

10-1-2008

Practical and Ethical Implications of Mediating International Child Abduction Cases: A New Frontier for Mediators

Jennifer Zawid

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Jennifer Zawid, *Practical and Ethical Implications of Mediating International Child Abduction Cases: A New Frontier for Mediators*, 40 U. Miami Inter-Am. L. Rev. 1 (2008)

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ARTICLES

Practical and Ethical Implications of Mediating International Child Abduction Cases: A New Frontier for Mediators

Jennifer Zawid*

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* Assistant Professor of Clinical Legal Education at the University of Miami School of Law. I would like to thank the following individuals, in no particular order, for their support and encouragement during the writing of this paper. My parents Drs. Joseph and Carole Zawid, my husband Peter Hickey, my children Leah, Noah and (born in the midst) Maya, Denise Carter, Melvin Rubin, Julia Alanen, Kevin Gaunt and Professor Keith Rosenn (for their incredible faith in me and commitment to publish a symposium before seeing a single draft!), Susan Rohol, Yiota Souras, David O'Brian, Melissa Kucinski, Professor Timothy Arcaro, Professor Sarah Mourer, Professor Douglas Frenkel, Professor Donna Coker, Professor Steven Schnably, Professor Michael Froomkin, Professor Caroline Bradley, Professor Bruce Winick, Professor Fran Tetunic, Sarah Vigers, Ignacio Goicoechea, Mihaela Cabulea, and Buck Buchanan. Finally, I would like to thank all the conference attendees who traveled from the various corners of the globe to spend three (thankfully glorious) days with me in Miami and become absorbed in a topic that had never quite been taught before in the United States. You inspired me. This paper is dedicated to the children all over the world, some in your backyard, who have been victimized by the tragedy of international child abduction. In the wee hours of the night as I attempted to write this paper, I remembered them. I also remembered the voices of their parents when they called for help, desperate for somebody to intervene, to provide answers, to find a way out of the legal nightmare that enveloped their lives. I hope that this symposium and the conference at the University of Miami in February 2008 that birthed it, will help energize the movement in the United States—started by those far wiser and more experienced than myself—to develop a mediation program to better respond to the crisis of international child abduction.

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I. INTRODUCTION

The United States is celebrating the twentieth anniversary of its ratification of the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention or Treaty).¹ While the Treaty has facilitated the return of many abducted, it is an “imperfect instrument.”² Scholars and child advocates continue to search for ways to make the Treaty more responsive to the needs of families in crisis.³

1. Hague Convention on the Civil Aspects of International Child Abduction, Dec. 1, 1983, 11 T.I.A.S. 670, 1343 U.N.T.S. 89 [hereinafter Treaty]. Its implementing legislation in the U.S. is the International Child Abduction Remedies Act (ICARA), 42 U.S.C. §§ 11601-11610 (1988). As an international treaty, the Hague Convention is on a par with the Constitution and supersedes any conflicting laws.

2. *Hearing Before the Subcomm. on Human Rights and Wellness, of the Comm. on House Gov't Reform*, 108th Cong. (2003) (statement of Maura Harty, Former Assistant Secretary, Bureau of Consular Affairs, United States Department of State) [hereinafter *Hearing Before the Subcomm. on Human Rights*].

3. See, e.g., Jeanine Lewis, *The Hague Convention on the Civil Aspects of International Child Abduction: When Domestic Violence and Child Abuse Impact the Goal of Comity*, 13 *TRANSNAT'L LAW* 391, 400 (2000) (internal quotations and footnote omitted). “Despite its imperfections, the Hague Convention provides a vast improvement over the lack of any international mechanism whatsoever and is well worth the continued work to improve its implementation.” See *Hearing Before the Subcomm. on Human Rights*, *supra* note 2. “While the Convention is far from 100% successful, it does provide a legal channel for left behind parents in a foreign court,

In particular the international child-welfare community is calling for an enhanced role for mediation in international parental abduction proceedings. Thus, mediation advocates in the United States are currently in the process of developing a set of protocols to govern mediations in this area, especially in cases involving Latin America. There are numerous practical and ethical issues that must be considered however in order to safeguard the integrity of the mediation process and insure that the goals of the Hague Convention are in no way compromised.

Part two of this article provides background information on the problem of international child abduction⁴ and on the operation of the Hague Convention. Part three of this article explores current initiatives in the international community to provide mediation to families involved in international custody disputes. Part four of this article examines both the risks and practical benefits of mediation in international child abduction cases and how the balance of power shifts throughout the process. Finally, part five of this article considers the unique set of ethical issues that arise when mediating child abduction cases in international forums, especially where there may be conflicting sets of rules governing the mediator's conduct. Part five also addresses some of the more critical ethical issues that need to be considered when developing standards and protocols for mediators in child abduction cases. Included are issues of mediator competency, impartiality, confidentiality and capacity to mediate, especially in cases involving allegations of domestic violence.

I conclude in the paper that the practical benefits of mediation outweigh the risks and that mediation, when conducted in an ethical manner, can be an appropriate and effective tool to resolve cases of international child abduction.

and results in children's return to the U.S. We also believe that the existence of the Convention's return mechanism has deterred an untold number of abductions." *Id.*

4. As described by Julia Alanan, system actors often use the terms "parental abduction" and "parental kidnapping" interchangeably, although typically, the term abduction appears in civil instruments and the term kidnapping in criminal statutes. Julia Alanan, *When Human Rights Conflict: Mediating International Parental Kidnapping Disputes Involving the Domestic Violence Defense*, 40 U. MIAMI INTER-AM. L. REV. 49 (2008). Alanan chooses to use the term parental kidnapping *exclusively* in her paper to "underscore the gravity of the act and its potential criminality."

II. BACKGROUND

A. *The Problem of International Child Abduction*

International child abduction generally refers to the “wrongful retention” or “wrongful removal”⁵ to another country of a child by the child’s parent or guardian, usually the mother.⁶ The problem may be growing⁷ due to such factors as the expansion of international travel and tourism, the increase of bi-national marriages and sexual relationships,⁸ and economic globalization. Since the late 1970’s, the Department of State has responded to approximately 16,000 children who were abducted from the U.S. by a parent.⁹ In 2007 alone, The National Center for Missing and Exploited Children (NCMEC)¹⁰ maintained a caseload of over 1,800 active international family abduction files, more than half

5. Treaty, *supra* note 1, at art. 3.

6. Alanen analyzed the data on this issue. She noted two studies, conducted one year apart (in 2006 and 2007), of the National Center for Missing & Exploited Children’s international family abduction database revealing that approximately sixty to seventy percent of *international* family abductors were *female* (usually mothers). Alanen, *supra* note 4, at 53-54. She also noted that at the 2006 Hague Special Commission Meeting on the 1980 Hague Convention on international parental abduction, the Hague Permanent Bureau and Professor Nigel Lowe of Cardiff University in Wales introduced the results of a 2003 joint survey that concluded that seventy nine percent of all Hague respondents (taking parents) were mothers (down from eighty six percent in 1999). *Id.*

7. The Hague Permanent Bureau maintains statistics on abductions involving its member States. Hague case statistics can be viewed at <http://www.hcch.net>. However, Alanen notes that these statistics are limited insofar as they rely upon self-reporting by the Central Authorities, many of which are poorly resourced. Moreover, the statistics do not reflect disputes involving circumstances that fail to meet the elements of the treaty and disputes involving at least one *non-state* party. Alanen, *supra* note 4, at 55-56. Finally, insofar as most states are *not* ratified parties to the treaty, and thus not the beneficiary of any reporting mechanism, it is nearly impossible to get a grasp of the full scope of the problem of international child abduction on a global scale. *Id.*

8. Sara E. Reynolds, *International Parental Child Abduction: Why We Need to Expand Custody Rights Protected Under the Child Abduction Convention*, 44 *FAM. CT. REV.* 464, 466 (2006) (internal footnotes omitted); Nat’l Ctr. for Missing and Exploited Children, *Family Abduction Prevention and Response*, 99 (2002) (stating that a significant *minority* of international child-abduction cases involve a child born to two parents who are citizens of the U.S. [hereinafter Family Abduction]).

9. Family Abduction, *supra* note 8.

10. NCMEC is a national clearinghouse and resource center congressionally mandated to provide technical assistance in cases of child abduction, missing children, and sexual exploitation. It is a private, non-profit organization funded under a cooperative agreement with the Office of Juvenile Justice and Delinquency Prevention at the U.S. Department of Justice. Former and current staff at NCMEC have been instrumental in advocating for a mediation program in the context of international parental abduction. Its website is www.missingkids.com.

involving Latin America.¹¹ The psychological harm suffered by abducted children and the severe emotional and financial distress of the left-behind parent are well documented.¹² Even in countries that are party to the Hague Convention, numerous structural, cultural and economic barriers, including gender bias and an inconsistent application of the law, limit the Treaty's effectiveness.¹³ Similarly, enforcement of Convention applications is dependent on the law enforcement resources of a particular country's Central Authority.¹⁴ When children are abducted to states not party to the Hague Convention, or states with incompatible cultural and legal norms, the situation can be particularly dire.¹⁵

11. Alanen, *supra* note 5, at 56 (statistics provided by Susan Rohol, Former Director of NCMEC's International Division (now NCMEC's General Counsel) in August 2008.) In fact, these numbers may be grossly under-reported as well. Undocumented parents may fear that reporting abduction will have negative immigration consequences. Law enforcement can also be a problem insofar and some law enforcement authorities are unfamiliar with the laws applicable to international abductions and/or are inadequately trained to investigate such cases. *Id.* at 56-57. Still others fail to take parental kidnapping seriously—perhaps thinking it is a “family affair.” *Id.*

12. *See generally* Family Abduction, *supra* note 8, at 117-128. Among other things, overall functioning was believed to have declined in more than half of the children between the time they were taken from and returned to the searching parent. *Id.* at 125; *see also* Geoffrey L. Greif, *Many Years After the Parental Abduction*, 36 FAM. & CONCILIATION CTS. REV. 32 (1998) (reporting on the mental health of forty eight families who have been followed for a number of years after the recovery of a missing child).

13. *See, e.g.*, Thomas A. Johnson, *The Hague Child Abduction Convention: Diminishing Returns and Little to Celebrate for Americans*, 33 N.Y.U. J. INT'L L. & POL. 125, 127 (2000). Professor Johnson is the father of a kidnapped child who has, for almost a decade, tried to facilitate her return from Sweden. He cautions, “too infrequently enjoying the benefits of the Child Abduction Convention, Americans are its principal victims both at home and abroad. Domestically, Americans are victims of the Child Abduction Convention in both federal and state courts—courts intentionally kept ignorant by the U.S. Department of State regarding the dire consequences of sending children to most of the other State Parties (i.e., civil-law countries) whose legal systems cannot provide enforceable access or visitation for American parents. . . and, except in common-law countries, Americans are victims of the Child Abduction Convention abroad because they too often forego other options and rely to their detriment on the usually false hope of gaining an enforceable (and enforced) Hague return order from legal and social welfare systems that are fundamentally incompatible with the principles and purpose of the Child Abduction Convention.” *Id.*

14. This has been particularly problematic in Latin America. UNITED STATES OF AMERICA DEPARTMENT OF STATE, REPORT ON COMPLIANCE WITH THE HAGUE CONVENTION OF CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 5 (2008), <http://travel.state.gov/pdf/2008HagueAbductionConventionComplianceReport.pdf> [hereinafter REPORT ON COMPLIANCE]. In the 2008 compliance report five countries from Latin America, Brazil, Chile, Ecuador, Mexico, and Venezuela, were found to be non-compliant. *Id.* at 7.

15. *See, e.g.*, Smita Aiyar, Comment, *International Child Abductions Involving Non-Hague Convention States: The Need For a Uniform Approach*, 21 EMORY INT'L L.

B. *The Hague Convention*¹⁶

The Hague Conference on Private International Law meets

REV. 277, 279-281 (2007). Aiyar describes non-Hague states as a “safe haven” for abducting parents, because there is little that can be done to return the child to the left behind parent, especially if the non-signatory country ignores the requests for the return of the child. *Id.* The situation is further complicated when the child is abducted in a non-Hague Islamic country where custody determinations are based on Shari’a law, which ascribes different roles to mothers and fathers. *Id.* Under Shari’a law, fathers are the ultimate guardians of their children. *Id.* at 281. In addition, Shari’a law considers it to be in the best interest of the child to be raised as a Muslim; therefore, the Hague principle of automatic return of the child would require Islamic nations to discard the Shari’a law. *Id.*; see also Deborah M. Zawadzki, Note, *The Role of the Courts in Preventing International Child Abduction*, 13 CARDOZO J. INT’L & COMP. L. 353, 365-366 (2005). In addition to the problems discussed by Aiyar, Zawadzki shows that the situation can be further complicated by the fact that in Middle Eastern countries, a father can impose travel restrictions on his wife and children and that some countries like Saudi Arabia do not accept dual citizenship. *Id.* at 365-366. This basically makes it impossible for a left behind mother to take her children back to the U.S. without the permission of the abducting father. The often insurmountable problems faced by the left behind parents of children abducted to non-signatory countries have prompted some to hire mercenaries to bring back their children. Patricia E. Apy, *Current International And Domestic Issues Affecting Children: Managing Child Custody Cases Involving Non-Hague Contracting States*, 14 J. AM. ACAD. MATRIM. LAW. 77, 96-97 (1997).

The mediation of international parental kidnapping cases in countries that subscribe to Shari’a law raise extremely complex and difficult cultural issues that are beyond the scope of this paper. As such, further scholarship and resources should be devoted to this extremely important topic.

16. Professor Silberman does an excellent job of setting the Convention within the context of U.S. law more broadly dealing with international custody disputes, as well as U.S. law dealing with the problem of international child abduction in particular. “The Uniform Child Custody Jurisdiction Act (UCCJA) and the more recently enacted Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) create the domestic framework for exercising jurisdiction over child custody cases and enforcing orders in the U.S. The new UCCJEA expressly reaches international cases as well, but can only regulate the U.S. side of the equation: that is, the Uniform Acts provide rules for the exercise of jurisdiction in international custody cases in the U.S., but they can do nothing to require enforcement of the resulting judgments abroad. And while these statutes cannot directly regulate the jurisdiction in foreign courts, the acts do set the standards for when a foreign custody order can be enforced in the U.S.” See Linda Silberman, *Patching Up the Abduction Convention: A Call for a New International Protocol and a Suggestion for Amendments to ICARA*, 38 TEX. INT’L L.J. 41, 42-43 (2003) (citations omitted).

The federal Parental Kidnapping Prevention Act (PKPA) buttresses the states’ enforcement obligations, but it has no application in international cases. The International Parental Kidnapping Crime Act (IPKCA) provides for criminal penalties that complement the Child Abduction Convention by assigning federal criminal penalties to those who abduct children to, or retain them in, non-Hague countries with the intent to obstruct the lawful exercise of parental rights. However, this federal criminal remedy—even when the U.S. is able to prosecute the abductor—does not necessarily effectuate the return of the child. *Id.* (citations omitted).

Finally, it is worth noting the existence of a more recent Hague Convention—the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and

every four years to evaluate conventions devised by specialized groups.¹⁷ The subject of child abduction was put on the agenda of the Hague Conference in the 1970's and the resulting Convention on the Civil Aspects of International Child Abduction was adopted on October, 25, 1980.¹⁸ The United States became a contracting party on July 1, 1988. To date, sixty eight countries have become contracting states through ratification or accession.¹⁹

The civil Treaty seeks (1) "to secure the prompt return of children wrongfully removed to or retained in any Contracting State" and (2) "to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting State."²⁰ The Treaty is not concerned with which parent ultimately is awarded custody. Rather, the Treaty's purpose is purely jurisdictional, to facilitate the prompt return of the child to his or her *habitual residence*²¹ so that a court of that country can resolve issues of custody and visitation.²²

A case brought under the Hague Convention must meet several basic requirements. The child must be under the age of six-

Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, often referred to as the 1996 Protection of Children Convention. This Convention is the international corollary to the UCCJA and UCCJEA and would establish international standards for the exercise of custody jurisdiction and the enforcement of custody orders. *Id.* at 43 (citations omitted).

17. See ELISA PEREZ-VERA, EXPLANATORY REPORT ON THE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION (1980), available at http://www.hiltonhouse.com/articles/Perez_rpt.txt. This often-cited legislative history of the Hague Convention on the Civil Aspects Child Abduction was written by the Hague Convention's reporter, Elisa Pérez-Vera and is known as the "Pérez-Vera Report."

18. *Id.* at 426.

19. U.S. Department of State, Possible Solutions: Using the Hague Abduction Convention, http://travel.state.gov/family/abduction/Solutions/Solutions_3854.html (last visited Dec. 28, 2008) [hereinafter Possible Solutions].

20. Treaty, *supra* note 1, at art.1. Each Contracting State (country) is required to designate a "Central Authority" to carry out the duties imposed by the Convention. *Id.* at art. 6. The United States' Central Authority is the Office of Children's Issues Services in the State Department's Bureau of Consular Affairs. Possible Solutions, *supra* note 19. The duties of the Central Authorities are spelled out in article 7 of the Treaty and include, among other things, the duty to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangement for organizing or securing the effective exercise of rights of access. Treaty, *supra* note 1, at art. 7(f).

21. Treaty, *supra* note 1, at art. 3. Habitual residence is not defined in the treaty or by ICARA but is a "mixed question of law and fact, which, besides looking to the place where the child resided just before the removal to another country, also includes among other considerations the parents' conduct, their intentions, and any agreements between them during that time period." *In Re Leslie*, 377 F. Supp. 2d 1232, 1239 (S.D. Fla. 2005).

22. Lewis, *supra* note 3, at 401; Perez-Vera, *supra* note 17, at 430.

teen.²³ The removal or retention of the child must be “wrongful” to qualify for governance under the Treaty—that is, the removal or retention of the child must also “breach the other parent’s rights of custody.”²⁴ Furthermore, the petitioning parent must have “exercised custody over the child prior to the abduction.” Custody rights may arise by operation of law, by judicial or administrative decision, or by an agreement that has legal effect.²⁵ This broad definition of custody rights is important because “it covers the important area of pre-litigation child-snatchings in which rights are less certain and no existing order has been breached.”²⁶

The Convention differentiates between custody rights and access rights. Access rights—the right to take a child to a place other than the child’s habitual residence for a period of time upon which the parents have mutually agreed—are recognized in Article 21 of the Convention. However, Hague Courts have narrowly interpreted access rights, and enforcement of access rights has been “less than robust.”²⁷

Once a petitioner demonstrates that the removal or retention of the child was wrongful, the Convention requires the prompt return of the child unless one of the following enumerated exceptions apply: (1) the person requesting removal was not, at the time of the retention or removal, actually exercising custody rights, or had consented to, or subsequently acquiesced in, the removal or retention,²⁸ (2) the return would result in great risk of physical or

23. Treaty, *supra* note 1, at art. 4.

24. Treaty, *supra* note 1, at art. 3; Lewis, *supra* note 3, at 406.

25. Treaty, *supra* note 1, at art. 3; Lewis, *supra* note 3, at 406. Any person or institution with a child abduction claim may apply to the Central Authority of any Contracting State for relief or, in the more typical case, to the Central Authority of the child’s habitual residence. See Treaty, *supra* note 1, at art. 8. The application must contain: (1) the identification of the child and the abducting parent, (2) the date of birth of the child, (3) the grounds upon which the applicant bases the claim, and (4) any information regarding the location of the child and the abducting person. *Id.* In addition, the application may be supplemented by (1) a copy of a court or administrative decision or legal agreement, (2) a certificate or affidavit from a competent authority of the state of the child’s habitual residence explaining the relevant domestic law, and (3) “any other relevant document.” *Id.* As well as bringing an application to a central authority, an action can also be filed directly in the courts. *Id.* at art. 29.

26. Richard E. Crouch, *Resolving International Custody Disputes in the United States*, 13 J. AM. ACAD. MATRIM. LAW. 229, 242 (1996) (internal quotations and footnote omitted).

27. Linda Silberman, *The Hague Child Abduction Convention Turns Twenty: Gender Politics and Other Issues*, 33 N.Y.U. J. INT’L L. & POL. 221, 248 (2000).

28. Treaty, *supra* note 1, at art. 13(a).

psychological harm;²⁹ (3) the child's return would not be permitted by the fundamental principles of the requesting State relating the protection of human rights and fundamental freedoms;³⁰ (4) the return proceedings commenced more than one year after the abduction and the child has become settled in the new environment;³¹ and (5) the child object's to being returned and has attained an age and degree of maturity at which it is appropriate to take into account his or her views.³²

III. THE ROLE OF MEDIATION IN INTERNATIONAL PARENTAL ABDUCTION CASES

A. *Recent Initiatives in Europe and South America*³³

As mediation has become more prevalent both in the United States and internationally,³⁴ it has dramatically altered the prac-

29. *Id.* at art. 13(b). The "grave risk of harm" exception is the subject of the most controversy because, as discussed *infra*, it is often raised in cases involving domestic violence.

30. *Id.* at art. 20.

31. *Id.* at art. 12.

32. The interpretation and expansion of these exceptions have generated a tremendous amount of criticism and scholarly commentary beyond the scope of this paper. Many scholars and commentators have expressed concern, however, that these defenses are being construed too broadly by many States as an excuse to avoid ordering the return of American children to the U.S. See, e.g., Michael R. Walshand & Susan W. Savard, *International Child Abduction and the Hague Convention*, 6 BARRY L. REV. 29, 50 (2006). Others have expressed concern that the exceptions are inadequate to protect victims of domestic violence. See, e.g., Lewis, *supra* note 3, at 426-427.

33. It is important to recognize when analyzing these different initiatives that there is no universally accepted definition of mediation, especially in the international context. See, e.g., Harold Abramson, *Selecting Mediators and Representing Clients in Cross-Cultural Disputes*, 7 CARDOZO J. CONFLICT RESOL. 253, 261 (2006). Abramson uses a very "broad, generic definition" of mediation in a cross-cultural context, in order to accommodate "the diversity of approaches to third party assistance found around the globe." *Id.* at 261-262. Thus, he defines mediation simply as "negotiation conducted with the assistance of a third party," preferring to emphasize the style of the mediation, i.e., facilitative, evaluative, directive, transformative, or some mixture of these. *Id.*; see also Larry Spain & Kristine Paronica, *Considerations for Mediation and Alternative Dispute Resolution for North Dakota*, 77 N. DAK. L. REV. 391, 391-392 (2001) (discussing several definitions of mediation, one with broader applicability which defines mediation as "the intervention into a dispute or negotiation by an acceptable, impartial, and neutral third party who has no authoritative decision-making power to assist disputing parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute."); Jacob Bercovitch, *Mediation Success or Failure: A Search For The Elusive Criteria*, 7 CARDOZO J. CONFLICT RESOL. 289, 290 (2006) (defining mediation in the context of international conflict, as "a form of assisted negotiation").

34. Indeed, mediation is practiced across the world and has a long history in many cultures. See Ann Milne, *Mediation: A Promising Alternative for Family Courts*, 42

tice of family law.³⁵ While there is less consensus about whether or how to mediate high-conflict cases, there is little dispute that mediation provides some important benefits over litigation.³⁶

JUV. & FAM. CT. J. 61 (1991). Mediation was the principal means of dispute resolution in China and is still practiced. *Id.* The Japanese also use conciliation services. *Id.* Religious institutions have played a part in dispute resolution. In the New Testament, Paul encouraged the Corinthians to appoint members of their own community to resolve disputes, rather than go to court. *Id.* at 62; *see also* Julia Ann Gold, *ADR Through A Cultural Lens: How Cultural Values Shape Our Disputing Processes*, 2005 J. DISP. RESOL. 289, 309 (2005). (“[M]ediation has existed for thousands of years. It was used in traditional and indigenous societies in China, Japan, Africa and the Americas. . . .”); Kimberlee K. Kovach, *Musings on Ideals in the Ethical Regulation of Mediators: Honesty, Enforcement and Education*, 21 OHIO ST. J. ON DISP. RESOL. 123, 123 nn.8-10 (2005) (describing burgeoning mediation programs in Europe, Argentina and India).

The modern mediation movement is said to have been birthed in 1976 with the Pound Conference. *Id.* at 123 n.2. Since then, “the use of mediation has expanded beyond its century-long home in collective bargaining to become an integral and growing part of the processes of dispute resolution in the courts, public agencies, community dispute resolution programs, and the commercial and business communities, as well as among private parties engaged in conflict.” UNIF. MEDIATION ACT, Prefatory Note (2001) [hereinafter MEDIATION ACT].

35. Commenting on the overall significance of the ABA’s approval of the *Model Family Mediation Standards*, Andrew Schepard said that it was a formal recognition by the legal profession of family mediation as a partner committed to resolve family disputes together with courts and lawyers. It was a step forward toward the realization of the vision expressed by the ABA at the 1976 Pound Conference, that of a court that was not a just a simple “courthouse, but a dispute resolution center where the grievant . . . would be directed to the process (or sequence of processes) most appropriate to a particular type of case.” Andrew Schepard, *An Introduction to the Model Standards of Practice for Family and Divorce Mediation*, 35 FAM. L.Q. 1, 1 (2001) (quoting Frank E. A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976) (ABA’s vision statement for its landmark 1976 Pound Conference)).

36. Mediation may promote autonomy by allowing parents, rather than a third-party judge, to make decisions about their children’s well-being. It models collaborative decision-making, enabling the work of future co-parenting. Mediation also appears to minimize future conflicts between the mediating parents by, among other things, improving communication skills, vital to long-distance collaborative parenting. *See generally* Katherine Kitzmann & Robert Emery, *Child and Family Coping One Year After Mediated and Litigated Child Custody Disputes*, 8 J. FAM. PSYCHOL. 150 (1994). Mediation may also result in greater client satisfaction and less post-divorce litigation than lawyer-directed or court-imposed settlements. *See generally* Howard S. Erlanger et al., *Participation and Flexibility in Informal Processes: Cautions from the Divorce Context*, 21 L. & SOC’Y REV. 585 (1987); Joan B. Kelly, *Parent Interaction After Divorce: Comparison of Mediated and Adversarial Divorce Processes*, 9 BEHAV. SCI. & L. 387 (1991); Elizabeth Koopman et al., *Professional Perspectives on Court-Connected Child Custody Mediation*, 29 FAM. & CONCILIATION CTS. REV. 304, 306 (1991). Parents who reach agreements through mediation are more likely to honor them. *Id.* A fifty to seventy five percent reduction in custody hearings was reported when parents participated in court-based mediation programs. *Id.*; *see also* UNIF. MEDIATION ACT, Prefatory Note (2001) (“Public policy strongly supports this development. Mediation fosters the early resolution of disputes. The mediator assists the parties in negotiating a settlement that is

In spite of the widespread recognition of mediation's usefulness in resolving a wide range of domestic disputes however, mediation has not been widely utilized in international child abduction cases. This is beginning to change.

Mediation was an important topic at the fifth meeting of the Special Commission to review the operation of the Convention.³⁷ In preparation for this meeting the Hague Permanent Bureau prepared a report encouraging the use of mediation in international child abduction cases.³⁸

In April 2006, the Council on General Affairs and Policy directed the Hague Permanent Bureau to conduct a Feasibility Study on Cross-border Mediation in Family Matters. This study was presented to the Council in April 2007,³⁹ and in April 2008 the Council invited the Permanent Bureau to "continue to follow, and keep Members informed of developments in respect of cross-border mediation in family matters." The Council also asked the Permanent Bureau to begin work on a "Guide to Good Practice"⁴⁰ on

specifically tailored to their needs and interests. The parties' participation in the process and control over the result contributes to greater satisfaction on their part.").

37. The Hague Convention is flexible and allows for alternative dispute resolution. Article 7 provides that:

"Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective State to secure the prompt return of children and to achieve the other objects of this Convention. In particular, either directly or through any intermediary, they shall take *all appropriate measures . . . to secure the voluntary return of the child or to bring about an amicable resolution of the issues* ." Treaty, *supra* note 1, at art. 7(c) (emphasis added).

38. See Sarah Vigers, *Hague Conference on Private International Law, Note on the Development of Mediation, Conciliation and Similar Means to Facilitate Agreed Solutions in Transfrontier Family Disputes Concerning Children Especially in the Context of the Hague Convention of 1980* (2006), http://www.hcch.net/upload/wop/abd_pd05e2006.pdf.

39. See Permanent Bureau, *Hague Conference on Private International Law, Feasibility Study of Cross-Border Mediation in Family Matters* (2007), http://www.hcch.net/upload/wop/genaff_pd20e2007.pdf. Although this document focuses in particular on the use of cross-border mediation in family matters and thus has a broad focus, it provides a very useful framework for analyzing some of the same issues that are involved in mediating international child abduction cases. The document and a related questionnaire were then sent to Hague-Signatory States for comment. The responses thereto were made available to the Council at their meeting in April 2008 and are available for view on the Hague's website. See Permanent Bureau, *Hague Conference on Private International Law, Feasibility Study of Cross-Border Mediation in Family Matters—Responses to the Questionnaire* (2008), http://www.hcch.net/upload/wop/genaff_pd10_2008.pdf [hereinafter Responses to the Questionnaire].

40. There are currently three parts of a Guide to Good Practice on the operation of this Convention which have been published. Hague Conference on Private International Law, *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part I—Central Authority*

the use of mediation in the context of the Hague Convention of October 25, 1980 on the Civil Aspects of International Child Abduction to be submitted for consideration at the 2011 meeting of the Special Commission to review the practical operation of that Convention.⁴¹

Government actors and mediation advocates from different nations, recognizing the devastating effects that child abduction has on families, have begun to study the usefulness of mediation in these cases as well. The federally funded German Association of Family Mediation (BAMF) has developed a highly specialized bi-national/co-mediation model for resolving international child abductions. The model envisions that two mediators would work together, one from each of the parents' home countries. One mediator should be male, one should be female. One mediator should have a mental health background and the other should have a legal background. Both mediators should have completed "advanced bi-national mediation training" and have at least one language in common.⁴²

In 2003, the BAMF partnered with mediators from France's Mission d'Aide à la Médiation Internationale pour les Families (MAMIF), operating within the French Ministry of Justice, to attempt to mediate some of the international parental kidnapping disputes between the two states using the co-mediation model outlined above.⁴³ The mediations typically took place over one or two weekends (unless follow-up was needed) and when possible and

Practice (2003); Hague Conference on Private International Law, Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part II—Implementing Measures (2003); Hague Conference on Private International Law, Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part III—Preventive Measures (2003). An additional two parts are in process, one on Transfrontier Contact and one on Enforcement of Orders. See William Duncan, Transfrontier Access/Contact General Principles and Good Practice (2006), available at http://hcch.e-vision.nl/upload/wop/abd_pd04e2006.pdf; Andrea Schulz, Enforcement of Orders Made under the 1980 Convention- A Comparative Legal Study, (2006), available at http://hcch.e-vision.nl/upload/wop/abd_pd04e2006.pdf; Andrea Schulz, Hague Conference on Private International Law, Enforcement of Orders Made under the 1980 Convention- Towards Principles of Good Practice, (2006), available at http://hcch.e-vision.nl/upload/wop/abd_pd07e2006.pdf.

41. Council on General Affairs and Policy of the Conference, Hague Conference on Private International Law, Conclusions and Recommendations adopted by the Council (April 1-3, 2008), available at http://www.hcch.net/upload/wop/genaff_concl_08e.pdf. The author thanks Sarah Vigers for clarification on these points.

42. Responses to the Questionnaire, *supra* note 39, at 5.

43. *Id.*

appropriate, the child was involved in the mediation.⁴⁴ All costs were borne by the respective countries. By the end of the project in March 2006 approximately fifty to sixty cases were mediated.⁴⁵ The academic study which accompanied the project concluded that the parents considered themselves “attended to much better—even if no agreement could be reached.”⁴⁶

In addition to the Franco-German project discussed above, MAMIF has intervened in disputes involving contracting and non-contracting states. MAMIF engages in bi-national mediation, but unlike Germany, does not necessarily consider mediators’ gender or professional background. Since 2001, MAMIF has processed 454 cases, most of these relating to international child abduction, involving seventy seven different countries. According to MAMIF, the success rate for international family mediations is about eighty six percent.⁴⁷

Latin America is also exploring the use of mediation in this area, which is of critical importance to the United States insofar as more than half of all international family abductions reported to NCMEC involve Latin America and the Caribbean region.⁴⁸ In Argentina, the Argentine Central Authority offers mediation⁴⁹ as an option to parents with international family abduction disputes. Mediations take place at the Central Authority because this is

44. See Vigers, *supra* note 38, at app. 4. The German Ministry of Justice estimates that about thirty mediation cases have been handled by this group. To the limited extent that the project was subject to academic study, it was found that “the overwhelming majority of both parents and mediators assessed the system positively. There was increased willingness of both parents to undertake mediation and the level of acceptance of the procedure was also high.” Based in part on the success of the German-Franco project discussed above, in 2005 the German Federal Ministry of Justice and the United States Department of State have initiated a pilot project of bi-national mediation in German-U.S. child abduction cases. German and American mediators are to be identified and trained in bi-national mediation.

45. ERA Conference, Minutes of Advanced Training Course, October 23-24, 2006 (on file with author).

46. *Id.*

47. Vigers, *supra* note 38, at app. 1. Elsewhere in Europe, Sweden, Ireland, and Holland are beginning to explore the use of mediation to respond to international child abduction cases. Interview with Sarah Vigers, Former Legal Officer of the Permanent Bureau (Sept. 19, 2008). The author looks forward to learning more about these initiatives as the data becomes available.

48. Interview with Susan Rohol, former Director of NCMEC’s International Division (now NCMEC’s General Counsel) (Mar. 2008).

49. As discussed in *supra* note 33, there is no universally accepted definition of mediation, especially in the international context. Consequently, countries are using the term mediation “very broadly” and are often including forms of dispute resolution that may be characterized by some as negotiation. Interview with Sarah Vigers, Former Legal Officer of the Permanent Bureau (Sept. 19, 2008).

considered to be a neutral venue. In general, the mediators will host as many meetings as necessary until an agreement is reached, unless the mediators feel that mediation is being used as a delay tactic.⁵⁰ In examining the benefits of mediation in this context, the Argentine Central Authority noted that a large percentage of their cases are resolved through mediation. Moreover, even in cases where the parties did not reach an agreement, there was a noted de-escalation in conflict.⁵¹

The Brazilian Secretariat for Human Rights (BCA), Brazil's Central Authority, sends out a notice of "conciliation" to all taking parents once the child's location has been confirmed, notifying them of the opportunity to participate in mediation through the BCA before proceedings are initiated.⁵² Mediations take place in person, by phone or over the Internet, depending on the resources and location of the respective parties.

If this out of court mediation undertaken by the BCA is not successful, a second attempt could be promoted by a Federal Court Judge once proceedings begin. The mediation process carried at either stage usually involves the participation of legal representatives of both parties to advise the parties during the process and to ensure that, in the event an agreement is ultimately reached, it is enforceable.⁵³

Elsewhere in the region, Peru, Ecuador and Paraguay are also beginning to experiment with mediation in these cases as well and have expressed interest in learning about international initiatives in this area.⁵⁴

Without question however, the most comprehensive and peer reviewed work on mediating international parental kidnapping cases is the work being done by the charitable agency Reunite International in the United Kingdom. Beginning in 2000, Reunite International Child Abduction Centre (Reunite), a privately funded non-governmental organization headquartered in London, undertook to mediate international parental kidnapping cases

50. Feasibility Study of Cross-Border Mediation in Family Matters, *supra* note 39.

51. Responses to the Questionnaire, *supra* note 39, at 6.

52. Responses to the Questionnaire, *supra* note 39, at 10; Interview with Stella Freitas-Chamarelli, Attorney, Assistant for Abduction Cases at BCA (Oct. 1, 2008).

53. Freitas-Chamarelli, *supra* note 52.

54. Interview with Ignacio Goicoechea, Latin American Liaison Legal Officer at the Hague Conference of Private International Law (Sept. 23, 2008).

involving the United Kingdom.⁵⁵ During the course of a four-year pilot project, twenty-eight cases proceeded to mediation (representing both contracting and non-contracting states such as Pakistan and Dubai).⁵⁶ An impressive seventy five percent of the mediated disputes were resolved without litigation. The resulting study serves as the most comprehensive report to date on mediation's potential and effectiveness in this context.⁵⁷

55. REUNITE INT'L CHILD ABDUCTION CTR., *MEDIATION IN INTERNATIONAL PARENTAL CHILD ABDUCTION: THE REUNITE MEDIATION PILOT SCHEME* (2006), <http://www.reunite.org/edit/files/Mediation%20Report.pdf> [hereinafter REUNITE report]. This report was conducted by the Reunite International Child Abduction Centre, funded by The Nuffield Foundation. The author is extremely grateful to Reunite's Director, Denise Carter, for her assistance during the writing of this paper. She has been an inspiration and a source of hope for those of us involved in this movement.

56. When a child is abducted to a non-Hague state the situation is particularly grave and desperate. Reunite has been instrumental in attempting to provide parents with mediation services in these cases. Some of the most exciting work is being done in Egypt where Denise Carter has been training mediators at a Cairo-based nongovernmental organization for a UK-Egypt pilot international parental kidnapping mediation scheme. Mediations will be conducted using the co-mediation model, using one mediator from each state. This author is anxiously awaiting data from this exciting pilot project. *See supra* note 55.

57. To evaluate the success of the mediation pilot scheme, all participating parents, solicitors, and mediators were asked to complete an extensive questionnaire. REUNITE report, *supra* note 55, at 49-50. In total, thirty-nine parents provided feedback, which represents seventy percent of those parents who participated in mediation. *Id.* The key findings noted in the Reunite report were as follows:

- After participating in the mediation pilot scheme, ninety-five percent of parents would recommend mediation to others.
- Eighty-six percent of parents were either highly satisfied or satisfied with the outcome of mediation.
- It is crucial that any mediator undertaking mediation in this type of case have expertise in the field of international parental child abduction and the 1980 Hague Convention, although it is not necessary to have a specialized family law background.
- Due to the complexity of this type of case, it is necessary to introduce a different mediation practice to that of traditional family mediation.
- Mediation in cases of international parental child abduction should always be co-mediated.
- From the parents' perspective, it is not necessary to have mediators of mixed genders; instead, the key requirements are expertise, professionalism, and neutrality from the mediators.
- In the majority of cases, participating in mediation does not delay the final hearing under the 1980 Hague Convention.
- It is crucial to undertake an initial pre-mediation screening interview with parents, not only to ensure that the case is suitable for mediation, but also to ensure that parents understand the purpose of mediation and that any concerns relevant to mediation are discussed.

*B. Efforts to Develop an International Family
Abduction Mediation Program in the United States*

U.S. efforts to mediate international child abduction cases are still in their infancy. The U.S. Central Authority and NCMEC have arranged for mediators to assist in these cases on a *pro bono* basis but there has been no funding to support the initiative.⁵⁸ In 2003, the State Department announced a plan to increase the use of mediation in these matters by such means as developing specialized training programs for mediators, creating a mediation referral list, and purchasing teleconferencing equipment.⁵⁹

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- Offering three 3-hour sessions of mediation is usually sufficient in these high-conflict cases.
 - Allegations of domestic violence do not preclude entering the mediation process and do not affect the ability to reach a settlement. However, it is important that a risk assessment is undertaken in each case and that appropriate measures are introduced to ensure that parents feel safe during the mediation process.
 - Where the use of an interpreter is necessary, it does not hinder the mediation process and does not affect the ability to reach a settlement within the allocated time frame.
 - It is not necessary to have formal agreements with Central Authorities in order to undertake mediation, but it is important that Central Authorities support mediation and that courts, attorneys and Central Authorities promote mediation as an option.
 - It is imperative to have an efficient administration system in place to manage the process from start to finish and coordinate international travel in a limited time frame, thus ensuring that the mediation does not hinder the court proceedings under the Hague Convention.
 - Where it is appropriate for the voice of the child to be heard within the proceedings, it is essential that the agency undertaking the interview with the child provide the mediators with a copy of the report so that this can be taken into consideration during the mediation process. The cost to Reunite of mediating a case that included venue charges and the use of an interpreter was approximately five thousand dollars.

58. Interview with Susan Rohol, Former Director of NCMEC's International Division (now NCMEC's General Counsel) (Jan. 14, 2008). In addition, although it is difficult to get precise numbers, it appears that a small number of these cases that are already in litigation are being sent to mediation via the various federal court mediation programs that exist in different jurisdictions. Anecdotal evidence suggests, however, that this is not the best forum to mediate these cases insofar as these programs are staffed by mediators who have not had any special training in the area of international parental kidnapping. Interview with Stephen Cullen, Attorney, (Oct. 1, 2008).

59. In a recent report by the State Department on compliance with the Hague Convention it stated that the department "believes that mediation could be a good tool

In February 2008, a national conference⁶⁰ was held for mediation advocates dedicated to creating an International Child Abduction Mediation Program in the United States.⁶¹ Subsequent to this conference, an international Steering Committee made up of attorneys, mediators, and judges convened to, among other things, oversee a committee to develop a series of “Best Practices and Protocols” to guide mediators in these cases.⁶² The Steering Group may also explore the practicality of developing a bi-national mediation pilot program between the United States and Mexico to

to reduce litigation in Convention cases, lowering the level of conflict between the parties and speeding up the resolution of the cases. Several inter-country mediation projects have shown that parents can reach agreement for custody and visitation, with proper intervention . . .” REPORT ON COMPLIANCE, *supra* note 14, at 19. Child advocates express hope that the State Department will embrace mediation as a viable alternative in cases of international child abduction and that the department will show leadership on this issue.

60. The conference was co-hosted by the University of Miami School of Law, NCMEC and Mediation Services, Inc. See Cross-Border Family Mediation with an Emphasis on the 1980 Hague Convention on the Civil Aspects of International Child Abduction, University of Miami School of Law, February 22-24, 2008, available at <http://www.law.miami.edu/cle> (last visited on Sept. 21, 2008). Topics addressed at the conference included an overview of the legal responses to international child abduction, the realities and Ethics of Litigating an International Custody Dispute, and the “Nuts and Bolts” of Mediating a Hague Case. In addition, special sessions were devoted to ethics and domestic violence. *Id.*

61. What is clear from the various international initiatives discussed above however, is that there is not yet a consensus on exactly what a cross-border mediation program to respond to the crisis of international child abduction should look like. One model would be to utilize government-employed mediators as part of a government sanctioned program to respond to cross-border abductions. This appears to be the model emerging in Argentina. Another model contemplates the use of private mediators subject to appropriate licensing and regulation, as seen in the U.K and Germany. There is also ongoing debate about what the role of the central authorities should be, if any, in such initiatives and how such a program can be administered impartially. There is also the issue of how much coordination, if any, there should be among the various Hague and non-Hague states. Should these initiative be run independently of each other or should there be a more centralized international approach to respond to the problem, perhaps headed by the Hague Permanent Bureau. These various models have numerous advantages and disadvantages that are beyond the scope of this paper but are certainly deserving of additional study. The U.S.-based Steering Group will begin to contemplate these issues as well as part of their effort to develop a mediation protoccls.

62. The author of this article serves on the Steering Committee and is co-chair of the Education Sub-committee. The Steering Committee hopes to complete the bulk of its work by the summer of 2009. One of the primary objectives of the committee is to explore potential public and private avenues of funding. This is a concern because funding was found to be *crucial* to the success of the Reunite Pilot Scheme and the mediation initiatives in Germany and France. In Reunite, for example, all costs, including the parties’ travel and subsistence costs incurred while participating in the mediation, all mediators’ fees, interpreter fees, and administration charges were covered by grant money. REUNITE report, *supra* note 55, at 7.

respond to the growing number of international abduction cases involving the two countries.⁶³

IV. AN EXAMINATION OF THE RISKS AND BENEFITS OF MEDIATING INTERNATIONAL CHILD ABDUCTION CASES

A preliminary inquiry that mediation advocates must consider when contemplating a mediation program in the United States is whether mediation is *ever* appropriate in cases of international child abduction or, whether the psychological impact of the event is *so dramatic and devastating* that the left-behind parent could never effectively participate in the process.⁶⁴ Stated another way, is the balance of power so out of proportion when a child is kidnapped that the left-behind parent would agree to *anything* in order to see the child again?⁶⁵ If so, what should a

63. Mexico has the highest number of reported abductions to and from the U.S. REPORT ON COMPLIANCE, *supra* note 14, at 5. Although Mexico acceded to the Convention in 2001, it has a demonstrated pattern of non-compliance that makes litigation of a Hague petition extremely frustrating. *Id.* at 66. In particular, the State Department reports that as a result of limited law enforcement resources, locating missing children is a “serious impediment” for parents and often takes years, severely undermining the implementation of the Convention. *Id.* The State Department also notes patterns of noncompliance in Mexico’s judicial system, in particular with an abuse of the appeal system which has led to excessive delay in resolving Convention cases and has further increased legal costs for left behind parents. *Id.* Recently however, there has been increased cooperation and collaboration between the U.S. and Mexico on these cases, especially among the judiciary and legal, law enforcement and social service organizations. An annual bi-national conference is held every year between the two countries to train system actors to better implement the Convention and locate missing children. Interview with Julia Alanen, Former Director of NCMEC International Division, (Sept. 26, 2008). As a member of the Steering Committee there is a general consensus that all these factors make a bi-national mediation initiative between Mexico and the U.S. an attractive and viable option to respond to the problem of international child abduction in this region.

64. Significantly, the Model Family Standards specifically warn against mediation where “a participant has or is threatening to abduct a child.” MODEL FAMILY STANDARDS § XI(A)(2) (2008) (emphasis added). It is unclear whether the termination of the mediation in this instance is mandatory or discretionary because of conflicting language in the drafting of the provision. *Id.*

65. Indeed, attorneys and mediators involved in these cases report examples where left behind parents have been willing to make tremendous financial concessions (paying for airfare and all costs associated with future visits, setting up the abducting parent and his or her new romantic partner in a house, providing them subsistence, paying the abducting parent’s educational expenses, paying the abducting parent’s relocation expenses, giving extravagant gifts to the abducting parent’s family) in order to effectuate a return. Interview with Melvin Rubin, Mediator, (July 19, 2008).

mediator do if he or she believes that the left-behind parent is agreeing to terms that are fundamentally unfair?⁶⁶

In a traditional domestic family abduction case the mediator would likely have to terminate the mediation.⁶⁷ However, many of the “gut checks” and the rules that mediators typically use to assess fairness and self-determination in the mediation process are of little use when a parent has been separated from his or her child, often for an extended period of time, and risks never seeing the child again.⁶⁸

Ironically, where the imbalance of power is perhaps the greatest—in cases involving children abducted to countries not party to the Hague Convention or cases where the parent does not have the financial means to wage a legal battle—parents tend to clamor the loudest for mediation. It is one thing to have an imperfect mechanism like the Hague Convention to fall back on when your child is missing; it is quite another thing to have no remedy at all. Mediation, although not appropriate in every case, may be an option for these parents.

While the possibility of power and balance must be carefully monitored, mediation can offer several key advantages over litigation in international parental abduction cases: (i) inconsistent and infrequent application of the treaty renders Hague litigation unpredictable, expensive and time consuming; (ii) mediation allows the parties to address a broader range of issues than Hague litigation would; and, (iii) Hague cases can lead to a wide range of

66. Although in this section the author addresses the imbalance of power weighing against the left-behind parent, there are times when the balance of power weighs against the abducting parent instead. For example, in cases involving domestic violence the abducting parent may literally fear for her life. Attorney Jeremy Morley also notes that the balance of power often favors the left behind parent insofar as they are more likely to have the benefit of a *pro bono* attorney (frequently from a large international law firm) to fund their defense. Interview with Jeremy Morley, Attorney (Oct. 1, 2008). The abducting parent by contrast, may have significantly less financial resources and must also of course pay for the maintenance of themselves and the child in a new location without the benefit of child support. They may also have to deal with pending criminal charges. *Id.* Of course, the balance of power is often a fluid concept that continuously shifts during the mediation process back and forth between the parties. A skilled mediator can attempt to level the playing field by continuously reminding both parties of the risks of their position.

67. See, e.g., FLA. STAT. ANN. § 10.420(b)(4) (2008) (“A mediator shall terminate a mediation entailing fraud, *duress*, the *absence of bargaining ability*, or *unconscionability*”) (emphasis added).

68. Stephen Cullen believes that mediation may be the best option in these cases because the “vagaries of judicial decision making often lead to unjust and unpredictable results.” Interview with Stephen Cullen, Attorney, (Oct. 1, 2008).

criminal, civil, and economic penalties that could be avoided or cured by mediation.

1. Inconsistent and Infrequent Application of the Treaty Makes Hague Litigation Unpredictable, Expensive, and Time Consuming

Litigating a Hague Convention case involving a child abducted to or from the United States can be extremely difficult and frustrating. The cases are often complicated and fact-intensive.⁶⁹ In order to prevail, the petitioner must proffer evidence proving the child's habitual residence, the extent to which the left-behind parent actually exercised parental rights, and whether the left-behind parent consented to or acquiesced in the child's relocation.⁷⁰ Litigants may need to solicit testimonial and documentary evidence from a wide range of experts and witnesses, including neighbors, coworkers, teachers, real estate professionals and doctors, as well as a wide range of mental health professionals, especially in cases involving domestic violence allegations.⁷¹ Procuring such experts and witnesses is often cost prohibitive for the average litigant.

Where evidence is not readily available, the proceedings can revert to "verbal disputes where the parties trade a tirade of accusations against each other with limited amounts of documentary evidence."⁷² Rules of evidence tend to be extremely relaxed in Hague Proceedings, increasing the likelihood of attorneys being "unprepared or blindsided by opposing counsel."⁷³

Moreover, since Hague cases must, at least in theory, be expeditiously adjudicated, parties usually have only one opportunity to present their case to the tribunal. Under these circumstances

69. Jeremy D. Morley, *How to Win a Hague Convention Child Abduction Case*, Oct. 2, 2004, <http://www.international-divorce.com/hague-win.htm>. Morley describes the reality of litigating a Hague case as follows: "Just as a current military strategy is to employ overwhelming force to create shock and awe, so too in a Hague Convention case it is often advisable to use overwhelming amounts of evidence to win the case. Such a campaign in a Hague proceeding may yield a capitulation by the other parent even before the hearing actually commences." *Id.* at 3.

70. *Id.* at 2

71. *Id.*

72. *Id.* at 3. Neither the Convention nor ICARA requires authentication of documents in a Convention proceeding.

73. *Id.* at 4.

there is often insufficient time to supplement the record or gather additional evidence.⁷⁴ Consequently, the litigation and the outcomes of Hague cases can be characterized by tremendous uncertainty and even unfairness.

The difficulty in litigating a Hague case is compounded by the fact that most judges are not experienced in handling international parental abduction cases. Under ICARA, Hague cases may be brought in any state or federal court in the United States.⁷⁵ One consequence of the volume of courts implicated is that many U.S. courts are entirely unfamiliar with the Convention. It would in fact be exceedingly rare for a particular judge to preside over more than a couple of Hague cases over the course of his or her entire career.⁷⁶

In addition, because the annual number of Hague cases is relatively small, only a small percentage of family law attorneys in the U.S. litigate enough cases to gain expertise in this area.⁷⁷ The reality is that by default a parent involved in Hague litigation turns to his or her family attorney. Family law attorneys however, often as a result of the nature of the practice, have very little experience in cases that implicate questions outside of their realm of state family law.

Hague cases raise complex choice-of-law issues that must be investigated and briefed on short notice. For example, the Con-

74. *Id.* at 2-3.

75. See 42 U.S.C. § 11603(b) (2006). In England by contrast all cases are tried by High Court Family Division judges and are heard in London. See REUNITE report, *supra* note 55, at 1.

76. William Duncan writes that “awareness among the judiciary within the Contracting States of the provisions and the underlying objectives of the Child Abduction Convention is one of the keys to its successful operation. William Duncan, *Action in Support of the Hague Child Abduction Convention: A View from the Permanent Bureau*, 33 N.Y.U. J. INT’L L. & POL. 103, 107 (2000). Generally speaking, the Convention has tended to work better where jurisdiction has been concentrated in a relatively small number of judges who are able to develop a degree of expertise with Convention cases.” *Id.* Efforts are being made in the U.S. however to better train judges in this area. Interview with Susan Rohol, Former Director of NCMEC’s International Division (now NCMEC’s General Counsel) (Feb. 18, 2008); see also Timothy L. Arcaro, *Creating a Legal Society in the Western Hemisphere to Support the Hague Convention on Civil Aspects of International Child Abduction*, 40 U. MIAMI INTER-AM. L. REV. 109 (2008).

77. Organizations such as the ABA section of Family Law and the International Law Section provide excellent opportunities for training and networking for attorneys interested in this highly specialized area of the law. Moreover, NCMEC through its ICAN network maintains a highly regarded list of attorneys with competency in these cases, many of whom are willing to work on a pro bono basis. Interview with Susan Rohol, Former Director of NCMEC’s International Division (now NCMEC’s General Counsel) (Feb. 18, 2008).

vention requires that the left-behind parent establish that the child was taken from the "habitual residence" and that the parent possessed and, in a return case, actually exercised "rights of custody" under the law of that jurisdiction.⁷⁸ However, "neither of those fundamental terms is defined in the Convention, and there exists substantial contradictory domestic and international jurisprudence concerning their scope and meaning."⁷⁹ The lack of uniformity in appellate decisions by the U.S. Courts of Appeals is particularly problematic.⁸⁰ Moreover, each international child abduction case must be decided by applying the Hague Convention, ICARA, conflicts of law, federal statutes, and a growing list of federal cases that have interpreted the Convention and ICARA.⁸¹ It is often essential to use foreign-law experts to establish the scope of the Treaty.⁸² This can be extremely challenging, especially for an attorney without experience in the area. Often, multiple attorneys are needed (one in the country of habitual residence and one in the country where the child is currently located) to litigate a Hague case effectively.

Even if a party can identify a lawyer (or lawyers) competent to handle a complicated Hague case, the cost may be prohibitive.⁸³ Although Article 26 of the Hague Convention provides that countries will pay the legal fees of parents in Hague return cases, the

78. Morley, *supra* note 69, at 3.

79. *Id.*

80. Interview with Stephen Cullen, Attorney (Oct. 2, 2008).

81. Veronica Torrez et al., *The International Abduction of International Children: Conflicts of Laws, Federal Statutes, and Judicial Interpretation of the Hague Convention on the Civil Aspects of International Child Abduction*, 5 WHITTIER J. OF CHILD AND FAM. ADVOC. 7, 8 (2005); see also Merle H. Weiner, *The Potential Challenges of Transnational Litigation for Feminists Concerned about Domestic Violence here and Abroad*, 2003 AM. U. J. GENDER, SOC. POL'Y & L. 749, 782-797. (discussing some of the additional challenges of transnational litigation in Hague Convention cases including the need for effective storytelling, the problem of experts, the difficulty of accessing information from abroad, the challenges of finding experienced lawyers for women in the U.S. and abroad, and the difficulty of linking gender inequality and domestic violence in these cases).

82. Morley, *supra* note 69. The attorney often needs to cite cases not only from the domestic jurisdiction but from other foreign jurisdictions. To aid attorneys in this area and in recognition of the need to promote uniform interpretation of the Treaty, the Hague Conference on Private International Law has established a database of significant Hague cases from courts around the world and has now catalogued them on the Hague Conference website at <http://www.hcch.net>.

83. The estimated cost of outgoing Abduction Convention applications can run \$100,000 or more to litigate, with the cost of preparation and conducting the first Hague hearing approaching \$30,000. Walshand & Savard, *supra* note 32, at 50; see also Silberman, *supra* note 27, at 248 ("A continuing problem in the U.S. and several other countries is the securing of legal representation for Hague applicants.")

Convention allows party countries to take a reservation in this regard and the US took that reservation.⁸⁴ This coupled with the fact that the United States does not have a comprehensive legal aid system,⁸⁵ makes obtaining legal representation for Hague applicants extremely difficult.⁸⁶ Moreover, while ICARA does provide for an award of attorneys' fees and costs to a successful *petitioner*,⁸⁷ the party still must be able to pay up front unless and until a pro bono attorney can be assigned. Reimbursement may *never* come because the abductor is generally judgment-proof.⁸⁸ Mediation can help "level the playing field" where the parties' financial resources differ substantially.⁸⁹

Although the statutory framework of the Treaty is intended to facilitate an expeditious resolution of the issues, anecdotal experience and published case law evidence the fact that some cases still take *several years* to complete.⁹⁰ Mediation, by contrast, may be effectuated in a reasonable period of time without delaying the underlying Hague proceedings in the event that the parties fail to reach an agreement.⁹¹ Mediation is a promising alternative for

84. Treaty, *supra* note 1, at art. 26.

85. One positive development in this area is that in 1995 the Department of State Bureau of Consular Affairs Overseas Citizens Services Office of Children's Issues began funding the American Bar Association's International Child Abduction Attorney Network (ICAN), a voluntary association of attorneys willing to provide legal services on a pro bono or reduced-fee basis for incoming Hague child abduction cases. They have done valiant work on behalf of parents and children.

86. By contrast, petitions brought for the return of children abducted to the United Kingdom are free of charge to the left-behind parent, and Germany limits the contribution to \$1,100 for the initial hearing. See Walshand & Savard, *supra* note 83.

87. See 42 U.S.C. § 11607(b)(3) (1988).

88. The access-of-counsel issues are even more pronounced for victims of domestic violence. These women need to find affordable counsel versed in *both* international law and in domestic violence issues. Weiner, *supra* note 81, at 749. The problem of finding counsel is further hampered by the fact that in most countries, the petitioners (i.e., for purposes of this section, the "batterers") receive free legal counsel. However, the respondents (i.e., the "battered women") do not." *Id.* at 794. Even in the U.S., where neither the petitioner nor the respondent receives free legal counsel per se, ICARA, as discussed in *supra* note 85, provides that a prevailing petitioner ("batterer") may, unless "clearly inappropriate," recover attorneys' fees and costs, but a prevailing respondent ("battered woman"), no matter what the situation, may not. *Id.*

89. Interview with Stephen Cullen, Attorney (Oct. 1, 2008).

90. See Marshal S. Willick, *International Kidnapping and the Hague Convention: A Short Introduction*, www.willicklawgroup.com. In Brazil, mediation is considered an attractive alternative because it can take up to three months (despite the six week time frame envisioned by the Convention) for a case to even be filed by the relevant authorities. Interview with Stella Freitas-Chamarelli, Attorney, Assistant for Abduction cases at BCA (Oct. 1, 2008).

91. For example, the drafters of the proposed German-U.S. mediation project

parents and may, in fact, be the *only* alternative for a parent without the financial resources to pursue litigation.

2. Mediation May Allow the Parties to Address a Broader Range of Issues than Hague Litigation

It is now known that the majority of Hague Convention applications that are filed involve children removed or retained by their primary caregivers, usually their *mothers*, who had joint custody with the father.⁹² Often these women want to return to their home country after living abroad during the marriage, but are prevented from leaving because restrictions on relocating children⁹³ have grown increasingly stringent in many states. In some cases, the primary objective of the left-behind parent (usually the father) is procuring or securing access rights,⁹⁴ not necessarily securing

estimate that the duration of a successful family mediation will range from twelve to sixteen hours, spread across two to four days. In the Franco-German initiative the mediation took the form of “block mediation” where possible, such as over a weekend. In the Reunite Pilot Project, two 3-hour sessions of mediation were offered over a two-day period. When asked by Reunite staff whether the amount of time designated for the mediation was adequate, eighty-two percent of parents and one hundred percent of mediators reported “yes.” See REUNITE report, *supra* note 55, at 17.

92. Duncan, *supra* note 76, at 112. The fact that the majority of the abductors have turned out to be mothers surprised the drafter of the convention. See, e.g., Silberman, *supra* note 16 at 44-45 for a fascinating discussion of the “gender politics” of the convention.

93. See Lucy S. McGough, *Starting Over: The Heuristics of Family Relocation Decision Making*, 77 ST. JOHN'S L. REV. 291, 291-292 (2003). “Relocation continues to be the subject of commentary and law reform around the globe as lawmakers are confronted by an increasingly mobile generation of divorced parents who seek new opportunities in reconstituted families.” *Id.* McGough argues that relocation issues, like all other issues affecting children, “should be resolved by the parents themselves because, both during their relationship and after their separation, they are the most concerned and the most knowledgeable about their child’s best interests.” *Id.* at 295. McGough concludes that “counseling, education, and mediation should, to the maximum extent possible, be substituted for litigation.” *Id.*; see also W. Dennis Duggan, *Rock-Paper-Scissors: Playing the Odds with the Law of Child Relocation*, 45 FAM. CT. REV. 193, 210 (2007) (arguing that the litigation process is ill-suited for resolving custody cases generally and relocation cases in particular and considering mediation as a possible alternative “through which parents and their lawyers can assess the relocation factors in an objective manner and in a pressure-reduced setting”); Merle H. Weiner, *Inertia and Inequality: Reconceptualizing Disputes Over Parental Relocation*, 40 U. C. DAVIS L. REV. 1747, 1833-34 (2007) (arguing that instead of restricting the ability of the custodial parents to relocate, courts should encourage noncustodial parents to relocate with the custodial parents and discussing the advantages of such solution to the complicated issue of relocation – i.e., it would be in the best interest of the children, a win-win situation, and would treat post-divorce parenting as a partnership).

94. The Convention has also been criticized for under-enforcement of *access* rights, making litigation of these issues less appealing, especially in the U.S. where

the child's permanent return.⁹⁵ Mediation may be more effective than traditional Hague litigation—which only addresses the issue of return but not custody—in these situations.⁹⁶

Mediation is also promising in cases where the abducting parent takes the child back to his or her country of origin (usually where extended family remains) because of “feelings of isolation” in the child's state of habitual residence. Isolation stems from such factors as a lack of family support, language and cultural barriers, or just general homesickness.⁹⁷ In a number of these

enforcement of access orders have been historically problematic. *See, e.g.,* Silberman, *supra* note 16, at 48. (“The Convention's mechanisms for enforcement of access rights, which were always less than robust, have been further limited by various court interpretations.”). Mediation can address this deficiency in the implementation of the Convention.

95. *See* Vigers, *supra* note 38, at 8; Janet R. Johnston & Linda K. Girdner, *Early Identification of Parents at Risk for Custody Violations and Prevention of Child Abductions*, 36 *FAM. & CONCILIATION CTS. REV.* 392 (1998). In their research, Johnston and Girdner attempted to identify which parents were more likely to abduct their children in order to design “preventive interventions—counseling, conflict resolution, and legal strategies.” *Id.* at 393. They found a number of “common characteristics of abducting parents:” (1) abducting parents are likely to deny and dismiss the value of the other parent to the child; (2) abducting parents are likely to have very young children who are easier to transport and conceal; (3) abducting parents are likely to have the social support of others—family, friends, or even an underground dissident movement to provide practical assistance and emotional support. Interestingly, they found that when factoring in domestic abductions as well as international, mothers and fathers were “about equally likely to abduct their children, albeit under different circumstances.” *Id.* at 395-396. Fathers were more likely to abduct when there was no child custody order in place. *Id.* Mothers, by contrast, were more likely to abduct after the court had issued a formal (but not to their liking) custody decree. *Id.*

96. As found by Reunite, if the applicant father does not ultimately expect to win some form of residential custody in the future, the whole process of compelling the child[ren] and mother to return to the home forum to commence custody proceedings that are likely to ultimately allow the child and mother to relocate abroad again in the future (albeit now with the court's blessing) causes unnecessary emotional strain and disruption. “At the same time, the child[ren] involved suffer the trauma of at least three relocations.” *See* REUNITE report, *supra* note 55, at 5. For example, mother, without father's consent, takes child from place of domicile in Chicago to Germany (move #1); father wins petition to compel mother to return child to Chicago (move #2); after protracted custody hearing, mother wins right to legally relocate child back to Germany (move #3).

97. *See* Vigers, *supra* note 95; Family Abduction, *supra* note 8, at 99 (“Many, if not most, of the cases reported to the U.S. Department of State involve a parent who was born or raised in a foreign country or who has close family, business, or religious ties to a foreign country. Foreign parents who have been assimilated into U.S. cultures as adults may feel that their children should be raised as they were. There may be sharp religious or cultural conflicts between the two parents. . . . A significant minority of international child-abduction cases, however, involves a child born to two parents who are citizens of the U.S.”). Thus, they may be abducting the child to a foreign locale merely to avoid detection.

cases, the abducting parent does not necessarily want to relocate permanently or cut off the child from contact with the left-behind parent. Instead, the abducting parent just wanted to spend time with extended family in his or her country of origin.⁹⁸ A mediator could help the parents establish a workable plan for funding and visiting relatives abroad. Presented with more favorable terms and conditions, the abducting parent may be willing to voluntarily return the child to the child's state of habitual residence.⁹⁹

Finally, while the desire to obtain or retain custody of a child, *albeit in one's home country*, appears to motivate most abductions, there are many other multifaceted psychological factors that are at play in some of these cases. According to Professor Lewis, the abducting parent may experience a "complex mixture of emotions including love, hate, fear, jealousy, and deprivation."¹⁰⁰ Abductions may be motivated by revenge, over the discovery of marital infidelity or a similar breach of trust, or even by financial considerations (for example, to gain leverage in a marital property settlement). A skilled mediator may be able to address these underlying issues and dynamics in a way that a judge can not.

The promise of mediation to address a broader range of issues than Hague litigation is already being seen in some of the international initiatives mentioned above. In mediations conducted by Reunite, the settlement agreements often covered matters such as "where and with whom the child would live, long term contact schedules for the non-resident parent, educational arrangements,

98. Sometimes a *ne exeat* clause, common in many divorce agreements, prevents a parent from ever leaving the jurisdiction with the child without the express permission of the other parent. Interview with Melvin Rubin, Mediator, (July 17, 2008).

99. Johnston and Girdner's research supports this conclusion. Johnston & Girdner, *supra* note 95, at 401-402. They examined the risk for abduction when one or both parents were foreigners ending a mixed-culture marriage. They described these parents as having a recognized abduction risk that is especially acute at the time of separation and divorce, when they feel "cast adrift from a mixed-culture marriage and need to return to their ethnic or religious roots for emotional support and to reconstitute a shaken self-identify." *Id.* They warn that "if the country of origin has not ratified the Hague Convention, [then] the stakes are particularly high." *Id.* at 402. They conclude that "[c]ulturally sensitive counseling and mediation that will discern and address these underlying psychological dynamics are needed to help these parents settle their internal conflicts. They also have to be reminded of the child's need for both parents, and that it is important to provide opportunities for the child to appreciate and integrate his or her mixed cultural or racial identities. . . . *It may also be necessary to provide the homesick parent with alternative emotional and financial support to stay in the area and to find ways to visit their homeland with assurances for the return of the child.*" *Id.* (emphasis added).

100. Lewis, *supra* note 3, at 399.

health matters, and financial support for the child.”¹⁰¹ In Germany, mediations frequently consider issues of long-term custody, maintenance, contact with grandparents and other relatives, and fulfilling the left-behind parent’s desire that the child learns his or her language.¹⁰² In Brazil, mediators at the BCA will include in the mediation any issue that *both* parents want to address, including financial issues.¹⁰³ In the United States, NCMEC reports that its pro-bono mediators are also willing to address issues related to custody, visitation and child support during the mediation process.¹⁰⁴ The ability to deal with a wide range of issues in mediation would also address concerns raised by several commentators that the “narrow” focus of the Convention does not “act on behalf of a child” or “address the civil and human rights of a child.”¹⁰⁵

101. In the Reunite Pilot Study, it was asked whether the ultimate settlement agreement covered issues “other than return.” See REUNITE report, *supra* note 55, at 46. One hundred percent of respondents reported “yes.” *Id.* Other issues covered included: contact, child support, sharing of responsibilities, travel arrangements, exchange of information regarding the child’s education, living in the home separately, bringing and returning the child to kindergarten, maintenance for the child and mother, dividing property, financial arrangements for flights, and continuing mediation at the domestic place. See *id.*

102. See Vigers, *supra* note 38, at 11; Christoph C. Paul & Steffi Kaesler, *Mediation within the Framework of a German-English Child Abduction*, 9 ADR BULLETIN 87, 88 (2007). In describing the range of topics covered during the successful mediation of a Hague case involving a boy abducted from England to Germany by his mother, it was noted that although: “the central and most important issue for the parents was the question of who [the child] was going to live with in the future[,] [other topics addressed included] the child’s permanent living arrangements, contacts with the other parent, arrangements for vacations, birthdays and holidays, ensuring language instruction, religion, travel expenses and child support. . . . The range of topics ended with the issue of ‘trust’ which was introduced by the father. Both parents were given the ‘homework’ of thinking about suitable ways to regain their mutual trust. . . .” *Id.*

103. Interview with Stella Freitas-Chamarelli, Attorney, Assistant for Abduction cases at BCA (Oct. 1, 2008).

104. Interview with Susan Rohol, Former Director of NCMEC’s International Division (now NCMEC’s General Counsel) (Oct. 3, 2007).

105. See Lewis, *supra* note 3, at 426-427 (2000) (citations omitted). The mediator may also have more flexibility than a judge to encourage the active participation of the child in the mediation process if appropriate and desirable. See Joan B. Kelly, *Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice*, 10 VA. J. SOC. POL’Y & L. 129, 162 (2002). Kelly uses the results of several empirical studies with college students whose parents got divorced to argue that it is both important and helpful to engage children in shaping those divorce outcomes that have a direct impact on them. She lists five circumstances when child-inclusive mediation has proved beneficial: 1) when the children wanted to speak to the mediator because they wanted their wishes to be taken into account in their parents’ deliberations; 2) when the parents requested that the mediator speaks to the children to try and help with the stress; 3) when the children resisted visitation or any parenting plan; 4) when parents expressed opposed views regarding their children’s needs and wishes, thus reaching an impasse; 5) when

3. Hague Litigation Can Lead to a Wide Range of Criminal, Civil, and Economic Penalties That Could Be Avoided or Settled in Mediation

In international child abduction cases, the abducting parent can be subject to a wide range of civil, criminal, and financial penalties that can have an impact on the taking parent.¹⁰⁶ In the U.S., potential claims include civil conspiracy or even charges under the Racketeer Influenced and Corrupt Organizations Act (RICO).¹⁰⁷ Abducting parents can also face potentially devastating immigration consequences.¹⁰⁸ Moreover, these penalties can extend to the abductor's "co-conspirators," or facilitators such as the child's grandparents or even a family lawyer.¹⁰⁹ Mediation could possibly defuse some of these highly charged cases and help the parties reach a settlement that would discourage further legal action.

Left-behind parents who suffer emotional distress and other harm because of the abduction could benefit from mediation as well. The Hague Convention does not provide a remedy for actionable torts that may be committed by an abducting parent, including the kidnapping itself or the infliction of emotional distress on the left-behind parent or other family members. Instead, parents of abducted children often file tort lawsuits seeking money damages to compensate for the expenses, pain and suffering resulting from the abduction or to gain leverage to encourage the abducting parent to return with the child.¹¹⁰ These lawsuits are not easy to prosecute however, and many parents are "too financially or emo-

the parents used their children to express their anger and conflict. *Id.* at 160; see also Robert E. Emery, Commentary, *Easing the Pain of Divorce for Children: Children's Voices, Causes of Conflict, and Mediation Comments on Kelly's Resolving Child Custody Disputes*, 10 VA. J. SOC. POL'Y & L. 164, 165 (2002) (agreeing with the importance of giving children a voice, but warning against shifting the burden onto the children); Melissa J. Schoffer, Note, *Bringing Children to the Mediation Table: Defining a Child's Best Interest in Divorce Mediation*, 43 FAM. CT. REV. 323, 324 (2005) (discussing four different models of integrating children in divorce mediation and concluding that such integration must be considered on a case-by-case basis).

106. See Alanen, *supra* note 4, at 78 nn.106-109.

107. *Id.*

108. *Id.*

109. *Id.*

110. A NCMEC publication advises left-behind parents to consider bringing a "civil child-snatching lawsuit" against the abductor, as well as any friends or relatives who may have acted as accomplices. See U.S. DEPARTMENT OF JUSTICE, A FAMILY RESOURCE GUIDE ON INTERNATIONAL PARENTAL KIDNAPPING 34 (2002). The publication suggests that such suits may help finance overseas investigations or legal battles. *Id.* at 105-106.

tionally exhausted to become involved in yet another lawsuit.”¹¹¹ Moreover, even if the parent prevails, the defendant may be judgment-proof or unable to pay.¹¹² In mediation, a settlement may be broadly construed to compensate an aggrieved party more fully for financial harm, eliminating the need for the institution of expensive and draining tort actions.¹¹³

V. ETHICAL ISSUES

A. *Potentially Conflicting Sources of Mediation Regulation*

One of the seminal issues that will need to be addressed by mediation advocates interested in crafting an international child abduction mediation program in the United States is what state-specific standards of licensure and conduct, if any, shall govern the mediators when the parties or the mediators are situated in different jurisdictions.

Mediation is an interdisciplinary field making uniform control of the practice inherently complex and challenging.¹¹⁴ Recognizing this, mediation advocates have made strides in the development of ethical codes¹¹⁵ for mediators. Depending on the jurisdictions involved in a dispute, a mediator may be governed by multiple, potentially conflicting sources of regulation, including federal and states laws, and professional standards promulgated

111. *Id.* at 35.

112. Willick, *supra* note 90, at 5. Willick, a recognized legal expert in this area, notes that in his experience, “especially as to health effects, post-traumatic stress, and other fall-out from the experience, the left-behind parent and the child might not even have suffered the worst of their damages at the moment the child is returned.” *Id.* In some cases, punitive or special damages can be sought. Although Willick concluded that in his experience, circumstances amounting to independently compensable wrongs are the exception, a simple attorney’s fee award in a Hague case may fall far short of actually compensating the left-behind parent for the economic and other damages suffered, even when such an award can actually be collected. *Id.* A surprising number of international abductors are effectively “judgment-proof,” despite having the resources to mount an international kidnapping. *Id.*

113. See Sue T. Bentsch, *Court-Sponsored Custody Mediation to Prevent Parental Kidnapping: A Disarmament Proposal*, 18 ST. MARY’S L.J. 361, 391 (1986) (“[U]nlike the other remedies for child snatching, court-sponsored mediation has the greatest promise for actually deterring parental kidnapping. . .”).

114. See Kovach, *supra* note 34, at 126 n.19. Professor Kovach notes that in addition to the interdisciplinary nature of the profession, making mediators a diverse group coming from “all walks of life,” regulation of mediation is also hampered by the absence of “one governing body or entity” for the entire field. *Id.*

115. As noted by Professor Kovach, while there is some “differentiation between ethical codes and standards of conduct,” mediation ethicists quite commonly use the terms interchangeably. *Id.* at 128 n.34.

by professional societies. For example, in the United States the two most influential sets of standards include the Model Standards of Conduct for Mediators (Model Standards)¹¹⁶ and the Model Standards of Practice for Family and Divorce Mediation (Model Family Standards), which provide more detailed guidance for issues unique to family practice such as domestic violence.¹¹⁷

In some states, specific mediator standards of conduct have been adopted by the courts and are, with limited exceptions, mandatory.¹¹⁸ In other states the standards are merely advisory.¹¹⁹ Mediators, as well as being subject to their state's specific mediation rules, must also comply with all applicable statutes, court rules, local court rules, and administrative orders *relevant to*

116. The Model Standards was developed by the American Arbitration Association, the American Bar Association and the Society of Professionals in Dispute Resolution (now known as the Association for Conflict Resolution). See MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005), available at http://www.abanet.org/dispute/documents/model_standards_conduct. It was the subject of a major revision in 2004, has been utilized in numerous jurisdictions, and has served as the "framework for many ethical codes developed thereafter." See Kovach, *supra* note 34, at 126-127. The Model Standards addresses nine topics: self-determination, impartiality, conflicts of interest, competence, confidentiality, quality of the process, advertisements and solicitation, and fees and obligations to the mediation process. See MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005), available at http://www.abanet.org/dispute/documents/model_standards_conduct.

117. The Model Family Standards developed as a collaborative effort by the Association of Family and Conciliatory Courts and the Family Law Section of the American Bar Association, and the National Council of Dispute Resolution Organizations, including the ABA Section of Dispute Resolution. See generally MODEL FAMILY STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION (2000); see also JAMES J. ALFINI, *Mediator Ethics in Dispute Resolution Ethics: A Comprehensive Guide* 66 (Phyllis Bernard & Bryant Garth eds., 2002).

118. Florida, for example, has been one of the most aggressive states in developing ethical standards for mediators. See Fran L. Tetunic, *Demystifying Florida Mediator Ethics: The Good, the Bad, and the Unseemly*, 32 NOVA L. REV. 205, 207 (2007). It was the first state to develop mediator standards of conduct which include enforcement provisions: the Florida Rules for Certified and Court-Appointed Mediators. *Id.* The ethical standards found therein apply to all mediation conduct by certified mediators and all court-appointed mediators whether or not certified. *Id.* at 209. In addition, in 1994 the Supreme Court of Florida created a nine member Mediation Ethics Advisory Committee (MEAC) (the first of its kind in the U.S.) to respond to written ethical questions posed by mediators. *Id.* The committee has since issued over 100 opinions. *Id.* MEAC opinions do not carry the weight of law but serve as advisory opinions upon which mediators can rely in good faith. *Id.* Because of Florida's influence in the area of mediator ethics and because the author is in fact a Florida Supreme Court Certified Mediator, particular attention is given to Florida in the course of this article.

119. Texas, for example, is one of these states. See ALFINI, *supra* note 117, at 67; TEX. FAM. CODE ANN. § 6.602 (Vernon 2008). Although its ethical codes are advisory, Texas is considered to be a leader in the field of mediation, having been the first state to enact a comprehensive statute which allowed courts to mandate mediation of pending lawsuits. See Kovach, *supra* note 34, at 123 n.5.

the practice of mediation.¹²⁰

Additional ethical regulations and standards are implicated when a mediator is also licensed within another profession, such as the law or social work.¹²¹ These mediators must abide by rules or standards of conduct (often conflicting) pertaining to *both* professions.

This convoluted regulatory situation creates a labyrinth for U.S. mediators involved in international child abduction cases.¹²² Mediators involved in cross-jurisdictional mediations cannot be assured of what legal standards cover them, or what legal standards apply in the event of a conflict, especially with regards to confidentiality.¹²³

120. The legislative embodiment of the public support for mediation is contained in more than 2500 state and federal statutes and many more administrative and court rules related to mediation. UNIF. MEDIATION ACT, § 11 (2001).

121. For example, the dual role of the lawyer/mediator has been addressed in part by the Model Rules of Professional Conduct. See MODEL RULES OF PROF'L CONDUCT R. 5.7 (1983) (addressing the responsibility of lawyers engaged in law-related services); Maureen E. Laffin *Preserving the Integrity of Mediation Through the Adoption of Ethical Rules for Lawyer-Mediators*, 14 NOTRE DAME J. L. ETHICS & PUB. POL'Y 479, 479 (2000).

122. Take the example of a Florida mediator mediating a case where the left behind parent is in Mexico seeking return of the child under the Hague Treaty, and the taking parent is in Texas with the child. This situation raises a number of issues for the Best Practice Committee to Address: does the mediator need to be "licensed" in Florida or Texas? Is the mediator subject to the advisory standards promulgated by the State Bar of Texas or the more vigorous standards and enforcement mechanism of the Florida Rules for Certified and Court Appointed Mediators? Alternatively, maybe the mediator should look to the Model Standards or Model Family Standards that are not state-specific? What about Mexico? Does the mediator need to be sensitive to the various mediator codes of conduct, if any, in the foreign country? Does it make a difference if the mediation takes place on the phone or in person? What if you have two mediators from different jurisdictions who are co-mediating? What if one of those mediators is in a different country (a bi-national model)?

Perhaps the mediator should be licensed in the state of the child's habitual residence because that is where the court will ultimately exercise jurisdiction if the mediation fails? But what if there is a dispute as to the child's habitual residence in the U.S.? In the example above, assume the parents are divorced and the mother lives in Texas and the father lives across the border in Louisiana. The parties have joint custody. The mother abducts the child to Mexico during one of her weekend visits. The mediation takes place on the phone. Which states' rules would the mediator be bound to in that scenario? Finally, does it make a difference if a mediator is mediating in a case in which a Hague Petition has already been filed (i.e., the jurisdiction of a court has been evoked) prior to the commencement of mediation? See KIMBERLEE KOVACH, ENFORCEMENT OF ETHICS IN MEDIATION, IN DISPUTE RESOLUTION ETHICS- A COMPREHENSIVE GUIDE 111, 113 (Phyllis Bernard & Bryant Garth eds., 2002) ("The court can exercise jurisdiction over only those who mediate cases filed and pending in Florida courts. Mediators in private practice who mediate non-litigation cases are not subject to the standards or the enforcement process.").

123. The Uniform Law Commission tried to provide some uniformity in this area by

One way to start climbing out of this maze is for mediation advocates working in this field to formulate their *own set* of standards governing both the qualifications and conduct of mediators who are asked to mediate international child abduction cases.¹²⁴ Guidance can be gleaned from the various state, national, or international standards¹²⁵ of conduct already in effect, and from the experiences of mediation experts in other contracting states. These standards could at the very least be advisory and could provide some needed guidance¹²⁶ and uniformity for mediators who

passing the Uniform Mediation Act in 2001. See UNIF. MEDIATION ACT, § 10 (2001). The drafters of the Uniform Mediation Act recognize the problems posed by such cross-jurisdictional mediations as follows: "Mediation sessions are increasingly conducted by conference calls between mediators and parties in different States and even over the Internet. Because it is unclear which state's laws apply, the parties cannot be assured of the reach of their home state's . . . protections." *Id.* The drafters were concerned in particular about conflicting statutes relating to confidentiality but their concerns would clearly be applicable to any number of ethical issues. *Id.* For example, another potential area of conflict may be provisions relating to evaluative mediation. In Florida, "a mediator shall not offer a personal or professional opinion intended to coerce the parties, unduly influence the parties, decide the dispute, or direct a resolution of any issues." FLA. R. CERTIFIED & CT. APP'TED MED. § 10.370(c) (2008). A mediator from a state or country without a mediation code that contains this particular restriction, or without any code at all, may not be subject to this prohibition. In addition, states or even countries may have different reporting requirements in the event that child abuse or neglect is suspected. Still another area of conflict might relate to prohibitions on the unauthorized practice of law. Some jurisdictions allow non-lawyer mediators to draft agreements, while others do not. These are all conflicts that may arise in the context of mediating a case involving international child abduction.

124. As discussed in *supra* Part II a group of mediation advocates in the U.S. is in the process of developing a set of Best Practices to govern mediations in this area which will include a suggested code of conduct for mediators.

125. For example, the International Mediation Institute, a Hague-based non-profit, non-governmental organization launched in 2007, is in the process of developing international competency standards for mediators. See American Arbitrators Association, *New Int'l Mediation Institute to Address Mediator Certification*, 62 DISP. RESOL. J. 10 (May-July 2007).

126. Without the force of law however, these standards would not provide any protection for a mediator in the event of a conflict with another statute, court rule or legal decision. A more comprehensive long term solution would be to advocate for the standards to be incorporated into ICARRA or a similar piece of relevant legislation. Interview with Julia Alanen, Former Director of NCMEC International Division, (Sept. 20, 2008). Alternatively, individual states could be convinced to incorporate the standards applicable to the mediation of international child abduction cases into their own more general mediation codes. Perhaps the ideal would be to have one set of *international standards* that could be used by contracting and non-contracting states to finally provide uniformity in the field. *Id.* The Hague's current efforts to create its own best practices for international child abduction mediation could be the first step towards this goal. *Id.*; see also Responses to Questionnaire, *supra* note 39, at 12 ("The European Community and its Member States are of the opinion that work could be launched on a good practice guide which could be of benefit to the parties and

are currently attempting to mediate these cases in a vacuum.

Also potentially instructive are recent efforts to create ethical standards for Online Dispute Resolution (ODR).¹²⁷ Critics of ODR had initially raised concerns about the lack of “uniform ethical guidelines” for its mediators. Similar to international family mediation, an ODR provider “may have some mediators who are bound to some rules, while other mediators are bound to another set of rules, while others still may be bound to no rules at all.”¹²⁸ In response to this concern, some of the major ODR providers have begun to develop their own sets of ethical standards for mediators who participate in their programs. It must also be decided whether these standards would be in addition to, or would trump, the other standards of conduct a mediator may be bound to as a result of the various state laws and court rules within his or her own jurisdiction¹²⁹

mediators in different countries.”) But see the response from the Government of Japan, which “does not believe it to be appropriate to regulate a broad range of procedural matters of cross-border mediation Therefore, each country should have its own laws which are consistent with the actual circumstances of that country. . . .” *Id.*

127. ODR is traditionally defined as the use of dispute resolution techniques over the Internet. See Sarah Rudolph Cole & Kristen M. Blankley, *Online Mediation: Where We Have Been, Where We Are Now, and Where We Should Be*, 38 U. Tol. L. Rev. 193, 196 (2006). It is most commonly used to resolve e-commerce or other Internet-related disputes but has been recently employed to resolve traditional off-line disputes. *Id.*; see also Ethan Katsh & Leah Wing, *Ten Years of Online Dispute Resolution (ODR): Looking at the Past and Constructing the Future*, 38 U. Tol. Rev. 19 (2006); Andrea M. Braeutigam, *Fusses that Fit Online: Online Mediation in Non-Commercial Contexts*, 5 APPALACHIAN J. L. 275, 276 (2006) (“Authorities agree that the type and number of disputes being taken to the online forum will increase, especially in the non-commercial context.”). One commentator writes, in its most basic form, the online mediation process “mirrors many aspects” of in-person mediation. *Id.* at 285. The process starts with opening statements. Next, the parties are invited to present their case. *Id.* Interests and concerns are “explored in a series of discussions and options are discussed.” *Id.* at 285-286. The mediator then decides whether to address the parties jointly or to caucus. *Id.* at 286. If a settlement is reached, an agreement can be posted for review and acceptance. *Id.* The most significant difference between ODR and traditional mediation is that online communication is textual and the parties are not in the same physical location. *Id.* at 287. Of course, with new technology, various forms of hybrid ODR are being introduced, including the use of videoconferencing. *Id.*

128. Cole & Blankley, *supra* note 127, at 210 n.90.

129. Cole and Blankley argue that ODR specific ethical guidelines should be implemented where “gaps in ethical coverage exist.” *Id.* at 210. They go on to argue that if each ODR provider implements its own code of ethics, the location of the mediator and whether the mediator was already bound by another code of ethics would no longer be an issue. *Id.* It is unclear however, whether this would be the case given the uncertainty of the ethical landscape regulating mediators mediating in multiple jurisdictions, especially in the case of dual-licensed mediators, such as

B. *Maintaining the Integrity of the Process*

When contemplating a specialized code of conduct for mediators handling international child abduction cases in the U.S., there are four seminal ethical issues that must be addressed. These include mediator competency, impartiality, confidentiality, and capacity to mediate.

1. Mediator Competency

An important threshold consideration for a mediator is whether he or she is competent to accomplish the purposes of a particular mediation.¹³⁰ In the United States mediators are drawn

attorneys, who may be bound by an additional set of regulations related to his or her profession. It is unlikely that an attorney could rely on an unlegislated set of ethical guidelines promulgated by an ODR provider organization in the event of a conflict with the rules promulgated by his or her state's bar association. *See id.* at 210 n.90 (citing Thomas Shultz, *Does Online Dispute Resolution Need Governmental Intervention? The Case for Architectures of Control and Trust*, 6 N.C. J. L & TECH. 71, 89-90 (2004) (arguing that if regulations were legislated, they would carry a stamp of approval of greater significance than a simple ODR provider's code of ethics)). Other criticisms of ODR, other than the lack of consistent standards, include the argument that textual communication is not "rich enough" to support mediation and that the digital divide unfairly tips the balance of power to the party that has better computer access and is more comfortable with online technology. Braeutigam, *supra* note 127, at 289-291. ODR appears to have some significant advantages however, that would transfer well to abduction cases. ODR is less expensive, more flexible and faster than traditional mediation. Cole & Blankley, *supra* note 127, at 204. The parties can be located anywhere and participate in the mediation at their convenience, eliminating travel and scheduling issues. *Id.* These practical considerations may serve to be very significant in the majority of international abduction cases where the impacted families do not have the funds to travel to participate in mediation (and the state does not have a program in place to fund these costs) or do not feel secure to travel due to various legal and criminal issues that may come into play. The potential speed by which ODR may be accomplished may also quell some of the concerns voiced by leaders in the field that mediation in abduction cases, if not properly thought out and administered, can "slow down the process" and ultimately, "undermine the effectiveness of the treaty." REUNITE report, *supra* note 55, at 52. Finally, some scholars argue that ODR may be particularly beneficial in family cases insofar as it may also lessen tensions associated with highly emotional disputes. Braeutigam, *supra* note 127, at 298. Even where relatively amicable, divorcing couples have well-established patterns of communication and are adept at reading each other's non-verbal cues. The online forum reduces the impact of those cues, making the process less confrontational. *Id.* In fact, in international abduction cases involving allegations of domestic violence, ODR may be the *only form* of dispute resolution that a fearful spouse would be comfortable with. It is the author's opinion that a mediator may put in place "safeguards" in cases involving domestic violence, including distance mediation using the Internet. But see Braeutigam's warning that online mediation may not be appropriate where there is a risk of violence between people in the same geographic area insofar as an online mediator may not be as perceptive to physical cues suggesting an imminent threat of violence. Braeutigam, *supra* note 127, at 299.

130. ALFINI, *supra* note 117, at 70; *see also* Paula Young, *Rejoice! Rejoice! Rejoice!*

from a wide range of professions, including attorneys, psychologists, social workers, clergy, and accountants. There are no universal standards for becoming a mediator, and states have differing educational and experiential prerequisites.¹³¹ One of the most controversial issues in evaluating mediator competency is whether or not competence should include substantive expertise. The Standards of Conduct for Mediators rejects any notion that a

Give Thanks and Sing: ABA, ACR, And AAA Adopt Revised Model Standards of Conduct For Mediators, 5 APPALACHIAN J. L. 195 (2006). In her analysis of the 2005 Model Standards of Conduct For Mediators, Young discusses the competency standard as it was revised by the Joint Committee. The underlying assumption behind the competency standard is that someone who offers to serve as a mediator creates the expectation that he or she is competent to provide effective mediation services. Thus, "training, experience in mediation, skills, cultural understandings are often necessary for mediator competence." *Id.* at 231 (citing MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005) (internal citations omitted)). This does not imply that mediators have to possess all these competencies in order to provide effective service in each mediation. In addition, mediators are required by the Model Standards to attend educational programs that would help enhance their knowledge and skills. *Id.* at 232. Alfini concludes that "the standards rely on truthful mediator disclosures, self-monitoring, and an educated market to control who handles what kinds of mediations." *Id.* at 233; see also Charles Pou, *Assuring Excellence, or Merely Reassuring? Policy and Practice in Promoting Mediator Quality*, 2004 J. DISP. RESOL. 303 (2004). Pou defines competence as "the ability to use dispute resolution skills and knowledge effectively to assist parties in prevention, management or resolution of their disputes, in a particular setting or context," *Id.* at 306, and notes that the sources of these skills and knowledge are a mixture of innate personal characteristics, education, training and experience. *Id.* at 307. He analyzes five types of quality assurance systems by taking into account the nature and height of "hurdles" that a mediator must meet to engage in mediation, as well as the "maintenance" or the continuing educational programs a mediator must engage in during his/her career. Thus, the five types are: "high hurdle/low maintenance," "high hurdle/high maintenance," "low hurdle/low maintenance," "low hurdle/high maintenance," and "no hurdle/no maintenance." *Id.* at 306. He warns that whatever the benefits of these approaches that certify some mediators as competent and exclude others, they pose clear risks such as exclusivity, overemphasizing marginal skills, diminished innovation, diversity and collegiality. He advocates instead a system that incentivizes, encourages and provides a support structure that allows mediators to develop their skills and self-awareness by using performance-based approaches and users' feedback as a yardstick. *Id.*

131. The situation is similarly complex in Europe where mediator credentialing is approached differently in different countries. For example, in Denmark and the Netherlands some mediation training is confined to family lawyers while in Norway and Sweden, mediators tend to be social workers and therapists. In Poland, initial mediation training programs were limited to therapists but have been recently expanded to include family lawyers as well. Vigers, *supra* note 38, at 21 (citing Lisa Parkinson, Paper Given at the European Masters in Mediation Seminar at Institute Universitaire Kurt Boesch in Sion, Switzerland: Family Mediation in Europe-Divided or United? (Mar. 2003)). The European Forum Training and Research in Family Mediation is attempting to standardize some basic standards for family mediation training. As of the date of this article, the Forum has training programs in fourteen European countries and Israel. *Id.* at 22.

mediator should possess expertise in the subject matter of the dispute. Conversely, the Model Family Standards state that the mediator should have at least *some* knowledge of family law and family conflict. These varying standards are subsumed by the catch-all provision in most state mediation statutes that a mediator shall mediate only when the mediator possesses the necessary qualifications or skills to satisfy the expectations of the parties.¹³²

Lack of training and relevant knowledge concerning the subject matter, while serious in any mediation, can have a devastating impact in the context of international parental kidnapping. For example, a mediator may be asked to mediate a case involving a country that, while technically a party to the Hague Convention, is non-compliant or enforces the laws only sporadically or in accordance with its own cultural biases. A mediator who agrees to mediate this cases should have some knowledge of the relevant Hague Compliance Record when fashioning an agreement that would permit a parent to remove a child, either for a visit or long-term, to a non-compliant country. Otherwise, the mediator risks facilitating a re-abduction. A mediator should also have at least some knowledge of the relevant immigration issues that could impact a settlement in a case involving international child abduction, including the inability of a parent to obtain a visa to return with a child and the fact that once an abduction has been reported, a parent may be barred from re-entry, making future visits impossible even if agreed to by the parties.¹³³

With this background in mind, mediation advocates involved in the development of a mediation initiatives in this area will assess what level of competency should be required of mediators handling international child abduction cases and, in particular, whether non-lawyer mediators can be used. In the Reunite example non-lawyer mediators *are* used. In the proposed German-U.S. protocol by contrast, at least one of the co-mediators is invariably expected to be a lawyer.¹³⁴

Initial data from the Reunite Pilot Scheme demonstrates that non-lawyer mediators can be extremely effective in these cases if

132. For example, in Florida a mediator shall “decline an appointment, withdraw, or request appropriate assistance when the facts and circumstances of the case are beyond the mediator’s skill or experience.” FLA. STAT. ANN. § 10.640 (2008).

133. Interview with Julia Alanen, Former Director of NCMEC International Division (Oct. 13, 2008).

134. Vigers, *supra* note 38, at 17; *see also* Christoph C. Paul & Dr. Jamie Walker, *Family Mediation in International Child Custody Conflicts: The Role of the Consulting Attorneys*, 22 AM. J. OF FAM. L. 1, 43 (2008).

they have extensive training in international family law issues¹³⁵ and have a sophisticated understanding of the relevant legal issues in order to ensure that agreements reached have a realistic chance of becoming enforceable legal documents.¹³⁶ In addition, the Reunite scheme contemplated that any agreement reached would ultimately be reviewed by an attorney before it became binding.

2. Impartiality

Impartiality¹³⁷ is considered a hallmark of mediation and is addressed in all mediator standards of conduct.¹³⁸ The comments

135. When the Reunite mediators were asked whether they would have been able to undertake mediation in this type of case “without any prior knowledge of international parental child abduction and the 1980 Hague Convention,” one hundred percent said “no.” REUNITE report, *supra* note 55, at 37. The mediators were equally divided about whether this type of mediation “should only be undertaken by a mediator with a special family law background” or with “non-legal expertise in the field of international parental child abduction.” *Id.* at 38.

136. In all jurisdictions, enforcement requires collaboration with trained legal counsel. Vigers, *supra* note 38, at 17. For example, in the U.S. agreements reached through mediation may be submitted to a state court in the form of a stipulated agreement that can be recognized and enforced in that jurisdiction as well as within other U.S. states under the UCCJEA. Under the Reunite Pilot Project, any agreement was memorialized in the form of a Memorandum of Understanding (MOU). REUNITE report, *supra* note 55, at 9. The U.K. lawyers then reduced the MOU to a lawfully binding consent order that was placed before the court. The overseas lawyers were asked to register/mirror the consent order made in the United Kingdom in the overseas jurisdiction. *Id.*

137. The term impartiality and neutrality are, in most instances, used interchangeably by legal ethicists. See Kovach, *supra* note 34, at 129. The author will do the same herein.

138. Compare Young, *supra* note 130, at 209-210, with Susan Nauss Exon, *How Can a Mediator be both Impartial and Fair? Why Ethical Standards of Conduct Create Chaos for Mediators*, 2006 J. DISP. RESOL. 387 (2006). Young states that impartiality characterizes the proper relationship between the mediator and the parties and the proper conduct of the mediator towards the parties. Thus, mediators should avoid conflict of interests and even the appearance of such a conflict during or after the mediation and they should be neutral during mediation. Impartiality also characterizes the proper relationship of the mediator with the outcome of the mediation and the proper conduct of the mediator toward the outcome. Professor Exon warns, however, that although all state standards address impartiality, principles of impartiality are not standardized. In her article she compiled a comparison chart of Standards in all fifty states regarding mediator impartiality and fairness concepts. *Id.* at app. A. She found that some definitions of impartiality relate to mediator conduct while others relate more to conflict of interest concerns. Further, “[m]any of the definitions of impartiality are insignificant because they seek to define themselves by the very term sought to be defined. Such an approach is not helpful to mediators because it is too easy for them to interpret the meaning of impartiality in very different ways based on personal custom and tradition The lack of clarity in many of the impartiality provision will lead to a lack of standardized

to the Joint Standards explain that the mediator must act free of “partiality or prejudice based on the parties’ personal characteristics or background. . . .”¹³⁹ The duty to maintain impartiality continues throughout the course of the mediation and a mediator must withdraw if his or her impartiality becomes compromised.¹⁴⁰ Impartiality may be defined differently in different mediation standards.¹⁴¹

It is important to keep the perception of impartiality in mind when designing mediation protocols in international parental kidnapping cases. Different concerns will surface depending upon whether mediation is organized by *one* State (as in the Reunite and Argentine examples), jointly (as in the German-Franco model and proposed German-US model), or by a mediator affiliated with a third, unrelated state (as suggested by the Central Authority of Malaysia.)¹⁴² Where mediation is both organized and conducted in *one* State, pains must be taken to ensure that the process is fair for all parties, in spite of linguistic and cultural differences. Access must be insured even if it means increased costs associated with obtaining translators, interpreters or bi-lingual co-mediators. For example, in the Reunite Project, English-speaking mediators were used, but professional translators were available whenever necessary. Another way to promote access is to invite the left-behind parent to travel (at the mediating State’s expense) to the location of the mediation. This will be particularly appealing for the left-behind parent if safe interim-visitation with the child can be facilitated during the course of the mediation.

Mediation schemes that apply strict criteria as to the gender and ethnicity of the mediators raise particular concerns. For example, the German-U.S. initiative proposes having one mediator from Germany and one from the United States, one male and one female. The theory is that each parent will feel more at ease with a mediator who shares their gender and background, particu-

use for mediators within their respective states, which could undermine the integrity and credibility of the mediation practice.” *Id.* at 399.

139. ALFINI, *supra* note 120, at 68; *see also* MODEL FAMILY STANDARDS § IV(I) (2008) (similar language); JOINT STANDARDS Comments (2008).

140. MODEL FAMILY STANDARDS § IV(I) (2008); JOINT STANDARDS § II (2008).

141. In Florida for example, impartiality is defined to mean “freedom from favoritism or bias in word, action, or *appearance*, and includes a *commitment to assist all parties*, as opposed to any *one individual*.” FLA. STAT. ANN. § 10.330(a) (2008) (emphasis added).

142. Responses to the Questionnaire, *supra* note 39, at 17. (“[I]n order to maintain impartiality, it is proposed that the mediator should be appointed from a third party State and one mediator would suffice.”).

larly when the mediation is taking place in a foreign State, and that the mediator will have more knowledge of the parent's legal system, culture and gender specific-issues.¹⁴³

These expected benefits must be balanced however, against the possibility that having defined criteria for mediators could hamper, or at least be *perceived* to hamper, the mediator's impartiality.¹⁴⁴ (For example, the German mediator may be perceived to identify more with the German parent.) Ideally, if a mediator is properly trained and sufficiently experienced, he or she should be able to effectively mediate *any* international child abduction case regardless of the gender and ethnicity of the parties involved.

3. Confidentiality

The importance of protecting the parties' confidentiality during mediation is well-established. The frank exchange requisite of a mediation can only be achieved if the participants know that what is said in the mediation will not be "used to their detriment through later court proceeding and other adjudicatory processes."¹⁴⁵ Although they vary in scope and coverage, all fifty U.S. states have statutes or rules designed to protect mediation communications.¹⁴⁶

The recently enacted Uniform Mediation Act has significantly expanded confidentiality provisions beyond what the majority of states currently require.¹⁴⁷ The Act has given a broad definition of "communication," encompassing such things as statements that are made orally, through conduct or in writing, or other recorded activity.¹⁴⁸ A mediator's "mental impressions and observations"

143. Vigers, *supra* note 38, at 16.

144. *Id.* at 12. Vigers cautions, "in establishing a mediation scheme States may wish to consider where to place the scheme and how to ensure mediators are *not only independent but are seen to be independent.*" *Id.* (emphasis added).

145. UNIF. MEDIATION ACT, § 6 (2001). The concept of a mediator privilege, however, may be antithetical and may in fact antagonize some foreign courts that look to the mediator to provide information in the event that negotiations break down.

146. Ellen E. Deason, *The Need For Trust as a Justification for Confidentiality in Mediation: A Cross-Disciplinary Approach*, 54 U. KAN. L. REV. 1387 (2006). In Florida for example, "[a] mediator shall maintain confidentiality of all information revealed during mediation except where disclosure is required or permitted by law or is agreed to by all parties." FLA. STAT. ANN. § 10.360 (2008). In addition, "[i]nformation obtained during caucus may not be revealed by the mediator to any other mediation participant without the consent of the disclosing party." *Id.*

147. See Uniform Law Commissioners, Summary Uniform Mediation Act (2001), http://www.nccusl.org/Update/uniformact_summaries/uniformacts-s-uma2001.asp (last visited December 6, 2008).

148. UNIF. MEDIATION ACT, § 2(2) (2001).

are also covered.¹⁴⁹ Coverage extends to all participants in the mediation, including non-participants such as experts and others who may have information that would facilitate the resolution of the case.¹⁵⁰

Confidentiality is not absolute, and the Uniform Mediation Act lists a number of statutory specific exceptions for which confidentiality may be waived, including threats to commit bodily injuries or crimes of violence and evidence of abuse and neglect.¹⁵¹ Most state statutes include similar provisions that circumscribe confidentiality when it conflicts with public policy, such as when a child is in need of protection.

Because confidentiality provisions vary from jurisdiction to jurisdiction, it is important when mediating an international parental kidnapping case that the parties are made aware of what the limits of confidentiality actually are. For example, the Uniform Mediation Act and many statutes provide an evidentiary privilege to prevent the discoverability and admissibility of mediation communications in court. It does not however, necessarily prevent disclosure *outside* of the proceedings to third parties such as family members or even the media.¹⁵² Mediation advocates need to be sensitive to whether or not prohibitions on such communications are advisable. By contrast, in some abduction situations parties may wish to permit or even encourage discussions about the substance of the mediation to outside family members—a stepparent or grandparent for example¹⁵³—who may have an interest in the well-being of the child.¹⁵⁴

149. *Id.*

150. *Id.* at § 4.

151. *Id.* at § 6.

152. *Id.* at § 8.

153. The need to consult other family members might be of particular importance in more kinship-orientated cultures where decisions are made based on the best interest of the family as a unit and where women are not permitted to make decisions absent the input of a male authority figure. Conversely, in other cultures a woman may be shamed, ostracized, tortured or even killed if they share details about their marriage to outsiders. Mediators must be extremely sensitive to these cultural differences and educate themselves accordingly when mediating cross-border family disputes.

154. The drafters of the act took an approach of restraint on this issue stating that “these decisions are best left to the good judgment of the parties, to decide what is appropriate under the unique facts and circumstances of their disputes, a policy that furthers the Act’s fundamental principle of party self-determination.” UNIF. MEDIATION ACT, § 47 (2001). Thus, if the parties want confidentiality to extend to third-parties they can draft a confidentiality agreement to the same. This appears to be the same approach taken by Reunite. The written statement on confidentiality provided to all participants in their mediation process provides “nothing said during the mediation

The mandatory reporting of child abuse found in most mediation codes and statutes raises a very interesting question in the context of international child abduction. If parental kidnapping can be considered child abuse, does a mediator have an obligation to report the location of a missing child in the event the mediation fails? The mediator and the parties must also be aware that, in certain situations, the reporting of abuse and the resulting criminal charges that may follow can derail an otherwise promising mediation and possibly ruin the left-behind parent's best-chance of a reunification with the child. If a criminal warrant for child abuse is issued, or even if a civil investigation is instituted, the abducting parent may be unwilling or unable to return to the place of the child's habitual residence. This makes it much more difficult for the mediator to fashion a settlement that has provisions for shared custody (or even for the child's return). The abducting parent may become more vested in his or her desire to remain abroad with the child. The question remains, do you prioritize the success of the mediation over the safety of the child?

There is also the complicated question of where the abuse is to be reported. Should the mediator report the abuse to officials in the State of the child's habitual residence or in the jurisdiction where the child currently resides or both? Should the mediator take into account the fact that some countries do not have adequate laws or enforcement mechanisms relating to domestic violence when making the decision where to report?

Another confidentiality concern that needs to be considered involves intentional misuse of mediation communication. Because of the fact that so many of these mediations will likely be conducted by phone, teleconference, or over the internet, there is an increased likelihood that one party may impermissibly record the contents of the mediation, or allow the mediation to be heard by third parties without disclosure. Alternatively, in the case of ODR, one party might cause email communications to be viewed or forwarded without the other party's permission. Mediation advocates need to think of ways to address this issue so that the integrity of the mediation process is not compromised.

can be *quoted in court*. Any oral or written information received before during or after a mediation is treated in the strictest of confidence except. . . *with the written consent of all parties.*" REUNITE INTERNATIONAL, MEDIATION SERVICE INFORMATION LEAFLET (2008), available at <http://www.reunite.org/edit/files/Mediation%20leaflet.pdf>.

4. Capacity to Mediate

The integrity of the mediation process will be severely compromised if one or more parties to the mediation lack the capacity to mediate effectively.¹⁵⁵ Mediators must always be sensitive to factors that may compromise a party's functioning,¹⁵⁶ such as alcoholism, drug abuse, physical or mental impairment, or domestic abuse.¹⁵⁷ In Florida for example, a mediator must terminate the mediation if the mediator reasonably believes that "the threat of domestic violence, existence of substance abuse, physical threat or undue psychological dominance are present and existing factors which would impair any party's ability to freely and willingly enter into an informed agreement."¹⁵⁸ The Model Family Standards state that a family mediator "shall recognize child abuse and neglect" and take "appropriate steps" to respond accordingly.¹⁵⁹ The Model Family Standards appear to advocate for an outright ban on mediation in cases involving child abuse,¹⁶⁰ and a

155. ALFINI, *supra* note 117, at 71.

156. While it is clear that, as mediation is currently practiced, the mediator has the ultimate responsibility to ensure that clients are capable, there are no clear legal standards however, governing how mediators *should* or *do* make those decisions. Connie J. A. Beck & Lynda E. Frost, *Defining a Threshold for Client Competence to Participate in Divorce Mediation*, 12 PSYCHOL. PUB. POL'Y & L. 1, 7-8 (2006) (establishing a functional standard for competence focusing on the impact of various individual and relational factors on each participant rather than considering the presence of a factor to be an absolute bar to participation in mediation). Moreover, some mediators, by virtue of their professional training in such fields as mental health, may have more expertise than others in assessing competence. *Id.* at 8; see also Erica F. Wood, *Addressing Capacity: What is the Role of a Mediator?* (July 2003), available at <http://www.mediate.com/articles/wood> (enumerating the factors that a mediator has to consider in determining whether a certain party has the ability to mediate – i.e. a party's understanding of the mediation process, of the identity of the parties, of the mediator's role, of the parties' relationship with the mediator and of the issues involved – and discussing the types of accommodation that a mediator might use, such as changing the place or time of the mediation, a support person, making sessions short, and finally, cautioning against using legal surrogates who might have different interests and values than the parties themselves); Erica F. Wood, *Dispute Resolution And Dementia: Seeking Solutions*, 35 GA. L. REV. 785 (2001) (discussing in more detail the capacity to mediate in general and the capacity to mediate of those who suffer from dementia).

157. Professors Beck and Frost note that although much of the literature has focused on domestic violence as a key "couple-level factor" that impacts capacity, other factors such as control, coercion, intimidation, and fear can also be significant. Beck & Frost, *supra* note 156, at 7.

158. FLA. STAT. ANN. §10.310 (2008). Although the rule is entitled specifically with "Self-Determination," the issues relating capacity and decision making are intertwined.

159. MODEL FAMILY STANDARDS §§ IX-X (2008). Section X replaces the words 'child abuse' and 'neglect' with 'domestic abuse'.

160. MODEL FAMILY STANDARDS § IX(B) (2008); ALFINI, *supra* note 117, at 71.

discretionary ban on cases involving domestic violence involving an adult, prohibiting the mediation *unless* the mediator has had “appropriate and adequate training.”¹⁶¹

Capacity is an important consideration for mediators mediating international parental kidnapping cases because many of these cases involve allegations of domestic violence.¹⁶² Although some feminist scholars have argued for a per se ban on mediating cases involving domestic violence,¹⁶³ to do so in the international

161. MODEL FAMILY STANDARDS § X(B) (2008); ALFINI, *supra* note 117, at 71. Section X(C) requires continued screening for domestic abuse throughout the mediation process and Section X(D) lists various safeguards a mediator can employ when mediating cases involving domestic abuse. See MODEL FAMILY STANDARDS § X(C) & (D) (2008).

162. Weiner, *supra* note 81, at 765 (noting that seven of the nine cases that reached the United States Courts of Appeals between July 2000 and January 2001 for example, involved an abductor alleging that she was a victim of domestic violence).

163. Many feminist scholars contend that mediation is *never appropriate* in cases where domestic violence is present. In general, two arguments are put forth in support of this proposition. The first argument deals squarely with the issues of competency, equality and power. A successful mediation requires equal power between the parties. An abuse victim is powerless or at least less powerful. Thus, mediation is ineffective and perhaps even unsafe in this context. See, e.g., Sarah Krieger, *The Dangers of Mediation in Domestic Violence Cases*, 8 CARDOZO WOMEN'S L.J. 235, 245-248 (2002); Alison E. Gerencser, *Family Mediation: Screening for Domestic Abuse*, 23 FLA. ST. U. L. REV. 43 (1995); Dianna Post, *Mediation Can Make Bad Worse*, NAT'L L.J., June 8, 1992, at 1. The second argument relates to the effects mediating domestic violence cases have on the larger goals of the women's movement and more specifically on the movement's efforts to “generate greater support for victims, publicize their pain, criminalize the abuse, deter batterers, and obtain more recognition for victims in the criminal justice system.” Kreiger, *supra* note 163, at 248. Mediation, with its focus on confidentiality, is thought to be “antithetical to the goal” of making domestic violence a public problem. See Post, *supra* note 163, at 2. (“Violence against women and children cannot be controlled as long as it lurks behind closed doors . . . by decriminalizing the behavior of the batterer, mediation moves in direct opposition to battered women's advocacy over the last twenty years.”). Other related arguments against the use of mediation in domestic violence cases include the belief that the entire process will be compromised because battered wives will not be able to articulate their own interest and needs; that the batterer may use children and custody issues to force women to compromise on alimony and financial claims; and that domestic violence victims will settle prematurely because of fear of voicing disagreement with their abuser. Susan L. Pollet, *Mediating Domestic Violence: A Potentially Dangerous Tool*, 77 N.Y. ST. B.J. 41 (2005). Conversely, proponents of mediation in cases involving domestic violence remind us that in litigation, the reality is that an abuse victim's chance of success rests more on “fortuity and the judge's sympathy than on any principled rule of law.” Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 FORDHAM. L. REV. 593, 599 (2000); see also Nancy Ver Steegh, *Yes, No, Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence*, 9 WM. & MARY J. WOMEN & L. 145 (2003). Ver Steegh underlies the shortcomings of the adversarial process when it comes to victims of domestic violence. Oftentimes, the adversarial process is too lengthy, costly, inefficient and oblivious to the needs of the parties to be effective

parental kidnapping context may be inappropriate and could further victimize and disempower families that have suffered abuse.¹⁶⁴

Instead, mediation advocates must address the availability and effectiveness of various screening tools that have been developed to determine if domestic violence exists in a particular case and, if so, to what extent. For example, some family mediators have begun to require face-to-face interviews as a prerequisite to any mediation. Others use detailed intake sheets with questions concerning domestic violence.

In circumstances where abuse has been identified, appropriate safeguards must be implemented to help ensure that an abused spouse's capacity to mediate is not compromised.¹⁶⁵ Pre-

when it comes to families torn apart by violence. Mediation helps avoid some of these shortcomings. *Id.* at 170, 174. However, she thinks there is no clear answer to the question of whether domestic violence victims should mediate their divorce. She argues that mediation should be offered as one alternative among others and that it is the abused survivors who should make an informed choice about whether mediation would work for them. *Id.* at 175-176; see also Luisa Bigornia, *Domestic Violence: Alternatives to Traditional Criminal Prosecution of Spousal Abuse*, 11 J. CONTEMP. LEGAL ISSUES 57, 62 (2000) (arguing that in cases of domestic abuse without physical injury mediation can be a successful way of solving disputes, provided that the parties retain a balance of power). Compare with Rene L. Rimelspach, *Mediating Family Disputes in a World with Domestic Violence: How to Devise a Safe and Effective Court-Connected Mediation Program*, 17 OHIO ST. J. DISP. RESOL. 95, 100 (2001). Rimelspach engages in a utilitarian analysis of mediation in the context of domestic violence and concludes that the benefits outweigh the potential harm. Effective mediators are trained to deal with the imbalance of power and they are more likely to identify abuse and deal with intimidation than attorneys. Moreover, empirical studies have shown that mediation has an impact on reducing the incidents of abuse and has caused some batterers to seek professional help. *Id.* at 102-103. Moreover, the access-to-counsel issues that plague any Hague case are even *more pronounced* for victims of domestic violence. These women need to find affordable counsel versed in both international law and in domestic violence issues. The problem of finding counsel is further hampered by the fact that in many countries the petitioners in Hague cases receive free legal counsel. However, the respondents (even if a domestic violence victim) do not. See Pollet, *supra* note 163, at 42-43. Thus, to deny these women access to mediation may further victimize them.

164. An examination of all the possible legal and social reforms that are being debated to make the Hague Convention fair to victims of domestic violence abused women and their children is beyond the scope of this paper. For that serious task I have faith in my colleagues who have been extremely influential in bringing these issues to light. See, e.g., Alanen, *supra* note 4; Weiner, *supra* note 163, at 599. As Weiner writes, "time is ripe" for an "in-depth exploration" of the Hague Convention's application to parents who take their children across international borders to escape from domestic violence." *Id.* at 598.

165. The importance of this issue cannot be overstated. It is well established in the literature that women who flee are often subjected to more abuse when they return. Moreover, experience in the U.S. indicates that batterers are two times more likely to seek sole custody of their children than other fathers are. The court adjudicating the

cautionary measures that have been employed with some success include placing the parties in separate physical locations during the mediation; Online Dispute Resolution; requiring the victim's attorney be present during the mediation; providing a "safe exit" plan to be implemented at the conclusion of the mediation; providing mediators with specialized training in domestic abuse issues; and performing more follow-up of mediated agreements in cases where violence is present.¹⁶⁶

The mediator must be constantly alert to ensure that the alleged domestic violence victim is able to articulate her own needs and interests, and that she is not entering into a settlement prematurely, or refusing to enter into a settlement at all because of fear of voicing disagreement with her abuser. The mediator must also be specially trained to recognize and respond to the often subtle signs of intimidation and coercion that permeate abusive relationships.¹⁶⁷

These recommendations are consistent with Reunite's experience mediating domestic violence cases in the United Kingdom. The Reunite Pilot Scheme concluded that "allegations of domestic violence [did] not preclude entering the mediation process and [did] not affect the ability to reach a [settlement]." However, it is important to conduct a risk assessment in each case and introduce appropriate measures to ensure that parents feel safe during the mediation process.¹⁶⁸ Importantly, when asked the question

Hague case may even give temporary custody of the child to the left-behind batterer parent. Weiner, *supra* note 81, at 766-769.

166. Pollet, *supra* note 163, at 43.

167. See, e.g., Douglas B. Knowlton & Tara Lea Muhlhauser, *Mediation in the Presence of Domestic Violence: Is it a Light at the End of the Tunnel or a Train on the Track*, 70 *NORTE DAME L. REV.* 255, 267 (1994). "Until mediators begin to understand, and are properly trained, skilled, and educated to recognize the velocity, force, and coercive power of even a simple involuntary movement (a hand gesture, a blink) and the effect it can have on a victim of intimate violence, they will never understand how the balance of power is inextricably changed with an episode of violence. The velocity of a look, a movement, a word cannot be controlled by a neutral and detached third party seeking to arrive at a consensus decision. Victims will frequently recount that they have become experts at interpreting the verbal and nonverbal cues of their batterers. A movement or word that appears benign to a mediator can have tremendous impact on the level of fear of the victim and the outcome of the session." See also *supra* Part V.B.1.

168. Specifically, when asked about safety, ninety-two percent of participants reported feeling "safe on arrival" and "in the waiting area" and when "leaving the premises." REUNITE report, *supra* note 55, at 14. An impressive one hundred percent felt safe "within the mediation process." *Id.* Of course, we must be careful before drawing conclusions from these numbers because we don't know from the report if cases of severe domestic abuse were removed from the pilot during the screening

“where there were allegations of domestic violence, did it hinder the mediation process,” seventy-five percent of participants said no.¹⁶⁹ Moreover, in the twenty-five percent of cases where domestic violence allegations appeared to have at least some impact on the parties’ participation, safeguards built into the mediation model appeared to make the participants feel safe and allowed the mediation to continue without compromising the abused spouse’s capacity to participate.¹⁷⁰

VI. CONCLUSION

Exploring a new frontier is always a challenge. There will be difficult terrain to navigate, especially when international borders are crossed. Although mediators must be alert and responsive to power imbalances that could compromise the process, mediation is emerging as an important and viable alternative for families facing the crisis of international child abduction. Mediation advocates in the United States need to take the lead in developing a workable and sensible mediation program in this area that can serve as a model for the Americas. Careful attention needs to be paid to how private mediators in these disputes should be regulated as well as to ethical consideration at all stages of the process. It is worth the effort. When a parent participating in the Reunite pilot scheme was asked whether the mediation process was helpful in resolving her dispute, she wrote:

[I]t was indispensable—both as an exercise to discover what each parent actually wants . . . and to hear independent professional mediators calmly and diplomatically [evaluate]

processes. Also, it would be more illustrative if these safety-related questions were asked specifically to women in cases where domestic violence was alleged.

169. *Id.* at 42. Interestingly however, there is no indication in the report how many cases alleged domestic violence in the first place. We know only that where alleged, it did not appear to have hindered the process in seventy-five percent of the cases.

170. Some of the comments included: “Some were hindered in the first hour but in all cases this was resolved.” Also, “[i]n a small number of cases one parent was nervous about meeting the other parent (due to domestic violence) but once mediation commenced the parent felt safe and therefore was able to speak freely and unhindered regarding the best interests of the child.” *Id.*

each parent's ideas It made me feel as though there was hope in my case as though I had a voice¹⁷¹

171. REUNITE report, *supra* note 55, at 25.