Attorneys frequently believe that they need to attend family law mediation sessions with their clients. This article reports the results of a study of the frequency of attendance and the justification offered by attorneys who attend family law mediation sessions. Questionnaires were sent to 500 members of the Family Law Section of the Florida Bar and 150 responses were returned. The results reflect many different reasons that attorneys attend these sessions with their clients.

As with most alternative dispute resolution methods, the use of formal mediation procedures in the family law arena is a relatively new experience for many attorneys. Thanks to many judges who have made mediation mandatory in family law cases, over the last ten years a majority of attorneys have gotten more than cursory exposure to family law mediation.

Today, many states have enacted statutes or court rules that mandate mediation for at least some family law issues, such as questions of custody or visitation. Most states do not restrict the level of involvement of attorneys in family law mediation. There are some states that prohibit or limit the participation of lawyers in custody mediation (McEwen and Rogers, 1989, 1994). Florida law does not specifically prohibit attorneys from attending family law mediation sessions, although some circuits within the state do have local rules that require clients' attorneys to be present during the mediation session. As the results of the survey reported here indicate, family law attorneys in Florida take advantage of the opportunity to attend mediation sessions.

Survey of Family Law Attorneys

In 1994, a survey was sent to 500 members of the Family Law Section of the Florida Bar. The Florida Bar has approximately 48,000 members and the Family Law Section has 3,047 members. A total of 150 attorneys responded to the survey. A detailed listing of the survey responses is provided in the Appendix.

Demographics. Geographically, most of the respondents (43.6 percent)
primarily practiced in South Florida, that is, Eleventh, Fifteenth, Sixteenth, Seventeenth, and Twentieth judicial circuits. The next largest group of respondents (32.3 percent) primarily practiced in Central Florida, that is, the Sixth, Ninth, Tenth, Twelfth, Thirteenth, Eighteenth, and Nineteenth judicial circuits. The smallest group of respondents (22.2 percent) primarily practiced in the Florida Panhandle, that is, the First, Second, Third, Fourth, Fifth, Seventh, Eighth, and Fourteenth judicial circuits.

Almost one-half of the respondents (46.4 percent) had practiced family law for ten years or less. A little less than one-third of the respondents (29.6 percent) had practiced family law for ten to twenty years. Less than one-fifth (16 percent) of the respondents had practiced family law for twenty to thirty years, and only 6.7 percent of the respondents had started practicing family law before 1964.

Most of the respondents (60.4 percent) devoted more than half of their practices to marital and family law cases. Another one-third (33.6 percent) devoted over three-fourths of their practices to family law matters.

Only 6 percent of the respondents indicated that they were Florida Bar board-certified in family law, and only 18.1 percent had taken a Florida Supreme Court-certified forty-hour family law mediation training course. Of the respondents who had completed a certified family law mediation training course, the majority did so between 1990 and 1994 (85.1 percent) and the remainder (14.9 percent) did so between 1983 and 1989.

Why Do Attorneys Use Family Law Mediation? Attorneys perceived the use of family law mediation as providing numerous benefits to all persons involved in a family dispute. For the respondents, the two most important benefits of family law mediation were that it increases the possibility of settlement (94 percent) and that it saves the client money that would otherwise be spent on litigation (79.2 percent). To a lesser extent, the respondents believed that family law mediation also saves time for clients, attorneys, and the court (63.8 percent) and serves the best interests of the children as a means of avoiding litigation (63.1 percent). Many attorneys (62.4 percent) seemed to appreciate family law mediation because they reported that mediation can temper the attitude of unreasonable clients, which promotes settlement.

Compared to the other possible benefits, not as many attorneys (55 percent) perceived family law mediation as giving the client some measure of control. There were even fewer respondents who recognized family law mediation as providing the clients with a feeling of satisfaction about the judicial process (35.6 percent) or about the services of their attorneys (6.7 percent).

How Often Do Attorneys Attend Family Law Mediation Sessions? Attorneys generally preferred attending family law mediation sessions with most of their clients. When asked to estimate the number of recent cases in which they personally attended the mediation sessions, well over half of the respondents (55.7 percent) indicated that they did so in three-fourths to all of their family law cases over the prior twelve-month period. Another 8.7 percent personally attended the mediation sessions in one-half to three-fourths of their cases.
Why Do Attorneys Attend Family Law Mediation Sessions? The respondents provided many different reasons why they personally attended family law mediation sessions. Almost three-fourths (73.8 percent) of the respondents said that they attended in order to “facilitate an agreement between the parties.” This percentage is encouraging and may indicate that a far greater number of attorneys have a positive attitude when attending family law mediation sessions. However, the figure does not reflect how they facilitate an agreement, for example, by spending more time preparing a client prior to a mediation session or by toning down the adversarial language and conduct during the session.

The next largest group of most frequently cited reasons for attending mediation sessions all stem from a belief that the attorney should be present to protect the client. The respondents felt that they should be present to protect their clients from themselves (52.3 percent), from the opposing parties (49 percent), and from the opposing attorneys (46.3 percent). These percentages indicate that attorneys do not believe that their clients can protect themselves and that they are unwilling to shift responsibility for the outcomes of mediation to their clients. Once again, these results do not tell us how often or to what extent each attorney served as a traditional advocate during mediation sessions. But it is noteworthy that over one-third of the respondents (34.9 percent) did admit that they attended mediation sessions in order to control their clients. This reason could be interpreted as protectionist in nature, but it might also be said to reflect the attorneys’ need to take control of the outcomes by controlling the conduct and communications of their clients during the mediation sessions.

Almost one-quarter of the respondents (24.8 percent) attended family law mediation sessions because they had “always done so with other types of civil litigation.” This particular reason confirms the idea that many attorneys do not actually see a difference between family law mediation and other types of civil litigation. Although the goal of the process is the same, the mechanics and tools used to reach a resolution are different because of the nature of the different types of litigation. For example, while the caucus format may be quite appropriate to other forms of civil litigation, many suggest it should be avoided, if possible, in family law mediation because the caucus format rarely allows negotiation between the parties and it “inadvertently or intentionally reinforces the message that direct communication would be inappropriate, unsafe, destructive or dangerous. . . . This form of mediation does not encourage or teach the couple any skills for productive future dialogue. . . . There are no changes made in the couple’s way of dealing with each other” (Schusheim and Seitlin, 1994).

It is evident by some of the responses that there are still many attorneys who do not trust mediators. Approximately 18 percent of the respondents indicated that they attended mediation sessions in order to ensure the mediators’ impartiality. As the education and regulation of mediators becomes more strict, this concern may lessen or even disappear. Many of the respondents’
comments stressed the necessity of having a well-trained and experienced mediator in order to produce a positive outcome.

There were even a few attorneys (14.8 percent) who attended mediation sessions in order to learn more about the mediators' abilities. Presumably, once these attorneys were satisfied that the mediators possessed sufficient training, experience, and skills, then the attorneys felt more comfortable passing the responsibility and control of the mediation sessions to their clients.

Only 8.1 percent of the respondents indicated that they attended mediation sessions in order to learn more about the process of mediation. Given that less than one-fourth of the respondents had completed a certified forty-hour family law mediation training course and that many of the respondents graduated from law school before law schools began to provide courses in mediation or other forms of alternative dispute resolution, this survey response percentage may indicate that attorneys are far too quick to think they "know it all" about mediation without actual training.

Not all of the attorneys in the sample were prompted to attend mediation sessions by positive motives. Although a small percentage of the respondents, 13.4 percent indicated that they attended mediation sessions in order to save time that is "wasted on standard discovery methods," and another 6.7 percent indicated that they attended to get information that is outside the scope of discovery. These respondents operated from two different premises. Some of them may have truly wished to resolve matters as quickly as possible in the interests of their clients and the court. Discovery can be a lengthy process. However, many of the comments indicate that mediation should not be attempted until after initial discovery is completed. Some of these attorneys may only have been "hired guns" who were focused on trials and used the mediation process to obtain information that they would not have been able to obtain by other means. One might consider how many of these attorneys enlisted their clients to participate in these rules and whether or not the clients were actually made aware of their attorneys' intent. Many of the respondents' comments reflected a clear frustration that mediation was a waste of time when faced with opposing attorneys who abused the mediation process in this fashion.

**Why Do Attorneys Avoid Mediation?** Many of the respondents did not try to avoid mediation and saw few justifications for doing so. Likewise, most of the respondents felt that the benefits to be gained from family law mediation far outweighed any potential disadvantages. One-third of the respondents could give no reason for attempting to avoid mediation, and additional comments on the question repeated that mediation should always be attempted.

In other comments on this survey question, a small percentage of the respondents (8 percent) justified not attempting mediation because they perceived it as too expensive, either because the issues involved did not justify the cost or because the parties simply could not afford the expense of hiring a mediator. Another group of respondents (10.7 percent) believed the legal issues in some of their cases were too complex for a nonattorney mediator and
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used this reason as an excuse not to attempt mediation. However, only 2 percent of the respondents avoided mediation because they felt that there were not enough attorney mediators available to handle their cases.

The second most cited "excuse" used by the respondents to avoid mediation was that they had cases involving allegations of spousal abuse (14.8 percent). These responses are in accord with an extensive literature on the topic of domestic violence that holds that cases involving allegations of spousal abuse are inappropriate for mediation. There is the counterargument, however, that this concern is based on a myth and that it can be addressed by providing specialized training to mediators as well as by developing more sophisticated screening tools for identifying cases that are inappropriate for mediation (Pearson, 1993).

A large number of the respondent attorneys believed that some of their family law cases simply could not be resolved by any means other than a trial. Almost one-half of the respondents (48.3 percent) rationalized not using mediation in at least one case over the prior twelve months because they believed that there was "no possibility of settlement outside a courtroom." This was the most frequently cited reason for avoiding mediation over the twelve-month period in question. If this reason reflects preconceived notions about cases, it is important to consider not only the attitudes of the attorneys but also those of their clients. Combative clients may indeed want their attorneys to wield the sword, and any attempts by the attorneys to discuss compromise may be perceived by the clients as weakness or reluctance to do battle on their behalf. Moreover, just as some clients may feel betrayed, some attorneys may feel like saboteurs of their own livelihood by suggesting the use of mediation. Everyone likes to feel needed and wants to believe that their jobs are necessary. Attorneys are no exception. Many family law attorneys may, wittingly or unwittingly, steer some of their cases away from mediation so that, by taking cases to trial, they can justify their existence. If attorneys do not objectively present their clients with the option of mediation, how can they presume that it will not work? A few attorneys in the present sample even commented that mediation had proved them wrong on more than one occasion by facilitating an agreement between parties who were originally very combative.

Conclusion

Attorneys can manufacture many excuses to justify why they believe mediation should not be used, notwithstanding their lack of knowledge and experience with the process. As my survey results suggest, however, after some experience with family law mediation, attorneys do recognize that the benefits of mediation far outweigh any disadvantages presented by the process.

The legal profession is beginning to respond positively to mediation. No one can ignore the studies indicating that the public perceives mediation as a primary solution to their dissatisfaction with the judicial system and as a
method of choice when they are faced with litigation (DeBenedictis, 1994; Wirthlin Group, 1992). The legal profession exists, in large part, to serve the public; therefore, mediation should be embraced.

Not all attorneys embrace mediation out of a sense of serving the public or their clients. Notwithstanding the efforts to educate attorneys on the differences between family law mediation and other civil law mediation, attorneys have an extremely difficult time understanding their role as advocates in the family law mediation process. The role of an advocate in family law mediation is different from the role of an advocate in litigation and other forms of mediation. Even within family law mediation, some issues are awash in legal technicalities whereas others are relational. Each requires a different level of involvement by the attorney.

The advocate in litigation and in various forms of mediation must focus primarily on legal and settlement issues. The advocate in family law mediation must focus primarily on the client's need for resolution, conciliation, and continued communication with the other party, especially when children are involved in the outcome (Schusheim and Seitlin, 1994). Family law mediation is not purely a means to avoid trial, even though it can serve that end. Those who truly understand the mediation process understand that it provides many opportunities: an opportunity for the parties to resolve issues that the judicial system is not equipped to handle, an opportunity for the advocate to listen and help resolve nonlegal issues, and an opportunity for the parties to take control of their own future and to create the rules by which they can communicate.

If attorneys attend mediation sessions and act as traditional advocates, they can easily control the process by limiting their clients' communications. By restricting the participation of the parties in the mediation process, the responsibility for negotiating is shifted to the attorneys (Schusheim and Seitlin, 1994). If the process is abused by the attorneys in this fashion, it then becomes an adversarial proceeding, not mediation (Feliciano, 1994). Most clients agree to pursue mediation as a means to avoid a trial. A mediation that is controlled by advocates and assists the parties in avoiding responsibility for their own problems may indeed avoid a trial, but only temporarily.

If family law attorneys fully reflected on their cases, they would see some clients who simply want a hired gun and prefer the attorney to control all communications with the "opponent," even in mediation. However, family law mediation does not involve opponents; it involves parties to a relationship that is going through a major change. When these clients are faced with postdivorce events such as the birth of their first grandchild, their child's wedding, or their child's college graduation, their advocates will not be there to speak for them or control the situation on their behalves. These parties are prevented from drawing on the experience and sense of responsibility gained in the family mediation process. If handled by a qualified mediator, the family mediation process can help parties achieve the confidence that they are able to work toward compromise and reach agreements even after their marital relationship has ended.
Appendix: Percentage Distribution of Responses to Survey of Family Law Attorneys

1. In which judicial circuit do you primarily practice?
   - First: 3%
   - Second: 3
   - Third: 0
   - Fourth: 7
   - Fifth: 2
   - Sixth: 8
   - Seventh: 4
   - Eighth: 2
   - Ninth: 5
   - Tenth: 2
   - Eleventh: 18
   - Twelfth: 3
   - Thirteenth: 6
   - Fourteenth: 0
   - Fifteenth: 5
   - Sixteenth: 1
   - Seventeenth: 16
   - Eighteenth: 4
   - Nineteenth: 3
   - Twentieth: 3
   - No response/Not applicable: 1

2. Are you board certified in family law?
   - No: 94
   - Yes: 6

3. In which year did you begin practicing marital and family law?
   - 1948–1969: 11
   - 1970–1979: 38
   - 1990–1993: 17

4. What is the approximate percentage of your practice over the last twelve months that was devoted to marital and family law cases?
   - 0–25: 14
   - 25–50: 25
   - 50–75: 27
   - 75–100: 34

5a. Have you taken a Florida Supreme Court-certified forty-hour family law mediation training course?
   - No: 81
   - Yes: 18

5b. If yes, which year?
   - 1983–1988: 3
   - 1990–1994: 15

6. Which of the following reasons have you used during the last twelve months to justify not attempting family law mediation?
   - "I represent the wife": 1
   - "Not enough certified public accountant mediators available": 1
   - "Not enough mental health mediators available": 1
   - "Not enough attorney mediators available": 2
   - "Financial matters too complex for non-certified public accountant mediator": 3
   - "Legal issues too complex for nonattorney mediator": 11
"Spousal abuse is alleged": 15
"No possibility of settlement outside a courtroom": 48

7. What is the approximate percentage of your marital and family law cases over the last twelve months in which you personally attended the mediation session(s)?
   Less than 5: 13
   5–25: 13
   25–50: 5
   50–75: 9
   75–100: 56

8. If you have ever personally attended any family law mediation sessions, please indicate why you did so.
   "To facilitate an agreement between the parties": 74
   "To protect my own client from himself or herself": 52
   "To protect my own client from opposing party": 49
   "To protect my own client from opposing attorney": 46
   "To control my own client": 35
   "I have always done so with other civil litigation": 25
   "Other": 18
   "To ensure mediator's impartiality": 18
   "To learn more about the mediator's abilities": 15
   "To save time wasted on standard discovery methods": 13
   "To learn more about the mediation process": 8
   "To get information that is outside the scope of discovery": 7

9. Of the following possible benefits of family law mediation, please check the five that you feel are most important.
   "Mediation increases settlement possibilities": 94
   "Saves the client money": 79
   "Saves time for the clients, attorneys, and court": 64
   "In best interests of minor children not to litigate": 63
   "Tempers attitudes of unreasonable clients": 62
   "Gives the client some measure of control": 55
   "Clients are more satisfied with judicial process": 36
   "Good discovery tool": 8
   "Clients are more satisfied with their attorneys": 7
   "Other": 4
   "Useful tactic to gain time (delay final hearing)": 1

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Susan W. Harrell is assistant professor in the Department of Government and director of the Legal Administration Program at the University of West Florida, Pensacola. She is also a Florida Supreme Court-certified family law mediator.