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Sofya Perelshteyn

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Mediator or Judge?: California's Mandatory Mediation Statute in Child Custody Disputes

Sofya Perelshteyn

INTRODUCTION

Mediation has long been recognized to be a process through which parties can come together to negotiate their own agreements in order to get past conflict and to structure ongoing relationships.¹ Mediators serve as neutral third parties who guide the parties in this negotiation process so that the parties can voluntarily and confidentially reach an agreement.² But this process becomes severely warped when states institute mandatory mediation programs, such as California's mandatory mediation program for child custody cases.

While some state courts mandate mediation on a case-by-case basis, child custody is the only area of the law where California mandates mediation.³ Child custody cases are considered to benefit the most from mandatory mediation due to their unusually contentious nature.⁴ Moreover, the California legislature likely decided that child custody cases should incorporate mandatory mediation because implementing mediation may help trim the court system's overflowing dockets. Additionally, mediators in this field often have some kind of mental health and/or psychology training, which scholars believe is very beneficial to the parties in such emotional disputes.⁵

Although mandating mediation in child custody cases seems like a logical and reasonable requirement, in reality, the law alters the nature of the

1. *Protecting Confidentiality in Mediation*, 98 HARV. L. REV. 441, 443-45 (1984).

2. *Id.* at 444.

3. Judicial Council of California, *Difficult cases in California Court-Based Child Custody Mediation*, CALIFORNIA COURTS 1 (2003)
<http://www.courts.ca.gov/documents/resupDiffCases99.pdf>.

4. Yuk Ki Lee & Avnita Lakhani, *The Case for Mandatory Mediation to Effectively Address Child Custody in Hong Kong*, 26 INT. J. LAW POLICY FAMILY 327, 328 (2012).

5. See generally Bob Finlay, "On the Line" with Bob Finlay: *Accommodating Mediation Participants with Mental Health and Addition Issues*, Finlay Counselling,
http://www.finlaycounselling.ca/pdfs/mediation_participants.pdf.

[Vol. 17: 1, 2017]

Mediator or Judge?

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

mediation itself as well—abrogating many of the basic tenets of mediation. Namely, if the mediation does not result in a mutually agreed upon settlement, the mediators are allowed to provide recommendations to the judge assigned to the case.⁶ Such a recommendation destroys the concept of mediator confidentiality because the mediator takes information the parties have shared and then bestows it upon the presiding judge. In addition, this also destroys the idea that the mediator is neutral because where parties know that the mediator has a special role with the judge, should they not reach a settlement, the priority may become swaying the mediator in the party's favor, as opposed to truly working toward a successful mediation process. They may do so by revealing things in an exaggerated or vindictive manner, which eradicates the possibility of the parties working together to reach an agreement that is sustainable for themselves as parents, and for their children.

This article will argue that mandatory mediation offers important benefits, including lightening the overloaded court system and capitalizing on the flexibility and personalization of mediation in certain kinds of disputes. This article will also discuss how allowing the mediator to provide recommendations to the judge after unsuccessful negotiations can shatter the basic tenets of mediation and create an altogether different process for the dispute. Furthermore, it will argue that California's mandatory mediation statute creates a system more akin to litigation, since the parties are presenting their case to a mediator who wears the hat of both mediator and judge. In light of this pre-litigation nature, this article will propose that the California legislature honor the true definition of mediation and take away the power of the mediator to give recommendations to judges before the parties actually have their day in court.

SIGNIFICANCE OF TOPIC

California's Statute

In 1981, California became the first state in the country to mandate mediation of child custody and visitation disputes.⁷ Section 3183(a) of the Family Code provides that:

6. *Protecting Confidentiality in Mediation*, *supra* note 1, at 443-45.

7. Angel Lawrence, *Capitulate or Else: San Diego's Mandatory Mediation Process and Procedural Fairness*, 16 J. CONTEMP. LEGAL ISSUES 247, 248-49 (2007).

[Vol. 17: 1, 2017]

Mediator or Judge?

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

[T]he mediator may, consistent with local court rules, submit a recommendation to the court as to the custody of or visitation with the child, if the mediator has first provided the parties and their attorneys, including counsel for any minor children, with the recommendations in writing in advance of the hearing.⁸

The statute then goes further to expand the mediator's recommendations by stating:

[I]f the parties have not reached agreement as a result of the mediation proceedings, the mediator may recommend to the court that an investigation be conducted . . . or that other services be offered to assist the parties to effect a resolution of the controversy before a hearing on the issues.⁹

Under California law, parents must seek mediation services privately or through local courts.¹⁰ Some local courts simply offer mediation services to child custody dispute parties, while other local courts provide the mediator with the right to make recommendations to the presiding judge when the mediation does not result in settlement.¹¹ Therefore, under the California statute, each county has the discretion to choose whether to allow its mediators to make recommendations to the presiding judge.¹²

In looking over both party testimony and potential mediator recommendations, the trial court must come to a factual finding about the child's best interests. This potentially gives mediators a lot of power in providing information to the judge to sway the judge if the parties do not reach an agreement during mediation negotiations.¹³ Some courts call these mediators "child custody recommending counselors" in an effort to separate them from the process of mediation.¹⁴ Mediators are supposed to be confidential, neutral, third parties, while child custody recommending counselors presumably do not have to work in the same framework.¹⁵

8. CAL. FAM. CODE § 3183(a) (West 2011).

9. *Id.*

10. *Difficult cases in California Court-Based Child Custody Mediation*, *supra* note 3.

11. *Custody Mediation*, CALIFORNIA COURTS, <http://www.courts.ca.gov/1189.htm>.

12. *Id.*

13. Susan C. Kuhn, *Mandatory Mediation: California Civil Code Section 4607*, 33 EMORY L. J. 733, 770 (1984).

14. Steve. K. Berenson, *The Elkins Legislation: Will California Change Family Law Again?*

15 CHAP. L. REV. 443, 458 (2012).

15. *Id.*

[Vol. 17: 1, 2017]

Mediator or Judge?

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

Differences Among California Counties

Because California law allows each county to determine its own rules regarding mandatory mediation in child custody cases, the rules vary widely from county to county.¹⁶ For example, in Southern California, Orange County and Los Angeles County do not allow court mediators to report to the judge with recommendations, in the event that settlement is not reached.¹⁷ In the same region, Riverside and San Diego counties allow mediators to make recommendations if settlement is not reached,¹⁸ and mediators are expected to make recommendations about child custody and visitation matters to the judge in the following counties: Alameda,¹⁹ Marin,²⁰ Humboldt,²¹ Amador,²² Contra Costa,²³ Inyo,²⁴ Kings,²⁵ Madera,²⁶ Mariposa,²⁷ Monterey,²⁸ Nevada,²⁹ Placer,³⁰ Sacramento,³¹ San Bernardino,³²

16. *Mandatory Court-Ordered Child Custody Mediation*, BOHM WILDISH, LLP, <http://www.cadivorce.com/california-divorce-guide/child-custody-mediation/mandatory-court-ordered-custody-mediation/>.

17. *Id.*

18. *Id.*

19. *Family Law Court: Child Custody and Visitation*, SUPERIOR COURT OF CALIFORNIA COUNTY OF ALAMEDA, <http://www.alameda.courts.ca.gov/pages.aspx/child-custody-and-visitation>.

20. *Family Court Services – Mediation Process*, SUPERIOR COURT OF CALIFORNIA COUNTY OF MARIN, https://www.marincourt.org/family_services.htm.

21. *Family Law Mediation*, SUPERIOR COURT OF CALIFORNIA COUNTY OF HUMBOLDT, (2016), <http://www.humboldt.courts.ca.gov/sh/familymediation.htm>.

22. *Rules of Court*, SUPERIOR COURT OF CALIFORNIA COUNTY OF AMADOR, 42-45 (July 1, 2015), https://www.amadorcourt.org/localRules/2015-07-01_LocalRules.pdf.

23. *How Mediation Works*, SUPERIOR COURT OF CALIFORNIA COUNTY OF CONTRA COSTA, (March 5, 2014), <http://www.cc-courts.org/index.cfm?fuseaction=Page.viewPage&pageId=1633> [<https://web.archive.org/web/20070501000000/http://www.cc-courts.org/index.cfm?fuseaction=Page.viewPage&pageId=1633>].

24. *Local Rules of Court: Superior Court of California, County of Inyo*, SUPERIOR COURT OF CALIFORNIA COUNTY OF INYO, 26-28 (July 1, 2010) <http://www.inyocourt.ca.gov/files/LocalRules.pdf>.

25. *Family Court Services (FCS)*, SUPERIOR COURT OF CALIFORNIA COUNTY OF KINGS, (2003), http://www.kings.courts.ca.gov/depts/family/Family_Court_Services.asp.

26. *Family Law Facilitator / Self Help Center*, SUPERIOR COURT OF CALIFORNIA COUNTY OF MADERA, (2004), <http://madera.courts.ca.gov/MaderaSelfHelp.htm>.

27. *Custody & Visitation*, SUPERIOR COURT OF CALIFORNIA COUNTY OF MARIPOSA, (2004), <http://mariposacourt.org/CustodyAndVisitation.htm>.

28. *Local Rules of Court*, SUPERIOR COURT OF CALIFORNIA COUNTY OF MONTEREY, 97 (July 1, 2015), <http://www.monterey.courts.ca.gov/Documents/RulesOfCourt/2015/2015-Local-Rules-of-Court.pdf>.

29. *Family Court Child Custody Recommending Counseling Services*, SUPERIOR COURT OF CALIFORNIA COUNTY OF NEVADA, http://www.nevadacountycourts.com/services/family_law/mediation.htm.

[Vol. 17: 1, 2017]

Mediator or Judge?

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

San Joaquin,³³ San Mateo,³⁴ Santa Clara,³⁵ Siskiyou,³⁶ Sonoma,³⁷ Tehama,³⁸ Tulare,³⁹ Ventura,⁴⁰ Yolo,⁴¹ Yuba.⁴²

Moreover, changes to California law in 1981 opened the door for mediators to have authority to exclude counsel from all negotiation proceedings.⁴³ In some counties, the mediation process starts when the attorneys have a separate meeting with the mediator—that is, before the mediator even meets the parties.⁴⁴

30. *Important Things to Know After Child Custody Recommending Counseling*, SUPERIOR COURT OF CALIFORNIA COUNTY OF PLACER, (2006-2013), http://www.placer.courts.ca.gov/family/family_mediation_after-mediation.html#.

31. *Child Custody Recommending Counseling, Family Court Services, Confidential Mediation, and Evaluation*, SUPERIOR COURT OF CALIFORNIA COUNTY OF SACRAMENTO, (2016), <https://www.saccourt.ca.gov/family/fcs.aspx#after>.

32. *Family Court Services*, SUPERIOR COURT OF CALIFORNIA COUNTY OF SAN BERNARDINO, (2016), <http://www.sb-court.org/Divisions/FamilyCourtServices.aspx>.

33. *Family Court Services*, SUPERIOR COURT OF CALIFORNIA COUNTY OF SAN JOAQUIN, (2015), <https://www.sjcourts.org/divisions/family-court-services/> [<https://web.archive.org/web/20150408055847/http://www.sjcourts.org/divisions/family-court-services/>].

34. *Family Court Services*, SUPERIOR COURT OF CALIFORNIA COUNTY OF SAN MATEO, (2016), http://www.sanmateocourt.org/court_divisions/family_court_services/.

35. *Family Court Services (FCS)*, SUPERIOR COURT OF CALIFORNIA COUNTY OF SANTA CLARA, (2016), http://www.sccourt.org/court_divisions/family/fcs/fcs_home.shtml.

36. *Child Custody Mediation*, SUPERIOR COURT OF CALIFORNIA COUNTY OF SISKIYOU, (2001), <http://www.siskiyou.courts.ca.gov/Page.asp?NavID=536> [<https://web.archive.org/web/19981215000000/http://www.siskiyou.courts.ca.gov/Page.asp?NavID=536>].

37. *Family Court Services – Frequently Asked Questions*, SUPERIOR COURT OF CALIFORNIA COUNTY OF SONOMA, (Dec. 2011), <http://sonoma.courts.ca.gov/sites/all/assets/pdfs/family-law/FAQ-eng.pdf>.

38. *Family Court Services*, SUPERIOR COURT OF CALIFORNIA COUNTY OF TEHAMA, (2007-2013), <http://tehamacourt.ca.gov/family.htm>.

39. *Family Court Services*, SUPERIOR COURT OF CALIFORNIA COUNTY OF TULARE, <http://www.tularesuperiorcourt.ca.gov/index.php?section=family-court-services#drill>.

40. *Family Law*, SUPERIOR COURT OF CALIFORNIA COUNTY OF VENTURA, (2015), <http://www.ventura.courts.ca.gov/family.html>.

41. *Local Rules of Superior Court of California, County of Yolo*, SUPERIOR COURT OF CALIFORNIA COUNTY OF YOLO, 47 (Jan. 1, 2007), <http://www.yolo.courts.ca.gov/sites/default/files/files/localrules/Yolo%20Superior%20Court%20Local%20Rules%20Effective%201-1-15.pdf>.

42. *Family Court Services*, SUPERIOR COURT OF CALIFORNIA COUNTY OF YUBA, (2016), <http://www.yubacourts.org/divisions/family-court-services>.

43. CAL. CIV. CODE § 4607(d) (West 2011).

44. King, *Handling Custody and Visitation Disputes Under the New Mandatory Mediation Law*, 2 CAL. LAW. 40, 40 (1982).

[Vol. 17: 1, 2017]

Mediator or Judge?

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

Evaluative and Facilitative Styles of Mediation

Some advocates of the California statute assert that the mandatory mediation system and its policy regarding mediator recommendations is just an extension of evaluative mediation as opposed to facilitative mediation.⁴⁵ Evaluative mediation is grounded in the theory that parties often naturally seek the opinion of the mediator, and that the mediator's opinions may help parties reach settlement.⁴⁶ It focuses on discussing the parties' positions and having the mediator express their views on the possible outcomes, both in mediation and potentially in court, and thus more directly steers the parties in a constructive direction.⁴⁷ As Leonard Riskin stated, "The mediator who evaluates assumes that the participants want and need her to provide some guidance as to the appropriate grounds for settlement—based on law, industry practice or technology—and that she is qualified to give such guidance by virtue of her training, experience, and objectivity."⁴⁸

On the other hand, facilitative mediation focuses more on the parties' individual autonomy.⁴⁹ Essentially:

The mediator who facilitates assumes that the parties are intelligent, able to work with their counterparts, and capable of understanding their situations better than the mediator and, perhaps, better than their lawyers. Accordingly, the parties can develop better solutions than any the mediator might create. Thus, the facilitative mediator assumes that his principal mission is to enhance communication between the parties in order to help them decide what to do.⁵⁰

Advocates of mandatory mediation and mediator-recommendation systems argue that such is not a departure from mediation at all; rather, because the mediator does not have authority to make a final judgment, their

45. Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 24-27 (2001). Welsh discusses the growth of mandatory mediation as a response to a lack of enthusiasm for mediation. *Id.* at 24. Even though these mandatory mediation systems were inconsistent with principles of self-determination, "[m]any mediation advocates saw 'mandatory' mediation as an opportunity to provide a forced education regarding mediation to attorneys and their clients." *Id.*

46. Ellen A. Waldman, *The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence*, 82 MARQ. L. REV. 155, 157 (1998).

47. *Id.* at 157.

48. Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 24 (1996).

49. James J. Alfini, *Evaluative Versus Facilitative Mediation: A Discussion*, 24 FLA. ST. U. L. REV. 919, 919 (1997).

50. Riskin, *supra* note 48, at 24.

recommendations are simply a more evaluative form of mediation.⁵¹ Moreover, proponents of the mandatory mediation system properly point out that in these court-ordered mediation programs, “mediators can’t stand idly by and watch miscarriage-of-justice settlements either, and that may require a more aggressive approach than just raising the question.”⁵² However, evaluative mediation is based on listening to the parties and giving recommendations to the parties—not a judge.⁵³ Indeed, allowing a mediator to take information from the parties at face value and to relay it to a judge without fact checking or performing any legal analysis seems to go beyond mere “evaluative” mediation.

The growing prevalence of evaluative mediation in court-connected mediation tends to transform ordinary settlement conferences to judicial settlement conferences.⁵⁴ Typically, the attorneys present in court-connected mediations look for mediators that work well with their naturally adversarial style.⁵⁵ Additionally, while the less adversarial principles of mediation may attract retired attorneys and judges to the process, they often struggle to detach from the biases of prior work experience such that their mediation skills are skewed toward a more litigious way of conducting business.⁵⁶ Thus, in many ways, the true clients of mediators are the attorneys, who look for a mediator that will fulfill their adversarial needs and work with their styles. This creates a system very different from a mediation process controlled, at least in substance, by the parties.⁵⁷

51. Robert M. Moberly, *Mediator Gag Rules: Is It Ethical for Mediators to Evaluate or Advise?*, 38 S. TEX. L. REV. 669, 671-72 (1997).

52. Alfini, *supra* note 49, at 932.

53. *Id.*

54. Welsh, *supra* note 45, at 26.

55. *Id.* at 26-27.

56. *Id.* at 27.

57. Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOT. L. REV. 71, 79 (1998).

Few, if any, debate the usefulness of a credible evaluation to provide a reality check and to help disputing parties reach agreement. These purposes underlie several dispute resolution processes, including non-binding arbitration, summary jury trial, and early neutral evaluation. We maintain, however, that when a neutral offers a requested evaluation—even as a “last step” in the mediation process—he moves beyond the boundaries of the mediation map, crossing over into a different process that should have different governing guideposts.

Id.

[Vol. 17: 1, 2017]

Mediator or Judge?

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

Importance of Confidentiality and Neutrality

As previously stated, confidentiality and neutrality are of the utmost importance in mediation because they ensure that the parties can engage in candid dialogue without worrying about the mediator revealing certain things to the other party or taking one party's side.⁵⁸ California's evidentiary rules also take confidentiality and neutrality very seriously:

No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.⁵⁹

Despite explicitly stating that confidentiality must be enforced in mediation proceedings, California's mandatory mediation statute circumvents the basic principles of confidentiality and neutrality by allowing mediators to take the disclosures of the parties to the judge. In essence, the statute eliminates the protection of confidential information and transforms the mediator's neutral role from neutral to partisan.

Confidentiality is one of the key differences between mediation and litigation, and is crucial to a successful mediation.⁶⁰ In an attorney-client relationship, for example, any communications between the attorney and their client are privileged,⁶¹ which creates a natural environment of trust between the attorney and the client, as well as with any experts used in the case. However, in a mediation setting, the mediator does not have a similar basis for trust because the mediator's main goal is to get the parties to communicate with each other, despite past conflict.⁶² Moreover, without confidentiality, there is no guarantee that what is said during the mediation proceedings will remain there because those admissions may emerge in litigation if a settlement is not reached.⁶³ Without the cloak of

58. Ronald J. Hedges, *Mediation Developments and Trends*, SL081 ALI-ABA 1695, 1724 (2006).

59. CAL. EVID. CODE § 1119 (West 2009).

60. *Protecting Confidentiality in Mediation*, *supra* note 1, at 443-44.

61. Ellen E. Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?*, 85 MARQ. L. REV. 79, 80 (2001).

62. *Id.* at 81.

63. *Id.* at 81-82.

It would be unrealistic to trust that the opposing party would refrain from using these communications to its litigation advantage. Even through a lawsuit, by the time disputing parties reach mediation, their relationship often has degenerated into animosity and distrust. Therefore, in many mediations, confidentiality does far more than merely

confidentiality, parties may be less forthright in their communications with the mediator and may instead choose to sway the mediator toward their side.⁶⁴ This creates a mediation that looks more like litigation than the traditional concept of mediation. Moreover, once confidentiality is compromised, neutrality also falls to the wayside.⁶⁵ Not only is the mediator meant to bridge the gap between two adversaries, but the mediator is also maintaining neutrality during the proceedings, which can make it even more difficult for the parties to trust someone who is not directly representing their interests.⁶⁶ Perhaps because of these added difficulties, confidentiality is really the crux of how much clients can trust their mediator, and is essential to facilitating negotiation.

Confidentiality creates a safe space of communication between the parties and the mediator by ensuring that the mediator will listen to the party's testimony and not reveal anything to the other parties or the judge.⁶⁷ The ultimate goal of mediation is to create an open space of communication in which the parties can themselves create solutions that benefit all parties.⁶⁸ This kind of candid conversation is essential to each party's ability to negotiate with one another under the aid of a mediator who can direct the conversation and relieve tension when necessary.⁶⁹

Confidentiality is a fundamental aspect of mediation, particularly because it is difficult to communicate with an adversary where there is a "threat of disclosure to one's disadvantage."⁷⁰ Oftentimes because the relationship between the parties is already so strained, confidentiality can be the key to getting the parties to the negotiating table in the first place.⁷¹ This caveat is especially important in child custody cases because parents are already dealing with emotional and financial strain, and yet still have to work together to come up with solutions that benefit them and their children.

A mediator's neutrality is just as important to the process as confidentiality is. It is especially important in child custody cases where parents are not represented by counsel and consent to the dispute resolution

enhance the candid nature of the discussion; between some adversaries, confidentiality may be akin to a precondition for any discussion.

Id.

64. *E.g., Protecting Confidentiality in Mediation, supra* note 1.

65. *Id.*

66. Deason, *supra* note 61, at 81.

67. *Id.* at 80-82.

68. *Id.* at 80.

69. *Id.* at 81.

70. *Id.*

71. *Protecting Confidentiality in Mediation, supra* note 1, at 443-45.

[Vol. 17: 1, 2017]

Mediator or Judge?

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

process without being properly informed.⁷² The fear in these situations is that mediators may not provide parties with accurate legal information regarding complex problems that arise during the mediation because they do not have the requisite legal training.⁷³ Moreover, because the mediator serves as a neutral third party, it is generally not a mediator's place to give legal advice, which again calls into question the kind of role the mediator should fill and the mediation style they should choose.⁷⁴ Potentially, an inadequately trained mediator could conduct a mediation without maintaining neutrality and could relay their opinion via a recommendation to the presiding judge. Mandated mediations further cloud these concerns because both confidentiality and neutrality are compromised.

Power Struggle Between Parents and its Effect on Children

Another principle aspect of mediation is the self-determination of the parties, meaning the parties control both the process and the solution.⁷⁵ But in child custody mandatory mediation settings, where the mediator is permitted—or even encouraged—to make recommendations to the judge, the system erodes self-determination in multiple ways.

Improper Influence on Judge

Because the mediator is present for all of the mediation proceedings, and hears all of the information presented by the parties, the judge may attach great weight to the mediator's recommendations under a belief that the mediator is most informed on the subject.⁷⁶ In one view, ignoring a mediator's recommendation after they spent countless hours discussing the positions of the parties could be considered a waste of the mediator's time and insight.

Studies increasingly show that mediators and counselors can emerge as the true decision makers in these cases.⁷⁷ The studies suggest that judges in child custody disputes are primarily affected by two factors: mediator

72. Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 837 (1999).

73. *Id.* at 837.

74. Riskin, *supra* note 48.

75. Welsh, *supra* note 45, at 4.

76. Janet M. Bowermaster, *Legal Presumptions and the Role of Mental Health Professionals in Child Custody Proceedings*, 40 DUQ. L. REV. 265, 272-73 (2002).

77. Carla C. Kunin et al., *An Archival Study of Decision-Making in Child Custody Disputes*, 48 J. CLINICAL PSYCHOL. 564, 564 (1992).

recommendation and child preference.⁷⁸ “The major factor that influenced decisions was counselor recommendation (60% of the cases); cases that lacked this recommendation were predicted by an inferential measure of the child’s preference (15% of the cases).”⁷⁹ Clearly, judges take mediator recommendations very seriously, which gives rise to a potential to influence the judge. Mediators should take into account a long list of factors when offering recommendations to the judge about how the custody of the child should be resolved, including “[h]ealth, safety, and welfare of the child; maintenance of the status quo living situation; the parents’ ability to love; parent-child shared interest; emotional support for (or abandonment of) the child; and preference for psychological parent over biological parent.”⁸⁰ These mediators have to synthesize so much information and so many nuances, and then provide a recommendation to the judge. Although this may sound reasonable, considering mediators are the first line of dispute resolution, and because they spend so much time with the parties getting to know the case, statistics show that judges overwhelmingly adopt the mediator’s recommendations.⁸¹

Moreover, mediators in divorce cases generally fall into two camps: mental health professionals and attorneys.⁸² It is difficult to discern which skill set is more valuable in these contentious cases because, arguably, both are just as vital to reaching agreement in these situations.⁸³ Advocates of mental health professionals highlight how their expertise in managing emotional stress can be vital to these conflicts, which may better equip them to handle children involved in divorce mediations as well.⁸⁴ Mental health professionals also stress the importance of interpersonal communication between the parties and are less afraid of tapping into emotional subjects that

78. *Id.* at 564.

79. *Id.*

80. Kunin et al., *supra* note 77, 565.

81. *Id.* at 567-68. “Of the 272 coded cases, 164 (or 60.3%) contained a written recommendation . . . [T]here was a considerable amount of agreement (75%) between the counselor and the judge.”

82. Kuhn, *supra* note 13, at 763.

83. *Id.*

84. *Id.* at 765.

A mental health professional can explain to the parents the effects of divorce on their children. Children frequently engage in strategic behavior in an attempt to reunite their parents. When parents misinterpret this behavior, the conflict between them often is exacerbated. A mediator who is trained in family dynamics can explain the child’s behavior to the parents and may be able to neutralize angry feelings. Parents will then be more likely to reach an agreement that is in the best interests of their children.

Id.

[Vol. 17: 1, 2017]

Mediator or Judge?

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

can get to the root of the parties' needs and interests.⁸⁵ Mental health professionals are more likely to understand and incorporate key intangible factors into the negotiation process, such as "(1) guilt at initiating the divorce; (2) diminished self-worth caused by rejection; and (3) risk aversiveness."⁸⁶ Mental health mediators are trained in body language behavior and unspoken communications, and are therefore more inclined to understand what is going on beneath the surface.⁸⁷ These skills can help mediators better identify destructive communication patterns and harness the process back on track.⁸⁸

On the other hand, the mediator's legal knowledge is also very important because the parties are likely very concerned with the legal consequences of their actions, and attorneys are really the only ones in an ethical position to give that information.⁸⁹ A mediator's proficient legal knowledge can translate to the parties and help them make legally sound choices in reaching an agreement.⁹⁰ This can then lead to valid settlement agreements strong enough to avoid future litigation.⁹¹ And although perhaps trivial, legally trained mediators are in a better position to explain tax consequences of the divorce, which may be just as important as child custody because the divorce is already an expensive and painful process. Tax information regarding child support and alimony can help the parents provide a more stable transition for their children.⁹² Having these resources in a mediator can be crucial for parties who choose to attend the mediation without attorneys. Therefore, it is clear that there are benefits to having a mediator with both mental health and legal training, since both are extremely important in divorce cases due to the wide range of issues on the table.

Judges are perhaps the epitome of neutrality in the legal system, and yet the California statute creates a system that impairs their judgment and prejudices their decisions.⁹³ Additionally, when it comes to legal analysis or depth of knowledge of the law, judges are in a unique position compared to mediators. After all, "the application of proven facts to defined legal standards is a basic lawyering skill . . . [b]ecause custody recommendations

85. See Kuhn, *supra* note 13, at 765.

86. Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441, 457 (1992).

87. Kuhn, *supra* note 13, at 765.

88. *Id.* at 765-66.

89. *Id.* at 766.

90. *Id.*

91. See *id.*

92. Kuhn, *supra* note 13, at 766, 768.

93. Kunin, *supra* note 77, 571.

[Vol. 17: 1, 2017]

Mediator or Judge?

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

in cases covered by legal presumptions require this distinctly legal conduct, mental health professionals cannot make ultimate issue recommendations in these cases without some degree of legal training.”⁹⁴ While it is understandable that judges need help lightening their dockets and the argument that disregarding a mediator’s thoughtful recommendation could prove wasteful is persuasive, there are simply too many due process issues at stake.⁹⁵

Improper Use of Confidential Information

In child custody cases, mandatory mediation system is primarily meant to expedite the litigation and settlement processes and to clear courthouse dockets.⁹⁶ As mentioned above, due to this need for a quicker process, confidentiality is often tossed to the wayside when weighed against the need for evidence.⁹⁷

During mediation, parties disclose confidential information to the mediator under the impression that the information will not become a part of the decision and will not be revealed to other parties.⁹⁸ This candidness allows the parties to communicate more directly with each other and fosters an environment where settlement is a legitimate possibility.⁹⁹ However, when these parties learn that the court-assigned mediator has the ability to later approach the judge with recommendations,¹⁰⁰ their testimony may be skewed, or even falsified. Oftentimes, mediators will speak with judges in informal settings and reveal what went on in the mediation, which also clearly complicates mediator confidentiality.¹⁰¹ Moreover, if the mediation does not result in an agreement, then the mediator may also subtly expose which party was the source of the mediation’s failure during trial.¹⁰² This of course can occur in either court-connected or private mediations of any field, but family law cases are particularly sensitive, and confidentiality is even more important to the parties because they want to keep such personal

94. Bowermaster, *supra* note 76, at 302.

95. *Id.* at 305.

96. *Id.* at 302-03.

97. Michael C. Moran, *Just Between You And Me: The Blanket Mediation Privilege in Massachusetts Unnecessarily Undermines Access to Evidence*, 39 SUFFOLK U. L. REV. 539, 540 (2006).

98. *See generally Id.* at 545-47.

99. *Id.* at 545.

100. Bowermaster, *supra* note 76, at 271-72.

101. Bryan, *supra* note 86, at 518.

102. *Id.*

[Vol. 17: 1, 2017]

Mediator or Judge?

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

matters as private and painless as possible. This becomes a problem in child custody cases involving domestic violence and abuse because the abusive parent may selectively choose not to reveal evidence of their abuse, perhaps at the guidance of their attorney.¹⁰³ Additionally, the parent that has been a victim of abuse may still fear their ex-spouse and omit relevant information to avoid further abuse. There are clearly many issues regarding confidentiality and disclosure in these cases, and as a matter of public policy, parents should not be encouraged to hide information that could significantly affect a child's well-being. There is a heightened need for more candid and honest communication in these kinds of disputes where the health of a child is at stake.

Improper Influence on the Parents

If the parents know the mediator can make a well-regarded recommendation to the judge, then the parents will presumably attempt to sway the mediator during the settlement proceedings, and their attorneys will likely persuade them to do so as well. As discussed, the mediation increasingly turns into a kind of pre-litigation process and loses its alternative dispute resolution purpose.

Scholars believe that mediation and litigation affect men and women differently because the sexes have unique needs.¹⁰⁴ According to several studies, men tend to be more objective and separate the moral problem from the emotional aspect of the conflict, while women tend to see situations as a network of relationships, where recognizing responsibility for one another is very important.¹⁰⁵ Because of this dichotomy, men are more likely to see the solution to a conflict as severing ties, while women believe the solution is strengthening those ties.¹⁰⁶

Generally, mandatory mediation and mediator recommendations can negatively affect a woman when she is at a financial disadvantage compared to the man.¹⁰⁷ Specifically in the child custody context, women may be limited as far as what they can offer towards the "best interest" of the child, and thus may have less to bargain with at the negotiation table. Accordingly, women may be more likely to concede or settle for less than

103. Alison Herlihy, *Ethical Issues and Child Custody*, 29 J. LEGAL PROF. 223, 226 (2004-05).

104. Maggie Vincent, *Mandatory Mediation of Custody Disputes: Criticism, Legislation, and Support*, 20 VT. L. REV. 255, 257 (1995).

105. *Id.* at 257.

106. *Id.* at 257-58.

107. Bryan, *supra* note 86, at 463.

what would be deemed fair in front of a judge.¹⁰⁸ Moreover, because of their generally stronger financial security, men often use this status as a means of influence, meaning those men come to believe they have all of the power over marital decisions.¹⁰⁹ This creates a situation where “husbands will act as influential leaders and . . . wives will defer to husbands during divorce mediation.”¹¹⁰ As a result, a situation where a financially powerful spouse can overpower the weaker spouse is a very real possibility in this statutory framework.¹¹¹ Because of their often poorer financial state, women in this system may be coerced to consent and therefore induced to settle in an expedited manner in order to save time, money, and emotional stress.¹¹² Settlements in these cases may not provide women with the same benefits as when mediation is truly confidential and the mediator is neutral, because the effect of the gender-based power imbalance could mute the neutrality of the mediator. These kinds of dynamics are exacerbated in cases involving domestic violence and emotional abuse.¹¹³ However, it is important to recognize that while these mediations may be mandatory, there is no requirement that the parties settle. In any case, it seems as though there is ample room for power imbalances between the parties to warp the fairness of the process.

Just looking at how men and women communicate in these divorce mediations reveals a process rampant with inequality.¹¹⁴ Men tend to control conversations with women, and are more prone to interrupting and speaking over women to ensure that they speak more.¹¹⁵ This is more frequent when the conversation is about topics that men think they have more knowledge about, and as a result, women have a hard time asserting themselves.¹¹⁶ Studies also show that even particularly assertive and dominant women have a hard time expressing themselves in mixed-sex groups.¹¹⁷ Bryan states:

108. Scott H. Hughes, *Elizabeth's Story: Exploring Power Imbalances in Divorce Mediation*, 8 GEO. J. LEGAL ETHICS 553, 560-61 (1995).

109. Bryan, *supra* note 86, at 463.

110. *Id.*

111. Joseph B. Stulberg, *Fairness and Mediation*, 13 OHIO ST. J. ON DISP. RESOL. 909, 931 (1998).

112. Bryan, *supra* note 86, at 463.

113. *Id.* at 463-64.

114. *Id.* at 464.

115. *Id.*

116. *Id.* Bryan noted that although women have a hard time asserting themselves when speaking with their husbands, it is less difficult for them to do so when they speak with other males. *Id.*

117. *Id.* at 465.

[Vol. 17: 1, 2017]

Mediator or Judge?

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

[S]ome women who do express their dominant tendencies do so primarily through group-oriented, rather than individually focused, actions. Thus . . . husbands likely will attempt domination and their wives, even those with high-dominance propensities, likely will engage in inhibited and submissive behaviors with respect to problem-solving and decisionmaking, particularly in the male dominated financial sphere.¹¹⁸

Some advocates believe that although mediation in theory should give all parties the same space for communication and expression, women are disproportionately harmed by mandatory mediation systems because they are forced into a conversation that they did not choose, and are put into a conversation that “preys on women’s traditional sense of self as being relational, in order to achieve settlements that may not be in the women’s best interest.”¹¹⁹ Studies show that women who go through mandatory mediation describe the process as being rife with sexual domination and lack the ability to fully express and articulate their feelings of disempowerment.¹²⁰ Women are being told that the mediation process is voluntary and confidential, and that it is a platform for them to express their fears and work toward a resolution with their partner about something so sacrosanct as their children; but in fact, the mediation is being forced by court, likely conducted at the courthouse, with a mediator who then has the ability to go to the judge and reveal their opinions about the case without the party’s control.¹²¹

These are important considerations, especially in mandatory mediation in child custody cases, because the parties are likely going to have a continuing relationship beyond the mediation, with regards to their children. Moreover, significant portions of divorce mediations can include cases involving domestic violence, which can further complicate the mediation process. Taking these factors into account, divorce mediation is unique in the mediation world in that the process is very emotional and complex, and creating a platform for the mediation process to be forced upon broken men and women seems much harsher than the aims of traditional mediation. Traditional mediation is very much rooted in voluntariness and mutual problem solving, and forcing mediation onto parents who communicate with a mediator who can then give their recommendation to the judge seems to severely warp the integrity of the process. Professor Trina Grillo perhaps takes an extreme view when she states,

118. *Id.*

119. Vincent, *supra* note 104, at 268. See also Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1550, 1577-81, 1603 (1991).

120. Grillo, *supra* note 119, at 1605.

121. *Id.* at 1606.

[Vol. 17: 1, 2017]

Mediator or Judge?

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

[F]orcing unwilling women to take part in a process which involves much personal exposure sends a powerful social message: it is permissible to discount the real experience of women in the service of someone else's idea of what will be good for them, good for their children, or good for the system.¹²²

Professor Trina Grillo suggested to mediators that this is how the women in the mediations felt, but their responses were unsympathetic.¹²³ The mediators firmly believed that even if the women felt uncomfortable for a few hours sitting across the table from their partner, the alternative of litigation was much worse in the long run.¹²⁴ But it seems as though these considerations should not be swept aside so apathetically, since divorce mediation affects the lives of not only the parties but the children as well.

The fact that judges give minimal attention to the process employed in reaching settlement agreements leaves women further unprotected.¹²⁵ In California, the mandated mediation cases are meant to free up the judge's time, leaving no reason for judges to fully review mediated settlement agreements.¹²⁶ This could mean that even where judicial review is commanded by the court rules, there would still be little protection for the divorcing wife.¹²⁷

Clearly, these kinds of power struggles can negatively impact children, who are often used as bargaining chips by parents.¹²⁸ This is even truer when the process drastically departs from the traditional tenants of mediation.¹²⁹ Children have the potential to learn a lot from a true mediation process by observing their parents go through a very difficult time and by witnessing their parents work together for the child's benefit without exploiting financial power imbalances.

Potential Benefits of Mandatory Mediation

Although the system seems very forced and coercive, there are several benefits. First, keeping cases off a judge's desk frees up an overloaded court

122. *Id.* at 1607.

123. *Id.*

124. *Id.*

125. Bryan, *supra* note 86, at 519.

126. Grillo, *supra* note 119, at 1607.

127. Bryan, *supra* note 86, at 519.

128. Grillo, *supra* note 119, at 1555.

129. Cassandra W. Adams, *Children's Interest—Lost in Translation: Making The Case For Involving Children In Mediation Of Child Custody Cases*, 36 U. DAYTON L. REV. 353, 355-56 (2011).

[Vol. 17: 1, 2017]

Mediator or Judge?

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

system.¹³⁰ But there are concerns here as well, since clearing the docket may result in settlements that have substantive and procedural issues, meaning the quality of the solution may be compromised and appealed.¹³¹ In an effort to clear their dockets, judges often ask the attorneys to simply split the difference in order to “narrow the gap,” and this is often done through money exchanges.¹³² This not only oversimplifies the major issues into monetary issues, which is often not the point of the conflict in divorce cases to begin with, but can eradicate the premise of mediation.¹³³ In this settlement technique, often identified as the “Lloyds of London” formula, the judge asks the parties to analyze the probability of liability and damages and split the difference if the numbers are in a reasonable range.¹³⁴ But in divorce mediation cases, the problems may be vast and are often non-monetary, especially when children are involved.¹³⁵ Because of the wide range of issues, the range of solutions is also vast, and the parties may rate important issues in a complementary fashion, meaning one party’s important issue may not be so important to the other party, which is not easily solved by “splitting the difference.”¹³⁶ As Menkel-Meadow properly states,

The irony is that settlement managers, who think they are making settlement easier by reducing the issues, may in fact be increasing the likelihood of deadlock [sic] by reducing the issues to one . . . using money as a proxy for other interests the parties may have, may thwart the possibilities for using party interests for mutual gain.¹³⁷

Attorneys dealing with such judges have found that in an effort to keep their dockets clear, these judges “tend to be more assertive in their settlement techniques (using several techniques that some of the lawyers considered to be unethical).”¹³⁸ Moreover, in jurisdictions that specifically mandate mediation, it took more time to get the cases to trial.¹³⁹ Therefore, although the idea that mediation helps judges keep their dockets moving can

130. Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 508 (1985).

131. *Id.* at 508.

132. *Id.*

133. *Id.* at 508-09.

134. *Id.* at 508.

135. Grillo, *supra* note 119, at 1552.

136. Menkel-Meadow, *supra* note 130, at 508.

137. *Id.* at 508-09.

138. *Id.* at 508.

139. *Id.*

be beneficial to the court system, it may not work in accordance with principles of self-determination and party-led negotiations in practice.¹⁴⁰

Second, mandating mediation gives parties the opportunity to create their own custom solutions without the immediate pressure and burden of litigation.¹⁴¹ As far as mediator recommendations, some advocates and judges believe it would be a waste for judges not to consider mediator recommendations, since they have presumably spent a lot of time with the parties and have heard a lot of testimony.¹⁴² To go through the entire process again without taking into account a professional's first impressions would be unwise and illogical, especially where mediators have a legal and/or mental health background.¹⁴³

PROPOSED SOLUTION AND CONCLUSION

Although the California statute gives counties broad discretion with regard to their child custody mediation programs, it is quite clear that mandatory mediation in and of itself is a benefit to the community.¹⁴⁴ Most of these cases are settled in mediation, and parties are generally satisfied with the process.¹⁴⁵ However, the success rates do not necessarily reflect whether parties are satisfied with mediation as an option, or the way their mediator maintains control over the process.¹⁴⁶ Parents could be completely on board with mediation as a step before litigation, yet not want to engage in a process controlled by their mediator's recommendations to the judge upon impasse.¹⁴⁷ Conversely, adversarial parents could prefer the additional opportunity to sway their presiding judge and use the mandatory mediation process to their advantage. Despite the potentially ulterior motives of the parents, in the end, mediation not only better serves the parents in these

140. *Id.* at 510.

Howard Raiffa's 'analytic mediators' (i.e., asking questions to explore the parties' interests and attempting to fashion tailor-made solutions from an objective' [sic] outside-of-the-problem position, but with additional information), then judicial and magistrate settlement magistrates may be providing both better and more efficient (in the Pareto optimal sense) solutions to litigation problems.

Id. See also HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION*, 138-39, 158-64 (1982).

141. Menkel-Meadow, *supra* note 130, at 488.

142. Grillo, *supra* note 119, at 1554-55.

143. *Id.*

144. *Id.* at 1609-10.

145. Nancy Ver Steegh, *Family Court Reform and ADR: Shifting Values and Expectations Transform the Divorce Process*, 42 FAM. L. Q. 659, 662-63 (2008).

146. Grillo, *supra* note 119, at 1609-10.

147. *Id.* at 1554-55.

[Vol. 17: 1, 2017]

Mediator or Judge?

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

custody battles, but also the children.¹⁴⁸ Especially in mediations where children are brought to the negotiation table (assuming they are of age and have the capacity to understand what is going on), it can potentially be helpful for children to see their parents work together to create mutually beneficial settlements.¹⁴⁹ Notably, these experiences can foster conflict resolution skills in the child's life going forward.¹⁵⁰

Some advocates state that although mediator recommendations may have due process and confidentiality implications, one way to combat this would be to provide parents professional legal training in order for them to better understand their role and their responsibilities.¹⁵¹ Advocates of this solution would combine better legal training with a more limited role for these mediators by having them serve solely as fact-finders and leave the actual decision-making to the judges.¹⁵² This would still give judges the benefit of receiving evidence presented by the mediator without expanding the mediator's role.¹⁵³ Although this seems like a good solution on its face, it still raises due process concerns because fact-finding is generally conducted on the record, and the fact-finding by mediators usually takes place off the record and behind closed doors.¹⁵⁴ This solution does not address the due process concerns and still fosters a pre-litigation environment because it leaves room for the mediator to influence a judge, shattering the concepts of confidentiality, neutrality, and due process. Ultimately, mediators in child custody cases would definitely benefit from additional psychology and mental health training, notwithstanding the type of mediation implemented by the court.

Mandating mediation for such an emotional and sensitive area of the law is not inherently a bad idea. For example, family law has historically been an area where mediation and alternative dispute resolution have been considered the optimal means of resolving disputes before bringing them to the courtroom.¹⁵⁵ The issue with California's mandatory mediation program is that it presses the constitutional boundaries by altering the mediator's classic role.¹⁵⁶ These recommendations destroy the confidentiality between

148. *Id.*

149. Bowermaster, *supra* note 76, at 355-56.

150. *Id.*

151. *Id.* at 302.

152. *Id.* at 304.

153. *Id.*

154. *Id.* at 305.

155. Bryan, *supra* note 86, at 514.

156. *Id.* at 519.

[Vol. 17: 1, 2017]

Mediator or Judge?

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

the mediator and the parties in a way that influences what the parties reveal during the negotiation process.¹⁵⁷ Also, mediator recommendations destroy the mediator's neutrality when the mediator listens to confidential information, forms an opinion in favor of one party, and shares their opinion with the presiding judge.¹⁵⁸

Therefore, the California statute mandating mediation should be amended to exclude mediator recommendations in the context of child custody disputes in the event that the parties do not reach settlement. The mediator's role should not be expanded, and the mediator should preserve their role as a third party neutral. On a fundamental level, the parties are entitled to present their case to the judge free of bias or interference from any mediator recommendation.¹⁵⁹

157. *Id.*

158. *Id.*

159. *Id.*