

OBJECTIONS TO MANDATORY MEDIATION

1. *Divorcing parents aren't ready to mediate at the beginning of the case. They need time to get over the strong emotions that come with a break-up.*

Litigation never makes people feel more kindly towards each other. Typically, the longer it lasts the worse they feel. In the words of 19th century cynic Ambrose Bierce, "A lawsuit is a machine into which you enter as a pig and depart as a sausage." Litigation makes the parties angrier, more defensive and more aggressive—until they run out of money and have to throw in the towel. Under the proposed legislation, mediation need only be commenced within sixty days, not concluded. If there are issues like locating one of the parties or exchanging basic information, that can be handled either during the sixty-day period or even after mediation is initiated.

2. *Mediation just adds an expense to an already-expensive process.*

Because mediation has such a high success rate, it saves the parties thousands of dollars that otherwise would be devoted to depositions, experts and legal fees. One study estimates that the cost of divorce is an average of \$20,000 per person, while the total cost of mediation for all issues in the divorce, including parenting, is \$2,000-5,000. Even if the case doesn't settle all issues, it will narrow the area of disagreement to something more manageable, and less expensive to resolve.

3. *Only poor or pro se litigants should be required to mediate.*

There is no valid reason to make the courts the exclusive domain of those who can afford lawyers, and to do so is probably unconstitutional under the Equal Protection and Due Process clauses.

4. *Mandatory mediation will economically damage divorce lawyers.*

Most parenting disputes are litigated without lawyers (or just one), so the impact will be slight in any event. The social cost of overcrowded courts and warring parents should be weighed against the potential loss of income to the bar.

5. We don't have enough trained mediators to handle the projected caseload.

Montana needs to undertake an intensive campaign to insure that each jurisdiction has enough mediators to handle the thousands of parenting cases that mandated mediation will generate. Family lawyers, especially younger lawyers, will jump at the opportunity to expand their practice. While there are qualified mediation trainers in Montana, it would be helpful to provide funding for training programs so that its cost will not be a deterrent. It may be necessary to subsidize mediation in Eastern Montana, where the resources are very limited, so that the courts can offer "mediation days" services by mediators from elsewhere in the state. Rural jurisdictions may also make use of telephone mediation, Skype mediation and other creative adaptations.

6. Why use special masters? That what we have judges for.

A special master or standing master can conduct a streamlined hearing and will be accountable for making a prompt decision. This gives each party their "day in court" without having to wait for months or even years for a decision. The field of "private judging" is exploding across the country and has been proven to be an excellent way to free up the courts for trials that require the full attention of the judiciary.

7. Mediation isn't effective where there is a difference in power between the two parents.

Actually, this is exactly why a mediator can be so effective—a well-trained mediator knows how to level the playing field and make sure both sides can be heard. Domestic violence cases, except with informed consent, are exempt from mediation.

8. The courts are essentially free. Why should litigants have to pay for the services of a mediator?

There is a general consensus that people tend to appreciate that in which they invest. Whether or not this is true, the budget cuts to legal services over the past decades requires us to shift the costs of resolution to the parties to the extent it is practical to do so. Each jurisdiction needs to establish a fee schedule that allows people of all income levels to participate in mediation, and mediators need to be willing to adjust their fees accordingly.