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# MANDATORY CUSTODY MEDIATION: A THREAT TO CONFIDENTIALITY

## I. INTRODUCTION

California enacted one of the nation's first laws requiring mediation of any child custody disputes in a dissolution proceeding.<sup>1</sup> The California Mandatory Mediation Law is designed to alleviate some of the destructive effects of adversarial divorce proceedings<sup>2</sup> by encouraging disputants to work together. Mediation is an alternative dispute resolution process in which the goal is to reach an agreement that is satisfactory to the parties and, in the case of custody mediation, that is in the best interest of the child.<sup>3</sup>

Mediation has long been used as a voluntary process in which disputants cooperate with a neutral third party facilitator to resolve their differences. Mediation in child custody disputes is no longer voluntary in California, but is *required by law* before a court will hear a dissolution case. It is hoped that the benefits attributed to voluntary mediation will also accrue to mandatory mediation.<sup>4</sup>

Whether mediation is voluntary or mandatory, several components contribute to its effectiveness. Trust and openness between the parties and the mediator are essential. Assurance from the mediator that the proceedings are confidential will encourage the disputants' honest disclosure and cooperation. Confidentiality is critical for suc-

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1. In 1981, California implemented the Mandatory Mediation Law. CAL. CIV. CODE § 4607 (Deering 1983). "In any proceeding where there is at issue the custody of or visitation with a minor child . . . the matter shall be set for mediation. . . ." *Id.*

2. The psychological effects of divorce are especially detrimental to the children involved. Children of divorced parents often experience shock, intense fear, worry, grieving, and difficulty in understanding the reasons for the breakup of their family. Such effects may continue to harm the child for years. See generally Wallerstein, *The Child in the Divorcing Family*, JUDGES' J., Winter 1980, at 17; J. WALLERSTEIN & J. KELLY, *SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE* (1982) (unpublished report).

3. See *infra* note 17.

4. One recently completed study of the effectiveness of mandatory mediation has found the process to be successful. The author of the study is a marriage and family counselor who privately mediated divorce cases prior to mandatory custody mediation and who continues to do so as a court-appointed mediator in Santa Cruz County, California. Saposnek, *How Has Mandatory Mediation Fared?: Research Findings of the First Year's Follow-Up*, CONC. CTS. REV., Dec. 1984, at 7.

cessful mediation; without it, parties may be hesitant to reveal too much, for fear of having the information used against them in a later proceeding.<sup>5</sup>

California's custody mediation law incorporates many of the elements of the traditional, voluntary process. However, the statute undermines the critical role of confidentiality, and thus threatens the success of custody mediation.

As the Mandatory Mediation Law now exists, the court can require a mediator to make a recommendation as to custody or visitation if the parties are unable to reach an agreement. At a subsequent trial, the mediator may claim an official information privilege and refuse to reveal the basis of that recommendation during testimony or cross-examination.

This comment addresses the conflict surrounding the confidentiality issue of the Mandatory Mediation Law. Section II examines the development of family and divorce law. Section III examines the ways in which California has assimilated the mediation model to resolve custody disputes in dissolution proceedings. California's Mandatory Mediation Law is then analyzed in conjunction with related statutes and case precedent, to demonstrate the conflict between the issues of confidentiality, privilege and the local court's option to require the mediator to make recommendations. Finally, this comment suggests that the California Mandatory Mediation Law can be amended to avoid this conflict by insulating the mediation function from the evaluation and recommendation function. Confidentiality will thus be preserved as will the integrity of custody mediation.

## II. BACKGROUND

### A. *Mediation: An Alternative Dispute Resolution Process*

Alternative dispute resolution processes such as mediation have been implemented as dissatisfaction with the traditional American adversarial system has increased. States have enacted laws requiring arbitration<sup>6</sup> or mediation<sup>7</sup> before a dispute may enter the court sys-

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5. Subject to local court rules, mediators may be asked or required to make a recommendation to the court if no resolution is reached in the mediation. CAL. CIV. CODE § 4607(e) (Deering 1983). See also text accompanying notes 36-37.

6. See, e.g., CAL. CIV. PROC. CODE § 1141.10-.31 (West 1982); CAL. R. CT. 1600(c) (West 1982) (requiring judicial arbitration of civil cases involving less than \$15,000).

7. Massachusetts and Connecticut also have laws requiring mediation of divorce issues. See generally Brown, *Divorce and Family Mediation: History, Review, Future Directions*, CONC. CTS. REV., Dec. 1982, at 1, 18.

tem. Various hybrid dispute resolution processes<sup>8</sup> have arisen in attempts to reduce overcrowded court dockets and to involve community members in resolving local disputes. The goal in each of the alternative processes is resolution of the dispute, not the adversarial determination of a winner and a loser.

The alternative of mediation has long been used in other societies,<sup>9</sup> in which cultural influences stress the importance of harmony in ongoing relationships. Mediation also has a tradition in this country<sup>10</sup> and is now being adapted for use in a legal system which had moved away from such notions of dispute resolution.<sup>11</sup> The current use of mediation is an attempt to implement principles of informal dispute resolution in a legal system that has tended to stress an adversarial rather than a cooperative approach.<sup>12</sup>

In the mediation process a neutral third party acts as a non-judgmental facilitator to help the disputants reach an agreement which is satisfactory to all involved.<sup>13</sup> Mediation requires cooperation among the parties to "re-orient" them toward each other for the sake of maintaining their ongoing relationships.<sup>14</sup> Mediation is read-

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8. Dispute resolution centers such as the San Francisco Community Boards have been established in several cities to provide mediation or arbitration of minor neighborhood disputes. Public school mediation programs have been established in Arizona and New York, in which students and staff are trained in conflict resolution techniques. *See generally* Brown, *supra* note 7; AMERICAN BAR ASSOCIATION, 8 DISPUTE RESOLUTION: QUARTERLY INFORMATION UPDATE (Spring 1982).

9. Mediation has been used in different societies for centuries. In both ancient and modern China, mediation has been the principal method of conflict resolution, based on the cultural belief in the importance of harmony in relationships. In the Soviet Union, comrades' courts use mediation to resolve civil and domestic disputes. *See generally* Felstiner, *Influences of Social Organization on Dispute Processing*, 9 LAW & SOC. REV. 63, 78 (1974).

10. In United States history, the extended family and local churches often provided a neutral third party to mediate community and family disputes. Early Quakers and Chinese immigrants used respected elders to help disputants resolve conflicts. As American culture has become more mobile, these traditional support systems have weakened, and resort to court intervention in such disputes has increased. As a result, the court system is burdened with many disputes which might be more efficiently settled outside the courts. *See generally* Brown, *supra* note 7, at 34.

11. One commentator has observed that social organization influences methods of dispute resolution. Mediation is more feasible in smaller, less complex societies; adjudication is dominant in large societies where there are fewer shared cultural experiences. Felstiner, *supra* note 9.

12. Some argue that such "informal justice" is simply another form of "coercive control" by the state, a way of keeping the poor out of the court system. Those who cannot afford the adversarial process are diverted into alternative systems which do not provide the necessary procedural protections. *See generally* R. ABEL, *THE POLITICS OF INFORMAL JUSTICE* (1982).

13. Brown, *supra* note 7, at 9.

14. Fuller, *Mediation: Its Forms and Functions*, 44 S. CAL. L. REV. 305 (1971). Parties are encouraged by the mediator to work together to settle their disagreement, rather than to seek judicial resolution of the conflict. The "re-orienting" of parents to each other, for the

ily applicable to custody disputes because of the nature of the continuing relationships between each parent and the child or children involved.

### B. *Mediation in Family Law*

In family law cases in which ongoing relationships are involved, the "fight to win" nature of the adversarial legal system is often too costly, both financially and psychologically, too time-consuming, and inappropriate. The non-adversarial nature of mediation is more conducive to a satisfactory resolution of custody disputes than is a courtroom fight, and is less psychologically destructive to the continuing relationship of the child with each parent.

The practice of family law has changed as awareness of the destructive effects of divorce have been recognized. In 1970, the California Family Law Act<sup>16</sup> introduced the idea of no-fault divorce. Under that law, divorcing couples no longer have to prove the "unfitness" of a spouse; thus the fighting nature of the dissolution process has been somewhat diminished. As no-fault divorce has proved successful, the idea of "no-fault custody" has developed.<sup>18</sup> Since 1970, the standard for child custody has shifted from a focus on parental fault to one of "the best interests of the child."<sup>17</sup>

As changes in the law occurred, attorneys, family counselors and other practitioners began to use private, voluntary mediation to resolve divorce and custody disputes. In addition, some family law judges began to recommend mediation with court conciliation counselors before hearing dissolution cases, in recognition of the benefits

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sake of continuing relations with their child, is a major goal of custody mediation. *Id.* at 308.

15. CAL. CIV. CODE § 4000 (Deering 1983).

16. Milne, *Custody of Children in a Divorce Process: A Family Self-Determination Model*, CONC. CTS. REV., Sept. 1978, at 1, 2. "[T]he judge is making a decision based upon all the negative information that each parent can muster against each other . . . [and] based upon who accumulates the least amount of damaging evidence. Such a 'lesser of two evils' doctrine is surely a poor method for determining placement of children." *Id.*

17. CAL. CIV. CODE § 4000 (Deering 1983). The Family Law Act deleted the preference for custody by the mother and required custody to be awarded to "either parent according to the best interests of the child." *Id.*

Factors contributing to the "best interests of the child" include: health, safety, and welfare of the child, history of abuse, and the nature and amount of contact with both parents. *See* CAL. CIV. CODE § 4608 (Deering Supp. 1985) (factors for court determination of the best interests of the child).

*See also* CAL. CIV. CODE § 4607 (Deering 1983). The purpose of the Mandatory Mediation Law is to "reduce acrimony . . . and to develop an agreement assuring the child or children's close and continuing contact with both parents." *Id.* It is such continued relations with both parents that is generally considered to be in the child's best interest.

of non-adversarial resolution of divorce issues.<sup>18</sup>

### III. THE CALIFORNIA LAW

#### A. *The Purpose of the Law*

The Mandatory Mediation Law<sup>19</sup> requires that all custody and visitation disputes be mediated before a dissolution case may enter the court. The law proposes to reduce acrimony between divorcing spouses and to develop an agreement as to the child's continuing contact with both parents.<sup>20</sup> The underlying philosophy of custody mediation is that it is more appropriate to give the family control in resolving issues that will continue to affect them, than to risk an arbitrary decision by a judge who is unfamiliar with the various interests at stake.<sup>21</sup>

The basic premise of divorce mediation is to provide a "framework within which divorcing couples can themselves determine their post-dissolution rights and responsibilities."<sup>22</sup> Such a system of "private ordering"<sup>23</sup> allows families to settle their disputes among themselves.

#### B. *The Mediation Process*

Mediation helps families to resolve important issues according to their own needs and interests. The mediator's role is that of an advocate for the child, not a representative of either parent.<sup>24</sup> The

18. Before the California Mandatory Mediation Law was enacted, a family law judge in San Francisco stated his dissatisfaction with the adversarial process:

Child custody is a legal problem only because the Legislature, by statute, requires the judge to decide it. In reality, it is not a legal problem. It is a human problem, an interpersonal problem, a psychological problem, a child development problem. The only real legal issue [as to custody matters] . . . is whether or not the court has jurisdiction over the parties and the child.

King, *Child Custody—A Legal Problem?*, 54 CAL. ST. BAR J. 156, 157 (1979).

19. CAL. CIV. CODE § 4607 (Deering 1983 & Supp. 1986).

20. *Id.* at § 4607(a).

21. Some mediators feel it is appropriate to include the entire family—including children who are old enough to understand—in the proceedings. Section 4607(d) of the California Civil Code allows the mediator to "interview the child or children when the mediator deems such interview appropriate or necessary." *Id.* at § 4607(d). See SAPOSNEK, *MEDIATING CHILD CUSTODY DISPUTES* (1983).

22. Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case for Divorce*, 88 YALE L.J. 950, 950 (1979).

23. *Id.* at 950 (using a term by H. Hart and A. Sacks).

24. See generally SAPOSNEK, *MEDIATING CHILD CUSTODY DISPUTES: A SYSTEMATIC GUIDE FOR FAMILY THERAPISTS, COURT COUNSELORS, ATTORNEYS AND JUDGES* (1983). Saposnek, a court-appointed mediator, found that by emphasizing his role as an advocate for

process begins with information-gathering by the mediator in interviews with the disputants. The process is described to the parties, emphasizing the goal of reaching a custody agreement which is in the best interest of the child.

The mediation phase begins as rapport and trust are built between the mediator and the parties. The neutral facilitator helps the parents to develop options for co-parenting, stressing both cooperation and a focus on what is best for the child. In the final phase, the mediator offers guidance for reaching an agreement which is satisfactory to both parents.

Parties may have attorneys present during the mediation sessions as long as all agree that the goal is to encourage the child's continuing contact with both parents, and that the mediation is not an adversarial proceeding. When a custody agreement is reached, parties may consult their attorneys before signing and submitting it to the court for final approval. If the court or either party is dissatisfied with the agreement, the court may order a return to mediation before the agreement becomes final and binding. The case will go before a judge in an adversarial proceeding only if there is a failure to reach an agreement.

### C. *The Statutory Provisions*

The Mandatory Mediation Law requires mediation of any custody or visitation issues in a dissolution proceeding.<sup>25</sup> The superior court in each county is required to appoint mediators for such cases.<sup>26</sup> The mediators may be professionals from a family conciliation court, probation department, or mental health services agency.<sup>27</sup> Minimum qualifications for court-appointed mediators are specified in the Code of Civil Procedure, which defines the education and experience required for "counselors of conciliation."<sup>28</sup>

The mediator (or counselor of conciliation) must have a master's degree in psychology, social work or another behavioral science.<sup>29</sup> These professionals must also have experience in counseling

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the *child*, most parents are cooperative in seeking an agreement that is in the child's best interest. *Id.*

25. CAL. CIV. CODE § 4607(a) (Deering 1983 & Supp. 1986).

26. *Id.* at § 4607(b).

27. *Id.*

28. *Id.* "The mediator shall meet the minimum qualifications required of a counselor of conciliation as provided in Section 1745 of the [California] Code of Civil Procedure." *Id.*

29. CAL. CIV. PROC. CODE § 1745 (Deering 1983 & Supp. 1986). There is a debate among mediation practitioners as to who should mediate, and what the appropriate qualifications should be. No licensing or certification requirements now exist for mediators. Profession-

or psychotherapy, and knowledge of both the California court system and procedures of family law.<sup>30</sup> They are also required to have knowledge of adult and child psychology and of the effects of divorce on children.<sup>31</sup>

Mediation proceedings are held in private and are required to be confidential.<sup>32</sup> Further, any information received by the mediator in the proceeding is deemed "official information" and is therefore privileged under California Evidence Code section 1040.<sup>33</sup>

The statute gives the mediator discretion and authority to allow counsel to be present in or excluded from participation in the mediation proceedings.<sup>34</sup> The mediator's duty is to assess the needs and best interests of the child, and to assist the parents in reaching an appropriate custody agreement.<sup>35</sup>

Local courts have the option of requiring mediators to make a custody or visitation recommendation to the court.<sup>36</sup> If the parties fail to reach a custody agreement, the mediator may make a recommendation for an investigation or restraining order until resolution is reached.<sup>37</sup> The mediation agreement must be reported to the court and to counsel for the parties; changes may be required before final approval from the court.<sup>38</sup>

The interaction between the provisions requiring confidentiality with those allowing a mediator to claim a privilege or make recommendations in later adversarial proceedings could inhibit successful custody mediation.

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als in law and the behavioral sciences differ in their opinions as to the skills, education and training necessary for effective mediation.

The statutory requirements for mediators are considered inadequate by some, who suggest, for example, that more legal knowledge should be required. According to section 1745(a)(1) of the California Code of Civil Procedure, a law degree alone is insufficient qualification for a mediator. CAL. CIV. PROC. CODE § 1745(a)(1) (Deering 1983 & Supp. 1986). However, section 1745(b) allows local courts to substitute additional experience for education, or vice versa. *Id.* at § 1745(b) (these statutory qualifications apply to counselors and mediators appointed by the local conciliation courts).

30. *Id.* at § 1745(a)(2),(3).

31. *Id.* at § 1745(a)(5),(6).

32. CAL. CIV. CODE § 4607(c) (Deering 1983 & Supp. 1986).

33. "[O]fficial information means information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made." CAL. EVID. CODE § 1040(a) (Deering Supp. 1985) See also text accompanying note 46, *infra*.

34. CAL. CIV. CODE § 4607(d) (Deering 1983 & Supp. 1986).

35. *Id.*

36. *Id.* at § 4607(e). "The mediator may, consistent with local rules, render a recommendation to the court as to the custody or visitation of the child or children." *Id.*

37. *Id.*

38. *Id.*



## IV. THE CONFLICT WITHIN THE LAW

A. *Defeat of the Purpose of the Mediation Law*

Mandatory custody mediation has been established to help families resolve their custody disputes in a non-adversarial environment which is less destructive to the relationships involved. In interpreting the Legislature's intent in enacting the Mandatory Mediation Law, the First District Court of Appeal has stated that it is the public policy of this state "to assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage."<sup>39</sup> The court in *In re Marriage of Mentry* restated the legislative intent of custody mediation by recognizing that the adversary process is destructive to the parent-child relationship and that a court decision does not always serve the best interests of those involved.<sup>40</sup>

The court noted that the Legislature set up a framework for mandatory mediation of contested custody issues, a system of "private ordering" and family decision-making. The court found that the mediation law "deserves strong judicial deference"<sup>41</sup> and support in order to fulfill the underlying legislative purpose.

Yet the laudatory legislative intent cannot be effectively met by the Mandatory Mediation Law as it now exists. Statutory provisions for confidentiality, mediator privilege, and local court options as to recommendations, conflict and act in such a way as to limit the effectiveness of mediation. The apparent guarantees of confidentiality and privileged "official information" in California Civil Code section 4607(c)<sup>42</sup> are limited by the option of section 4607(e) which allows the courts to require recommendations from the mediators. The purpose of mediation is defeated by this conflict among the provisions of the law.

B. *Confidentiality, Privilege and the Local Option*

California Civil Code section 4607(c) provides that mediation

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39. *In re Marriage of Mentry*, 142 Cal. App. 260, 265, 190 Cal. Rptr. 843, 846 (1983).

40. *Id.*

41. *Id.* at 270, 190 Cal. Rptr. at 849.

42. CAL. CIV. CODE § 4607(c) (Deering 1983 & Supp. 1986). "Mediation proceedings shall be held in private and shall be confidential, and all communications, verbal or written, from the parties to the mediator made in a proceeding pursuant to this section shall be deemed to be official information within the meaning of Section 1040 of the Evidence Code." *Id.* See *supra* note 33.

shall be private and confidential.<sup>43</sup> To be fully effective, parties must have assurance that information revealed during mediation will not be used against them at a later proceeding. Honesty, trust, and cooperation are difficult to achieve if the parties fear that disclosures made during mediation may later form the basis for a recommendation to the court. For example, under section 4607(e) the mediator may make a recommendation to the court based on information acquired in mediation.<sup>44</sup> If, upon failure of the process, the court requires a mediator to make a recommendation for custody or visitation, the mediator may then claim the section 4607(c)<sup>45</sup> "official information" privilege and refuse to disclose the reasons for the recommendation. The privilege this section confers undermines the due process protection of cross-examination of the mediator-witness. Not only is the confidentiality of the mediation proceeding at risk by allowing mediators to make recommendations, but parties may be further disadvantaged by an inability to question or to rebut the mediator's use of "privileged" mediation information.

The California Evidence Code defines privileged "official information" as "information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made."<sup>46</sup> The information of a public entity, such as a conciliation court, is granted the same evidentiary privilege accorded official information.<sup>47</sup> The entity or an authorized person may claim the privilege and refuse to disclose official information when disclosure is forbidden by statute or is against the public interest.<sup>48</sup>

No statutory provision forbids disclosure of information obtained in mediation or information which formed the basis of the mediator's recommendation. Thus, a mediator's claim of an official information privilege must be based on a belief that it is against the public interest<sup>49</sup> to reveal information gained through the mediation process.

The trial judge in a dissolution proceeding must therefore decide whether the public interest in preserving the confidentiality of

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43. *Id.*

44. CAL. CIV. CODE § 4607(e) (Deering 1983 & Supp. 1986). *See supra* note 36.

45. *See supra* notes 33 and 42.

46. CAL. EVID. CODE § 1040(a) (Deering 1983 & Supp. 1985).

47. CAL. EVID. CODE § 1040(b) (Deering 1983 & Supp. 1985).

48. *Id.* "Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information." *Id.* at § 1040(b)(2).

49. *Id.*

the mediation process outweighs the need for a recommendation from the mediator.<sup>50</sup> In the case of mediation, the preservation of confidentiality is crucial to the effective resolution of custody disputes. If a mediator can use information gathered during mediation to make a recommendation to the court, disputants may be less willing to participate openly. The effectiveness of the process is thus limited. The role of the mediator is unclear regarding the use of such a privilege in light of the statutory provision for privacy and confidentiality.

Lack of a consistent statewide policy as to the proper role of the mediator increases the conflict between the provisions of the statute. In order to assist family court judges with child custody decisions, some counties allow mediators to recommend a settlement.<sup>51</sup> Other counties prohibit such recommendations in order to encourage full disclosure and participation of the disputants in the process.<sup>52</sup> The confidence of the parties that a mediator gains as a neutral facilitator during mediation is betrayed when he is later required to act as a judgmental evaluator. This dual role of neutral mediator and expert evaluator/witness, who may claim a privilege and refuse to explain reasons for a recommendation, hinders the success of mediation and complicates the court proceeding that follows if mediation fails.

### C. Case Precedent

Only one California case, *McLaughlin v. Superior Court*,<sup>53</sup> has addressed the conflict between requiring a mediator's recommendation and the effect on the mediation process of the mediator's claim of privilege. Pursuant to the local court option of California Civil Code section 4607(e),<sup>54</sup> the San Mateo County Superior Court required mediators to make custody recommendations to the court if

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50. CAL. EVID. CODE § 1040(b) (Deering 1983 & Supp. 1985). See *supra* note 48. See also 1983 CAL. FAM. L. REP. 2195, 2197 (1983): The judge must decide if confidentiality is more important than the need for disclosure. Without the official information privilege, mediation will be impaired by a lack of confidentiality. However, "if confidentiality is the primary goal, the best way to achieve it is not to permit [mediator recommendation or testimony] in the first place." *Id.*

51. See, e.g., RIVERSIDE COUNTY COURT POLICY MEMO (Family Law), July 15, 1981: "10 . . . The mediator will make a recommendation when appropriate or when a request is made by one or of both sides." *Id.*

52. See, e.g., SANTA CLARA COUNTY FAMILY COURT GUIDELINES, Effective May 23, 1983: Rule 17.4 (A)(10)(b)(3): "[T]he mediator will not be called upon to testify or to make recommendations to the court." *Id.*

53. 140 Cal. App. 3d 473, 189 Cal. Rptr. 479 (1983).

54. See *supra* note 36.

the parties failed to reach an agreement during mediation. The local court rule also prohibited cross-examination of the mediator regarding his or her reasons for the recommendation.

In *McLaughlin*, the husband moved for a protective order to prevent the mediator from making a recommendation if mediation failed. If the local court rule were followed, the mediator/witness could not be cross-examined after making a recommendation. The husband's request was an attempt to preserve his right to cross-examine the mediator as to his reasons for the recommendation. The husband argued that the rule preventing cross-examination unconstitutionally denied him due process of law. The trial court denied the motion, thus upholding the local court rule.<sup>55</sup>

The court of appeal overruled this decision and ordered the trial court to reject a recommendation from the mediator unless either the court has first made a protective order preserving the right to cross-examine, or each party has waived this right. The appellate court thus held that local court rules as to recommendations by mediators are valid as long as the parties are guaranteed the due process right to cross-examine the mediator.<sup>56</sup>

The result in *McLaughlin* does little to lessen the conflict between confidentiality, privilege and mediator recommendations, although it does attempt to protect the due process right of cross-examination. *McLaughlin* fails to address the issue of a mediator's right, upon cross-examination or redirect examination, to claim the official information privilege after a recommendation has been made. It is unclear to what extent the mediator may refuse to answer specific questions about his or her reasons for the recommendation.<sup>57</sup> Confidentiality of the mediation proceeding may be partly preserved by the *McLaughlin* decision, but the due process protection of cross-examination can still be defeated by a mediator's claim of the official information privilege. Parties may still be disadvantaged by an inability to question or to rebut the mediator's recommendation or testimony upon a claim of the privilege. Neither the statute nor court interpretations of the privilege have resolved this conflict.

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55. *McLaughlin*, 140 Cal. App. at 476, 189 Cal. Rptr. at 493.

56. *Id.* at 483, 189 Cal. Rptr. at 489. The appellate court cited *Fewel v. Fewel*, 23 Cal. 2d 431, 144 P.2d 592 (1943), in which a custody order was reversed because it had been based on the recommendation of a court investigator who was not available for cross-examination as to the reasons for the recommendation.

57. The scope of the official information privilege in a mediation case has not been addressed in a reported California case.

## V. A PROPOSED SOLUTION

The California Mandatory Mediation Law as it now exists contains an unnecessary and potentially harmful conflict in its provisions. The interaction of the statutory provisions for privacy and confidentiality (section 4607(c)),<sup>58</sup> for the official information privilege (also in subsection (c)), and for a local court option regarding mediator recommendations (subsection (e)),<sup>59</sup> limit the effectiveness of custody mediation. The interests of divorcing families and of the state are not met under circumstances that limit the confidentiality and due process protections.

The conflict between confidentiality, privilege, and the local option as to mediator recommendations can be eliminated. Rather than allowing each county's superior court to set policy as to mediator recommendations (section 4607(e)), the Legislature should adopt a rule which would be more consistent with the legislative intent of the Mandatory Mediation Law.<sup>60</sup>

The state policy regarding the use of mediator recommendations must be changed in order to meet the legislative goals of reducing acrimony and serving the child's best interest.<sup>61</sup> Because confidentiality is such an essential aspect of mediation, no mediator recommendations should be allowed. Adoption of this policy would prevent the conflict between the mediator's claim of privilege and the due process implications of the mediator's subsequent refusal to respond to cross-examination.

The language of the Santa Clara County court rule as to mediator recommendations provides a guide for statutory change: "[T]he mediator will not be called upon to testify or to make recommendations to the court."<sup>62</sup> Such a change in the statute would prevent the conflict between confidentiality, privilege and recommendations.

The Los Angeles County Superior Court rule presents an alternative for a statewide policy regarding mediator recommendations. When mediation has failed to result in an agreement, a Los Angeles court does not allow any mediator report or recommendation, and "proceeds to hear and determine the contested issue or issues without referring to the unsuccessful mediation process in any way."<sup>63</sup> The

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58. See *supra* note 42.

59. See *supra* note 36.

60. See *supra* note 19.

61. See *supra* note 17.

62. See *supra* note 52.

63. Amicus brief submitted to the *McLaughlin* court. See *McLaughlin*, 140 Cal. App. 3d at 480 n.7, 189 Cal. Rptr. at 484 n.7.

confidentiality of the mediation process is preserved by disallowing a recommendation from the mediator, thus enhancing his or her role as a neutral facilitator.

Another method of preserving the confidentiality of mediation consists of referring any custody dispute to a juvenile department for a report and recommendation. For example, in Santa Clara County, if custody is still in dispute after mediation, the court has discretion to refer the case to the investigative unit of the Juvenile Probation Department.<sup>64</sup> The mediator thus maintains his or her neutral role and can preserve the privacy and confidentiality of mediation by avoiding the report and recommendation function.

In order to preserve confidentiality in mediation proceedings, the mediator's function as a neutral facilitator should be insulated from the role of judgmental evaluator.<sup>65</sup> Mediators should not be requested to make recommendations to the court upon failure of custody mediation. Mediation is more effective when parties can rely on confidentiality because they will disclose information without fear of later adverse use. This assurance of confidentiality eliminates the problems associated with the use of the official information privilege. All mediation information would thus be protected as private and confidential.

## VI. CONCLUSION

The conflict between California Civil Code sections 4607(c) and 4607(e) will be eliminated if the Legislature amends the existing Mandatory Mediation Law to preserve the confidentiality of custody mediation. The privacy, confidentiality and privilege provisions would no longer be threatened by a local court option to require mediators to submit recommendations to the court. A statewide rule against mediator recommendations will also eliminate the conflicting dual roles of the mediator as both neutral facilitator and judgmental evaluator.

A rule that insulates the mediation function from the evaluation and recommendation function will enhance the integrity of custody mediation proceedings. The legislative purpose of reducing acrimony and meeting the best interest of the child will be fully served by a

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64. See SANTA CLARA COUNTY RULES OF COURT, Effective May 23, 1983, Rule 17.4, Family Court Guidelines, (A)(10)(c).

65. See SB 961: *Bane or Boon?* 1980 CAL. FAM. L. REP. 1373 (1980) (discussing the potential impact of the Civil Code section requiring custody mediation, and supporting a separation of mediator roles).

process which guarantees the essential mediation element of confidentiality. Mandatory mediation of custody disputes will thus be made more effective by eliminating the statutory conflict between confidentiality, privilege, and mediator recommendations.

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