairness—as some critics appear to—one must inevitably reject the fairness of mediation or negotiation. In reality, the parties to settlement have different values and priorities. For mediation advocates, this is a virtue. Gary J. Friedman & Margaret L. Anderson, Divorce Mediation's Strengths, in Divorce Mediation Readings 81, 81-82 (1985). In fact, it is the very existence of differing values and priorities that sometimes permits each to gain by settling. See, e.g., Haynes, supra note 21, at 5 (concluding that when a mediator focuses couples on ways to achieve individual goals, it is possible to achieve a win-win situation). To adopt this position one must of course assume that the alternative to mediation is legal advocacy and that legal advocates equalize the positions and resources of parties.

57. Susan L. Keilitz et al., Multi-State Assessment of Divorce Mediation and Traditional Court Processing 37 (1993); Pearson, supra note 4, at 73-76.

58. Pearson, supra note 25, at 191.


60. Woods, supra note 2, at 435. The presence of lawyers in mediation would not necessarily respond to Woods's other critique of mediation, namely that it "trivializes family law issues by relegating them to a lesser forum," one which "diminishes the public perception of the relative importance of laws addressing women's and children's rights . . . by placing these rights outside society's key institutional system of dispute resolution—the legal system." Id.
men. The critics appear to accept the view of Professors Robert Mnookin and Lewis Kornhauser: that with represented parties "the outcome that the law will impose if no agreement is reached gives each parent certain bargaining chips—an endowment of sorts." Obviously, lawyers vary in ability and expertise, but this is the sort of variance that operates as well in other parts of the disputing process, such as trial.

Clearly, fairness in divorce mediation concerns both critics and advocates. Most embrace a comparable notion for fairness—that is, mediation should approximate the results achieved in lawyer-to-lawyer negotiation. Even when they embrace this mainstream definition of fairness, however, their commentary about how best to insure fairness in mediation has been constrained by common assumptions about the absence of lawyers, the similarity of all mediation programs, the role that lawyers would play if present, and the role of trial as the alternative to mediation. The same faulty assumptions have also confused the analysis of the dominant "regulatory approach," to which we now turn.

II. EVALUATING THE TWO DOMINANT STATUTORY APPROACHES

The two dominant statutory schemes of mediation—the "regulatory" approach and the "voluntary participation" approach—reflect the debate over fairness in divorce mediation. The "regulatory" approach requires divorcing parents to attend an introductory session on mediation or mediation itself, and the process is highly regulated in an effort to make it fair, despite the usual absence of lawyers at mediation sessions. The "voluntary participation" approach enables the parties to choose whether to participate in an introductory session or mediation session. Because lawyers will not attend mediation sessions, parties should opt not to participate if they anticipate conditions that will lead to unfairness.

63. We do not distinguish between mandatory attendance at an introductory session or at mediation itself because the parties do not seem to perceive a distinction. Jeanne Clement et al., Descriptive Study of Children Whose Divorcing Parents Are Participating in Voluntary, Mandatory or No Custody/Visitation Mediation 16 (1993) (reporting that 82.4% of Columbus, Ohio, parties ordered to an assessment felt pressured to attend mediation).
In this section, we explain why the efforts to add regulations or remove compulsion in order to make mediation fair are not only ineffective, but also introduce significant costs. In doing so, we measure the fairness against lawyer-to-lawyer negotiations, a process few commentators question.64

A. THE “REGULATORY” APPROACH

Early divorce mediation statutes were simple. They authorized the courts to require divorcing parents to appear for mediation of custody or visitation disputes before an impartial mediator.65 That was all. Over the last decade and in the context of the debate about the fairness of mandatory mediation, regulatory schemes accompanying the authority to compel participation have emerged and burgeoned.66 At present, numer-

64. Bryan, supra note 2, at 519-23; Woods, supra note 2, at 435. There is both research and commentary raising questions about the fairness and adequacy of lawyered negotiation outside of the divorce process. For example, research on negotiation of tort cases suggests that plaintiffs do better the more they participate in the process. DOUGLAS ROSENTHAL, LAWYER AND CLIENT: WHO’S IN CHARGE? 38-56 (1974). Similarly, clients lose control of their cases in the typical lawyer-to-lawyer negotiation, which excludes them. Stephen Bundy, The Policy in Favor of Settlement in an Adversary System, 44 HASTINGS L.J. 1, 46-47 (1992); Robert J. Condlin, Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role, 51 Md. L. REV. 1, 29-30 (1991). These authors, however, simply point out that negotiation can be improved; they do not contend that negotiated settlements are less fair than adjudicated judgments.


66. In 1986, California amended its statutes to require the California Judicial Council to adopt standards regarding equalization of power and safeguarding children's rights and interests and to provide special provisions for domestic violence cases. CAL. FAM. CODE §§ 3180-85 (West 1994). Colorado amended its statutes in 1992 to exclude domestic violence cases upon request and to deal with cases involving other situations of unfairness. COLO. REV. STAT. § 13-22-311 (Supp. 1994). In 1992, the Florida Supreme Court adopted Rule 10.060 of its Rules for Certified and Court-Appointed Mediators dealing with power imbalance. FLA. R. FOR CERTIFIED & COURT APPOINTED MEDIATORS 10.060 [hereinafter FLA. MEDIATORS R.]. The Indiana Supreme Court promulgated rules on alternative dispute resolution in 1992, giving mediators certain duties regarding fairness. IND. R. ALT. DISP. RESOL. 2.7(D). In 1986, the Iowa Supreme Court adopted rules requiring family mediators to assure a “balanced dialogue” and to assume other duties related to fairness. IOWA R. PRAC. FOR LAWYER MEDIATORS IN FAM. DISP. 5(B) [hereinafter IOWA MEDIATOR R.], reported in IOWA CODE ANN. § 598 App. (West Supp. 1994). In Missouri, the rules of civil procedure deal with fairness in family mediation. MO. R. CIV. P. 88.07(b). New Jersey also deals with fairness in the rules of civil procedure. N.J. R. GEN. APPL. 1:40-4(e). The Oklahoma Supreme Court, in 1989, adopted a Code of Professional Conduct for mediators, requiring mediators to end the mediation
ous statutes, supplemented by court rules, reflect in varying
degrees the dominant scheme for regulating court-directed
mediation. Under the dominant regulatory scheme, mediation is a ne-
gotiation that the mediator guides. The lawyers usually will not
attend the mediation session or will attend in silence. Statutes
in California, Kansas, and Wisconsin permit exclusion of law-
yers from mediation sessions. In some Arizona courts, counsel
can confer with the mediator at the beginning, but can be ex-
cluded thereafter. In some other jurisdictions, parties have a
right to bring their lawyers, although in Florida the lawyers
may be instructed to speak only privately to their clients. Research indicates that in most jurisdictions, lawyer participation
is the exception.

The typical rationale for excluding lawyers is that they
"spoil" mediation: lawyers will interfere with candid expres-
sions by the parties and thwart a problem-solving style of nego-
tiation. Statutes reflect this by highlighting problem solving

67. Seventeen states have mandatory mediation that is more heavily regu-
lated than in other states, in an attempt to achieve fairness. The regulations
and the states adopting them are listed in Appendix A, infra.


72. Data from the NCSC Database indicate that 14% of the programs re-
ported lawyer participation in most mediation sessions. See NCSC Database,
supra note 18. Sometimes lawyer attendance varies widely, even within a par-
ticular state. For example, in three Florida counties, attorneys attended the
sessions in less than 10% of the cases, while in one county attorneys were pre-
sent in 98% of the cases mediated. Jennifer L. Mason & Sharon B. Press,
Florida Dispute Resolution Ctr., Florida Mediation/Arbitration Pro-

73. See infra text accompanying notes 216-221 (exploring the "lawyers as
spoilers" assumption).
by the parties\textsuperscript{74} and emphasizing that the parties themselves should speak in mediation.\textsuperscript{75}

As discussed above, most commentators would not find such extensive regulation necessary to ensure fairness if lawyers attended and participated in mediation, because the process then would become the equivalent of lawyer-to-lawyer negotiation in terms of fairness.\textsuperscript{76} To obviate potential unfairness in the absence of attorney representation, commentators have advocated regulating the mediator and the mediation procedures.\textsuperscript{77} In this section, we discuss whether each of the varying forms of regulating divorce mediation is likely to contribute to fairness in the absence of lawyers, and we examine the probable costs of regulation in terms of other mediation goals.

1. Mediator Duties Regarding Fairness

Some statutes and court rules make the mediator accountable for the fairness of the mediation process and result. Mediators often must encourage the parties to consult with their lawyers before signing a mediated agreement.\textsuperscript{78} In some juris-

\textsuperscript{74} CAL. FAM. CODE § 3161 (West 1994) ("The purposes of the mediation proceeding are as follows: (a) To reduce acrimony that may exist between the parties, (b) To develop an agreement . . . ."); LA. REV. STAT. ANN. § 9:352 (West 1991) (same); MINN. STAT. § 518.619(1) (1994) (same); N.C. GEN. STAT. § 50-13.1(b) (Supp. 1994) (instructing mediators to provide "nonadversarial setting that will facilitate . . . cooperative resolution"); WASH. REV. CODE ANN. § 26.09.015(1) (West Supp. 1995) (asserting that mediation can reduce acrimony).


\textsuperscript{76} But see Penelope E. Bryan, Reclaiming Professionalism: The Lawyer's Role in Divorce Mediation, 28 FAM. L. Q. 177, 222 (1994). Professor Bryan argues that mediation "cools out" the lawyer, a phenomenon not confirmed by our research in Maine. See infra part IV.B (documenting lawyers' advocacy during mediation).

\textsuperscript{77} See Gardner, supra note 9 at 513-16, 607; Gagnon, supra note 2, at 291-93; Neumann, supra note 9, at 231; Saposnek, Mandatory Mediation, supra note 8, at 491-92. See generally Edward F. Hartfield, Qualifications and Training Standards for Mediators of Environmental and Public Policy Disputes, 12 SETON HALL LEGIS. J. 109, 124 (1988) (concluding that personal qualifications, temperament, and personality may be the most significant aspects for consideration); Shaw, supra note 9, at 136 (concluding that guidelines for selecting and developing mediators should be measured in terms of human skills and demonstrated performance rather than technical or theoretical parameters).

\textsuperscript{78} FLA. R. CIV. P. 1.740(f); IOWA MEDIATOR R., supra note 66, R. 6; KAN. STAT. ANN. § 23-603 (1988); LA. REV. STAT. ANN. § 9:353B (West 1991); MINN. STAT. § 518.619(7) (1994); MO. R. CIV. P. 88.06(c); NEB. REV. STAT. § 25-2913(6) (Supp. 1994); NEV. R. PRAC. FOR 8TH DIST. 5.70(c); N.D. CENT. CODE § 14-09.1-
dictions, mediators must ensure that the parties make factual disclosures to each other. The mediator must define or explain the mediation process, fees, and limitations. In Iowa, the mediator must "assure a balanced dialogue," and in Florida a "balanced process," although these terms are left undefined. In California, the mediator must be "vigilant" about power imbalances, "conducting negotiations in such a way as to equalize power relationships between the parties." Elsewhere, the mediator must terminate the mediation in certain situations, such as when the parties cannot "participate meaningfully" or "harm" will result, or when the mediator believes this to be the case or believes that the agreement would be unconscionable.

In addition, the mediator commonly must assess and sometimes advocate for the best interests of the children. For example, Iowa divorce mediators must ensure that participants "consider fully the best interests of any affected child and that they understand the consequences of any decision they reach concerning the child."
In some jurisdictions, there is no apparent sanction for breaching these mediator duties and no indication that the duties create defenses to enforcement of a settlement agreement. Civil liability is not a risk in jurisdictions providing immunity for negligent acts. In several jurisdictions, however, the duties are accompanied by a risk of liability and even sanctions. In Florida, for example, a mediator who violates statutory duties may lose the certification to receive court referrals, may be required to pay costs, or may receive other sanctions.

Nonetheless, there is little reason to believe that these mediator duties ensure fairness. Miranda-type warnings do little to address critics' concerns about bargaining imbalances and pressures to settle that might produce settlements placing at least one party in a worse position than would have resulted from lawyer-to-lawyer negotiations. Although the broader requirements imposed upon mediators respond to critics' concerns, they implicitly demand that mediators play a quasi-judicial function, in conflict with their mediary role and without guidance as to the meaning of "harm," "power imbalance," or "balanced dialogue." Aside from highlighting conflict between the mediator's role in assisting settlement and the demands to promote fairness, the effect of such duties is unclear. As Professor Robert A. Baruch Bush has noted regarding mediator standards generally, "Where the mediator is confronted ... with the need to choose between two values, like fairness and self-determination, the codes typically contain provisions that, read together, tell her to choose both." Even if mediators are eager to comply with their broad duties, they may not have sufficient information to do so. Mediators do not hear the witnesses or make factual findings, and often do not talk with the children. Furthermore, if mediators are not eager to comply, it is not

92. FLA. MEDIATORS R., supra note 66, R. 10.240.
95. Cf. Gary Paquin, Protecting the Interests of Children in Divorce Mediation, 26 J. Fam. L. 279, 310 (1987-88) ("[M]any private mediators usually never even see the children . . . .").
likely that the parties can show that they violated the duty, even if sanctions are available. One is reminded of Lerner’s lyric:

A law was made a distant moon ago here,
July and August cannot be too hot;
And there’s a legal limit to the snow here
in Camelot.96

Thus, the primary virtue of legislating such mediator duties is to instill optimism in the rule-maker or legislator.

Because provisions of mediator accountability are unlikely to be effective, and because they are unnecessary if the parties bring their lawyers to the session, it is important to examine the costs of mediator duties. By analogy, one can examine commentary on the cost of defensiveness in the medical field, which argues that warnings, disclosures, and additional tests result in expenses for the patient and government and physician unwillingness to accept certain cases.97 If the threat of accountability is taken seriously, mediators may react in similar fashion, issuing warnings, insisting on written acknowledgements, and taking only “low-risk” cases. In this event, the spontaneity, simplicity, and availability of the mediation process will likely fade, a particularly dear cost because these aspects of mediation make it more effective than traditional court processes in engaging parties actively and assisting in identifying creative solutions.98 Given low prospects for ensuring fairness, mediator duties seem like a costly placebo.

2. Case Selection

If one accepts that unfairness in lawyerless mediation stems in part from bargaining imbalances, it follows that the process becomes more fair if courts exclude cases from mediation that are likely to involve such imbalances.99 Presumably, fairness would also be enhanced if the courts similarly excluded cases involving parties who are particularly susceptible to mediator pressures.100 Mediation statutes identify several classes of

100. Gagnon, supra note 2, at 291-92 (“If there is reason to believe that there is current physical abuse or that the women fears for her own or her children’s safety due to a history of domestic abuse, mediation is not appropriate.”).
parties who might be subject either to imbalances or mediator pressure: victims of domestic violence; persons with substance abuse or mental health problems; and persons who fit in a more general category of bargaining disadvantages. Domestic violence exclusions have been the primary subject of debate and regulation.

The problem with exclusion as a means to achieve fairness is the difficulty in predicting whether and how power imbalances will appear or when the mediator will pressure a party to settle. Scholars of the negotiation process note that power shifts frequently during negotiation. Based on studies of mediation transcripts, Janet Rifkin, Sara Cobb, and Jonathan Miller observe that the mere order of presentation of the opening stories in the mediation may impact significantly on bargaining advantage and thus outcomes. Ethnic identifications between mediators and parties may also affect outcomes. The imbalances probably shift according to the issue under discussion as

101. ARIZ. REV. STAT. ANN. § 25-381.23 (West 1991) (undue hardship); N.C. GEN STAT. § 50-13.1(c) (Supp. 1994) (drug, alcohol, mental health, spousal abuser or neglect); OR. REV. STAT. ANN. § 107.179(3) (Butterworth 1990) (emotional distress); UTAH CODE ANN. § 30-3-22 (Supp. 1994) (undue hardship, abuse, substance abuse, and mental illness); Wis. STAT. ANN. § 767.11(8) (1993) (undue hardship); see also infra note 102 (citing statutes that exclude cases involving domestic abuse).

102. COLO. REV. STAT. § 13-22-311(1) (Supp. 1994) (excluding cases with domestic abuse); FLA. STAT. ANN. § 44.102(2)(b) (West Supp. 1995) (excluding case if significant history of violence would compromise mediation); LA. REV. STAT. ANN. tit. 9, § 363 (West Supp. 1995) (excluding case if court finds that family violence exists); MD. R. SPEC. P. S73A(b)(2) (excluding case if there is genuine issue of physical or sexual abuse of party or child); MINN. STAT. § 518.619(2) (1994) (excluding cases with probable cause of domestic abuse); NEV. REV. STAT. ANN. § 3.500(2)(b) (Michie Supp. 1993) (allowing exclusion of case with a showing of child abuse or domestic violence); N.J. R. GEN. APPL. 1.40-5, -7; N.C. GEN. STAT. § 50-13.1(c) (Supp. 1994) (excluding cases with allegations of party or child abuse); N.D. CENT. CODE § 14-09.1-02 (1991) (excluding case if issue of abuse); OHIO REV. CODE ANN. § 3109.052(A) (Anderson Supp. 1993) (providing that conviction or determination that parent perpetrated abusive act is a factor in deciding whether mediation is appropriate); UTAH CODE ANN. § 30-3-22 (Supp. 1994) (excluding case if mediation participation would cause undue hardship or threaten health or safety); see Fischer et al., supra note 61, at 2173; see also Desmond Ellis, Comment, Marital Conflict Mediation and Post-Separation Wife Abuse, 8 LAW & INEQ. J. 317, 339 (1989-90) ("[M]ediation is inappropriate in the presence of pre-separation abuse and alcohol and/or drug abuse.").


well as the order of proceedings. Power shifts may also occur if there is a sense of guilt or lack of knowledge on particular issues. Thus, it is difficult to predict power imbalances either by category of case or by individual in advance of the mediation session.

Even if one focuses only on imbalances stemming from domestic violence, the problems arising in implementing case selection by statute or court rule become apparent. Statutes employ three primary means to exclude domestic violence cases from mediation: categorical prohibition, case-by-case screening by the court, and exclusion by the court upon a party's motion and special showing. Each of these methods proves problematic.

Categorical exclusions from mediation are "blunt instruments." Research and experience indicate that they may lead to underinclusion of cases, particularly when such exclusions are based only on court pleadings. In a pilot study of 261 contested custody cases in three Ohio courts, parties alleged violence in the pleadings twenty-six percent to thirty percent of the time. A much higher proportion, however, fifty-one percent of the eighty-nine respondents to surveys and forty-five percent of those interviewed by employees of one court, said that their marriage had been violent. Elsewhere, interviews show a

107. For a discussion on power shifts during mediation sessions, see Albie Davis & Richard A. Salem, Dealing With Power Influences in Mediation of Interpersonal Disputes, MEDIATION Q., Dec. 1984, at 17, 17.
109. N.C. GEN. STAT. § 50-13.1(c) (Supp. 1994) (allowing waiver of mandatory mediation for "good cause," including "undue hardship," allegations of substance or family abuse, or emotional problems); OR. REV. STAT. ANN. § 107.179 (Butterworth 1990) (permitting waiver if court "finds that participation . . . will subject the party to severe emotional distress"); UTAH CODE ANN. § 30-3-22(1) (Supp. 1994) (permitting waiver if attendance would pose a threat to mental or physical health or safety); WIS. STAT. ANN. § 767.11(8) (West 1993) (permitting court to waive attendance if it would cause "undue hardship" or "endanger the health or safety" of a party).
110. MAINE COURT MEDIATION SERV., MEDIATION IN CASES OF DOMESTIC ABUSE: HELPFUL OPTION OR UNACCEPTABLE RISKS, THE FINAL REPORT OF THE DOMESTIC ABUSE AND MEDIATION PROJECT 26-29 (1992) (relating experience about reluctance of victims to reveal abuse); CLEMENT ET AL., supra note 63, at 20-21 (discussing research about differences between allegations in pleadings and statements to court personnel).
111. CLEMENT ET AL., supra note 63, at 20-21.
112. Id.
higher incidence of violence reported to court personnel than alleged in pleadings.\textsuperscript{113}

Procedural hurdles that serve to curb misuse of categorical exclusions lead to further underinclusion. Legislators appear hesitant to exclude cases from mediation solely on the basis of a statement of abuse to a court counselor. In fact, they seem to worry that permitting exclusion based on allegations in the pleadings will lead to misuse and overexclusion. Thus, some statutes do not provide for exclusion from mediation solely because of reported violence.\textsuperscript{114} In California, for example, cases receive special treatment only if parties allege domestic violence under penalty of perjury.\textsuperscript{115} Some statutes require a finding of probable cause,\textsuperscript{116} a showing to the satisfaction of the court,\textsuperscript{117} or a finding that the violence occurred.\textsuperscript{118} Although the reaction to possible bogus claims is understandable, this higher threshold widens the gulf between actual violence cases and those cases that are excluded from mediation. A conservative estimate based on the Ohio data\textsuperscript{119} indicates that almost fifty percent of domestic violence cases are excluded where something more formal than the victim's statement to a counselor is required.

The substantiation requirement also adds to cost, because it introduces additional court processes prior to mediation. This also probably interferes with early mediation scheduling. By adding cost and introducing delay, substantiation may destroy the cost-effectiveness of mediation for the parties and allow conflicts to escalate.

Categorical case exclusion would seem to be relatively cost-free if based solely on a party's statement. Reliance on the statements alone, however, might result in substantial overexclusion, and cases that could be mediated fairly would not enter the pro-

\textsuperscript{113} One study found that in Alaska, in 61\% of eligible cases, one divorcing party said in an interview that violence had occurred. Susanne D. DiPietro, \textit{Alaska Child Visitation Mediation Pilot Project, Report to the Alaska Legislature} (1992).


\textsuperscript{115} Cal. Fam. Code § 3181(a) (West 1994).

\textsuperscript{116} Minn. Stat. § 518.619 (1994).


\textsuperscript{119} Clement et al., \textit{supra} note 63, at 20-21.
cess. One study indicates that four-fifths of the divorce mediation couples had families with serious substance abuse, child abuse, or family violence situations. Given the view that lawyer advocacy helps balance power in cases of abuse, blanket categorical exclusion would be unnecessary if lawyers participated actively in mediation and if provisions were made for separating the parties in mediation upon request.

Individual case assessments by court personnel have been touted as a means to identify instances of domestic violence and to predict whether the violence will present serious bargaining imbalances. We do not have research on which to evaluate the success of case assessment in excluding cases that involve substantial bargaining imbalances. As we discussed above, however, it is difficult to predict how the negotiations, and thus bargaining power, will play out in mediation. In addition, high-quality screening is costly. In one Ohio court, for example, a full-time equivalent mediation professional assessed 594 cases in the course of a year and recommended against mediation in only fifteen percent of the cases. In contrast, during the same time in another Ohio court, the equivalent of one mediation professional provided free mediations in about seventy-five cases, resulting in almost one-half of them settling.

Similar arguments about under- and overinclusion and costs could be made for other types of bargaining imbalances, such as those created by persons who are risk averse or have low aspirations. Case selection is thus questionably effective in achieving the same level of fairness as in lawyer-to-lawyer negotiations, and it is costly. Categorical exclusions are likely either to vastly over- or underexclude or to add delay and cost. Individ-

120. See DiPietro, supra note 113, at i-ii (reporting that, as the result of various exclusions, only 20 cases of a potential 475 cases screened and 125 cases deemed eligible for mediation services actually reached mediation; domestic violence allegations excluded 61%, despite statements by victims that they wanted to try mediation).


122. Fischer et al., supra note 61, at 2153.


124. Fischer et al., supra note 61, at 2155.

125. Telephone Interview with Jessica Shimberg, Director of Mediation, Franklin County Common Pleas Court, Domestic Relations Division (Mar. 4, 1994).

126. Telephone Interview with Michele McFarland, Director of Mediation Services, Lucas County Common Pleas Court (Mar. 4, 1994).
ual assessment, the method most likely to be effective, requires expending staff resources that could otherwise be used to offer free mediation.

3. Issue Limitations

Commentators state that bargaining imbalances are more likely to cause harm if parties discuss economic as well as child status issues during the mediation.\textsuperscript{127} Justifications for this assertion vary. One commentator contends that an aggressive parent will demand economic concessions in exchange for allowing the other parent more access to or rights concerning the children.\textsuperscript{128} Separating economic issues from child custody and visitation issues in the mediation process presumably averts these inappropriate trade-offs. Other commentators add that the legally-naive party faces the greatest disadvantage in the negotiation of economic issues, where legal advice, higher education, and experience make choices more informed.\textsuperscript{129} One also argues that lawyers will resist mediation if non-lawyer mediators “handle” economic issues.\textsuperscript{130} Most statutes authorize mandatory mediation only for contested custody and visitation issues, probably to prevent linking these to economic issues, to reduce bargaining imbalances, and to avoid resistance from the bar.\textsuperscript{131} In two states, separate mediation programs, staffed by attorney-mediators, are authorized for economic issues.\textsuperscript{132}

The statutes that purport to separate economic from custody/visitation issues probably do not succeed in actually sever-
ING THESE ISSUES OR IN PREVENTING PARTIES FROM LINKING THEM. \(^{133}\) Dean Folberg suggests that we must “romanticize” to believe these issues are not considered together. \(^{134}\) In fact, despite statutory language limiting mediation to custody and visitation issues, a recent national survey indicates that, in a substantial number of programs, mediators are likely to discuss child support. \(^{135}\) Some private mediators consider other economic issues so intertwined with custody that they now consider them together. \(^{136}\) Professor Grillo points out that joint custody arrangements often assume equal financial obligation when, in fact, one parent usually has the major care responsibilities and thus financial burdens, \(^{137}\) creating economic implications when custody is resolved. In sum, it is doubtful whether issue limitations in fact circumscribe discussion of financial matters or prevent parents from linking them together inappropriately.

There is reason to doubt whether those seeking custody will be forced to trade financial support for custody. A recent study of California divorce cases found “no statistically persuasive evidence that mothers who experienced more legal conflict had to give up support to win the custody they wanted.” \(^{138}\) Sociologist Jessica Pearson also characterized “custody blackmail” as a “relatively rare phenomenon.” \(^{139}\)

Given doubts about the need for and effectiveness of issue limitations, it is important to assess their costs. One important cost is the apparent inference by lawyers that they need not attend the mediation sessions, thus creating risks of unfairness.

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133. Severing issues, even if possible, may not be a good idea, inasmuch as “simultaneous exploration of custody and financial matters significantly increases the total number of potential solutions available.” Irving & Benjamin, supra note 8, at 134.

134. Folberg, supra note 8, at 33-34.


136. Irving & Benjamin, supra note 8, at 134; Folberg, supra note 8, at 33-34 (“As much as we would like to romanticize parenting and separate children’s needs from the financial needs of parents, we know that custody and the attendant financial arrangements represent some trade offs in the minds of the divorcing parties that we can only pretend to keep separate.”).

137. Grillo, supra note 2, at 1571; see also Bryan, supra note 2, at 492 (discussing how mediators’ assumptions that husband and wife are equal gives men an advantage in the custody process).


139. Pearson, supra note 4, at 20.
erning lawyer participation in divorce mediation, Professor John McCrory concluded that lawyer participation depends on the scope of the issues subject to mediation, with lawyers more actively participating when mediation addresses property and financial issues. An analysis of data on court-connected mediation programs supports McCrory’s view. It reveals that lawyers participate in only thirty-eight percent of the programs that mandate custody mediation but participate in ninety-one percent of those mandatory programs that touch on economic issues in addition to custody and visitation.

Another cost is in the effectiveness of mediation. A British study of marital conciliation reports more satisfaction and greater savings when the mediation included all issues in the divorce—a logical result considering that mediated settlement removes the need for further proceedings, other than presenting the agreement for court approval. If the mediation addresses only custody matters, however, then either a court or the parties with their lawyers must separately craft the financial terms of the divorce. In addition, British and Canadian researchers suggest that settlements of isolated issues, such as child custody, will not endure as long as more comprehensive settlements.

Issue limitations thus do not seem to solve the problem for which they were designed—avoiding linkage between economic and custody issues. They may be based on faulty premises of custody blackmail. They tend to discourage lawyer attendance, thus eliminating a promising fairness protection. Furthermore, they are costly in terms of party expenditures, party satisfaction, and compliance.

142. Id.
143. Anthony Ogus et al., Report to the Lord Chancellor on the Costs and Effectiveness of Conciliation in England and Wales 219, 264, 385 (Conciliation Project Unit, Univ. of Newcastle Upon Tyne 1989).
144. Id. at 264, 385C; Richardson, supra note 10, at 45.
4. Mediator Qualifications

In the early days of divorce mediation, there were few, if any, legal qualifications for divorce mediators. For example, mediators could be court employees or volunteer retirees who had impressed a court administrator as fit for the job. Like negotiators—and, indeed, like judges—mediators were thought to vary in ability, but not in easily quantifiable terms.

Now, the quality or fairness of mediation is treated as a direct product of the mediator, and mediator qualifications, set by statute or rule, commonly include educational degrees and specialized training. In a number of jurisdictions, mediators who receive court referrals must have post-baccalaureate degrees. The advanced degree may be in one of a variety of fields, such as law, mental health, or accounting. The mediation training requirement is often described in terms of hours of class, usually forty hours, sometimes by a trainer who has met yet another set of certification requirements. Occasionally, 

145. California, for example, provided that the mediator could be an employee of the court, probation department, mental health agency, or any other person designated by the court. CAL. FAM. CODE § 3164 (West 1994) (formerly CAL. CIV. CODE § 4607 (effective 1980)).

146. See GARDNER, supra note 9, at 513-26 (discussing disadvantages of mediation).

147. See infra Appendix A pt. A (listing statutes).

148. CAL. FAM. CODE §§ 1815, 3155 (West 1994); FLA. MEDIATORS R., supra note 66, R. 10.010(b); IDAHO R. CIV. P. 16(6); LA. CIV. CODE ANN. art 9, § 356 (West 1991) (permitting experience as substitute); MO. R. CIV. PROC. 88.05; N.J. R. GEN. APPL. 1:40-20 (experience may sometimes substitute); N.C. GEN. STAT. § 7A-494(c) (1994); Utah Code Ann. § 30-3-27 (West Supp. 1994).

149. FLA. MEDIATORS R., supra note 66, R. 10.010(b) (master's or higher in behavioral sciences, or a physician, lawyer, or accountant); LA. CIV. CODE ANN. art. 9, § 356 (West 1991) (attorney, master's in counseling, social work); MICH. COMP. LAWS ANN. § 552.513(4) (graduate degree in behavioral science, attorney); N.J. R. GEN. APPL. 1:40-10 (master's in counseling, social work, behavioral science, attorney, or five years of experience); MO. R. CIV. P. 88.05 (graduate degree in behavioral science, attorney); N.C. GEN. STAT. § 7A-494(c) (1994) (master's degree in human relations discipline); Utah Code Ann. § 30-3-27 (Supp. 1994) (psychiatrist, social worker, family therapist, attorney).

150. CAL. STANDARDS OF JUD. ADMIN. § 26(b), reported in CAL. CIV. R. app. (West Supp. 1994); DEL. SUPER. CT. INTERIM R. 16.2(g) (25 hours); FLA. MEDIATORS R., supra note 66, R. 10.010(b) (40 hours in program certified by court); IND. R. ALT. DISP. RESOL. 2.5 (40 hours); MICH. COMP. LAWS ANN. § 552.513(4) (West 1988 & Supp. 1994) (40 hours); MINN. STAT. § 518.619(4) (1994) (40 hours); NEB. REV. STAT. § 42-2905(1) (1993) (60 hours); N.H. REV. STAT. ANN. § 328-C:5 (Supp. 1993) (48 hours and 20 hours in internship); N.C. GEN. STAT. § 7A-494(c)(2) (1994) (40 hours in program approved by court); OHIO R. SUPER. CT. C.P. 81 (40 hours); TEX. CIV. PRAC. & REM. CODE § 154.052 (West 1995).
the rules require continuing education. There have also been proposals to add or substitute skills testing. These statutes and rules aim to screen out all but the “good mediator,” who will then protect the parties against unfairness.

There is reason to be skeptical about whether mediator qualifications, particularly those requiring educational degrees, substantially contribute to the fairness of the process. Research on mediator qualifications has failed to show a correlation between the mediator’s education and rough indicators of performance, such as settlement rates or satisfaction by the parties. The content of the required education also provides little reason to predict that mediator qualifications affect bargaining imbalances. Law and accountancy programs require few, if any, courses that develop qualities that might make mediators effective at promoting fairness, such as ability to perceive and understand power imbalances, demonstrate empathy, show sensitivity to diverse values, and distance the mediator’s values from the issues. Indeed, some commentators and researchers raise concerns about the powerful influence of the mediator’s professional ideology on the parties’ decisions.

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153. See Gardner, supra note 9, at 504.


155. Jessica Pearson & Nancy Thoennes, Divorce Mediation Research Results, in Divorce Mediation: Theory and Practice, supra note 36, at 429, 435-41 (comparing lawyers and mental health professionals); see also Singer, supra note 10, at 41 (finding no evidence tying mediators’ educational qualifications to performance).

156. But see Gardner, supra note 9, at 522-23 (asserting that many years of professional experience make a difference).

157. Commission on Qualifications, Society of Professionals in Dispute Resolution, Qualifying Neutrals: The Basic Principles 9 (1989); Test Design Project, supra note 152, at 5-6; see also Singer, supra note 10, at 41 (suggesting familiarity with divorce law and basic counseling techniques as primary qualifications).

Enhanced educational qualifications may carry a variety of costs. A “blue ribbon” commission of dispute resolution professionals warns that high educational qualifications may produce a contracting pool of mediators who lack diversity and who charge higher fees.\textsuperscript{159} Already, there is anecdotal support for this. For example, private mediators in Florida receiving court referrals usually charge $125 per hour for several hours of mediation.\textsuperscript{160} Florida requires advanced degrees. In Maine, by contrast, mediators are paid $50 per mediation.\textsuperscript{161} Maine does not have such educational requirements. Furthermore, some rural counties may be unable to operate mediation programs, because no one in the community meets the educational qualifications. In addition, varying qualifications may restrict mediators from handling cases in other jurisdictions.\textsuperscript{162}

In sum, mediator qualifications can be costly. They may serve other purposes,\textsuperscript{163} but they are not needed to preserve fairness if lawyers attend mediation sessions, and they are probably ineffective at insuring fairness if lawyers do not attend.

5. Lawyer and Court Review of Mediated Agreements

Mediated agreements regarding children do not become final until the court approves them.\textsuperscript{164} In some jurisdictions, mediators must also advise the parties to seek attorney review of the settlement before execution of the mediation agreements.\textsuperscript{165}

Court review has traditionally been viewed as a check on only the most egregious and obvious unfairness, because the judge receives only the written result of negotiations and has no advocate for non-signature.\textsuperscript{166} Professors Robert Mnookin and Lewis Kornhauser point out that the “sheer quantity of cases

\textsuperscript{159} Commission on Qualifications, supra note 157, at 5.
\textsuperscript{160} Telephone Interview with Sharon Press, Director, Florida Dispute Resolution Center, Florida Supreme Court (May 10, 1993).
\textsuperscript{161} Telephone Interview with Paul Charbonneau, Director, Court Mediation Services, Augusta, Maine (Mar. 8, 1994).
\textsuperscript{162} For an analogy to social worker regulation, see David A. Hardcastle, Public Regulation of Social Work, 22 Soc. Work 14, 19 (1977).
\textsuperscript{163} For example, some qualifications may affect settlement rates or public perception of programs.
\textsuperscript{164} E.g., Unif. Marriage and Divorce Act § 306(a)-(c), 9A U.LA. 216-17 (1987).
\textsuperscript{166} Bryan, supra note 2, at 519; Folberg, supra note 8, at 24; Mnookin & Kornhauser, supra note 62, at 993; Pearson, supra note 25, at 194.
that a judge must oversee" makes it impractical for a judge to attend to cases prone to injustice.\textsuperscript{167} Nonetheless, court approval costs the parties relatively little and does not hamper the effectiveness of the mediation process. Thus, we see little reason to change this requirement.

By contrast, lawyer review of mediation agreements appears to present better prospects for meaningful protection. Lawyers, however, express frustration over their limited ability to advise on these agreements, because they do not witness the give-and-take of the negotiations that created them and lack access to the information needed to evaluate properly alternatives to settlement.\textsuperscript{168} One commentator warns of legal malpractice liability for advice under these circumstances.\textsuperscript{169} Some lawyers refuse to provide opinions because they believe that they cannot competently do so under the circumstances.\textsuperscript{170} The Boston Bar Association approved the process of attorney review of mediated agreements, but warned, "A separation agreement cannot really be evaluated by one who has not participated in the negotiations leading to it and, therefore, cannot judge whether it appropriately reflects the views, needs, strengths, and weaknesses of each of the parties."\textsuperscript{171}

While providing limited help in assuring fairness, post-mediation lawyer review is a costly process. The more thorough the review, the more costly it will be. Lawyers who are uncertain about whether the agreement represents the best possible result may recommend against execution, perhaps unnecessarily scuttling the client's best option. Even the possibility of frequent lawyer consultation does not seem to avert rejections of tentative agreements. In fact, mediators view lawyer recommendations against signing tentative mediation agreements as a significant problem.\textsuperscript{172} Thus, the cost and effort of the mediation may be lost when lawyers do not participate. In sum, required lawyer review is a costly and less effective alternative to lawyer attendance.

\textsuperscript{167} Mnookin & Kornhauser, supra note 62, at 993.
\textsuperscript{168} Pearson, supra note 26, at 194.
\textsuperscript{169} Rutherford, supra note 8, at 24.
\textsuperscript{170} See generally Bryan, supra note 2, at 515-19 (discussing this dilemma).
\textsuperscript{172} Stephen K. Erickson & Marilyn S. McKnight, Divorce Mediation: Strategies For Breaking Impasse, in ABA Options For All Ages, Family Dispute Resolution 55, 58 (Velitta F. Prather ed., 1990).
6. No Recommendation by the Mediator to the Court

Some of California's domestic relations courts allow the mediator to make a recommendation to the court if the parties fail to reach a settlement during mediation.173 This procedure enables the mediator to threaten a recalcitrant party with a negative report. Professor Grillo most recently attacked this kind of settlement pressure.174 "Blue ribbon" reports on mediation by members of the dispute resolution profession have also criticized this approach.175 Though mediator recommendations have become a highly visible target through Grillo's article and other reports, court rules more often eschew mediator recommendations to the court, and some statutes specifically prohibit these.176

The prohibitions against mediator recommendations remove a potential source of pressure to settle and, thus, of unfairness. As such, these laws serve a valuable function, regardless of whether lawyers attend the mediation sessions, and we strongly support them. They do not, however, address bargaining imbalances that may exist even in jurisdictions where the mediators do not provide recommendations.177

The "regulatory" approach attempts to insure fairness in the absence of lawyer participation in mediation sessions. Only one type of regulatory provision—judicial review—is relatively low in cost. Only one type of provision—prohibition of mediator reports on the merits—seems likely to increase the fairness of divorce mediation. The others—issue limitations, case selection procedures, high mediator qualifications, mediator duties, and lawyer review—threaten to make mediation more expensive and, in some cases, more rigid and less effective, with little prospect of positive effects on fairness. In short, substituting regula-

173. This process is in place in San Francisco and 32 other California counties. CAL. FAM. CODE §§ 3163, 4351(f) (West 1994) (providing authority for local court rules). One commentator suggests that Massachusetts probate courts follow this procedure as a matter of practice. Gagnon, supra note 2, at 279.

174. Grillo, supra note 2, at 1554-55.


177. See supra note 176 (citing statutes).
tion for lawyer-participation threatens to undermine important qualities of mediation without doing much to insure fairness.

In addition, regulation fails to address the deepest concerns of critics of mediation—that even the best mediators can never be "neutral" and will play a powerful role in shaping outcomes that may create disadvantages for the parties. Lawyers who participate in mediation can address these concerns. Lawyer representation does not guarantee equity, but critics of mediation tend not to criticize as unfair divorce outcomes resulting from lawyer negotiations. Their confidence in lawyer-negotiated outcomes suggests a general agreement that attorney representation provides the best insurance of fairness that we know. The research in Maine, discussed below, indicates that in practice, lawyers play just such a role in protecting client interests in mediation.

B. The "Voluntary Participation" Approach

Some commentators argue that mediation will be more fair if legislators or courts simply eliminate the compulsion to participate. Presumably, if parties choose to use mediation, those who do will be informed, and their rights will not be jeopardized, even though lawyers generally will not attend the mediation sessions. These commentators thus advocate against mandatory participation.

There is reason to doubt, however, whether lawyers can predict when they need to attend to protect their clients against unfairness. Furthermore, a voluntary system that lacks lawyer participation presents the risk that lawyers will encourage mediation to resolve the problems they dislike or feel uncomfortable handling. In Maine, as elsewhere, lawyers encourage divorcing clients to do part of the negotiating themselves. Thus encouragement appears much more likely on some issues

179. Gagnon, supra note 2, at 291; Geffner & Pagelow, supra note 2, at 157; Treuthart, supra note 2, at 777 (arguing that mandatory mediation is a "contradiction in terms").
180. See supra text accompanying notes 103-107 (discussing the difficulty of predicting when lawyer's presence is necessary to protect party).
181. The New Hampshire lawyers interviewed were as likely as Maine lawyers to report that their clients negotiated some part of the divorce agreement. Divorce Lawyer Interview Data, infra note 243; see also Howard S. Erlanger et al., Participation and Flexibility in Informal Processes: Cautions From the Divorce Context, 21 Law & Soc'y Rev. 585 (1987) (critiquing informal divorce settlement).
DIVORCE MEDIATION

(the division of personal property and visitation schedules) and for some clients (those with less income). Such encouragement probably stems from a concern about controlling costs, especially when there are insufficient resources to pay attorneys. It also arises from a desire by some lawyers to avoid "pots and pans issues." According to these lawyers, these matters do not require legal expertise, unlike matters involving real property, alimony, and pensions. Parties, however, may well need as much support and guidance on these issues as they do on more legally relevant topics, but may find themselves referred either to party-to-party negotiation or mediation without lawyers, if it is available. Thus, a statutory approach that relies wholly on voluntary participation may indirectly exacerbate problems of unfairness by delegating difficult and important "nonlegal" issues to mediation without lawyers present.

Voluntary participation, as a means of assuring fairness, may also entail costs if voluntary mediation programs are party-paid. This makes mediation an option primarily for the well-to-do. For instance, in an Ohio study of contested cases, while only forty percent of all divorcing parties with contested cases had incomes over $20,000, seventy-three percent of those attending voluntary, party-paid mediation had incomes over $20,000.

182. Lawyers whose clients were generally upper middle class were far less likely to report that their clients frequently did most of the negotiating (9%) while those with a range of clients or largely working class clients reported more often that clients frequently did most of the negotiating (25%). Divorce Lawyer Interview Data, infra note 243.

183. For example, in commenting on what went on at mediation a handful of lawyers interviewed in connection with the authors' research noted observations such as the following: "But then there are some things, if they're talking about visitation times, if they're talking about dividing up the personality, I don't need to be there for that." Interviews, infra note 243, No. 28. "What's a lawyer going to do with pots and pans? Why should a lawyer get involved whether it's Friday at five or Sunday at six? That's ridiculous, I mean clients aren't babies." Id. No. 29. See also infra note 244 (presenting percentages of representation in New Hampshire cases).

184. We found, for example, that those New Hampshire attorneys we interviewed who expressed an interest in the potential of mediation generally viewed it either as an alternative for potential clients to lawyer representation or as an adjunct to representation where parties could be sent on their own to work out these "pots and pans" issues, including visitation. Typical New Hampshire lawyers who worked with a voluntary, private system of divorce mediation were two who observed: "The only time I encouraged them to do mediation is on the issue of visitation." Interviews, infra note 243, No. 112. "Not on the financial aspects. I don't mind, too much, mediation in terms of visitation or mediation in terms of personal property." Id. No. 133.

185. CLEMENT ET AL., supra note 63, at 17.
Experience indicates that mediation does not occur frequently unless states require that parties participate or require attendance at a session where parties are urged to participate.\textsuperscript{186} One parent may reject the option when it is (or because it is) favored by the other parent. At least one of the parties rejected even free mediation services in half of the cases reported by one custody mediation study\textsuperscript{187} and even more in another.\textsuperscript{188} Thus, if reduced use of mediation constitutes a cost,\textsuperscript{189} voluntary mediation carries with it an additional disadvantage. Under the voluntary approach, parties would rarely use mediation and would have little assistance of counsel when they did. Requiring the divorcing parties to attend a mediation session at which their lawyers actively participate would seem to promote fairness more effectively. Regulators and commentators, however, assume that this would destroy mediation. Furthermore, those advocating voluntary mediation often assert that trial will obviate fairness concerns, assuming trial is the alternative to attending mediation sessions.\textsuperscript{190}

Such assumptions as these have artificially limited the examination of alternatives for promoting fairness in divorce mediation. Consequently, the debate about fairness has revolved around the "regulatory" approach and the "voluntary participation" approach, neither of which satisfactorily addresses fairness. These limiting assumptions, however, prove to be inaccurate. We turn now to evidence showing that the assumptions that the two dominant approaches present are myths. This opens up a third policy choice—the "lawyer-participant" approach.

\section*{III. ASSUMPTIONS UNDERLYING THE DOMINANT APPROACHES}

Four assumptions are implicit in the two dominant statutory approaches to assuring fairness in mediation, and also in the commentary for and against mandatory mediation: (1) lawyers do not attend mediation sessions but do attend trials; (2) divorce mediation sessions are all alike; (3) lawyers spoil media-

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\textsuperscript{187} Pearson & Thoennes, \textit{supra} note 155, at 431.  
\textsuperscript{188} DiPietro, \textit{supra} note 113, at ii.  
\textsuperscript{189} See infra text accompanying notes 329-354 (comparing mediation with negotiation).  
\textsuperscript{190} See \textit{supra} part II.B (discussing the "voluntary participation" approach).
\end{flushleft}
tion if they attend and participate in the sessions; and (4) trial represents the typical alternative to mediation. We address the assumptions in turn, and in the next section show them to be myths.

A. The Disappearing Lawyer

Critics and proponents of mediation alike see the absence of lawyers as a defining aspect of divorce mediation. According to mediation advocate Joshua Rosenberg, for example, "Admittedly, one significant difference between court hearings and most mediation sessions is the presence of attorneys at one and not the other." Case summaries of "ideal" mediations by a number of commentators describe sessions without lawyers present. A diminished role for lawyers is indeed one of the goals of some divorce mediation advocates. For example, after describing a structured mediation process for divorce, O.J. Coogler asks, "What is there for the lawyer to do when mediation is completed?" His answer is, "Not much." . Even if the divorce is handled by an attorney, it is a ministerial ritual for which only a very nominal fee can be charged. Under the dominant view, the parties' lawyers may consult before or after the session, perhaps even by phone during it, but they disappear when the parties sit down with the mediator.

Statutory provisions in several states that permit exclusion of lawyers from mediation reinforce the presumption of attorney non-involvement. Even where attorneys may

191. Erickson & Erickson, supra note 8, at 173; Gardner, supra note 9, at 504-05; Irving, supra note 8, at 83; Bryan, supra note 2, at 515-19; Folberg, supra note 8, at 11, 13; Geffner & Pagelow, supra note 2, at 156; Grillo, supra note 2, at 1581.
192. Rosenberg, supra note 8, at 500.
194. See Marlow, supra note 8; Victoria Solomon, Divorce Mediation: A New Solution to Old Problems, 16 Akron L. Rev. 665, 669-70 (1983); Weissman & Leick, supra note 8, at 266-67.
195. Coogler, supra note 8, at 91.
196. Id.
197. Rutherford, supra note 8, at 23-34.
attend, they generally do not. It is possible that they have accepted mediation sessions as being outside their turf or believe that mediation covers issues not squarely within their legal expertise.

It should not be surprising, therefore, that lawyers are notably absent in the commentary on what occurs during divorce mediation sessions. Research about divorce mediation focuses largely on the experience of the parties and seldom mentions lawyers. Popular accounts adopt this view as well: 

"[Mediation] does, of course, represent a trade-off. A couple in mediation forgoes a lawyer's advocacy in return for avoiding a lawyer's friction." Although most books about divorce mediation practice list "lawyers" briefly in the index, they figure in the text most prominently as lawyer-mediators, as promoters of the adver-


200. NCSC Database, supra note 18.

201. Among the critics, see FINEMAN, supra note 2; Bryan, supra note 2; Fischer et al., supra note 61, at 2117, 2172 (asserting that excluding lawyers increases unfairness in domestic violence cases); Grillo, supra note 2; M. Laurie Leitch, The Politics of Compromise: A Feminist Perspective on Mediation, MEDIATION Q., Winter 1986/Spring 1987, at 163; Woods, supra note 2, at 435. Among the proponents, see JOAN BLADES, FAMILY MEDIATION: COOPERATIVE DIVORCE SETTLEMENT 50 (1985); COOGLER, supra note 8, at 23-38; HAYNES & HAYNES, supra note 8; Michelle Deis, California's Answer: Mandatory Mediation of Child Custody and Visitation Disputes, 1 OHIO ST. J. ON DISP. RESOL. 149, 152-55; Milne & Folberg, supra note 36, at 6-9; Rosenberg, supra note 8; Saposnek, Mandatory Mediation, supra note 8.

One of the reasons for the presumption that lawyers will be absent has been the preoccupation with private, voluntary mediation. According to Kelly's and Gigy's study of private divorce mediation clients, 81% went to mediation in order to "reduce contact with lawyers and court." Joan B. Kelly & Lynn L. Gigy, Divorce Mediation: Characteristics of Clients and Outcomes, in MEDIATION RESEARCH 263, 270 (Kenneth Kressel et al. eds., 1989). As states have turned to public, mandatory mediation, these presumptions have turned up variously in policies and policy discussions of the proper role of lawyers in mediation. Some of the myths of mediation have developed out of and in response to the early marketing of private, voluntary, attorney-free divorce mediation as a better way to handle divorces than adversarial processes.

202. E.g., Pearson & Thoennes, supra note 165 (discussing results of two major research projects).

203. Peggy Clausen et al., Divorce American Style, NEWSWEEK, Jan. 10, 1983, at 42, 45. But see Ted Gest, Divorce: How the Game Is Played Now, U.S. News & WORLD REP., Nov. 21, 1983, at 39, 41 ("[M]ediation does not necessarily save money, because couples are advised to hire their own attorneys on top of paying the mediator.").
sarial climate, or as reviewers of mediation agreements.\textsuperscript{204} One book even lists "legal advice" as a subheading under "Obstacles to Successful Mediation."\textsuperscript{205}

Critics of mediation also assume that lawyers do not participate in mediation. They see the results, however, as bad rather than good.\textsuperscript{206} For them, lawyers who protect clients from domination at all other points in the divorce process disappear into the shadows during mediation except to advise clients on the wisdom of agreements reached. Bryan, for example, asserts, "Negotiating lawyers rely upon these legal entitlements and divorce agreements reflecting them, thereby loosening the control men traditionally wield over economic resources and the socialization of children [but] . . . mediation [without attorneys] unobtrusively reduces this threat to patriarchy by returning men to their former dominant position."\textsuperscript{207} Thus, critics believe that the absence of lawyers in mediation and their ineffectiveness in advising parties about mediation agreements precludes effective advocacy and fails to protect legal rights in mediation. Professor Grillo starkly poses the dilemma resulting from the presumed absence of lawyers from mediation. She states that "[t]he choice presented today is between an adversary process with totally powerful legal actors, in which clients never speak for themselves (and often do not know what is going on), and a mediation process in which they are entirely on their own and unprotected."\textsuperscript{208}

\textbf{B. MEDIATION AS MONOLITH}

Much commentary treats mediation generically, as if all mediation was alike.\textsuperscript{209} Many critics of mediation offer as prototyp-
ical the mediation programs of one jurisdiction. Professor Grillo, for instance, draws her examples from a county in California that follows the minority rule of permitting the mediator to make disposition recommendations to the court if the parties fail to reach agreement. Professors Bryan and Martha Fineman assume a generic, lawyerless mediation, in which the mediator is a mental health or social work professional who lacks financial sophistication and who holds a bias toward joint custody. This runs counter to studies that show no mediator bias toward joint custody, and to the reality that there are thousands of divorce mediators who are not mental health or social work professionals.

Supporters of mandatory mediation also treat mediation generically in their aspiration to a world of uniformly "good" mediators. They argue that "bad mediation" is an aberration that training and tighter or better regulation can cure.

C. LAWYERS AS SPOILERS

Laws that regulate mandatory mediation seem designed to protect the parties' interests in the absence of their lawyers. This regulatory approach implies that the easy solution—encouraging lawyer presence—must be avoided because lawyers negatively affect mediation. For example, Professor Rosenberg argues against lawyer involvement in mediation because the advocacy role that attorneys play may promote reluctance "to explore helpful and creative solutions. Possibilities that might help both parties could be permanently lost."

211. Grillo, supra note 2, at 1551-55. For a criticism of Professor Grillo on this point, see Duryee, supra note 8, at 513. See generally supra notes 173-176 and accompanying text (discussing Grillo's criticism of California domestic relations courts).
212. Bryan supra note 2, at 491; Fineman, supra note 206, at 765-66, 774.
213. Maccoby & Mnookin, supra note 138, at 290; Pearson, supra note 4, at 67.
214. Approximately 1250 mediators who are members of the Academy of Family Mediators are attorneys. Telephone Interview with Linda Wilkerson, Executive Director, Academy of Family Mediators (Mar. 18, 1994).
215. Girdner, supra note 34, at 152-55; Hugh McIsaac, Reducing the Pain of a Child Custody Struggle, 14 FAM. ADVOC. 26, 29, 56 (1992); Rosenberg, supra note 8, at 469-70.
216. Gardner, supra note 9, at 514-15; Marlow, supra note 8, at 69-80.
217. Rosenberg, supra note 8, at 500. But see Saposnek, Mandatory Mediation, supra note 8, at 496 (indicating a change in his views to favor greater involvement of lawyers in family mediation).
tion in divorce mediation "threatens to compromise the viability of the process," adding that lawyers who do not agree with mediation goals are "likely to become a dysfunctional element in the process, not only jealous of its intrusion into their domain of competence, but also unable to adapt professionally to a situation of controlled and defused, rather than polarized and contentious, conflict." Mediation proponents also suggest that lawyer participation may reduce commitment to, and thus compliance with, the settlement reached.

Critics of mediation also assume that lawyers would "spoil" the mediation process. Because they see the virtues of a lawyered process, but believe that lawyers and mediation are incompatible, they give little attention to lawyer presence as a protection against unfairness.

D. Mandated Mediation Versus Trial

Much of the current debate about the fairness of mediation presupposes a choice between trials and mediations, although some critics such as Professor Bryan, some advocates such as Blades, and some researchers such as Chandler recognize that most divorce cases settle. Thus, Professors Grillo and Rosenberg debate whether judges or mediators are more biased and whose biases are more consequential. Proponents sell mediation as a way for parties to control their own fate. By contrast, critics deride mediation because it removes the opportunity to have a judge find on behalf of a weaker party.

218. CARBONNEAU, supra note 8, at 174.
220. Bryan, supra note 2, at 445 n.7; Grillo, supra note 2, at 1548 (extolling party control in decision making).
221. But see Bryan, supra note 76, at 208; Grillo, supra note 2, at 1597-1600 (discussing exceptions).
222. Bryan, supra note 2, at 445 n.8.
223. BLADES, supra note 201, at 10.
225. Folberg, supra note 8, at 12 ("Divorce mediation ... has been proposed as an alternative to traditional judicial intervention and divorce litigation."); Weissman & Leick, supra note 8, at 266-69; Terri Garner, Comment, Child Custody Mediation: An Alternative To Litigation, 1989 J. DISP. RESOL. 138, 148-49.
226. Grillo, supra note 2, at 1588-90; Rosenberg, supra note 8, at 488-89.
227. MARLOW, supra note 8, at 174; DIANE NEUMANN, DIVORCE MEDIATION 49 (1989).
228. Grillo, supra note 2, at 1559.
Mandatory mediation programs have been instituted for "contested" custody or divorce proceedings. As the California statute makes clear, the goal of mediation is to "reduce acrimony . . . [and] develop an agreement." Mediation advocates assume that mediation—when it works—largely replaces trial or hearing with settlement. Proponents celebrate this consequence. They believe court contests harm parties and children, and find judicial decisions frequently inadequate for dealing with the complex and highly individual needs of divorcing parties and their children. That presumed consequence is consistent with the claims that mediation saves money for the parties and reduces the burden on the courts.

In sum, the four assumptions underlying the dominant regulatory approaches are rarely challenged in the debate about mandated divorce mediation. If they are accurate, there may be only two viable alternative solutions to the universally acknowledged problem of unfairness—the "voluntary participation" approach and the "regulatory" approach. But if these assumptions are myths, as we argue they are, options for insuring fairness can be more broadly examined. In fact, lawyers can and do participate in mediation sessions more often than they appear in trial; mediation can look very different from state to state and mediation to mediation; lawyers can and do assume constructive roles in mediation as advocates without undermining the party-centered goals of mediation; and mediation can, and in some places does, complement negotiation more often than it substitutes for trials.

To buttress these challenges to the four assumptions, we turn to a detailed case study of the experience of lawyers who play an active role in mandated divorce mediation.

229. ROGERS & McEWEN, supra note 10, § 7:01.
230. CAL. FAM. CODE § 3161 (West 1994).
231. Fiske, supra note 9, at 57-61; Jay Folberg, Mediation of Child Custody Disputes, 19 COLUM. J.L. & SOC. PROBS. 413, 419-21 (1985); Rosenberg, supra note 8, at 471-74.
232. BIENENFIELD, supra note 8, at 155; GARDNER, supra note 9, at 508-12; Rutherford, supra note 8, at 19-21; Weissman & Leick, supra note 8, at 279.
233. Deis, supra note 201, at 161, 163.
234. See Evarts & Goodwin, supra note 8, at 295-97 (discussing the role of lawyers as negotiators).
IV. THE ASSUMPTIONS UNDERLYING THE DOMINANT APPROACHES ARE MYTHS: A CASE STUDY OF MAINE'S MANDATORY DIVORCE MEDIATION INVOLVING LAWYERS

A. THE STUDY OF DIVORCE LAWYERS AND MEDIATION IN MAINE

In Maine, divorce mediation has been mandatory since 1985. Maine's regulation of divorce mediation differs in key respects from the dominant regulatory model, and the practice of mediation in Maine differs from the mediation schemes that many of the critics of divorce mediation eschew. First, mandated mediation in Maine encompasses economic and other issues of the divorce, rather than solely custody and visitation. Second, any case involving children under eighteen and any contested issue—not just one regarding custody or visitation—triggers compulsory participation. Third, lawyers usually attend the mediation sessions. Fourth, Maine does not regulate mediation as heavily as many other states. Maine has no statutory qualifications for mediators, no required assessments of cases to determine "fitness" for mediation, no mediator duties regarding bargaining imbalances, no mandatory exclusions of particular cases, no limitation on issues, and no authorizations for the mediator to exclude lawyers.

In one central respect, divorce mediation in Maine resembles the model that many proponents defend and critics attack—participation is mandatory. In another respect, it differs from the model that some critics attack and corresponds to the model that some advocates propose—the mediator is directed not to make recommendations or report on the case content to judges when the parties cannot reach agreement in mediation. Furthermore, a judge must review the agreement prior to its entry as a court order.

Although the research upon which we draw was not a study of divorce mediation per se, it effectively taps the experiences of

236. Id.
237. Id.
238. See infra text accompanying notes 249-250 (discussing Maine lawyers' attendance in mediation process).
239. Compare Maine statutes listed in Appendix B with statutes listed in Appendix A.
241. Id.
242. Id.
Maine divorce lawyers. We undertook the research to learn how divorce lawyers in Maine and New Hampshire (where very little public or private divorce mediation existed at the time of the research) vary in the ways they represent clients. Two of the authors interviewed eighty-eight Maine lawyers, all of whom did substantial divorce work, and a colleague interviewed seventy-five comparable New Hampshire attorneys. These interviews examined the attorneys’ practices in general and their experience in mediation in particular.243

The portrait of divorce practice in Maine that emerges from these interviews challenges the four assumptions that underlie the policy debate and the statutes and explains how mandated divorce mediation can productively reshape divorce negotiation.

B. THE ASSUMPTIONS PROVE TO BE MYTHS IN MAINE

1. The Disappearing Lawyer

a. Lawyer Participation in Maine Mediation Sessions and Divorce Cases

Before examining whether lawyers disappear in Maine mediation, we must recognize that frequently in divorce cases attorneys never appear at all. In Maine—as in New Hampshire244

243. Craig McEwen, Richard Maiman, and Lynn Mather conducted these interviews in a structured format, averaging 90 minutes per lawyer, between July 1990 and February 1991. They interviewed lawyers who devoted a considerable part of their practices to divorce law in three New Hampshire counties and four roughly comparable counties in Maine.

To choose lawyers to interview, we sampled the 1989 divorce dockets of the courts in these counties and recorded the names of the lawyers of record, thus developing a frequency distribution of their appearance in each court. Then we sampled the list, taking all the lawyers with the most frequent representations, about half of those with moderate frequencies, and a few of those with lesser frequencies. In no case did we choose from the many lawyers who represented only one or two divorce clients a year.

Of the 178 lawyers initially contacted, we completed interviews with 163 (92%), 88 in Maine and 75 in New Hampshire. These interviews were taped and each was transcribed. One part of the interview focused on the relationship between mediation and divorce practice. It is that part of the interview from which we draw most of the data reported in this Article.

This Article includes quotations from 39 of the Maine lawyers interviewed. Excerpts from these interviews are hereinafter cited as Interview, and include the interview identification number of the lawyer. Numerical summaries of lawyer responses are hereinafter cited as Divorce Lawyer Interview Data. Complete transcripts of all interviews are on file in the office of Professor Craig A. McEwen, Bowdoin College, Brunswick, Maine.

244. The New Hampshire docket data indicate that neither divorcing party is represented in 5.2% of the cases, the plaintiff only is represented in 49.9%,
and elsewhere in the United States—lawyers typically represent fewer than half of divorcing parties. In our sample of nearly 5000 Maine divorce cases, docketed between 1979 and 1988, neither party was represented in sixteen percent of the cases, only the plaintiff was represented in another forty-four percent, and only the defendant was represented in less than two percent. Both parties had attorneys in thirty-eight percent of the cases.

Contested divorce cases, however, are the ones that may be ordered to mediation, and are far more likely to involve two lawyers. Eighty percent of the mediated cases in our post-mandate docket sample involved two attorneys, and another seventeen percent involved one lawyer. Thus, in examining mandatory divorce mediation in Maine, we are largely, although not exclusively, looking at that minority of divorce cases in which both sides have legal representation.

In Maine, lawyers usually attend mediation sessions. Seventy-eight percent of the attorneys we interviewed reported that they "almost always" attended mediation sessions involving

As part of the research in Maine and New Hampshire, we coded data from docket records of 2001 New Hampshire divorces for three counties (for 1980, 1984, and 1988) and from docket records of 4790 Maine divorces for four counties (for 1979-80, 1983, 1984, 1985, 1986, and 1988). These cases were systematically sampled to represent divorces in the counties under study. These data will be hereinafter cited as Divorce Docket Data.


246. These percentages are weighted averages from the District Court and Superior Court reflecting the proportions of divorce cases filed in each court. Lawyers are much more likely to be present in Superior Court divorces (80.7% involved two lawyers), but less than eight percent of Maine divorces occur in these courts.

247. According to our analysis of docket data, pro se cases in Maine take far less time (114 days versus 288 days), involve far fewer motions (0.07 per case versus 1.66) and require far less court intervention (0.01 hearings or orders per case compared to 0.40) than do two-lawyer cases. Cases with only one lawyer fall between, but closer to the pro se cases. Divorce Docket Data, supra note 244.

248. A similar pattern was found in an Ohio study of 261 contested cases in three urban courts, where 95% of the mothers and 96% of the fathers had lawyers. Clement et al., supra note 63, at 15. In research about legal representation in divorce cases in 16 urban courts, the National Center for State Courts reports a wide range of percentages of cases with two lawyers. The presence of two lawyers, however, proved to be one of the strongest predictors of contentiousness. See Goerdt, supra note 245, at 59, 61 (finding presence of two lawyers increased the amount of time it took to settle a case and the number of motions filed).
their clients and another seventeen percent reported they "usually" did so. Thus, in Maine, lawyers do not disappear when mediation occurs. Nor do they disappear within the mediation sessions. Instead, Maine divorce attorneys actively participate as advisors and, when necessary, as advocates throughout the mediation process.

b. Lawyer Advocacy in Maine Divorce Mediation

Maine lawyers believe that their primary role in mediation is to provide a check on unfairness. According to one attorney:

I'm there to protect [my client] if I think things are not being run fairly and to watch out for their interests, but primarily, it's them, the mediator and the other spouse.

In describing their advice to clients in mediation and their own responsibilities in the process, virtually every Maine lawyer interviewed described a similar role for themselves. Those lawyers who elaborated identified two aspects of the potential for unfairness. First, "Mediation is like a crucible and bad decisions can be made." As a result, attorneys believe they need to attend mediation to prevent clients from being swept into accepting an inappropriate settlement:

I'm always there... [to] make sure they don't give away the farm

Numerous clients [begin with] a position that is somewhat unrealistic. And you get them to sit down across the table from somebody who's talking reasonably and getting this person to edge in a little and the process does work. They start them down the road and then they do things, in those situations. Before we get an agreement, I say I want to talk to my client, and say, "Do you agree? Are you sure you don't feel pressured by this? These are things you said you weren't going to concede. You've conceded some of them. Is this what you

249. Divorce Lawyer Interview Data, supra note 243.
250. By contrast, Maine lawyers, like divorce attorneys in other states, frequently disappear when negotiations occur. Many attorneys would prefer to have clients resolve on their own the "pots and pans issues" that include not only the division of personal property but the establishment of visitation arrangements. For example, over half of both Maine and New Hampshire lawyers indicated that a majority of their clients did some or all of the negotiating in their own divorces. This widespread practice of encouraging clients to negotiate on their own is inconsistent with the presumption of Bryan, supra note 2, at 519-22, for example, that attorneys control negotiation. See also Erlanger et al., supra note 181, at 591 (reporting on the involvement of clients in negotiations in Illinois divorce cases).
251. Interviews, supra note 243, No. 39.
252. Divorce Lawyer Interview Data, supra note 243.
want to do? You're entitled to do it and I think it will work, if I do feel that way, but just make sure you're not being pressured.\textsuperscript{254}

[Or] they had a change of heart, and so I say "Let's go outside. Just stop it right there before you make any promises that you can't keep."\textsuperscript{255}

However, in some cases where it's either been a very difficult decision or my client appears to be tentative or it's a very complicated decision, I frequently will say, "We've made an agreement here today, but I want a couple days to let it settle before we firm it up," so that I can... let my client sleep on it for a while.\textsuperscript{256}

Experienced divorce lawyers understand that even good mediation—or, perhaps, especially, good mediation—can create a momentum toward settlement that prompts some parties to lose perspective on their needs, interests, rights, and options. Unfairness results. Attorneys participate in divorce mediation to prevent that from happening.

Second, Maine divorce lawyers see themselves as protecting against mediator pressures or unfair bargaining advantages that the other party may have:

Generally, we tell them what it's all about. The mediator cannot force anything on them whatsoever... Anytime, if they want to take a break or have any questions, just say, "I'd like to take a break." Then we'll go out and talk about it.\textsuperscript{257}

I tell them that they are entitled to talk to me whenever they want. If they want me there, and I'm not there, to let me know that and to really be prepared to not be strong-armed, kind of thing... I am there to get my client out when I feel they need to talk to me or be advised and when they're either caving in or getting angry.\textsuperscript{258}

I don't let anyone get in control of [a mediation session] and walk down a road that I don't want to go or that I think we're not ready for. I wouldn't let a mediator steamroll a client in the decision on a financial issue where everything hadn't been disclosed or certain issues need to be explored.\textsuperscript{259}

Although mediation advocates hope that good mediators can balance unequal power and refrain from pressuring parties to settle, lawyers are properly skeptical. In Maine, lawyers see the need to protect against potential sources of unfairness. Lawyers know that even good mediation may produce a momentum to

\textsuperscript{254} Id. No. 39.
\textsuperscript{255} Id. No. 228.
\textsuperscript{256} Id. No. 205.
\textsuperscript{257} Id. No. 218.
\textsuperscript{258} Id. No. 37.
\textsuperscript{259} Id. No. 210.
settle; they fear that mediators cannot balance unequal bargaining power adequately and may exert their own pressures for settlement. As a result, mediation in Maine provides substantial room for legal advocacy.

2. Mediation as Monolith

Both critics and advocates of mediation too frequently assume that "mediation" or "divorce mediation" can be described generically. Generic discussions, however, miss the enormous variation in the structure and processes of mediation programs. By its very existence, Maine's divorce mediation program challenges the assumption that all mandatory mediation programs are like those (often from California) that much of the commentary portrays.260 The little evidence available on court-related divorce mediation programs across the country confirms enormous variety.261 Both advocates and critics need to situate their commentaries carefully within this diverse terrain of mediation programs.

Not only do mediation programs differ widely and significantly, but mediation experiences also differ within any program. This wide and inevitable variation challenges regulation advocates who hope for uniformity in mediation.262 The observations of Maine divorce lawyers highlight the pressures for variability that arise because parties, situations, and mediators differ.

Mediation varies particularly because parties are central to what happens in mediation, and parties differ enormously in

260. See supra part III.B (discussing the "mediation as monolith" assumption).

261. The NCSC Database, supra note 18, provides a broader sense of the variation in public divorce mediation programs across the United States. The programs encountered in this database differ in their scope and include separate county or court programs in states such as California, Colorado, Florida, Kansas, Michigan, and New York, as well as the entire Maine state program. The database shows that of the 205 court-related divorce mediation programs for which it has data, 75 mandated participation categorically, 75 permitted case-by-case, mandatory judicial referrals, and the remaining 55 allowed initiation by one or both parties. Further, 109 of the 205 court-related programs focused exclusively on custody or visitation conflicts, while the other 96 included spousal support and property division issues as well. Of these programs, 14% reported active lawyer participation in mediation sessions; 11% reported that lawyers could observe proceedings; 33% reported that lawyers could participate by stipulation of the parties; and 43% reported that lawyers did not play a role in mediation. On variance in divorce mediation style, see Kenneth Kressel & Edward A. Frontera, The Settlement-Orientation vs. the Problem-Solving Style in Custody Mediation, 50 J. Soc. Issues 67, 67-69 (1994).

262. See supra notes 9-10 (citing sources that advocate regulation to assure quality in mediation).
their relationships and in their skills, interests, and perceived needs. In describing their own role in the mediation process, the lawyers we spoke with commonly recognized this variety:

It depends on the client, but I'll tell them, if you want to talk, feel free to talk. The mediator would rather have you talk, but if you prefer me to talk, that's fine.263

If I've got a shrinking violet, I guess I do most of the talking. If I've got somebody that has some opinions and wants to say something, because sometimes in divorce cases somebody really wants to say something, [for example] what they think of a person because they've been stepping out behind their back for the past year, and my attitude is, say it in mediation. That's the safest place to say it... do it.264

Because parties have different skills and needs, lawyers in Maine want to participate in mediation to help those who require assistance.

Situations, like clients, also differ. As a result, lawyers wish to be present for the unpredictable occasion when a client needs them to intervene or participate:

I like to play the role of advisor, supportive advisor, but that's not always possible—depends on who the mediator is, depends on what the tenor of the mediation is. There are some where I play negotiator, and I don't let my client speak.265

Maine lawyers know first hand the high variability among mediators and mediation sessions, depending as they do on the special chemistry of the clients, lawyers, and mediators.266 Given this variability, and given the clear differences among clients, divorce attorneys need to be present in mediation to play the right role at the right time.

Both mediation programs and mediation sessions differ enormously. Neither critics nor advocates should assume that all mediation is or can be alike.

263. Interviews, supra note 243, No. 50.
264. Id. No. 3.
265. Id. No. 43.
266. Variations in style and quality of mediation within a particular jurisdiction appear even in highly regulated mediation programs. Afini's research in the civil mediation program in Florida, for example, documents enormous differences among mediators—whom he classified as "hashers, thrashers, or bashers." James Afini, Trashing, Bashine and Hashing It Out: Is This the End of "Good Mediation"?, 19 FLA. ST. U. L. REV. 47, 66-73 (1991); see also Robert A.B. Bush, The Mediator's Role and Ethical Standards in Mediation, 41 FLA. L. REV. 253, 266-70 (1989) (discussing the powers of mediators to encourage self-empowerment of participants and allow parties to understand each other's situation).
3. Lawyers as Spoilers

Commentators suggest that lawyer participation would adversely affect the quality of mediation in three ways. First, lawyer advocacy would reduce settlement rates. Second, lawyers would create an "adversarial" atmosphere. Third, lawyers would "take over," so that clients had little opportunity to participate. This view of lawyers as spoilers of mediation has proven to be inaccurate in Maine. Also, the picture emerging in Maine resembles research elsewhere on lawyers as negotiators.

a. Settlement and Lawyer Participation

The participation of Maine lawyers in mediation does not spoil mediation's capacity to promote settlement, even in the relatively short sessions used in Maine. Maine's Court Mediation Service reports that roughly one-half of all mediation sessions conclude with an agreement. The remaining sessions conclude without settlement, although about twenty percent are rescheduled for further mediation. These rates compare favorably with those in other jurisdictions where lawyers do not attend mediation sessions. Furthermore, lawyer presence at the mediation session produces firmer resolution than is possible when counsel must review a tentative resolution created in their absence. A 1985 study of Maine mediations concluded that only one percent of the cases in which the parties reached agreements in mediation later went to trial.

The effectiveness of Maine mediation in promoting settlement—even with lawyer participation—should not be surpris-
ing. Rather than exacerbating conflict, lawyers report that they and other attorneys typically try to reduce it. The professional norm among the divorce attorneys we interviewed is that of the “reasonable lawyer” who limits client expectations, resists identifying emotionally with the client, avoids substantially inflating demands, understands the likely legal outcome, asserts the client’s interests, responds to new information, and seeks to reach a divorce settlement:

And I try not to be angry which is easy to do. It’s easy to take on the emotions of your client, actually. After all, you are fighting for them and you get the kind of “gee whiz” feeling that they have. You know, “Gee whiz, you’re doing this.” But you don’t want to come across like that to a lawyer. You want to come across as understanding both sides and having a perspective about reasonable settlement, reasonably reached.

It’s pretty much a predominant approach. It’s reasonable and wants to get things done and so forth. There’s always that handful of attorneys that just always want to litigate and contest everything. And sometimes you run into those kinds of lawyers and some of them have big egos. They get in the way of getting the job done for both parties. It takes longer and more expense.

Thus, Maine lawyers believe that settlement best resolves divorce cases. “Reasonable lawyers” in Maine facilitate rather than resist settlement.

274. Interviews, supra note 243, No. 228.
275. Id. No. 250.
276. The reasons for the widespread norm of reasonableness include the continuing relationships between lawyers, concerns about costs, and deep skepticism about the odds or long-term utility of outright victory in court. Lawyers in smaller cities and towns especially noted continuing relationships, but even big city attorneys reported them. One attorney from a large city observed, “The bar in Portland and environs is small enough that for the most part you’re dealing with the same lawyer over and over again and you want to play pretty fair.” Id. No. 51. By playing “fair,” an attorney encourages reciprocation by other lawyers over time and builds a reputation for credibility among one’s peers. A credible lawyer can produce settlements much more efficiently for the client. See Erlanger et al., supra note 181, at 601 (stating that some attorneys have difficulties asserting their clients’ demands because they do not want to be viewed as unreasonable).

Indeed, concerns about efficiency and cost play a central role in supporting the “reasonable lawyer” standard. The “unreasonable lawyer” forces wasted effort and considerable delay in moving toward an outcome. Costs rise when a lawyer does not control his or her client and makes “off the wall” demands that violate shared expectations about the “normal divorce outcome.” As a consequence, the “reasonable lawyer,” unlike the exceptional “pit bulls,” “Rambos,” or
Maine, however, is not unique in this regard. In fact, it is not at all clear that lawyers involved in mediation are any more likely to seek distributive solutions (assuming a fixed pie to be divided) than integrative solutions (seeking an enlarged pie), or to be competitive (aggressive or position-seeking) rather than cooperative or interest-based. For example, Professor Menkel-Meadow concluded, after observing civil mediation sessions, that “lawyers were no more or less likely to engage in distributive or competitive behaviors than parties.” Furthermore, the image of lawyers who polarize the parties finds little support in other research. Felstiner and Sarat describe the lawyer’s central role as encouraging a negotiated settlement by shaping client expectations and overcoming the emotional resistance of angry clients. Many researchers have highlighted the attorney’s central role in settling contentious divorce negotiations, for example, by limiting the flow of information and advice to their clients in order to maneuver them toward an agreement. Kressel estimates that a relatively small percentage of divorce lawyers fit the popular image of a conflict escalator in divorce negotiations, a finding replicated by Canadian research. In sum, research depicts divorce lawyers as pragmatic negotiators who fully recognize the costs and uncertain success of pursuing cases through formal legal processes.

Where it exists, the competitive or disruptive negotiation style sometimes encountered in a lawyer-to-lawyer negotiation may stem in part from the lack of opportunity for frequent client consultation. For example, Professor Condlin suggests that lawyer-to-lawyer bargaining uses “argument, challenge, and demand” that is carried out in a “stylized” and “impersonal

"mad dog litigators," tries to diminish rather than to escalate conflict between parties.

277. See generally Goldberg et al., supra note 8, at 48-62 (discussing elements of negotiation).
282. Richardson, supra note 10, at 20.
fashion.\textsuperscript{283} Condlin's analysis, however, assumes the absence of clients during negotiation and notes that their absence makes it hard for lawyers to adopt more cooperative approaches.\textsuperscript{284} Although starting with client instructions about their interests, the negotiating lawyer must face the problem that "the information and understanding necessary to make [the] determination [of those interests] change constantly as bargaining proceeds."\textsuperscript{285} Faced then with the ethical difficulty in making negotiating decisions without easy opportunities to consult clients, lawyers must assume a client who wants the greatest competitive advantage. Accepting Condlin's analysis, one could conclude that including clients in the negotiating process would allow lawyers to employ cooperative bargaining approaches in lawyer-to-lawyer negotiations.\textsuperscript{286}

In addition, lawyers seem to adapt their negotiating behavior as a result of mediation. Almost all the experienced Maine divorce lawyers whom we interviewed perceived that divorce practices had become less "adversarial" since the introduction of mandatory mediation.\textsuperscript{287} Furthermore, Maine lawyers were significantly more willing to endorse "reaching a settlement fair to both parties" as the goal of negotiation—compared with "getting as much as possible for their client"—than a comparable group of New Hampshire lawyers who had never participated in court mandated mediation.\textsuperscript{288} In addition, the volume of motions filed per divorce case dropped by twenty percent in Maine following the introduction of mandatory mediation.\textsuperscript{289} In neighboring New Hampshire, which has no such mandate, the incidence of motions increased by twenty percent to thirty percent over the same period.\textsuperscript{290} One plausible interpretation of these changes and differences is that individual Maine lawyers have learned in mediation to assist clients achieve their goals in a more coopera-

\textsuperscript{283} Condlin, supra note 64, at 29.
\textsuperscript{284} Id.
\textsuperscript{285} Id. at 30.
\textsuperscript{286} See Leonard Riskin, The Represented Client in a Settlement Conference: The Lessons of G. Heileman Brewing Co. v. Joseph Oat Corp., 69 WASH. U. L.Q. 1059, 1076-80 (1991) (asserting that because a client has a better understanding of her needs than an attorney, the client has a greater opportunity to contribute to a solution).
\textsuperscript{287} See McEwen et al., supra note 141, at 181.
\textsuperscript{288} Id. at 178-79.
\textsuperscript{289} Id.
\textsuperscript{290} Id.
tive fashion. Moreover, the collective experience of the Maine divorce bar altered expectations about appropriate attorney conduct in family law cases. These Maine and New Hampshire findings are consistent with Professor Leonard Riskin’s view that law students instructed in mediation take more of a problem-solving approach to their clients’ problems.

The Maine data indicate that most lawyers do not employ competitive and disruptive styles of negotiation, that experience with mediation tends to moderate competitive tendencies, and that lawyers tone down aggressive negotiation styles in mediation sessions. Given the evidence of general interest on the part of divorce lawyers in achieving settlement, mediation and lawyer representation are compatible.

b. Encouraging Reasonable Positions and Behavior in Mediation

Despite most lawyers’ general orientation toward reasonableness, unreasonable lawyers do exist and unreasonable clients do push their attorneys to advocate unrealistic positions. Mediation, however, diminishes some of these acrimonious tendencies. Mediation modestly challenges the conduct of these occasional “pit bull” or “Rambo” attorneys and provides “reasonable” lawyers increased leverage with difficult clients. The dignified and structured character of the mediation process itself can moderate the most outrageous conduct of both clients and lawyers:

And I think it’s an atmosphere where people are for some reason or another, maybe it’s because there’s another person in the room who’s neutral. The climate is there for compromise and if you... sit in a room with two lawyers, I think, clients tend to think that they’ve got these two champions there and so that’s the whole mode. It’s just such a different dynamic when you get into the mediation room.

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291. This is consistent with a finding elsewhere that lawyers are most effective in informal tribunals “if they have sufficient direct or vicarious experience with the particular tribunal.” Karl Monsma & Richard Lempert, The Value of Counsel: 20 Years of Representation before a Public Housing Eviction Board, 26 Law & Soc’y Rev. 627, 663 (1992).

292. Telephone Interview with Professor Leonard Riskin, University of Missouri-Columbia School of Law (Mar. 20, 1995); see Ronald M. Pipkin, Project on Integrating Dispute Resolution into Standard First-Year Courses: An Evaluation (Final Report to the University of Missouri-Columbia School of Law, 1995) (evaluating results); Leonard Riskin & Jay Westbrook, Integrating Dispute Resolution into Standard First-Year Courses, 39 J. Legal Ed. 309 (1989) (describing curriculum).

293. Interviews, supra note 243, No. 21.
The mediation process demands civility and a sense of decorum that may have been lacking in the private interchanges between lawyers and clients:

They're going to have to sit down across the table and face you and most of the time they may have been kind of ugly to you over the phone or the documents you've traded back and forth may have sounded very aggressive, but when you actually sit down across the table, it's rare that you get someone who's being obnoxious. 294

It's easy to be Tarzan over the telephone, it really is. It's real hard to pull that garbage when the client is present; . . . you can call my client a slut or a crook over the telephone, but it's real different to have the guts to do that when they're sitting across from you. A lot of lawyers who will do that nonsense over the telephone won't do it in person. 295

Not only do the norms of mediation diminish the most aggressive conduct by attorneys, but seeing the other side makes posturing more difficult:

So, I like to have a mediation session so that I can sort of cut through a lot of posturing because you can really sort of see the client in there, you can get a pretty good handle on what's going on and who's really calling the shots and how convinced that person is about what they're putting on the table. 296

In mediation, parties also find themselves accountable to the other party and the mediator for their positions. They cannot simply assert a position without justifying it:

What was an unreasonable [client position], what I may consider to be an unreasonable position earlier, all of a sudden is tempered because now it's not in the protection of the lawyer's office. It's out in a setting where they're being judged a little more. 297

Mediation . . . puts two parties in the same room. We're going to talk about this. It's not, you know, I send a letter back and the client says, "No, I'm sorry I don't want to cope with that. No, I'm not going to agree to that." And I hear from the other attorney, "No, my client doesn't want to do that." You tell your spouse face to face in the same room and you'll be surprised at what happens. People don't do it. And that's good. It's easy to sit back and say to your lawyer, "No, I don't want to agree to that. No. Forget it. I already told her I wasn't going to agree to that. I'm not going to do that." And we both have, I mean, we all have that in terms of our clients. Put them in the room with the mediator, and the mediator says "Well, why aren't you going to agree

294. Id. No. 205.
295. Id. No. 214.
296. Id. No. 13.
297. Id. No. 1.
Mediation may help diminish client rigidity because it helps clients overcome their suspicions of the opposing side, suspicions that are reinforced by a lack of direct contact:

I think that it clears up misconceptions that clients tend to have about the other side, about the other attorney and what's going on the other side, and the attorney's advising of the other spouse.\textsuperscript{299}

The exposure of lawyers and parties to the otherwise unseen people on the other side of the case provides opportunities to test the degree of consensus between lawyers and clients and to challenge misconceptions.

Mediation with lawyers present also promotes settlement. It enables lawyers to reinforce their own “reality testing” with clients who may be unrealistic in their expectations or demands. In their role as partisans and advocates, lawyers often find it difficult to challenge clients to relinquish unrealistic positions and claims. By highlighting the reactions of mediators, however, attorneys can persuasively reinforce their own advice. Over one-half of the Maine lawyers whom we interviewed spontaneously described mediation as advantageous for this reason:\textsuperscript{300}

So sometimes, the mediator . . . will help me in my role with a client, if I have a hard sell with my client.\textsuperscript{301}

In other words, you can say, you can't get that, you go to mediation, the mediation takes place and this and that and it shows that it's not only my ideas. Then I can come out and say, “Well, I told you.” It gives them almost a second opinion.\textsuperscript{302}

I can't force my client to do something the client is uncomfortable with. I'm not there to argue the other person's case. Whereas at mediation, it's an opportunity for my client to kind of expose his or her case to reality and the mediator many times is going to say “Wait, is that what you really mean? Do you really think a judge is going to listen to this? Listen, I've just heard it for the first time and let me tell you what my reaction is.” And you're kind of exposing . . . and many times when [a client] says it to their attorney, it will be received, obviously, differently from just a completely disinterested person.\textsuperscript{303}

\begin{thebibliography}{9}
\bibitem{298} Id. No. 43.
\bibitem{299} Id. No. 236.
\bibitem{300} Divorce Lawyer Interview Data, \textit{supra} note 243.
\bibitem{301} Interviews, \textit{supra} note 243, No. 234.
\bibitem{302} Id. No. 11.
\bibitem{303} Id. No. 4.
\end{thebibliography}
Only by participating in mediation can the lawyer make use of these moderating effects on "unreasonable" demands. At the same time, lawyer participation permits attorneys to encourage client resistance to any overtures from the mediator or other side to abandon positions already viewed as reasonable. Lawyer participation then can simultaneously serve settlement and fairness.\textsuperscript{304}

Active participation in the mediation process offers a way to moderate the unreasonable conduct or demands of parties and lawyers. In this fashion mediation adds a dimension to the settlement process that is otherwise unavailable even to "reasonable" lawyers. For these and other reasons, divorce attorneys in Maine tend to view mediation not so much as an alternative to trial, but as an improvement on negotiation. We return below to this issue.

c. Spoiling Mediation for Clients

Mediation proponents often express that lawyer participation spoils mediation for their clients by replicating a courtroom environment in which attorneys dominate.\textsuperscript{305} The evidence from Maine suggests otherwise.\textsuperscript{306} Even with lawyers present, clients reportedly participate actively in mediation sessions, speak and listen to a spouse in a controlled setting, and find an outlet for emotions such as anger.

Maine lawyers recognize that mediation generally requires them to recede into the background, serving as client-advisors and supporters and only occasionally as outspoken advocates. They almost universally report encouraging their clients to take the lead role in mediation sessions, while reserving for themselves the right to intervene when necessary or to confer privately with their clients:

\textsuperscript{304} These two lawyer roles in encouraging or discouraging conciliatory positions of their clients may conflict. In particular, reminding parties of their rights and interests may undermine potential settlements. But the notion of fairness used in this Article demands that parties reach agreements freely and with knowledge.

\textsuperscript{305} See supra text accompanying notes 216-219 (discussing "lawyers as spoilers").

\textsuperscript{306} Professor Rosenberg has also suggested that adversarial conduct by attorneys is prompted by the presence of third-parties with decision-making authority. This view implies that as lawyers learn that mediators are not decision-makers, they will be less likely to behave as adversaries. Maurice Rosenberg, Resolving Disputes Differently: Adieu to Adversarial Justice?, 21 CREIGHTON L. REV. 801, 812-13 (1988).
I'm much more inclined to let the client talk in the mediation room . . . . [M]y experience has been that sometimes that room is the first time that clients have been face to face, or it's one of the few times they have the opportunity to be face to face, and they need to get some stuff off their chest, and it can be done in that setting safely and usefully . . . .

I want to sit back and listen, and I'm not going to interrupt unless I feel that you've misstated something or you're misinformed on an area or need some counseling.

Most of the attorneys I deal with apparently work the same way because everybody sits there, doesn't do all the talking, sits there and lets them [the clients] work it out.

With five mediation participants rather than three, one would reasonably expect some reduction in the parties' speaking time. That, however, may not be problematic. Research in the community mediation setting indicates that the level of client satisfaction relates most directly to whether the clients participate rather than the quantity of participation.

Mediation also permits the expression of emotions. Roughly one quarter of the Maine lawyers spontaneously remarked upon this role of mediation for their clients:

I guess it gives them a chance before [trial] to get their side out and hear the other side. Maybe it's cathartic, I don't know.

And I think sometimes a mediator can be very helpful in getting the two sides to work out their anger, to talk with each other and not at each other.

More often, I think you can accomplish more by sitting down, letting the parties put some stuff on the table. Maybe they've got an issue that's totally unrelated to what's really got to be decided. And maybe you can get that out and get it out of the way. Maybe she's just upset because he's running around with another woman. Maybe we can get that sting out. Maybe we can address that.

Thus, from the viewpoint of attorneys, mediation in Maine—even with lawyers present—enables parties to express their feelings and to participate actively in the divorce process.

308. Id. No. 1.
309. Id. No. 39.
311. Interviews, supra note 243, No. 50.
312. Id. No. 35.
313. Id. No. 238.
Are the lawyers accurate in their description of client participation? With such unanimity of opinion, the inaccuracy would seem to be a matter of degree only; certainly clients were not completely silenced. The picture that lawyers paint of party participation is entirely consistent with one of the authors' observations of mediation sessions. The current director of Maine's Court Mediation Service confirmed that Maine lawyers encourage their clients to speak during sessions.\(^3\)

Apparently lawyers do not "spoil" mediation, but instead permit mediation to accomplish many of the goals surrounding party participation and empowerment.

4. Mandatory Mediation Versus Trial: Mediation Substitutes for or Supplements Negotiation

Although mandated divorce mediation in Maine seems to encourage earlier settlements, it does not typically replace trials. Maine lawyers did not view trial substitution as mediation's major function, although they acknowledged cases that settled in mediation that they otherwise thought would have been tried. Maine divorce lawyers estimate that on average, nineteen percent of their cases go to a contested final hearing, an average only a bit lower than that of a comparable group of lawyers in New Hampshire (twenty-two percent), who typically have no recourse to mediation.\(^3\)\(^1\)\(^5\) Unfortunately, no data are available to indicate what proportion of divorce cases end with a contested hearing and whether that fraction has declined with mandatory mediation. Even if it has, in the largest proportion of cases, mediated settlement replaces settlement negotiated without a mediator.

Thus, it is not surprising that Maine attorneys describe mediation largely as formalizing and improving negotiation, rather than as providing an informal substitute for trials.

5. Conclusions: The Myths and Maine Mediation

Many advocates of divorce mediation assume that lawyers create conflict and persist in legal argument and positional negotiation so that problem-solving negotiation cannot occur when they are present. Lawyers, presumably, speak in place of their

\(^3\)\(^1\)4. Telephone Interview with Paul Charbonneau, Director, Maine Court Mediation (July 15, 1993) ("In general, attorneys are inclined here in Maine to have their clients do the talking in mediation, especially when it comes to children's interests.").

\(^3\)\(^1\)5. Divorce Lawyer Interview Data, supra note 243.
clients and resist settlement. Under this view, if lawyers remind clients of legal rights, any negotiations will focus exclusively on these issues, and lawyers will dominate discussions. In order to preserve party participation and enable problem-solving negotiation, these advocates assume that mediation must take place without lawyers. To protect rights under these circumstances, these advocates argue that well-regulated mediation will balance bargaining inequalities and insure uniformly high-quality mediation. As a consequence, they argue, such mediation offers better resolution of cases than does a trial.

Critics of mandatory mediation similarly assume that mediation precludes discussion of rights and presupposes the absence of lawyers. They conclude, however, that mediators cannot effectively protect weaker parties and regularly insert their own biases in pressuring for settlements. As a consequence, parties lose out in mediation, faring less well than they would in court. All mediation systems share these qualities and thus mandatory mediation—perhaps all mediation—is generically bad, especially for women.

What has occurred under Maine's mandatory mediation scheme challenges these assumptions. First, lawyers who appear at negotiation sessions or trial typically appear at mediation sessions as well. Second, mandatory divorce mediation is highly variable. The existence of a program like Maine's—and similar programs elsewhere—challenges the assumption that all mandatory mediation systems are identical. Operating under few regulations and with the active participation of lawyers, Maine's divorce mediation differs strikingly from the versions portrayed by critics and advocates.

Differentiation does not end with the structure of the system. Mediators and mediation sessions also vary substantially within any system. Because of its dependence on relatively unguided participation of parties, mediation varies substantially with the interests, attributes, and relationships of the participants, as well as the issues at play in a divorce. Mediators must interpret, innovate, and improvise. It is too much to expect that even the best-trained and most perceptive mediators will always

316. See supra notes 9-10 (citing sources advocating regulation to assure quality in mediation).
317. See supra notes 2-3, 5 and accompanying text (citing commentary that asserts mediation is unfair to women).
318. NCSC Database, supra note 18.
understand fully the range of issues and priorities of each party. Inevitably, mediation sessions unfold differently.

Furthermore, the participation of attorneys in Maine mediation helps to assert the rights of and provide support for parties at a disadvantage. It also provides for considerable levels of client involvement, expression of feeling, and personal control. Lawyers see themselves protecting clients against choosing a result because of the pressure of the process, the other party, or the mediator. Yet lawyer attendance does not interfere with settlement rates or with substantial client participation. The active roles of lawyers “spoil” neither advocacy nor the mediation process.

Finally, mandatory mediation in Maine does not usually replace trial. Instead, its major role is to structure and formalize negotiation and to place parties at the center of those negotiations.319

The evidence from Maine thus challenges the myths implicit in much of the debate about how best to protect fairness in divorce mediation. Recognizing that mandatory mediation programs vary, that lawyers can participate actively in mediation without either spoiling mediation or neglecting advocacy, and that mandatory mediation serves largely as an adjunct to negotiation rather than as a substitute for trial, we examine anew the alternatives for achieving fairness in divorce mediation.

V. BRING IN THE LAWYERS

Absent the faulty assumptions discussed above, one can look anew at a regulatory scheme in which lawyers participate in mandatory mediation. This scheme achieves fairness primarily by encouraging lawyers to attend and participate. Legislators could accomplish this result by prohibiting exclusion of lawyers from mediation sessions and, in fact, broadening the issues covered in mediation to include matters of real property, alimony, and other financial issues that stimulate lawyer participation. This scheme includes only two other key regulatory provisions—court review of mediated agreements and a prohibition against the mediator’s recommendation to the court. It is possible that some extra provision for domestic violence cases, such as the right to refuse joint sessions with the attacker, ought to be included as well.

A. COMPARED TO THE "REGULATORY" APPROACH

Most fairness concerns evaporate if lawyers attend mediation sessions with the parties or if the parties opt out of the process when unrepresented. Less intrusive regulations, such as judicial review of agreements, prohibition of settlement pressures, and provisions for unrepresented parties, may moderate the remaining fairness issues. The detailed rules of the "regulatory approach" largely become unnecessary to preserve fairness if lawyers are present.

By encouraging lawyer presence and permitting modification of the mediation ground rules, this scheme is more flexible and certain in responding to the problems of bargaining imbalances and mediator pressures. Especially given the unpredictability and changing situational character of these challenges to fairness, the presence of lawyers in the process can assure necessary help in those unpredictable circumstances. The Maine research shows that with lawyers present as advisors and potentially as spokespersons, the risks of unfairness decline, even in the most unbalanced situations. By permitting adjustment of the mediation process (for example, allowing shuttle mediation), mediation can be tailored to fit particular relationships and issues in each case.

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

320. It should be noted that mediation may provide important, if imperfect, protections for unrepresented parties who otherwise would negotiate on their own or, for the pro se party, who would face a represented spouse in negotiation. See infra part V.C.4 (discussing unrepresented parties).

321. But see Chandler, supra note 224, at 344 (reporting findings that women who reported spouse abuse did not enter unfair agreements). In an Ohio study, women who reported domestic violence settled at about the same rate as those who did not and were no more likely to report pressure to settle. Furthermore, settlement rates for those reporting violence were slightly lower in mediation than in negotiation without mediation. Clement et al., supra note 63, at 20-21.

322. There are, however, sometimes concerns or fear simply as a result of the meeting, but arguably this can be handled by separate sessions.
opportunities for abuse, or that are unlikely to be obeyed, or that are bad deals.\textsuperscript{323} Lawyers can also advise their clients to terminate mediation sessions. Although some suggest that mediation should also be avoided because divorce settlement condones violence,\textsuperscript{324} research indicates that in the prime alternative to mediation—negotiation—settlements occur with about the same frequency as in mediation.\textsuperscript{325} Thus, in domestic violence cases, mediation probably encourages settlement more quickly rather than more often.

Issue limitations also become unnecessary if lawyers attend and can advise on economic trade-offs and legal issues. There is no more danger in combining the issues in mediation than exists if disposition of all issues occurs outside of mediation.

So, too, an assumption that lawyers will be absent underlies reliance on mediator qualifications as a means to ensure fairness. Absent lawyers, mediators must have at least some of the skills and knowledge that lawyers would otherwise provide.\textsuperscript{326} In fact, Maine divorce lawyers acknowledge that they sometimes get poor mediators. In these cases, the lawyers simply take charge and use the sessions as four-way negotiation sessions. Although mediator qualifications involving advanced educational degrees may help increase settlements or party confidence, they are unnecessary to protect against unfairness under the "lawyer-participant" approach, because mediators need not substitute their knowledge for that of lawyers. Lawyers can intervene (as discussed above) to compensate for inferior mediators and can request their removal.

Mediator duties to appraise parties of various legal rights, to terminate mediation, and to moderate bargaining imbalances also rest on the assumption that lawyers are absent in mediation. Obviously, requirements for post-mediation review of settlements by lawyers rest on the assumption that the lawyer does not take part in the give-and-take of negotiations.

In other words, lawyer participation reduces substantially the need for regulation. Probably, a mediation model should al-

\textsuperscript{323} Cf. Geffner & Pagelow, supra note 2, at 155-157 (arguing that ineffective assistance of counsel often disadvantages battered women in the mediation process).
\textsuperscript{324} Treuthart, supra note 2, at 726 (arguing mediation fails to hold an abuser accountable for his actions).
\textsuperscript{325} CLEMENT ET AL., supra note 63, at 20.
\textsuperscript{326} There may be reasons for qualifications apart from fairness concerns, such as enhancing the acceptance of a program. These are beyond the scope of this Article.
low domestic violence victims to opt out of joint sessions. This model should also prohibit mediator recommendations to the court. Such low-cost requirements as court review of the agreement and brief mediation training should be incorporated into this third model. Finally, because this model assumes lawyer participation, perhaps unrepresented parties should be able to avoid mediation.

Our opposition to regulation by court rule or statute in order to achieve fairness is not an opposition to good management and supervision of mediation programs. Such management probably should insure periodic training, discussion of issues of practice, and efforts at quality control. In attempting to insure quality, mediation programs should make use of such devices as peer evaluation and attorney commentary. Regulation, however, differs from management because regulation imposes rigid and categorical obligations and thus introduces unnecessary costs and inflexibility.

B. COMPARED TO THE “VOLUNTARY PARTICIPATION” APPROACH

The “voluntary participation” approach to assuring fairness assumes that lawyers can and will predict in advance whether unfairness will occur at a mediation session. Under this approach, however, the lawyer still is not present if an unexpected problem arises during a session. The “lawyer-participation approach,” by contrast, does not compel the lawyer and party to take risks based solely on a prediction regarding the course of negotiations. Also, the “lawyer-participation” approach makes greater use of mediation, because lawyers who can attend mediation sessions will more likely recommend that their clients participate in such sessions. Finally, with lawyers participating, the courts can, without undue concerns about fairness, compel a reluctant party to attend, thereby increasing the use of mediation.

C. CONCERNS ABOUT THE “LAWYER-PARTICIPANT” APPROACH

Critics of mandatory mediation will still question what requiring parties to participate in mediation adds to a lawyer-guided settlement or trial process. Mediators may still question whether the lawyer-participant approach, although fair,

327. See supra part II.B (discussing the “voluntary participation” approach to mediation).
provides worthwhile benefits for the parties. At base, these re-
actions stem from the myths discussed and dismissed above.
The remaining concerns of mediation critics and advocates
about this third regulatory model can be summarized in five
questions. First, does mediation add anything to the lawyer-to-
lawyer negotiation that usually would otherwise occur? Second,
does requiring participation undermine self-determination in
the litigation process? Third, does lawyer participation increase
the cost of the mediation process? Fourth, what happens in
cases in which both sides are not represented by counsel? Fifth,
and finally, does lawyer-participant mediation constitute "real
mediation"? The research in Maine provides a basis for answer-
ing these questions.

1. Mediation Versus Negotiation

One might ask whether lawyer-participant mediation dif-
fers from lawyer-to-lawyer negotiation. As described below,
Maine divorce attorneys believe that mediation improves negoti-
ation because, in their view, it increases efficiency, decreases
communication problems, enhances client involvement and un-
derstanding of the process, increases information for attorneys,
and dignifies the divorce process for many clients.329

Unlike many of the theoretical models of negotiation, actual
negotiations over divorce cases are discontinuous and frag-
mented.330 By gathering everyone together at the same place
and time to give sustained attention to settlement, the "months
[or more] of diddling back and forth between lawyers"331 can be
diminished:

Years ago, there wasn't any real alternative. You make me a pro-
posal. I get the letter. I send it to my client. The client reviews. The
client comes on back into the office, we look at it together, and then I
make a counter-proposal. And you get this . . . round robin thing that
is going back and forth like this. And often, very time consuming. A
lot of opportunity for miscommunication.332

Each of the events in the negotiation round robin may be sepa-
rated by days or even weeks as lawyers play telephone tag with
each other and with clients. Frequently, one party simply fails

329. See infra text accompanying notes 330-354 (setting forth lawyers' de-
scriptions of their experiences with mediation).
330. For a similar assertion on regular civil cases, see HERBERT M. KRITZER,
LET'S MAKE A DEAL: UNDERSTANDING THE NEGOTIATION PROCESS IN ORDINARY
331. Interviews, supra note 243, No. 227.
332. Id. No. 216.
to respond at all, dragging out an already protracted process. At each step, distracted lawyers and anxious parties must get up to speed on the issues and possible settlement. Simply by assembling the parties, mediation in Maine streamlines the negotiation process.

Mediation also provides direct communication between the two lawyers and the two parties, and thus insures that nothing will be "lost in the translation":

I think people regard mediation as a good place to do their negotiations and get them over with in one or two sessions. Everybody's there. You don't have to say, "Well, I've got to ask my client." If there's any confusion, they're both there to talk about it. They're both there to disagree, so you don't lose. . . . Something isn't lost in the translation.333

It gets them face to face with the other side. It eliminates all the rumors. They tell me what their spouse said their lawyer said; all that smoke is gone when we sit down in mediation.334

If I think the attorney on the other side is being the difficult one, if my client keeps saying, "I'm sure my ex, my soon-to-be ex, wouldn't be saying those kinds of things," gives me an opportunity in mediation to make our pitch, make our fair arguments, so that the clients hear, and it's not always straight through me [and the other lawyer].335

At the least, the mediation process alters the dynamics of the communication in negotiation. Instead of a process in which client A talks to lawyer A who talks to lawyer B who talks to client B and then back again, all actors are present to listen and to speak to one another. This benefit, of course, would exist if lawyers and clients met without the assistance of a mediator, but in practice such four-way talks do not occur frequently unless scheduled through mediation.336 Several Maine lawyers explained why. They had doubts that such four-way talk would work out with attorneys they did not know well and trust. In addition, lawyers expressed concern about creating situations where client emotions could run high without a helping hand to guide and channel those emotions productively.

Apart from inefficiency and inaccuracy in communication, a lawyer-run negotiation can also create tension in the relationship between lawyer and client. Almost every attorney whom we interviewed attempted to keep clients fully informed of the

333. Id. No. 209.
334. Id. No. 17.
335. Id. No. 201.
progress of their cases by sending them copies of all or most correspondence and informing them of any offers received. Yet, lawyers frequently reported that clients felt left out and uninformed:

If you're negotiating, and you're doing letters, which I hate to do already... and phone calls, and you're meeting with lawyers, the client's going to get the sense of "Wait, who's doing this anyway? I didn't say I would do that." And so [mediation] is a way of covering your tail and involving your client and being efficient about getting a resolution.  

In the episodic, lawyer-run negotiation, clients who play a passive and consultative role may believe that their lawyers are doing little and resent the diminished participation in and control over their case. The direct engagement of parties and concentrated attention to negotiation that mediation provides can thus improve lawyer-client relationships as well as efficiency and communication.

Lawyers also report that participation in mediation permits them to glean additional information that increases their capacity to serve as advisors to and advocates for clients. First, mediation provides attorneys an opportunity for contact with and first-hand assessment of the other party, something that rarely occurs otherwise. Over one-third of the Maine divorce attorneys whom we interviewed commented on this value of the mediation process, often characterizing it as "discovery".  

Also going is like early discovery, you get a sense of the other person, and where they're at, and you get a sense of like issues that pop up that maybe you don't know about and then, like, your client gives you one story and now you hear the other story and if you're not there you don't hear the other story.

That's one thing about mediation. If they do talk, the other party, not their attorney, does talk, you can kind of understand where they are coming from. Then you can kind of judge the ways that you are going to present yourself to this person.  

The exposure of lawyers to the other spouse in mediation also helps each attorney to assess that person independent of the potentially inaccurate reports of both their client and the opposing lawyer.  

The conventional insulation from the other spouse

337. Interviews, supra note 243, No. 10.
338. Divorce Lawyer Interview Data, supra note 243.
340. Id. No. 209.
341. In addition, attorneys report learning more from and about their own clients through the mediation process:
may at times contribute to contentiousness or compromise the
capacity of a lawyer to advise her client well.

Lawyers hear their [client's] side of the story, and they start from that,
and they believe in their side of the story, and they never really under-
stand or fully accept the other side, the other view of the same situa-
tion. If you hear it from the other lawyer, you don't believe in it as
thoroughly as if you're sitting there [in mediation], and the lawyer
and client are spelling it out in a way that you have to sit there and abso-
lutely listen, and you can't interrupt, and it really gets spun out.342

When attorneys cannot “size up” the other party directly, they
may be less effective in assessing the other spouse's priorities
and needs, a practice widely viewed as essential to effective
negotiation.343

Typically, arm's-length negotiation leaves little room for di-
vorcing husbands and wives to hear each other out in a relatively safe setting. Either lawyers take over the communication,
or direct interactions between the parties are heated and unpro-
ductive.344 Mediation provides a setting for communication be-
tween parties that settlement does not, a setting in which
parties can and do discuss and explain needs and problems and

[Mediation] gives you an opportunity to evaluate the other party
as to whether they're going to be a good or a bad client and also to see
whether or not there are some things that your client has not told you
about. You sit down, your client has said, “Well, it's going to be this,
that or the other,” and all of a sudden, here's the other party saying,
“Well, how about the John Deere tractor,” you know . . . . And you turn
to your client and say, “Let's step outside. What's this all about?”

Id. No. 2. According to another attorney, “[I]t's amazing what comes out at me-
diation. I mean, I get surprises at mediation when clients divulge things that I
had no idea were there . . . .” Id. No. 44.

Factual information about her client's case is not the only potential by-
product of mediation for a lawyer. A divorce attorney can also evaluate a cli-
ent's potential as a witness at trial:

[Mediation] sometimes gives me the first opportunity to see how my
client reacts, not in court, but in court-like situations, where the client
is confronted with the other party and the other attorney and the medi-
ator. So it gives me a barometer of the client's possible reaction if we
do litigate.

Id. No. 222. Maine lawyers perceive mediation as providing a context to learn
more about their own clients as well as about the other party with the result
that they can better advise about settlement possibilities and about the likeli-
hood of success in a contested hearing.

342. Id. No. 203.

343. See, e.g., ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING
AGREEMENT WITHOUT GIVING IN 40-55 (1991) (asserting that effective negotia-
tion focuses on interests); ROY J. LEWICKI & JOSEPH A. LITTLER, NEGOTIATION
69-71 (1985) (explaining that information about an opponent's objectives and
needs is crucial to the formulation of a successful negotiation strategy).

344. Erlanger et al., supra note 181, at 590-96.
express anger and disappointment with the other party, not just exchange demands and positions:

Sometimes the parties don't talk and [mediation means] maybe listening and maybe hearing, that maybe makes sense, hearing the other side. I think it's important to hear the other side.

[My experience has been that sometimes that room is the first time that clients have been face to face, or it's one of the few times they have the opportunity to be face to face, and they need to get some stuff off their chests and it can be done in that setting safely and usefully . . . .

[T]his is the only opportunity I have to have him sitting there listening to my client's point of view. He's probably never done it in his life. Now he's got someone who's describing what her life is going to be like; going through her budget. This is what expenses are going to be; she's going to have to move out . . . . This is what your family, the people that you are responsible for, the people that you married and loved for fifteen years, this is how they are going to be living. This is what they are going to be living on.

Mediation, unlike negotiations, is a dignified process that engages the divorcing parties and gives them a chance to tell their story, not only to their spouse but to someone “official”:

Mediation introduces the supposedly neutral party and what a lot of divorce clients want is the opportunity to tell the story to somebody else and get it out of . . . their system.

I think that it also gives people the sense that they've had, maybe not so much as their day in court, but they at least feel as if another

345. Professor Grillo has suggested that anger is best expressed through the lawyer as surrogate or “mouthpiece.” Grillo, supra note 2, at 1573 (“The parties' anger is expressed in a formal, contained way through the ritualized behavior of the lawyers.”). Neither the typical divorce trial nor the even more typical divorce negotiation, however, provides much room for the lawyer to deliver for the client. Few avenues exist in negotiation—except nasty letters—because a lawyer cannot talk directly with the other spouse if he or she is represented. In addition, our interviews suggest that divorce lawyers generally try to resist voicing client anger themselves because it diminishes their ability to be “reasonable lawyers.”

Moreover, attorneys often discourage the expression of anger even in the privacy of their own offices. For example, lawyers frequently point out that they cannot do anything about the client's feelings and that each emotional outburst costs the client considerable money in lawyer's fees.

Under these circumstances, mediation provides a more likely outlet for expression of anger than either trial or negotiation.

346. Interviews, supra note 243, No. 28.
347. Id. No. 21.
348. Id. No. 225.
349. Id. No. 218.
person has heard their side of the story. And that the other side, the other attorney has heard their side.  

[Mediation] is definitely something out of the ordinary. You are not just sitting having coffee in your attorney's office, and the two attorneys aren't just whacking each other on the back and saying "Oh well, I see you have a new tree in the corner of your office or...." You know it's definitely a separate, formal procedure, and I think that in going through a divorce it's very important the people have marked guideposts and milestones. . . . When [couples] separate, many times that's not so. They just go into court and have five minutes in front of a judge—boom, boom—my lawyer says this, his lawyer says this, we signed a piece of paper—it's as if you're just left in the middle of a hurricane, whereas at mediation it is a formal marking of the occasion and the system is participating . . . .

A central conclusion from the research about procedural justice is that people value highly the opportunity to voice their grievances and to be heard in a dignified setting. Many Maine lawyers see divorce mediation not only as a way of improving efficiency in negotiation, but also as a way of formalizing and dignifying the process for clients. Lawyer-participation in mediation thus appears to add substantial "value" to lawyer-to-lawyer negotiation.

A by-product of lawyer participation is its effect on lawyers even when not in mediation. By changing the structure for negotiation through the addition of mediation involving parties and attorneys, lawyer behavior may change over time. As discussed above, there is some evidence that Maine lawyers, for example, are significantly more willing to endorse "reaching a settlement fair to both parties" as the goal of negotiation—compared to "getting as much as possible for their client"—than a comparable group of New Hampshire lawyers who had no experience participating in court mandated mediation. Furthermore, the use of the formal legal process—such as discovery requests and motions to compel—declined significantly in Maine after the introduction of mediation while increasing in neighboring New Hampshire. One plausible interpretation of these

350. Id. No. 41
351. Id. No. 4.
352. See e.g., E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 101-06 (1988) (arguing, generally, that the opportunity to speak enhances one's experience of procedural fairness); E. Allan Lind et al., In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System, 24 LAW & Soc'y Rev. 953, 980-983 (1990) (asserting that procedural formality enhances the parties' satisfaction with the proceeding).
353. McEwen et al., supra note 141, at 176-80 (comparing data from Maine and New Hampshire court dockets).
changes and differences is that Maine lawyers have learned in
mediation to assist clients in achieving their goals in a more co-
operative fashion.\(^\text{354}\)

2. Mandated Lawyered Mediation and Self-Determination

Maine mandates mediation.\(^\text{355}\) Lawyers may not simply se-
lect mediation voluntarily to enhance the negotiation process. Requiring lawyer participation in Maine might appear to burden
substantially both lawyers and clients.\(^\text{356}\) In practice, however,
mandatory divorce mediation in Maine permits considerable
flexibility and does not appear to undermine free choice regard-
ing settlement.

The general practice in the use of mediation varies from
court to court. In some courts, lawyers routinely request media-
tion soon after filing, while in others local culture encourages
mediation requests only when initial efforts at negotiation re-
veal problems in achieving settlement. Because of its costs, law-
yers are less likely to routinely request mediation in cases where
the parties have few resources.\(^\text{357}\)

From the perspective of clients, mediation in Maine simply
appears as another step in the divorce process—often described
by lawyers as an important opportunity—rather than as a spe-
cial burden. In fact, having incorporated mediation into their
practices, Maine divorce lawyers report that they typically de-
scribe the process, seriously examine settlement options and ap-
proaches, and preach mediation's virtues to clients in preparing
them to undertake the process:

[I] explain that we can take breaks and discuss things and that
they don't have to reach any agreement if they don't want to, that most
people are happier if they agree to something rather than having it
imposed upon them.\(^\text{358}\)

\(^{354}\) SEE supra part IV.B.3 (asserting that Maine lawyers, rather than act-
ing as "spoilers," promote successful mediation and settlement).

\(^{355}\) Me. REV. STAT. ANN. tit. 19, § 752 (West Supp. 1994).

\(^{356}\) Indeed, only a small minority of Maine lawyers (four percent) indicated
interest in abandoning mandatory mediation altogether. The major concerns
about the mandate, even among some of its supporters, were that it imposed
added costs and that it sometimes demanded mediation in cases where failure
was inevitable.

\(^{357}\) The discretionary character of these choices is, in practice, suggested
by the fact that the proportion of cases entering mediation dropped from about
28% to around 21% after the initiation of a $60 fee for the mediation service.
SEE 1989 ANNUAL REPORT, supra note 268 (author's calculations).

\(^{358}\) Interviews, supra note 243, No. 7.
I explain what the process is and what I tell them is that my view of a good mediation is a free-wheeling discussion where you can feel free to say anything. As far as my client goes, I tell them the best thing that could happen is if you guys could get it all out and walk out of the room with an agreement.\textsuperscript{359}

Belief in mediation's potential assistance in negotiation leads eighty-five percent of the Maine divorce lawyers whom we interviewed to request mediation even in cases not involving children.\textsuperscript{360} In their vital role as translators and interpreters of the legal process, lawyers convey to their clients a realistic view of the process, but one which emphasizes the opportunities mediation provides rather than the burdens it imposes.

The slight imposition, as perceived by the parties' lawyers, seems even less significant compared with the benefits. Without mandatory mediation, settlement discussions are unlikely to occur as frequently, because both sides—rather than one—have to agree to participate. By requesting mediation in Maine's mandatory system, one side can bring a reluctant party to the negotiation table.\textsuperscript{361}

Sometimes, you cannot get the other lawyer to make a commitment, you can't, they just want to march right into court, and [mediation] gets the other side to see that, that their own lawyer is [sort of avoiding the case].\textsuperscript{362}

[Without mediation] you cannot force the other party to sit down with you face-to-face and discuss the issues.\textsuperscript{363}

Furthermore, compulsion to participate removes one tactical concern of the party requesting mediation. With mandated mediation, the other side will not view a proposal that the parties seek mediation as a sign of weakness or as a rush to settle. Rather, parties will view such requests as either routine or as a

\textsuperscript{359} Id. No. 213.
\textsuperscript{360} Divorce Lawyer Interview Data, supra note 243.
\textsuperscript{361} These problems prevent lawyers from regularly using four-way conferences of attorneys and clients. Additional resistance to four-way meetings is generated by the special character of divorce cases. According to one lawyer: "A lot of lawyers were very skittish about the emotions that get generated in a divorce case and as a rule would never sit down and have that kind of meeting [four-way conferences of lawyers and clients] in a divorce case." Interviews, supra note 243, No. 56.

However, a few lawyers report that they have developed a level of trust with a few other attorneys so that they regularly schedule such meetings. Erlanger, Chambliss, and Melli take a different view of such four-person conferences, describing them as a device to pressure clients into settlements. Erlanger et al., supra note 181, at 593.

\textsuperscript{362} Interviews, supra note 243, No. 28.
\textsuperscript{363} Id. No. 23.
sign that the requesting party wants to proceed to trial and needs to get past the mediation stage.\textsuperscript{364}

In addition, lawyers indicate that mandated mediation focuses the lawyers and parties to settle earlier than would otherwise occur. The pressures of managing a law practice, of handling a heavy caseload, and of responding to court deadlines make it difficult for lawyers to pursue sustained efforts to settle a single case. By scheduling mandated mediation, lawyers create a settlement event and deadline:

\[\text{Mediation} \text{ moves the process along because it, for the unprepared attorney, it forces the attorney to become prepared, or at least to come to face the fact, that, okay, we're going to have to deal with these issues in this divorce.}\textsuperscript{365}\]

Most lawyers tend not to get ready until they have to...[that is] sitting down [and] focusing on what the issues are. And mediation helps to speed up that process because they've got to be prepared for that mediation.\textsuperscript{366}

The mediation event may also move indecisive clients to make decisions they have been reluctant to make:

And it also helps, I think, to get the parties ready in a sense, to be prepared for mediation they really have to give the matters some thought, think about what they truly want, what they expect out of the process, and it causes them to focus on the real issues that they might otherwise have been ignoring or just refusing to come to grips with...\textsuperscript{367}

Lawyers often request mediation quite early in the case. The scheduled mediation date then prompts case preparation and serious involvement in negotiation.

Finally, required participation brings cases to mediation that profit from the process but would not have gone to mediation in a voluntary system. In fact, the experience of many Maine lawyers challenges the argument that the parties may know something that the "state" does not about the value of mediation.\textsuperscript{368} Attorneys report that they were often mistaken in

\textsuperscript{364} See Deanne Siemer, Perspectives of Advocates and Clients in Court-Sponsored ADR, in Goldberg et al., supra note 8, at 423, 425 (arguing that "[l]awyers may hold back from offering settlement alternatives so as not to appear too ready to compromise").

\textsuperscript{365} Interviews, supra note 243, No. 237.

\textsuperscript{366} Id. No. 8.

\textsuperscript{367} Id. No. 32.

\textsuperscript{368} Grillo, supra note 2, at 1582 ("It is presumptuous to assume that the state has a better idea than the parties themselves about whether mediation will work in their particular case.").
their predictions about the uselessness of mediation for particular cases:

Other times it's just because, well, we're gonna have to go through mediation because this one issue involving custody is just not going to be resolved, but we've got to go to mediation before we can have a hearing so we've got to go through the motions somewhat, but sometimes you get fooled and things get worked out at the mediation.369

I'm growing increasingly of the opinion that they're productive even in those case where I've said, "No way!"370

A lot of times you'll end up with a case that doesn't look like it's going to settle, or people think that it won't... But I also realize a lot of those cases do settle in mediation. Very extreme cases will settle in mediation, maybe even after one session.371

If left alone to screen which cases should enter mediation, lawyers might not guess well about when it may be useful.

The major impact of a mandated mediation program, such as Maine's, is to structure and improve settlement negotiations. What remains is the argument that mediation is an unnecessary and costly procedure. Fifty-three percent of the Maine lawyers interviewed reported that mediation was sometimes a wasted step "on the way to trial," while forty-seven percent felt that this happened rarely or not at all. In some situations, this argument may trump all others.372 If settlement rates drop or if the expense of mediation climbs, mandatory mediation may not be worth it, on balance. Thus, courts should monitor their mandatory mediation programs and should change or abandon them when they are not a net benefit or when their cost constitutes a barrier to trial for some parties.

3. Cost and Lawyer Presence

Does lawyer presence make mediation more costly? Research done in programs without lawyer presence indicates that, on the average, the parties save if they settle through mediation and do not pay more if they attend mediation and do not settle.373 Some might argue that lawyer presence changes the calculus by making mediation more costly. The Maine lawyers

369. Interviews, supra note 243, No. 256.
370. Id. No. 32.
371. Id. No. 209.
372. Divorce Lawyer Interview Data, supra note 243.
whom we interviewed were almost evenly split on the question of whether mediation increased the costs of divorce.374

We think there is a sound argument that the cost on average is about the same for those who undergo mediation under either the "regulatory" approach or the "lawyer-participant" approach. With lawyers present, the sessions can take place early in the case and can address all issues in the divorce. Research in Canada indicates that parties in programs mandating mediation of all issues save costs, whereas no such savings result in programs that mediate only custody issues.375 Pearson's review of fifteen divorce mediation studies concludes that private programs offering mediation of all divorce issues achieve the greatest cost saving for the parties.376

Furthermore, even with lawyers absent, parties incur substantial legal fees connected with mediation. Presumably, fees for consultation before, during, and after mediation (a mean fee of about $1500 per person in one California study)377 should be lower if lawyers attend.

Mediators are not required to have substantial educational qualifications in Maine, and the mediator's fee is therefore likely to be low. Court mediator fees of $60 per party for the entire mediation in Maine (with the mediator paid $50)378 compare favorably with fees of about $125 per hour (paid directly to the mediator) in those Florida jurisdictions that refer parties to private mediators who must meet higher qualifications.379 One private mediation center in California charged an average mediation fee of $2224 in the late 1980s.380

Other cost-related factors deserve mention. When lawyers attend, courts do not need to hold special conferences to assess the case before assignment to mediation, eliminating attendant costs to parties, perhaps including attorney costs. Lawyer attendance renders unnecessary the post-mediation agreement review by the attorney, and the lawyers will not need to advise against signature, thus requiring a costly reconvening of media-

374. Divorce Lawyer Interview Data, supra note 243.
375. RICHARDSON, supra note 10, at 40, 45.
376. Pearson, supra note 4, at 62.
377. Kelly, supra note 373, at 15.
378. Telephone Interview with Paul Charbonneau, Director, Court Mediation Services, Augusta, Maine (Mar. 8, 1994).
379. Telephone Interview with Sharon Press, Director, Florida Dispute Resolution Center, Florida Supreme Court (May 10, 1993).
380. Kelly, supra note 373, at 15.
Attorney presence in mediation may reduce the need for discovery and may narrow the issues, even if the parties do not settle. In Maine, the use of discovery requests and motions to compel for contempt and for temporary support declined significantly after mandatory mediation involving lawyers began. In other words, there is reason to believe that mediation does not simply add a step to an otherwise unaltered litigation or settlement process; instead, mediation involving lawyers changes those processes substantially, making them more efficient and less costly.

It also seems likely that mediation with lawyers can occur more expeditiously than mediation without them. Lawyers assist in clarifying information, consult with and advise clients on the spot, and help identify unaddressed issues. Absent lawyer participation, mediation experts advise a series of sessions with time for consultation between them. By contrast, Maine divorces cases typically require only a single session.

In sum, the research in Maine offers promise that mandatory mediation, even with lawyers attending, on average does not increase costs and that mandatory mediation does not decrease the possibility of affordable trials.

4. Fairness for Unrepresented Parties

The typical party to a divorce proceeding is represented only if the case is contested. A recent study of divorce in sixteen urban areas indicates that one or both parties was unrepresented in anywhere from fifty-three percent to eighty-eight percent of the cases, with an average across areas of seventy-two percent. The authors of this study conclude that many divorce litigants represent themselves because “substantial percentage of divorces are uncontested, and most parties have meager property or financial assets. These cases are simple and, with a little guidance, the parties can obtain a divorce without incurring a

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381. See Pearson, supra note 25, at 194 (reporting occasional need to revise agreements based on attorney feedback).
382. During the same period, discovery requests and motions of various kinds increased in neighboring New Hampshire, a state without mandatory mediation.
383. There may be other values in scheduling multiple sessions over time, but they seem to be less significant as a means to reach settlement, as multiple sessions were often not needed in Maine to settle a case.
few hundred dollars of lawyer's fees." These conclusions parallel those described earlier for Maine. Clearly, case duration and the likelihood of motions—both good indicators of contest—are substantially greater for two-lawyer cases than for single-lawyer cases, and are greater for single-lawyer cases than for no-lawyer cases. Thus, even given the empirical reality that most divorcing parties have no legal representation, it is far more likely that parties have attorneys in contested cases.

The courts mandate mediation only in contested cases. Because parties are usually represented in contested cases, mediated cases are particularly likely to involve parties with lawyers. A study of three urban domestic relations courts in Ohio indicated that in 247 contested custody cases, about ninety-five percent of the parties had lawyers. In Maine, we estimate from docket records that eighty percent of all mediation cases involved two lawyers. Thus, the nature of selection into mandatory mediation insures that disproportionate numbers of cases involve counsel when compared to the total population of divorce cases. But not all do.

A system for insuring fairness that rests largely on the participation of lawyers, of course, would appear to fall short when parties are unrepresented. Clearly, when lawyers are not representing parties to mediation, they cannot be present to assist them and protect their rights. Although we lack research on this point, we suspect that problems of inequity in bargaining power would be more pronounced and the potential for unfairness greater in negotiations conducted in the absence of a mediator. The mediator can set ground rules, prevent interruption, serve as a drafter, and in other ways moderate the effects of aggressive negotiation on a weaker party. Thus, even weak mediation may be better than leaving the parties alone to work out a settlement, perhaps with one party negotiating, pro se, with the other party's lawyer.

In addition, the regular presence of lawyers in mediation sessions may provide training, education, and a regular check on inappropriate mediator conduct that may in turn improve the quality and fairness of mediation in cases where attorneys are not present. Lawyers might effectively contribute to a system of supervision and quality control of mediators that would be far more effective than rules and qualifications in rooting out ine-

386. Id. at 63.
387. Rogers & McEwen, supra note 10, § 7:01.
388. Clement et al., supra note 63, at 15.
fectiveness. As experienced users of many mediators, lawyers' confidential judgments of mediator competence could be a far better device for assessing quality than a collection of responses from divorcing parties who only have the one experience to judge.

Still, the research provides little guidance about whether the greater prospect of unfairness for pro se litigants argues in favor of giving those litigants an opportunity to "opt out" of mandatory mediation.\textsuperscript{389} The pro se party who opts out would be left to his or her own devices. Because the most likely alternative to mediation is negotiation, those who opt out would presumably face negotiating with the other party's lawyer or directly with the other party. If they are not permitted to opt out, however, the "regulatory" approach is not likely to assure fair mediation. Furthermore, the regulation is likely to be costly for the bulk of the mediation parties who have lawyers. Thus, an "opt out" provision for pro se parties may be the best alternative for the present.

5. Is This "Real Mediation"?

To the divorce mediation traditionalists, lawyers attend judicially-hosted settlement conferences but not mediation sessions, and Maine mediation may thus seem more like facilitated pretrial settlement conferences and less like mediation sessions. These traditionalists may say that sessions involving lawyer participation do not constitute "real mediation."

What is meant by "real" in this context? If "real" references active participation by the divorcing parents, the research suggests that party participation can be maintained, even with lawyers present.\textsuperscript{390} If "real" describes an opportunity for expression of emotions, there is also evidence that this occurs in Maine mediation.\textsuperscript{391} If it describes an opportunity to listen, research indicates that this occurs in the largely joint sessions in Maine.\textsuperscript{392} The same is true for a focus on the parties' interests,\textsuperscript{393} for a  

\textsuperscript{389}. \textit{COLO. REV. STAT.} § 19-3-310.5(3) (Supp. 1994) (permitting pro se litigants to opt out of neglect/dependency mediation).
\textsuperscript{390}. \textit{See supra} part IV.B.3.c (asserting that lawyer presence does not preclude parties from actively participating in mediation).
\textsuperscript{391}. \textit{See supra} part IV.B.3.c.
\textsuperscript{392}. \textit{See supra} part IV.B.3.c.
\textsuperscript{393}. \textit{See supra} part IV.B.3.a (discussing effect of lawyer participation on settlement).
problem-solving approach to negotiations, and for opportunities for integrative solutions. Settlement rates resemble those in programs where lawyer attendance is the exception. Over fifty percent of all Maine mediations result in settlement. Two Florida counties in which parties typically have lawyers with them during mediation have settlement rates of seventy-five percent and sixty-nine percent; six Florida counties in which parties attend without lawyers in ninety percent or more of the cases have settlement rates of forty-nine percent, sixty-five percent, sixty-eight percent, sixty-eight percent, and eighty-seven percent. The agreements endure at least in the short term. In Maine, only one percent of the mediated agreements fail to survive long enough to become court judgments. "Real" may also refer to confidentiality, and Maine mediation sessions are privileged.

In short, divorce mediation involving lawyers resembles the mediation described in the literature, with a few exceptions. First, mediation tends to take less time. Second, "lawyer-participant" mediation sends fewer fees to mediators and more fees to lawyers, probably with approximately the same total expense by divorcing parents. Third, mediators tend not to be lawyers

394. See supra part IV.B.3.a (discussing lawyer's role in facilitating settlement).
395. See supra part IV.B.3.a.
396. Orbeton & Charbonneau, supra note 268, at 64-65.
397. Mason & Press, supra note 72, at 4-5 to 4-7, 4-10.
398. Orbeton & Charbonneau, supra note 268, at 67. But see Wagner, supra note 384, at 50 (noting a 10% rate of challenge to mediated agreements in Lewiston, Maine).
399. Me. R. EvId. 408(b) (disallowing admissibility of conduct or statements by parties or mediator during court-sponsored domestic relations mediation sessions).
400. See, e.g., Weissman & Leick, supra note 8, at 279-80 (describing advantages of mediation).
401. Orbeton & Charbonneau, supra note 268, at 64-67 (reporting that mediation resolved 56% of cases studied; most cases took only one mediation session); Pearson & Thoennes, supra note 155, at 432 (reporting that an average mediation in the private sector takes 8.7 hours and requires an average of 6.2 sessions; the average mediation in the public sector takes 6.3 hours and requires an average of 3.4 sessions).
402. See supra text accompanying notes 373-383 (discussing costs of mediation with lawyers present).
or mental health professionals.403 Fourth, there seem to be more assurances of fairness.404

Ultimately, the needs of divorcing families and the indicia of fairness in the process ought to be key factors in defining mediation procedures. Lawmakers should discard traditional mediation, even if it seems more "real" or satisfying to the mediator, if it fails to serve the families' needs or ensure fairness. The courts call upon mediators to serve these aims rather than to create satisfying professional goals for themselves. Thus, the value of the procedures should not depend on whether mediation professionals view them as producing "real mediation."

CONCLUSION

Critics and proponents of mandatory divorce mediation recognize potential for unfairness in its use. They should also realize that the remedy is that lawyers should participate, along with their clients, in mandatory divorce mediation. Alternative approaches—the "voluntary participation" and "regulatory" approaches—are ineffective and costly. Furthermore, the assumptions underlying these dominant approaches are myths.

With lawyers present and participating, the concern for fairness no longer justifies heavy regulation or confining mediation to voluntary participants. Lawyer participation in the mediation sessions permits intervention on behalf of clients and buffers pressures to settle. Lawyers may also counsel clients to moderate extreme demands. In addition, once lawyers become accustomed to mediation, lawyer involvement in mandated mediation does not appear to prevent the meaningful participation of parties or inhibit emotional expression between spouses.405

With mediation covering a broad scope of issues and with lawyers in attendance, the parties probably will pay more for lawyers and less for mediators. Overall costs, however, will probably remain unchanged because settlements are more likely to be comprehensive and less likely to fall victim to negative re-

403. COURT MEDIATION SERV., MAINE JUDICIAL DEPT., TEN YEARS OF PROGRESS: THE COURT MEDIATION SERVICE 1977-1987 at 10-13 (1988); Telephone Interview with Paul Charbonneau, Director, Maine Court Mediation Service, Portland, Maine (Apr. 19, 1995) (indicating that mediator qualifications are similar to those reported in 1988).

404. See supra text accompanying notes 320-326 (discussing how lawyer presence reduces risks of unfairness).

405. Moreover, involvement has generated a favorable view by lawyers toward mediation and may alter attitudes about negotiation outside of mediation. McEwen et al., supra note 141, at 177-79.
views by a non-participating lawyer. In addition, mediation with lawyers may reduce discovery costs. What the parties will get is likely to be a fair process in which lawyers intervene to protect against pressures from the other party, the process, or the mediator. They are also likely to get a more spontaneous mediation, unfettered by a web of regulation or defensive mediators. They will enjoy, as compared with parties in a system without mandatory mediation, a greater likelihood of having the opportunity to express themselves and to listen to discussions regarding matters of utmost concern. About one-half the time, they can expect to secure a settlement earlier in the process than would otherwise be the case.

Bringing the lawyers into mandatory mediation will permit the repeal of numerous statutes and a reduction in court rules. Furthermore, it will ease fairness concerns as a reason not to compel participation in mediation. The revised regulatory approach preserves the widespread use and flexibility of the mediation process without undue risk of unfairness.
APPENDIX A

JURISDICTIONS WITH REGULATED MANDATORY MEDIATION

A. Mediator Qualifications

1. California: Master's degree; at least two years counseling or psychotherapy experience; knowledge of court system and procedures, community resources, family psychology; familiarity with the effects of domestic violence on children sufficient to assess needs of children. CAL. FAM. CODE § 1815 (West 1994).

2. Florida: Forty hours of training; observation and supervision experience; Master's or Doctoral degree in behavioral or social sciences, or psychiatrist, attorney, or C.P.A. with four years in that field or eight years of family mediation experience. FLA. MEDIATORS R. 10.010(b).

3. Idaho: Any one of several professional credentials and twenty hours of additional training every two years. IDAHO R. CIV. P. 16(j)(6).

4. Indiana: Forty hours of training with an additional five hours of training every two years; Indiana-licensed attorney, bachelor's degree, or a person approved by the court and parties; knowledge of community resources. IND. R. ALT. DISP. RESOL. 2.5(a)-(c).

5. Iowa: Mediation to be conducted by an attorney alone or with individuals from other disciplines, qualified by training, experience, and temperament. Introduction, IOWA R. PRAC. FOR LAWYER MEDIATORS IN FAM. DISPUTES, reported in IOWA CODE ANN. § 598 App. (West Supp. 1994) [hereinafter IOWA MEDIATORS R.].

6. Maryland: Court must approve mediators and develop list of qualified mediators. MD. R. SPEC. P. S73A(h).


8. Nebraska: Thirty hours mediation training; additional thirty hours of family mediation training; and three supervised sessions. NEB. REV. STAT. § 25-2913(1)(Supp. 1994).

9. Nevada: A child custody specialist to conduct mediation where parties contest child custody or visitation. NEV. R. 8TH DIST. CT. § 5.70(c).

10. New Jersey: Forty hours of training, as well as graduate degree or certificate of advanced training in behavioral or social sciences; supervised clinical experience in mediation or relevant experience. N.J. R. GEN. APPL. 1:40-10(2.1).
11. North Carolina: Master's degree in a human relations discipline; forty hours of training; professional training and experience in child development, family dynamics or related areas. N.C. GEN. STAT. § 7A-494(c) (1989).

12. Oklahoma: Twenty hours of training; observation; experience; annual written approval of program coordinator; continuing education. OKLA. R. & PROC. FOR DISP. RESOL. ACT, R. 1.1, reported in OKLA. STAT. ANN. tit. 12, ch. 37 app. (West 1993) [hereinafter OKLA. R. FOR DISP. RESOL.].

13. Utah: Licensed psychologist, social worker, marriage therapist, family therapist, or attorney; forty hours of training; knowledge of family issues. UTAH CODE ANN. § 30-3-27 (Supp. 1994).

B. Mediator Duties

1. California: Duty to assess the needs and interests of children involved, including the right to interview children when appropriate or necessary, CAL. FAM. CODE § 3180 (West 1994); authority to exclude counsel from mediation where appropriate or necessary, id. § 3182; must inform the court when the best interests of a child require appointing counsel for the child. Id. § 3184.

2. Florida: Duty to promote a balanced process, to encourage parties to conduct nonadversarial deliberations, and to promote consideration of the interests of those affected by an agreement but not represented at the mediation, FLA. MEDIATORS R. 10.060(d)-(e); must advise parties to seek legal counsel, id. R. 10.090(b); must terminate session when unsuitability of a case for mediation becomes apparent, id. R. 10.050(b).

3. Idaho: Duty to advise parties to seek legal counsel before resolving issues and forming an agreement; duty of impartiality; duty to advise parties of any possible bias, prejudice or partiality. IDAHO R. CIV. P. 16(j)(7).

4. Indiana: Duty to advise parties that the mediator does not represent either party; duty to advise parties to seek independent legal advice; duty to ensure that the parties consider the best interests of any children involved; duty to terminate the session when continuation would harm or prejudice a party or child involved; right to interview involved children out of the presence of the parties and their attorneys. IND. R. ALT. DISP. RESOL. 2.7.

5. Iowa: Continuing duty to advise each party to obtain legal review prior to reaching an agreement, IOWA MEDIATORS R.
6; must give parties written statement warning them of risks in not being represented by legal counsel, \textit{id.} R. 6; duty to facilitate negotiations while raising questions of fairness, equity and feasibility of proposed agreements, \textit{id.} R. 3; mediators must ensure that parties fully consider the best interests of affected children and to inform parties when such interests appear ignored, \textit{id.} R. 3; must assure that participants base decisions upon sufficient information and knowledge, \textit{id.} R. 4; duties to suspend or terminate sessions when continuation would harm a party, \textit{id.} R. 5; duty to assure a balanced dialogue by diffusing manipulation or intimidation of either party, \textit{id.} R. 5.


10. Nevada: If appropriate or necessary, mediator may exclude counsel and may interview any children involved during the mediation. \textit{Nev. R. 2d Dist. Ct.} 53(7)(b)-(c)

11. Oklahoma: Duty to suspend or terminate mediation when continuation would harm or prejudice any party. \textit{Okla. R. for Disp. Resol. A(B)(1)(e)(1)}.

C. Case Selection

1. Colorado: Court may not refer a case to mediation where one party physically or psychologically abuses the other party and the victim is unwilling to mediate or when one party shows compelling reasons not to order mediation. \textit{Col. Rev. Stat. Ann.} § 13-22-311(1) (West Supp. 1994).

2. Florida: Court may not refer cases to mediation when it finds significant history of domestic abuse which would compromise the mediation process, \textit{Fla. Stat. Ann.} § 44.102(b) (West Supp. 1995); the mediator and parties shall evaluate the bene-
DIVORCE MEDIATION

fits, risks, and costs of mediation to determine its appropriateness for the case. FLA. MEDIATORS R. 10.050(b).

3. Idaho: Court shall not order mediation if it is not in the best interests of the children involved or if otherwise inappropriate under the circumstances. IDAHO. R. CIV. P. 16(j)(5).

4. Iowa: Mediator shall conduct an orientation session to determine appropriateness of mediation for participants. IOWA MEDIATORS R. 1.

5. Louisiana: Court shall not order mediation where there has been family violence. LA. REV. STAT. ANN. § 9-363 (West Supp. 1995).

6. Maryland: Court may not initially order the parties to attend more than two mediation sessions and may order up to two additional sessions only for good cause shown and upon the mediator’s recommendation unless the parties voluntarily continue with mediation. MD. R. SPEC. P. S73A(c)(1).

7. Minnesota: Court may not order mediation when it finds probable cause of domestic or child abuse. MINN. FAM. CT. GEN. PRAC. R. 310.01(a).

8. Nevada: Mediation program must allow the court to exclude cases for good cause shown, including a history of child abuse or domestic violence. NEV. REV. STAT. ANN. § 3.500(2)(b) (Michie Supp. 1993).

9. New Jersey: Court may not refer a case to mediation where an order of domestic violence has been entered; all custody and visitation issues must be screened to determine that genuine and substantial issues exist; a case can be removed from mediation for good cause shown; parties must attend a mediation orientation program. N.J. GEN. APPL. R. 1:40-5(a)-(b).

10. North Carolina: Court may waive mandatory mediation for good cause shown, including undue hardship to a party, allegation of spousal or child abuse or neglect, a drug or alcohol problem, or mental problems. N.C. GEN. STAT. § 50-13.1(c) (Supp. 1994).

11. Oklahoma: Court must conduct an initial interview to determine if the case is appropriate for mediation and if the parties are capable of meaningful participation in the process, OKLA. R. FOR DISP. RESOL. 8(B); no mediation will be conducted if an unassisted party refuses to participate due to the presence of a person assisting the opposing party, id.R. 10(B)(3).

12. Utah: Court may waive mandatory mediation when it would cause undue hardship to or threaten mental or physical health or safety of a party or child involved, including child
abuse, spousal abuse, alcohol or drug abuse, mental illness or incompetence, UTAH CODE ANN. § 30-3-22 (Supp. 1994); parties shall attend an initial evaluation session to determine whether mediation is appropriate, id. § 30-3-23.


D. Issue Limitations

1. California: Mediation limited to issues relating to parenting plans, custody, and visitation, CAL. FAM. CODE § 3178(a) (West 1994); mediation limited to visitation when step-parent or grandparent is petitioner, id. § 3178(b).

2. Florida: Court must order mediation in domestic relations actions involving custody, visitation, or other parental responsibility disputes. FLA. STAT. ANN. § 44.102(b) (West Supp. 1995).

3. Idaho: Court must order mediation in custody or visitation controversy. IDAHO R. CIV. P. 16(j)(2).


5. Louisiana: Court may order the parties to mediate their differences in a custody or visitation proceeding. LA. REV. STAT. ANN. § 9:332 (West Supp. 1995).

6. Maryland: Mediation limited to custody and visitation issues unless parties agree otherwise in writing. MD. R. SPEC. P. S73A(c)(2).

7. Nevada: District courts must establish mandatory mediation program in cases that involve custody or visitation. NEV. REV. STAT. ANN. § 3.500 (Michie Supp. 1993).

8. New Jersey: All complaints involving a custody or visitation issue shall be screened and referred to mediation. N.J. R. GEN. APPL. 1:40-5(a).


10. Utah: Mediation shall not include property division issues unless related to legal custody or visitation dispute. UTAH CODE ANN. § 30-3-25 (Supp. 1994).
E. Required Lawyer Referral for Review of Agreement

1. California: Mediator must report any agreement by the parties to counsel before reporting it to the court, Cal. Fam. Code § 3186(a) (West 1994); the mediator must inform the court if the best interests of children involved require appointment of counsel, id. § 3184.

2. Florida: Any agreement must be in writing signed by parties and counsel, if any, Fla. R. Civ. P. 1.740(f)(1); counsel may object to agreement in writing within 10 days after receipt if not present at the mediation, id.; mediator shall advise parties to seek legal counsel if the party does not understand the legal significance of the matters involved, Fla. Mediators R. 10.090(b).

3. Idaho: Parties have the right to retain counsel to review any agreement before submission to the court; mediator shall advise parties to seek independent legal counsel prior to resolving any issues and forming any agreement. Idaho R. Civ. P. 16(j)(7).

4. Indiana: Mediator shall advise parties to consider independent legal advice; attorneys shall be present at any mediation session unless otherwise agreed. Ind. R. Alt. Disp. Resol. 2.7.

5. Iowa: Independent counsel should review any proposed agreement before parties sign; mediator has duty to advise each party to obtain legal review prior to reaching an agreement. Iowa Mediators R. 6.


9. Minnesota: Parties shall discuss any agreement with their attorneys, if any, and the agreement shall not be enforceable unless parties and their counsel consent to present it to the court. Minn. Stat. § 518.619(7) (1994).

11. Utah: Any agreement involving child custody or visitation must be reviewed by the attorney of each party and by appointed guardian ad litem for child, if any, and all attorneys must certify in writing that they reviewed the agreement and that the agreement meets the best interests of children involved. Utah Code Ann. § 30-3-29 (Supp. 1994).


F. Required Court Review of Agreements

1. Florida: When court approval is necessary, an agreement becomes binding upon court approval. Fla. R. Civ. P. 1.740(f)(2).


3. Iowa: The court may disapprove any proposed agreement contrary to the legal rights of the parties or affected children. Iowa Mediators R. 6.


9. Utah: Court may approve or reject any mediation agreement based on the best interest of the children. Utah Code Ann. § 30-3-29 (Supp. 1994).

G. Miscellaneous

1. California: Uniform standards of practice adopted by the Judicial Council should govern mediation of custody and visitation issues, which standards to include a provision for the best interests of children, safeguarding the rights of children, and conducting negotiation to equalize power between the parties, Cal. Fam. Code § 3162 (West 1994); where a history of domestic violence exists, the mediator may, upon request, meet with the parties separately, id. § 3181(a) (West 1994 & Supp. 1995); where custody of visitation with minor child is at issue, court may require counseling for parties, id. § 3190(a) (West 1994); a party protected by restraining order due to domestic violence may have a support person in mediation, id. § 6303(c).

2. Iowa: Mediator shall ensure full financial disclosure and promote the equal understanding of this information before any agreement is reached and assure that each participant has had the opportunity to fully understand the implications and ramifications of all available options. Iowa Mediators R. 4.


4. Utah: Parties can opt out of mandatory mediation if one party objects and if the court finds it would create undue hardship or threaten the mental or physical health or safety of either party or children of parties. Utah Code Ann. § 30-3-22(1) (Supp. 1994).
APPENDIX B

JURISDICTIONS WITH VOLUNTARY PARTICIPATION OR LESS REGULATED MANDATORY MEDIATION

A. Mediator Qualifications

1. Alaska: Court may appoint any person it finds suitable to act as mediator. ALASKA STAT. § 25.24.060(b) (1991).

2. Delaware: Twenty-five hours of mediation training. DEL. SUPER. CT. CIV. INTERIM R. 16.2(g).


4. Michigan: Licensed psychologist, or a master’s degree in counseling, social work, or marriage and counseling; or five years of experience in family counseling; or a graduate degree in a behavioral science and successful completion of a mediation training program with forty hours of classroom training and 250 hours of practical experience; or membership in the Michigan bar and completion of a training program; knowledge of the court system and procedures, community resources, child development and other family related issues. MICH. COMP. LAWS ANN. § 552.513(4) (West 1993).

5. Missouri: Attorney or graduate degree in behavioral sciences substantially related to marriage and family relations; twenty hours of child custody mediation training. Mo. R. Civ. P. 88.05(b).


7. New Hampshire: Forty-eight hours of instruction, eight of which must be in domestic violence and related family law issues; mediation internship; twenty hours of supervised mediation and three recommendations from co-partners in marital mediation work. N.H. REV. STAT. ANN. § 328-C:5 (1994).


9. Ohio: Mediation procedures adopted by local court rules shall include provisions establishing qualifications for mediators and provisions for establishing standards of conduct for mediators, OHIO REV. CODE ANN. § 3109.052(A) (Anderson
bachelor's degree, two years of professional experience, forty hours of mediation training, ethics and liability insurance. **Ohio R. Superintendence for Cts. C.P. 81.**


11. Pennsylvania: Certified mediator must have at least fifteen years membership in the bar of a state or be admitted to practice in Pennsylvania and determined by the Chief Judge to be competent. **U.S. Dist. Ct. R., E.D. Pa. Local R. 155** (West 1995).

12. Texas: Forty hours training and twenty-four hours of family dynamics, child development, and family law training; or court may appoint a mediator who is qualified because of legal or other professional training or experience in dispute resolution. **Tex. Civ. Prac. & Rem. Code Ann. § 154.052** (West Supp. 1995).

13. Washington: Mediator may be a member of the professional staff of the family court or a mental health services agency, or any other person or agency designated by the court. **Wash. Rev. Code Ann. § 26.09.015** (West Supp. 1995).

14. West Virginia: Administrative office of the supreme court shall hire one qualified mediator for each of the regions participating in the pilot project or may establish and train panels of volunteer mediators. **W. Va. Code § 48A-5-7a** (Supp. 1994).

15. Wisconsin: Every court-referred mediator must have twenty-five hours of mediation training or not less than three years of professional experience in dispute resolution. **Wis. Stat. Ann. § 767.11(4)** (West 1993).

**B. Mediator Duties**

1. Missouri: Duty to advise each party to obtain independent legal advice, ensure that the parties consider fully the best interests of their children and that the parties understand the consequences of any decisions regarding the children; duty to advise the parties to get legal assistance with drafting an agreement or legal review of the other party's proposal; duty to terminate the session when continuing it would harm or prejudice the other party or any children involved. **Mo. R. Civ. P. 88.06-.07.**

3. Oregon: Duty to provide written report of any agreement reached by the parties to counsel for the parties. OR. REV. STAT. ANN. § 107.765(2) (Butterworth 1990).


5. Wisconsin: Duty to consider the best interests of the children; may include a child's guardian ad litem in mediation, interview the child, terminate mediation when evidence of child abuse, spousal abuse, or drug and alcohol abuse exists. Wis. STAT. ANN. § 767.11(10) (West 1993).

C. Case Selection


2. Delaware: Court review and by-pass of mediation process if petition alleges child dependency, neglect, or abuse of an emergency nature; parties to mediate if petitions include above allegations of a non-emergency nature. Del. Fam. Ct. Civ. R. 20.

3. Hawaii: Court may excuse a party from participating in mediation if allegations of spousal abuse are involved and if the court determines that excusing the party is in his or her best interest. Haw. Rev. Stat. § 580-41.5 (1993).


6. Montana: Court may not authorize or permit mediation if it suspects that one of the parties has physically, sexually, or emotionally abused the other party or a child of a party. Mont. Code Ann. § 40-4-301 (1993).

8. New Mexico: When custody is contested, court shall suspend mediation when domestic violence or child abuse has occurred unless court finds that three conditions are satisfied: 1) the mediator has substantial training in the effects of child abuse or domestic violence on victims; 2) the alleged victim is capable of mediating with the other party without suffering from an imbalance of power; and 3) the mediation process contains provisions to protect against an imbalance of power between the parties resulting from the violence. If the violence involves the parents, court shall stop or suspend mediation unless the victim requests mediation and the mediator is informed of the violence. N.M. STAT. ANN. § 40-4-8 (Michie 1994).

9. North Dakota: Court may decline ordering mediation if custody, support, or visitation issues may involve physical or sexual abuse of any party or involved children. N.D. CENT. CODE § 14-09.1-02 (1991).

10. Ohio: If history of domestic violence or child abuse is present, the court may order mediation only if it determines it is in the best interests of the parties and the court makes written findings of fact to support the order. OHIo REV. CODE ANN. § 3109.052(A) (Anderson Supp. 1994).

11. Oregon: Court may waive mediation if either party objects to mediation on the grounds of severe emotional distress and moves to waive mediation. OR. REV. STAT. ANN. § 107.179(3) (Butterworth 1990).

12. Wisconsin: Initial session is required to assess the possible efficacy and appropriateness of mediation; court may waive mediation if it would endanger the health or safety of any party, including child abuse, spouse abuse, and alcohol or drug abuse. Wis. STAT. ANN. § 767.11(8) (West 1993).

D. Issue Limitations

1. Alaska: Court may order the parties to submit to mediation when a petition for child custody is filed. ALASKA STAT. § 25.20.080 (1991).


12. Oregon: Where custody or visitation, or both, are contested, court shall order mediation; the mediator shall not consider issues of property division or spousal or child support without written approval of both parties or their counsel. Or. Rev. Stat. Ann. § 107.765 (1990).


17. West Virginia: Mediation will be provided in designated counties in all cases in which the issues of custody or visitation are contested. W. Va. Code § 48A-5-7a (Supp. 1994).

18. Wisconsin: Mediation provided by the court may not include issues related to property division, maintenance, or child support unless it is directly related to legal or physical custody and the parties agree in writing. Wis. Stat. Ann. § 767.11(9) (West 1993 & Supp. 1994).

E. Required Lawyer Referral for Review of Agreement


3. Missouri: No agreement is binding until signed by the parties and their attorneys, if any. Mo. R. Civ. P. 88.06.

4. Montana: Agreement that the parties reach by mediation must be discussed by the parties with their attorneys, if any. Mont. Code Ann. § 40-4-305 (West 1993).


8. Wisconsin: Agreement must be in writing and reviewed by attorneys, if any, and guardians of children, if any; all attorneys shall certify that the agreement was reviewed and is in the best interests of children involved. Wis. Stat. Ann. § 767.11(12) (West 1993 & Supp. 1994).

F. Court Review of Agreements


3. Missouri: No agreement is binding until approved by the court. Mo R. CIV. P. 88.06.

4. Montana: Court may adopt an agreement reached as a result of mediation if the parties agree to submit it to the court. MONT. CODE. ANN. § 40-4-305 (1993).


8. Wisconsin: Court may approve or reject any mediation agreement based on the best interest of the children and shall state reasons for rejecting an agreement. WIS. STAT. ANN. § 767.11(12) (West 1993 & Supp. 1994).

G. Miscellaneous


3. Missouri: Mediator may meet with children involved and, with consent of the parties, may meet with the opposing party; the mediator must ensure that the parties fully consider the best interests of affected children and that the parties understand the consequences of any decisions regarding the children. Mo. R. CIV. P. 88.06(7)-(8).

4. New Mexico: When parties contest custody of minor children, court may appoint an attorney as guardian ad litem to
appear for and represent the minor children. N.M. STAT. ANN. § 40-4-8(A) (Michie 1994).

5. Washington: Mediator shall assess the needs and interests of the children and may interview them if appropriate or necessary. WASH. REV. CODE. ANN. § 26.09.015(4) (West 1994).

6. Wisconsin: Court-appointed mediator shall be guided by the best interests of the children and may include a child's guardian ad litem in mediation, interview the child, and terminate mediation when evidence of child abuse, spousal abuse, or drug and alcohol abuse exists. WIS. STAT. ANN. § 767.11(10) (West 1993).