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Power Imbalances in Divorce Mediation

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Resolution of family disputes is one of the fastest growing areas of mediation practice.[1] Parties may choose to participate in family law mediation through mediators in private practice or through voluntary court programs.[2] In addition, some states have court-annexed programs that require the parties to participate in mediation before a judge will hear their case.[3]

Proponents of divorce mediation favor this form of dispute resolution over litigation for several reasons. Mediation enables the parties to exercise self-determination rather than leaving the final decision making to the judiciary.[4] It is voluntary in the sense that the parties, and not the mediator, make the decisions.[5] Mediation focuses the dispute on the relationships and responsibilities involved. In doing this, it dismisses the traditional approach of applying legal rules that are independent from the parties' experience.[6] In this regard, mediation minimizes the focus on fault, which can prevent compromise and resolution.[7]

Statistics show that a mediated agreement is more likely to satisfy parties to a dispute[8] and less likely to be violated than a court order.[9] In addition, mediation is substantially less expensive than litigation.[10]

Mediation is twice as likely as litigation to improve the relationships between the parties.[11] Judicial determination is believed to be an effective means of dispute resolution only where the court must render a judgment related to the resolution of current consequences of past behavior.[12] Parties to a divorce, however, often need to maintain a continuing relationship. Where spousal and/or child support are involved, parties have ongoing financial relationships. Where children and custody are involved, parties have ongoing social relationships.[13] Because the adversarial method focuses on the determination of past conduct, its structure does not lend itself to future ongoing relationships.[14]

Because of the benefits of mediating family dissolutions, mediators should seek continuously to improve the process. This article addresses one area in which improvement is needed: power imbalances between the parties. Unequal bargaining power between the parties in divorce mediation may substantially affect the fairness of a mediated agreement. Divorce mediators should set goals to develop better methods of recognizing and correcting such power imbalances.

When looking at power imbalances between the parties, the following questions arise:

1. whether the fundamental principles of mediator neutrality and party empowerment prevent active substantive intervention that would protect the weaker party from unfair

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outcomes and therefore make mediation an unfair process; and
2. whether mediators are adequately trained to solve the task of power balancing.

Those who support the use of mediation in domestic relations cases, as well as critics, are concerned with the issue of power imbalances.[15]

Mediation is a branch of the negotiation process, and without negotiation as a backbone, there can be no mediation.

THE PRINCIPLES OF MEDIATION

Any discussion of power imbalances in divorce mediation must consider the general principles of mediation. Mediation is defined as "a process in which an impartial third party—a mediator—facilitates the resolution of a dispute by promoting voluntary agreement (or 'self-determination') by the parties to a dispute."[16] One of the theories behind the presence of an impartial third party is that the presence and participation of an outsider provides the parties with new and different perspectives on the issues in conflict and helps to build a problem-solving relationship.[17]

Mediation is a branch of the negotiation process, and without negotiation as a backbone, there can be no mediation.[18] The parties initiate a mediation session by first stating the problems as each side sees them.[19] They then gather information regarding the dispute and attempt to identify the key problems of the dispute.[20] Once the fundamental disagreements are established, the parties explore options and goals for solving the problems and eventually reach an agreement.[21] Mediation supplements these traditional negotiation techniques by allowing a neutral third party to assist the parties in identifying the problems and exploring options for solving the problems.[22]

A mediator has limited or no decision-making power.[23] The mediator cannot force the parties to resolve their dispute or reject the agreement reached by the parties.[24] The mediator aids the parties in evaluating their needs and negotiating an agreement that will meet the parties' standards of fairness.[25] The parties, not the mediator, retain the ultimate decision-making authority.[26]

Party empowerment is the underlying goal of mediation.[27] The principle of party empowerment focuses on individual decision making, and mediators contrast this with litigation, where a judge imposes formal, objective, legal rules on private family matters.[28] The "ethic of party empowerment" generally used in mediation grants couples the opportunity to determine their postdivorce lives.[29] This independence and self-determination is often one of the most attractive features of mediation.[30]

The concept of fairness is important to the mediation process.[31] Fairness in mediation is understood as the connection between procedural fairness and outcome fairness.[32] If the process is unfair, then it is likely the negotiated outcomes will be unfair.[33] Inherent in the issue of fairness is the conflict between the requirement that a mediator remain neutral and his or her duty to promote a fair agreement.[34]

Mediators differ on their standards for determining whether an outcome is fair. With party empowerment as a guiding principle, some mediators evaluate a fair outcome based solely on the individual's standard of fairness.[35] Other mediators include several values and goals, including legal ones, as long as the parties arrive at them without pressure.[36] Other commentators on divorce mediation use the lawyer-to-lawyer negotiation as the guideline for fairness.[37]

An essential aspect of the mediator's role is his or her ability to intervene in a dispute.[38] Intervention is defined as entering "into an ongoing system of relationships, to come between or among persons, groups, or objects for the purpose of helping them."[39] In theory, a third party should be able to aid the parties in resolving conflict by providing information or suggesting a more effective process.[40] If the mediator uses these intervention tactics it is believed he or she will be able to change the basis of the conflict in the relationship.[41]

Impartiality and neutrality are two fundamental characteristics of mediation.[42] Impartiality means "the absence of bias or preference in favor of one or more negotiators, their interests, or the specific solutions that they are advocating."[43] Neutrality addresses the relationship between the intervenor and the parties in dispute. It means that the mediator is independent and does not have a previous relationship with the parties, that the mediator does not expect to obtain benefits from the outcome of the decision, and that he or she does not involve his or her personal biases in the mediation.[44]

Again, one of the fundamental principles of mediation is that the parties should arrive at the agreement voluntarily. The mediator merely assists the parties in the negotiating process by helping them identify issues and solve problems. If

one party is a less effective negotiator, the agreement will reflect this unless the mediator can effectively intervene to balance the negotiating power.

POWER IMBALANCES

Mediation as Negotiation

When mediation is viewed as a negotiation with the presence of a neutral third party, the effect of power imbalances becomes apparent.[45] Negotiations reflect power structures between the parties, and consequently, unequal negotiating power will reflect the power imbalances between a husband and wife.[46] Several factors contribute to unequal bargaining power in negotiations. These include the disparity in the parties' tangible resources, such as education and income.[47] Intangible factors such as status, dominance, depression, self-esteem, reward expectation, fear of achievement, and sex role ideology have also been identified.[48]

Tension Between Mediator Neutrality and Fairness of the Outcome

There is a recognized tension between neutrality and the mediator's ability to protect the weaker party from an unfair settlement.[49] At times, substantive intervention may be the only means of correcting a power imbalance. The problem with using substantive intervention to correct a power imbalance has been identified as follows:

> Mediators could achieve power balancing's goal of equitable financial agreements by closely monitoring the substance of the emerging agreement, and, when necessary, intervening to promote fairness. Herein, however, lies the problem. Mediator neutrality and party empowerment norms require the mediator steadfastly to avoid interference with the parties' right to self-determination. Active substantive intervention lacks neutrality and violates party empowerment.[50]

In its ideal form, neutrality prevents the mediator from attempting to influence the substance of mediated agreements.[51] The issue, then, is how the mediator may substantively intervene without violating the duty of neutrality.

The tension between mediator neutrality and the need to protect the less powerful spouse from unfair settlement is one of the most problematic issues confronting mediators. If the mediator intervenes and provides legal information to one spouse, the mediator is no longer neutral and he or she comes close to becoming a legal advocate, which will benefit one party to the disadvantage of the other.[52] In addition, the mediator's choice of when to intervene is based on his or her notion of fairness, which may seriously infringe on the parties' right to self-determination.[53]

There is a recognized tension between neutrality and the mediator's ability to protect the weaker party from an unfair settlement.

There is confusion as to the exact meaning of neutrality in mediation.[54] This confusion has created an uncertainty among mediators as to when intervention is appropriate.[55] Several mediators admit that they will depart their role of neutrality to prevent unfair results.[56]

Procedurally oriented mediators argue that the mediator should do little to influence the power relations between the parties because it undermines the mediator's impartiality.[57] Such mediators believe that power balancing and fairness in an agreement may be achieved without violating neutrality if the mediator controls the *process* without engaging in the *substance* of the agreement.[58] Procedural fairness includes balancing the bargaining between the parties, creating a "level playing field," self-determination by the parties without settlement pressure by the mediator, and consideration of the children's interests.[59] Critics of mediation argue that because of the intense psychological nature of power, control of process and process intervention remain inadequate to correct power imbalances.[60]

Substantively orientated mediators argue that even though the mediator should remain impartial and neutral, he or she should work with the parties on substantive issues to reach a fair and just decision.[61] Mediators should intervene in substantive decisions when "the impacts of negotiated agreements [will affect] underrepresented groups."[62] Some mediators believe they have an ethical responsibility to raise questions about substantive options,[63] and this responsibility may include situations where "the agreement appears to be extremely inequitable to one or more of the parties."[64]

One theory suggests that substantive intervention does not violate impartiality as long as a mediator does not advise the parties on what decisions to make.[65] In her article addressing the ethical challenges of mediation, Lorretta Moore states

that although there is a commitment to neutrality, the mediator should raise questions for the parties to consider in reaching a "realistic, fair, equitable, and feasible resolution of their disputed matter."[66] She also states that in terms of raising legal issues, the mediator may propose legal issues as options for resolving the dispute as long as he or she does not advise the parties on what decision to make.[67] Another author suggests that mediators should not rigidly adhere to the philosophy of either substantive or procedural intervention, but instead should determine the particular situation and adapt the process to suit the particular needs of the parties.[68] This is based on the fact that disputes vary and the needs and goals of the parties differ in each mediation session.[69]

There is much debate about whether mediators are qualified to deal with the deep psychological issues inherent in power imbalances.

John M. Haynes, who has written extensively on mediation, has established guidelines for mediators that not only facilitate the parties' decision making but also allow the mediator to substantively intervene to ensure fairness.[70] Mr. Haynes does not use the language "substantive intervention," but instead distinguishes between content discussions and process discussions.[71] Discussions on content are those in which the mediator helps a party focus on the consequences of a particular choice and those relating to the outcome of the agreement.[72] During discussions on content, the mediator must avoid use of the imperative, because this approach invades the couple's right to make a decision.[73] The mediator is helping the parties to explore the consequences in content discussions, and therefore the mediator should not use the imperative, but rather ask questions which ultimately expand the options for the parties to consider.[74] By asking questions, the mediator encourages the parties' own decision making and allows them to choose their own solutions.[75]

Mediator Qualifications to Balance Power

Balancing power between the parties may be one of the most difficult tasks a mediator faces. There is much debate about whether mediators are qualified to deal with the deep psychological issues inherent in power imbalances.[76] In addition, as noted above, there is great confusion among mediators as to when intervention is appropriate to correct a power imbalance.

Two important issues must be considered in determining mediator qualifications to balance power. The first issue is whether mediation courses train mediators to detect power imbalances. The second is whether the psychological issues inherent in power imbalances are properly addressed at all in the mediation process, since mediation's primary goal is to reach an agreement.

Critics of mediation argue that mediator training does not adequately address or explain power imbalances.[77] A mediator must have the necessary qualifications to meet the reasonable expectations of the parties.[78] Divorce mediation training programs usually require a maximum commitment of 40 hours over a five-day period.[79] The program focuses on basic mediation skills, psychology of divorce, child psychology, and the legal and financial issues of divorce.[80] Mediation standards are generally set by rule or statute and require that mediators become certified after training.[81] Several states require additional training to mediate domestic disputes,[82] and several jurisdictions require mediators who receive court referrals to have postbaccalaureate degrees in such areas as law, mental health, or accounting.[83]

Craig Mcewen, an attorney in Maine, where divorce mediation is mandatory, advocates a program in which attorneys for both parties participate in the mediation.[84] Mcewen argues that in looking at the required education for mediators, there is little reason to believe they have the qualifications to detect power imbalances.[85] The skills necessary for a mediator to promote fairness include the abilities to understand power imbalances, to demonstrate empathy, and to distance the mediator's personal values from the issues.[86]

Currently, no uniform standards address divorce mediator training.[87] There is, however, a movement to establish specific training criteria.[88] In addition, many people think mediators should have knowledge of the psychological, economic, tax, and legal aspects of a divorce.[89] However, there is no current consensus on the amount of knowledge or degree of training a mediator should have.[90] If clear guidelines for mediation training were established, mediator training and qualification could be more adequately addressed.[91]

However, even if mediators are adequately trained, attempting to determine power imbalances based on intangible and psychological factors is difficult.[92] Even if a mediator can detect a

power imbalance, he or she cannot change a party's psychological and emotional state. Extensive therapy may be required to balance a power disparity.[93]

A mediator's failure to suspend mediation when a party is emotionally unable to participate is a breach of the mediator's duty to ensure the fair and equitable quality of the process, and therefore it is imperative for mediators of family disputes to solve the problem of power imbalances.[94] As stated above, at times the only way to correct a power imbalance between the parties is through active, substantive intervention by the mediator.[95] Where a mediator is incapable of detecting a party's emotional inability to participate effectively in mediation, an additional method of addressing power imbalances may be to obtain the assistance of a co-mediator with a psychology background.[96]

Lawyer participation in a mediation session or lawyer representation throughout the mediation process is an additional solution to resolve power imbalances. The American Bar Association Family Law Section standards on mediation state that a continuing duty is placed on the mediator to advise the parties to seek independent legal assistance.[97] Some states require a lawyer of record to be present during mediation.[98] Other states expressly disallow attendance of anyone other than the parties during a mediation.[99]

As a solution to the problem of power imbalances in mediation, a group of divorce attorneys in Maine advocate the "lawyer-participant" approach.[100] Divorce mediation in Maine is mandatory, and lawyers attend the mediation sessions.[101] Based on their practical experience, the attorneys in Maine assert that lawyer presence is the answer to power imbalances.[102] Attorneys are present throughout the mediation process to participate as advisors and as advocates when necessary.[103] Their role is to provide a check on unfairness.[104]

The attorneys who employ the "lawyer-participant" model of mediation argue that it provides the best insurance of fairness in circumstances where there is a concern that a mediator's lack of neutrality will shape the outcomes of agreements.[105] In addition, lawyer participation gives an attorney the opportunity to advise the client against the unreasonable demands of the opposing side.[106] The presence of an attorney allows the parties to express their anger in a controlled setting,[107] and it prevents the possible unfairness of a mediated agreement from a mediator who does not have an attorney's legal knowledge.[108]

Lawyer participation in a mediation session or lawyer representation throughout the mediation process is an additional solution to resolve power imbalances.

Statutes and Rules Adressing Power Imbalances

Professionals involved in psychiatry, psychology, family counseling, social work, and law serve as mediators.[109] Those who mediate do not share the same ethical requirements, and there have been problems establishing a comprehensive set of standards that apply to all mediators.[110] The American Bar Association, the Society of Professionals in Dispute Resolution, and the American Arbitration Association have worked together to establish the most recent national standards to regulate the conduct of mediators.[111] These standards outline the general principles of mediation, including self-determination of the parties, neutrality of the mediator, and the fairness of the outcome.[112]

In addition to these standards, several state statutes address the issue of power imbalances in mediation.[113] Mediation standards usually require a mediator to determine "the ability and willingness of the parties to participate in mediation and terminate the process, if necessary, to prevent harm to a participant."[114] In Illinois, if a party is "emotionally impaired" and this interferes with mediation, that party should be excluded from court-ordered mediation.[115] Some court-ordered mediation programs require a mediator to screen the parties for the inability to negotiate and for the effects of domestic violence.[116] In Iowa, the standards for mediation state that "[t]he mediator shall discuss . . . [t]he emotions which play a part in the decision-making process. The mediator shall attempt to elicit from each participant a confirmation that each understands the connection between one's own emotions and the bargaining process."[117]

The mediator has a duty to ensure that both parties understand the financial aspects of a mediated agreement.[118] Some standards provide for financial disclosure where it is necessary to balance power. For example, the Iowa mediation rules state:

> The mediator shall assure that there is full financial and factual disclosure, such as each would reasonably receive in the discovery process, or that the participants have sufficient information to waive intelligently the right to such disclosure . . . in addition . . . the mediator shall promote the equal understanding of such information before

> any agreement is reached . . . the mediator shall assure that each participant has had the opportunity to fully understand the implications and ramifications of all available options.[119]

Some states require the mediator to conduct a private screening session with each party to determine his or her level of understanding with regard to financial issues.[120] In Kansas, the mediator is required to recommend to the parties that they should seek expert consultation if it appears that more knowledge is needed for balanced negotiations.[121]

The state and national rules on mediation address the problem of power imbalances to the extent that they require mediators to be sensitive to the emotional foundations for these issues.[122] It is acknowledged, however, that these standards assume the mediator has knowledge of and sensitivity to how emotions affect a party's ability to mediate.[123] In addition, to the extent that unequal negotiating power creates unequal distributive awards, the state standards provide for full financial disclosure and require the mediator to ensure that the parties have a full understanding of the financial implications.[124]

Given the complicated nature of power imbalances, the current mediation statutes and rules may be only a minimal solution to power balancing. The attempt to eliminate the possibility of unfair mediated outcomes through regulation is a positive beginning to solving a complicated problem. Greater uniformity of mediation standards in conjunction with improved mediator training courses may adequately address the problem of unequal bargaining power in divorce mediation.

MEDIATION: BALANCING THE BENEFITS WITH THE PROBLEMS

The benefits of mediation must be balanced with the problems surrounding unequal negotiating power between the spouses.[125] The duties of a mediator to remain neutral and to promote a fair agreement may prevent intervention to protect the less powerful spouse and may prevent a fair mediated agreement.[126] In addition, the underlying psychological bases for unequal negotiating power between spouses are so amorphous that it becomes questionable whether mediation can address this problem or whether it is even the proper forum for people facing these issues.[127]

Power imbalances are a recognized problem in the area of divorce mediation.[128] Hopefully, awareness of this issue in the legal profession will lead to mediator training and standards that require adequate methods to balance power. Although it is argued that a mediator cannot substantively intervene without violating the principles of mediator neutrality and party empowerment,[129] the research on various mediation techniques indicates this may not be true.[130]

Mediation is an alternative method of dispute resolution and not necessarily the best solution for every domestic relations dispute. The recommended solutions in this article address the issues of fairness, mediator training, recognition of unequal negotiations, power imbalances, and party representation.

ENDNOTES

[1]Christopher Moore, The Mediation Process: Practical Strategies for Resolving Conflict 26 (1996).

[2]*Id.*

[3]*Id.*; *see, e.g.*, Alaska Stat.§ 25.24.060 (Michie 1983); Fla. Stat. Ann. § 44.101 (Harrison Supp. 1989); Ill. Rev. Stat. ch. 40, ¶ 607.1(c)(4) (Smith-Hurd 1980 & Supp. 1990); Wis. Stat. Ann. § 767.081 (1991); Colo. Rev. Stat. § 13-22-311 (1993).

[4]Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 Yale L.J. 1545, 1548 (1991).

[5]*Id.*

[6]*Id.*

[7]*Id.* at 1560.

[8]Joshua D. Rosenberg, *In Defense of Mediation*, 33 Ariz. L. Rev. 467, 493–95 (1991) (citing K. Kressel & D. Pruitt, Mediation Research 18 (1989)).

[9]*See e.g.*, Steven C. Bowman, *Idaho's Decision on Divorce Mediation*, 26 Idaho L. Rev. 547, 549–50 (1989) (stating that mediated agreements are much more likely to inspire voluntary compliance because they give the parties a feeling of self-determination).

[10]Jeanne A. Clement & Andrew I. Schwebel, *A Research Agenda for Divorce Mediation: The Creation of Second Order Knowledge to Inform Legal Policy*, 9 Ohio St. J. on Disp. Resol. 95, 113 (1993).

[11]Rosenberg, *supra* note 8, at 472 (citing Duryee, A Consumer Evaluation of a Court Mediation Service, Report to the Judicial Counsel of the State of California (1991)).

[12]Rudolph J. Gerber, *Recommendation of Domestic Relations Reform*, 32 Ariz. L. Rev. 9, 11 (1990).

[13]*Id.* at 12.

[14]*See* Bowman, *supra* note 9, at 549 (stating that "[t]he zero-sum view of divorce is apparently blind to the reality that the divorce decree is not the final resolution of the dispute. The winner-loser emphasis can continue to adversely affect the future relationships of the parties with each other and their children and can increase the likelihood of future litigation. Consequently, the adversary system restricts the range of potential solutions. The emphasis is placed on strategies and tactics and causes a shift in focus away from the actual needs and best interests of both parties.")

[15]Professor Joshua D. Rosenberg states that in all relationships, and as a result in all marriages, there are power imbalances caused by specific external situations and personality differences. He concludes, however, that eliminating mediation will not address these concerns. In addition, he states that adequate protection is provided in mediation by telling the parties that their agreement should be viewed as tentative, they should consult their attorneys, and they should think about the process before they reach a final agreement. Rosenberg, *supra* note 8, at 493–95. *See also* Loretta W. Moore, *Lawyer Mediators: Meeting the Ethical Challenges*, 30 Fam. L.Q. 679, 714 (1996) (stating that "[b]alancing power is a continuing process that requires continuing attention" and noting that several mediation standards address the challenges inherent in resolving power imbalances).

[16]Moore, *supra* note 15, at 679 (citing American Arbitration Association, Society of Professionals in Dispute Resolution (SPIDR) & American Bar Association, The Standards of Conduct for Mediators I (1996)); *see also* Moore, *supra* note 1, at 15 (describing mediation as "the intervention in a negotiation or a conflict of an acceptable third party who has limited or no authoritative decision-making power but who assists the involved parties in voluntarily reaching a mutually acceptable settlement of issues in dispute").

[17]Moore, *supra* note 1, at 15.

[18]*Id.* at 16. For purposes of this article, the mediation process is described as a negotiating process. There are different theories on negotiating strategy. Under the competitive theory, negotiators use distributive bargaining, where a "proposed solution will result in an increase over the initial position for one party and a decrease for the other." John S. Murray et al., Processes of Dispute Resolution: The Role of Lawyers 130 (David L. Shapiro et al. eds., 1996). An alternative theory is the problem-solving method, under which the parties use integrative bargaining and share joint gains. In using the problem-solving model, the parties try to undercover the underlying, actual needs of both parties. Because the parties may not value things in the same way, a focus on the various needs will produce greater possible solutions. Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 U.C.L.A. L. Rev. 754 (1984).

[19]John S. Murray et al., Dispute Resolution: Materials for Continuing Legal Education III-7-9 (National Institute for Dispute Resolution 1991).

[20]*Id.*

[21]*Id.*

[22]Murray et al., *supra* note 18, at 344.

[23]Moore, *supra* note 1, at 17.

[24]*Id.*

[25]*Id.* at 18.

[26]*Id.*

[27]*See* John M. Haynes, *A Conceptual Model of the Process of Family Mediation: Implications for Training*, 10 Am. J. Fam. Therapy 5, 10 (stating that the mediator must be committed to the client's right of self-determination).

[28]Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 Buff. L. Rev. 441, 503 (1992).

[29]*Id.*

[30]Rosenberg, *supra* note 8, at 467.

[31]Murray et al., *supra* note 18; Craig A. Mcewen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 Minn. L. Rev. 1317, 1327 (1995).

[32]Mcewen et al., *supra* note 31, at 1325.

[33]*Id.* at 1327.

[34]Murray et al., *supra* note 18, at 344.

[35]*See* Rosenberg, *supra* note 8, at 487 (discussing a court-appointed mediator's response to a client's question regarding fairness: "I can't really say what would be 'fair'. . . . I can talk to you about the possible effects on different arrangements on the children, and I can talk to you about the standards the law directs a court to look at, but you are in a better position that I am to decide what is 'fair' for your family").

[36]Mcewen et al., *supra* note 31, at 1327; *see also* Leonard L. Riskin, *Toward New Standards for the Neutral Lawyer in Mediation*, 26 Ariz. L. Rev. 329, 335 (1984) (stating that for some mediators the substance of the law and the rights of the parties are the foundation for the decision-making process, while for other mediators the law plays only a supporting role to the parties' own sense of fairness); Bryan, *supra* note 28, at 501 (citing Linda K. Girdner, *Custody Mediation in the United States: Empowerment or Social Control*, 3 Canadian J. Women & L. 134, 147–48 (1989) (discussing mediators who incorporate therapy in mediation)).

[37]Mcewen et al., *supra* note 31, at 1329.

[38]Moore, *supra* note 1, at 16.

[39]*Id.* at 16 (quoting C. Argyris, Intervention Theory and Method: A Behavioral Science View 15 (1970)).

[40]*Id.*

[41]*Id.*

[42]*Id.* at 52.

[43]*Id.*

[44]*Id.*

[45]*Id.* at 16.

[46]Bryan, *supra* note 28, at 446–47.

[47]*Id.* at 449–57; *see also* Penelope E. Bryan, *Reclaiming Professionalism: The Lawyer's Role in Divorce Mediation*, 28 Fam. L.Q. 177, 194 (1994).

[48]Bryan, *supra* note 28, at 457–98; Bryan, *supra* note 47, at 195–207.

[49]Bryan, *supra* note 28, at 508; *see also* Moore, *supra* note 1, at 68 (stating that "[t]o assist or empower the weaker party or to influence the activities of the stronger . . . requires very specific interventions that shift the mediator's role and function dangerously close to advocacy").

[50]Bryan, *supra* note 28, at 504; *see also* Grillo, *supra* note 4, at 1592 (stating that "[w]hen a mediator analyzes and attempts to correct a power imbalance, she can no longer claim to be simply a facilitator of the couple's process; rather, she is taking an active role in affecting the outcome of the process").

[51]Bryan, *supra* note 28, at 502–503.

[52]*Id.* at 505; Moore, *supra* note 15, at 689.

[53]Bryan, *supra* note 28, at 503.

[54]*Id.* (citing Lee E. Teitelbaum & Laura DuPaix, *Alternative Dispute Resolution and Divorce: Natural Experimentation in Family Law*, 40 Rutgers L. Rev. 1093 (1988)).

[55]*Id.* (citing Gregg B. Walker, *Training Mediators: Teaching About Ethical Concerns and Obligations*, Mediation Q., Spring 1988).

[56]*Id.* (citing Joan Dworkin & William London, *What Is a Fair Agreement*, 7 Mediation Q. 3 (1989) (presenting a case example where the mediators intervened to protect a wife from what appeared to the mediators to be a grossly inequitable property

division and acknowledging that their intervention violated their commitment to self-determination)).

[57]*Id.*

[58]*Id.* (citing Jay Folberg & Allison Taylor, Mediation: A Comprehensive Guide to Resolving Conflict Without Litigation 7–8 (1984)).

[59]Mcewen et al., *supra* note 31, at 1325–26.

[60]*See* Bryan, *supra* note 28, at 505 (stating,"A wife actually may speak more than her husband, yet his few words may command her deference. The wife may submit a thorough budget, yet the budget may reflect her low expectations or her depression may blunt her ability to effectively negotiate for her financial needs reflected in the budget").

[61]*Id.*

[62]Moore, *supra* note 1, at 75 (quoting L. Suskind, *Environmental Mediation and the Accountability Problem*, 6(1) Vt. L. Rev. 1, 46–47 (1981)).

[63]*Id.* at 76.

[64]*Id.*

[65]Moore, *supra* note 15, at 689.

[66]*Id.*

[67]*Id.*

[68]Moore, *supra* note 1, at 55.

[69]*Id.*; *see also* Gregg B. Walker, *Training Mediators: Teaching About Ethical Concerns and Obligations*, Mediation Q., Spring 1988, at 34–37 (stating that the decision to intervene should be left to the discretion of individual mediators' "subjective ethics").

[70]John M. Haynes, *Mediation and Therapy: An Alternative View*, 10 Mediation Q. 21 (1992).

[71]*Id.*

[72]*Id.*

[73]*Id.*

[74]Haynes gives four examples that illustrate the distinction between using imperatives and asking questions.:

> (1) "You should sell the house" is an imperative, and therefore inappropriate. But are the following imperatives? (2) "Have you considered selling the house?" (3) "You may want to consider selling the house." (4) "Do you want to consider selling the house as an option" . . . . Statement 1 is a clear command to act. However, question 2 could also be an embedded suggestion if the client hears it as a suggestion to act; in that situation it becomes an imperative. Statement 3 is an offering to the client that places the right of selection on the client. As in 2, this may be received by the client as a suggestion/imperative. Statement 4, on the other hand, places the offer in the context of a range of options explicitly making the right of selection the client's.

Id.

[75]*Id.*

[76]Grillo, *supra* note 4, at 1592; Bryan, *supra* note 28, at 500.

[77]Bryan, *supra* note 28, at 500; Mcewen et al., *supra* note 31, at 1344.

[78]Moore, *supra* note 15, at 684 (citing American Arbitration Association, Society of Professionals in Dispute Resolution (SPIDR) & American Bar Association, The Standards of Conduct for Mediators I (1996), Standard IV); *see also supra* note 17.

[79]Bryan, *supra* note 28, at 499–500.

[80]*Id.*

[81]Mcewen et al., *supra* note 31, at 1343.

[82]Moore, *supra* note 15, at 684.

[83]*Id.*

[84]Mcewen et al., *supra* note 31, at 1322.

[85]*Id.* at 1344.

[86]*Id.*

[87]Bryan, *supra* note 28, at 499.

[88]*Id.* (citing Nancy H. Rogers & Craig A. Mcewen, Mediaton: Law, Policy, Practice § 11.2 at 179–86 (Supp. 1991)).

[89]Bryan, *supra* note 28, at 499 (citing Kenneth Kressel, The Process of Divorce: How Professionals and Couples Negotiate Settlements 189 (1985)).

[90]*Id.*

[91]*Id.*

[92]*Id.* at 500.

[93]*Id.* at 501.

[94]*Id.* at 504; *see also* Grillo, *supra* note 4, at 1592.

[95]*Id.*

[96]*Id.*

[97]Moore, *supra* note 15, at 712 (citing American Arbitration Association, Society of Professionals in Dispute Resolution (SPIDR) & American Bar Association, The Standards of Conduct for Mediators I (1996), Standard VI).

[98]Moore, *supra* note 15, at 716; *see, eg.*, Mich. Rules of Ct. Rule 3.216 (1996); Rules of Practice and Procedure of the United States Dist. Ct. for the Middle Dist. of N.C., Rule 605(d)(2) (1995).

[99]Moore, *supra* note 15, at 717; *see, e.g.*, Kan. Stat. Ann. § 23-603(6) (Supp. 1996).

[100]Mcewen et al., *supra* note 31, at 1322.

[101]*Id.* at 1357.

[102]*Id.* at 1360.

[103]*Id.*

[104]*Id.*

[105]*Id.*

[106]*Id.* at 1371.

[107]*Id.*

[108]*Id.* at 1377.

[109]Moore, *supra* note 15, at 680.

[110]*Id.*

[111]*Id.* at 681.

[112]Moore, *supra* note 15, at 681.

[113]*Id.* at 680–81.

[114]*Id.* at 714 (citing Kan. Sup. Ct. Rule 901(1995)).

[115]Moore, *supra* note 15, at 714 (citing Ill. 17th Cir. Ct. Rule 6(a)(1996)).

[116]Moore, *supra* note 15, at 714–15.

[117]*Id.* at 714 (citing Iowa Rules Governing Standards of Practice for Lawyer Mediators in Family Disputes Rule 1 (1996)).

[118]Moore, *supra* note 15, at 716.

[119]Iowa Rules Governing Standards of Practice for Lawyer Mediators in Family Disputes Rule 4 (1996).

[120]Kan. Sup. Ct. Rule 901(1995); Ill. 16th Cir. Ct. Rule 15.22(i).

[121]Kan. Sup. Ct. Rule 901(1995).

[122]*See, e.g.*, Ill. 17th Cir Ct. Rule 6(a)(1996); Iowa Rules Governing Standards of Practice for Lawyer Mediators in Family Disputes Rule 1 (1996).

[123]Moore, *supra* note 15, at 714.

[124]*See* Moore, *supra* note 15, at 684 (citing American Arbitration Association, Society of Professionals in Dispute Resolution (SPIDR) & American Bar Association, The Standards of Conduct for Mediators I (1996), Standard IV).

[125]Grillo, *supra* note 4, at 1550.

[126]Bryan, *supra* note 28, at 504.

[127]*Id.* at 501.

[128]*See supra* note 15 and accompanying text.

[129]Bryan, *supra* note 28, at 504.

[130]Haynes, *supra* note 27.