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DIVORCE MEDIATION: A NEW SOLUTION TO OLD PROBLEMS

INTRODUCTION

THE AMERICAN BAR has traditionally operated as if the practice of law was a profession unto itself, totally unrelated to other disciplines. Fortunately, there is today a growing recognition that the law can be neither developed nor applied in a vacuum. In order to best serve the needs of one's clients and of the legal system as a whole it is necessary to draw upon knowledge evolved in other fields such as economics, history, sociology and psychology. Divorce, for example, is a phenomenon with not only legal but also broad sociological and psychological implications which must be considered in any attempt at problem solving and reflected in the solution. The recent development of divorce mediation as a viable alternative to traditional divorce processes is an example of this philosophy at its best.

I. BACKGROUND

People in this country have, over the past few decades, begun to make increasing demands of the marital relationship. Marriage is no longer as necessary for the economic or social security of the partners as it once was. Thus, spouses now look to the marital relationship itself for satisfaction of individual needs and desires more than ever before. This cannot help but produce more divorce.¹

For every two marriages in the United States in 1981 there was one divorce.² Current projections by the United States National Center for Health Statistics suggest that at least 50% of the current marriages will also eventually end in divorce.³ This rate represents a tripling since 1959.⁴ Our nation's children are also being affected in significant numbers by this trend. Over 60% of all divorcing couples have children,⁵ with one million children involved in divorce proceedings each year.⁶ Half the children of divorce have not seen their father in at least a year.⁷ Such a trend has important social and psychological implications.

¹See *Mediation Debated at Philadelphia Bar Association's Annual Meeting*, 9 FAMILY L. REP. 2014 (1982). See also, Weitzman, *Changing Families, Changing Laws; Ten Major Trends That Have Altered The Lifestyles of Parents and Children*, 5 FAM. ADVOC. 2 (1982).

²NATIONAL CENTER FOR HEALTH STATISTICS, ANNUAL SUMMARY OF BIRTHS, DEATHS, MARRIAGES, AND DIVORCES: UNITED STATES, 1981.

³*Id.*

⁴*Id.*

⁵R. WEISS, MARITAL SEPARATION 167 (1975).

⁶Heymann, *Mediation Helps Couples*, 41 HUMANIST 21 (1981).

⁷Clausen, *Divorce American Style*, Newsweek 42 (Jan. 10, 1983).

A divorcing individual experiences a myriad of emotions including guilt, anxiety, and a pervasive sense of failure.⁸ Terminating a marriage can be a frightening experience even if both parties are in agreement, and spouses often experience a loss of self trust and a desperate need for reassurance. Yet people lose the ability to support and communicate with one another in a rational adult manner during this period. Often “[c]onflict becomes the means by which the emotional connection between two people unable or afraid to let go can be maintained.”⁹ Thus, the divorcing couple may actually be in agreement about important issues but fail to recognize this due to anger and poor communication.¹⁰ The feelings engendered by divorce must be faced and resolved or they will eventually become overwhelming, incapacitating one’s ability to function as a mentally healthy adult and parent. “The burden to themselves and to the community and its agencies of embittered distraught people can be substantial, in terms of mental health, demands upon doctors, impairment of employability, and many personal debilitating matters.”¹¹

Divorce can also leave deep scars on children impairing their learning ability, their understanding of human relationships, and their belief in their ability to love.¹² The immediate response of most children to the news of parental separation is distress and anxiety.¹³ A child may also feel intense anger. With his parents blaming one another, it is quite natural for him also to begin thinking in terms of who is at fault.¹⁴ Yet such hostile feelings in turn arouse strong guilt in the typical child.¹⁵ It is thus very important to the child that the parent who has left the home continue to play an active role in his life;¹⁶ however, hostility between his parents may make this difficult. “Continued parental conflict is the single most damaging aspect of divorce for children. It places them in a position of divided loyalties and can siphon off energy needed to deal with the developmental tasks they face.”¹⁷

Thus, there is a greater incidence of psychiatric disorders in children of divorce than in those of intact, stable homes.¹⁸ Some children turn to delin-

⁸WEISS, *supra* note 5, at 258.

⁹Gold, *Mediation In The Dissolution of Marriage*, 36 ARB. J. 9, 11 (1981).

¹⁰Gaughan, *Taking A Fresh Look At Divorce Mediation*, 17 TRIAL 39, 40 (1981).

¹¹*A Family Conciliation Service*, 126 SOLIC. J. 372 (1982).

¹²Heymann, *supra* note 6, at 21.

¹³A number of studies have shown that children whose parents are separated are on the whole more anxious than children from intact families. See WEISS, *supra* note 5, at 221. See also Wallerstein, *The Child in the Divorcing Family*, 19 JUDGES' J. 17 (1980).

¹⁴R. GARDNER, *PSYCHOTHERAPY WITH CHILDREN OF DIVORCE* 143 (1976).

¹⁵*Id.* at 116.

¹⁶WEISS, *supra* note 5, at 217.

¹⁷Gold, *supra* note 9, at 11.

¹⁸GARDNER, *supra* note 14, at 40. In one study, one-fourth of the children of divorced parents became progressively more troubled after their parents' separation. They were sad, with decreased self esteem, and their relationships with others were “ungratifying and superficial. Their social and emotional lives seemed to have been persistently impaired by the separation.” WEISS, *supra* note 5, at 216.

quency as a way to act out unresolved feelings of anger and frustration caused by the divorce. Delinquent children are in fact more likely than non-delinquents to come from homes broken by separation or divorce.¹⁹

It is not merely the fact of divorce that causes these lingering problems. Indeed, divorce handled rationally and maturely can be the best solution for all concerned. It is the hostility that often pervades the divorce process that can cause the problems. Too often, spouses continue to be debilitated by hatred and bitterness towards one another long after their marriage has ended. Their divorces, often resulting in prolonged litigation, jam our court system as the unhappy couples return to court again and again to relitigate disputed issues.²⁰ "There has been a dramatic increase in family litigation over custody and visitation rights, accompanied by clogged dockets, case delay, high costs, and assembly line treatment."²¹ Although therapy can be quite helpful, families often do not take advantage of it. The only help sought is from the legal system. And even for the strongest of clients our legal system has all too often been a hindrance rather than a help to mental health in its approach to divorce.

II. STEPS IN THE RIGHT DIRECTION

Divorce in America was at one time granted only if one spouse was able to prove the other's desertion, adultery, alcohol or drug abuse, or predilection for unnatural acts.²² For over two hundred years this fault-based system made it virtually impossible for divorce to culminate in anything but bitterness and anger.²³

Over the past two decades, in response to growing social and political pressure, the legal system has developed some important innovations designed to deal with this problem. In 1970, for example, California became the first state to recognize irremedial breakdown of a marriage as grounds for divorce.²⁴ No fault divorce laws evolved out of the recognition that both parties usually contribute to the breakdown of the marriage,²⁵ and that "[p]ublic policy does

¹⁹GARDNER, *supra* note 14, at 212. One study showed that 21% of delinquents came from divorced or separated homes, compared to only 11% of non delinquents. *Id.*

²⁰Bahr, *Mediation Is The Answer*, 3 FAM. ADVOC. 32 (1981).

²¹Pearson, Thoennes, & Vander Kooi, *Mediation of Contested Child Custody Disputes*, 11 COLO. LAW. 337 (1982). See also Chief Justice Berger, *Isn't There A Better Way?*, ANNUAL REPORT ON THE STATE OF THE JUDICIARY, Jan., 1982.

²²WHEELER, NO FAULT DIVORCE 2 (1974). See also BRAUN, SURVIVING DIVORCE 29 (1975).

²³"Fault based systems often served to exacerbate the hostile forces already affecting the family. Invariably there is a far greater amount of anger at the end of the legal proceeding than there was actually at the time they made the decision to divorce." McGraw, Sterin, & Davis, *A Case Study in Divorce Law Reform And Its Aftermath*, 20 J. FAM. L. 443, 453 (1981-1982).

²⁴Section 4508 of the California Civil Code provides that "If . . . the court finds that there are irreconcilable differences, which have caused the irremediable breakdown of the marriage, it shall order the dissolution of the marriage or a legal separation." CAL. CIV. CODE § 4508. (West 1970). As usual, California led the way. By June, 1981 sixteen American jurisdictions had established breakdown of the marriage as the sole ground for marital termination; seventeen had added breakdown to the traditional grounds, and twenty-five had living separate and apart options. Only two states — Illinois and South Dakota — had retained the traditional fault grounds as the only means for divorce. 24 BOOK OF THE STATES 82 (1982-83).

²⁵GARDNER, *supra* note 14, at 143

not discourage divorce where the relations between husband and wife are such that the legitimate objects of matrimony have been utterly destroyed."²⁶ No fault divorce proceedings are very similar to those of fault divorces; however . . . "it is the marriage, rather than one of the spouses that is impugned."²⁷ Designed to make marital termination "more realistic, viable, and humane,"²⁸ such laws put an end to the deception and collusion often involved in old style adversary divorces.

Another recent innovation has been the increasing use of joint custody. In 1980, California again set the trend by legislating a presumption in favor of joint custody to the parents.²⁹ The purpose of such legislation is "to assure minor children of frequent continuing contact with both parents after the parents have separated or dissolved their marriage, and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy."³⁰

Parents with joint custody tend not to experience the sense of loneliness and loss often felt by a non-custodial parent. It allows each parent to retain equal responsibility for making major decisions about the physical, emotional, and moral development of the child's life.³¹ At the same time, it recognizes the child's need for both parents and allows him to maintain meaningful relationships with both thus avoiding the profound sense of loss that children often suffer in divorce situations.³²

Joint custody tends to eliminate the parental power plays that can be so damaging to the child. With power divided more equally, the likelihood of using the child as a pawn decreases.³³ One study has shown that "couples who share their children are only half as likely to return to court as couples where one parent has exclusive custody."³⁴ Today twenty-seven states have adopted the notion of joint custody.³⁵

²⁶DeBurgh v. DeBurgh, 39 Cal. 2d 858, 250 P.2d 598 (1952), quoting Hill v. Hill, 23 Cal. 2d 82, 93, P.2d 427, 422 (1943).

²⁷WEISS, *supra* note 5, at 268.

²⁸Haldy, *The Ohio Divorce Reform Act: Half-Stepping to the Modern Drummer*, 2 OHIO N.U.L. REV. 508 (1975).

²⁹Section 4600 of the California Civil Code provides that custody should be awarded ". . . in the following order of preference according to the best interests of the child: 1) To both parents jointly . . . or to either parent. In making an order for custody to either parent the court shall consider, among other factors, which parent is more likely to allow the child or children frequent and continuing contact with the noncustodial parent . . . ; 2) If to neither parent to the person in whose home the child has been living in a wholesome and stable environment"; and 3) To other suitable persons. CAL. CIV. CODE § 4600.5 (West Supp. 1982).

³⁰CAL. CIV. CODE § 4600(a) (West Supp. 1981).

³¹Mills & Belzer, *Joint Custody As A Parenting Alternative*, 9 PEPPERDINE L. REV. 853, 873 (1982).

³²*Id.*

³³*Id.* at 872.

³⁴Clausen, *supra* note 7, at 44.

³⁵*Id.* at 42.

III. PERSISTENT PROBLEMS

Although these innovations are steps in the right direction, they have by no means put an end to the old adversary system. Use of both, in fact, presupposes a certain amount of amicability between the spouses. By definition, for example, spouses who are raging at one another are not as likely to enter into a no fault divorce. In a 1978 Ohio study, 62.5% of the couples terminating their marriage relied on traditional fault grounds, despite the availability of a dissolution statute and of a "living separate and apart" option.³⁶

Similarly, parents who are caught up in feelings of hostility towards one another are less likely to agree to a joint custody arrangement, which, by definition, requires extensive parental cooperation.³⁷ Even if the court does order joint custody in such a situation, it is likely to fail or at least to engender even more animosity between the embattled parents, to the emotional detriment of the child.³⁸

The legal system often does not contribute to an atmosphere conducive to the use of these potentially valuable tools. Lawyers tend to think in strictly legal terms. They often actively discourage communication between the divorcing spouses during a time when it may be most necessary out of fear that their client will inadvertently weaken his or her negotiating position or concede too much.³⁹ They may feel bound to counsel their clients against even brief reconciliations which might be in the family's best interests psychologically, because "from a legal standpoint any reconciliation may condone a spouse's earlier offenses."⁴⁰ Also, virtually all lawyers will permit a client to tell only that part of the story that makes as strong a case as possible for the client. Although this is done with the best of intentions, such tactics serve only to perpetuate the adversarial atmosphere. Moreover, many lawyers, in good faith attempts to represent their clients zealously, tend to negotiate too hard and thereby worsen the postmarital relationship of the spouses.⁴¹ For example, they may take positions more extreme than the client desires in order to eventually achieve an advantageous compromise but in so doing increase the anger and alienation between the spouses.⁴²

Finally, many spousal disputes are caused by the lack of skill of attorneys

³⁶McGraw, *supra* note 23, at 464. 12.6% did choose the separate and apart option (OHIO REV. CODE ANN. § 3501.01(k) (Baldwin 1976)), which requires proof of separation without cohabitation for two years. 22.4% relied on the dissolution statute (OHIO REV. CODE ANN. §§ 3105.61-.65 (Baldwin 1976)), which requires a mutual agreement to terminate the marriage and all decisions pertaining to child care, child support, and the division of property and income. 12.5% cited both fault grounds and the living separate and apart option. *Id.*

³⁷Mills, *supra* note 31, at 872.

³⁸*Id.*

³⁹WEISS, *supra* note 5, at 265.

⁴⁰*Id.* at 263.

⁴¹*Id.* at 265.

⁴²*Id.*

in dealing with controversy.⁴³ "Many lawyers begin their involvement with divorcing litigants by attempting to calm them down and bring about some compromise in their demands. However, when such efforts fail, many get swept up in the conflict and join their clients in trying to win the battle and punish the spouse."⁴⁴

IV. A SOLUTION

There is yet another innovation which not only provides a solution to many of these problems but also facilitates the use of joint custody and no fault divorce. This is the concept of mediation. Divorce mediation is a process consisting of voluntary use⁴⁵ by spouses of a neutral person to help them settle disputes connected with their decision to divorce.⁴⁶ Unlike traditional processes, divorce mediation "places responsibility for making vital decisions where the responsibility should lie — with the parties, not with lawyers or the court system."⁴⁷ At its best, mediation is used as a substitute for the traditional adversarial process and prior to any courtroom involvement.⁴⁸

The concept of mediation recognizes that feelings are as important as the legal aspects of divorce and that there are often psychological as well as legal barriers which must be understood and overcome before compromise and agreement become possible. Thus representing a "marriage" between the concepts of psychotherapy and labor mediation,⁴⁹ divorce mediation stresses "honesty, informality, open and direct communication, expression, attention to the underlying causes of disputes, reinforcement of positive bonds, and avoidance of blame."⁵⁰ Its purpose is not only to help spouses reach an agreement which recognizes the needs and rights of all family members but also to lay the foundation "for the healthy restructuring of post-divorce family life."⁵¹

A. The Process

There are roughly four phases involved in the mediation process.⁵² During the first phase, which generally lasts one or two sessions, the mediator begins to assess the dynamics of the situation and to establish an optimistic and safe emotional climate. She gathers factual information⁵³ and encourages the parties

⁴³*American Arbitration Association's Family Dispute Services*, 2 FAM. L. REP. 3083, 3084 (1976).

⁴⁴GARDNER, *supra* note 14, at 369.

⁴⁵Although some states such as California have adopted mandatory mediation programs for divorcing couples, this is not the optimum model. "The likelihood of an individual's gaining anything from a counseling situation if he feels pressured into it is very small." Pearson, *supra* note 21, at 337; *See also* GARDNER, *supra* note 19, at 374; *But see* Jenkins, *Divorce California Style*, 32 STUDENT LAW. 31 (1981).

⁴⁶*See* Fiske, *An Enthralling Introduction to Divorce Mediation*, 25 B. B. J. 15 (1981).

⁴⁷*See* Jenkins, *supra* note 45, at 32.

⁴⁸*See* Pearson, *supra* note 21, at 340.

⁴⁹*Id.* at 337.

⁵⁰*Id.*

⁵¹Gold, *supra* note 9, at 11.

⁵²*Id.* at 12.

⁵³Generally, each party is asked to submit a financial and property statement, a budget form, recent tax returns, and other supportive data. Gough, *supra* note 10, at 41.

to express anxieties and concerns.⁵⁴ The mediator discusses her role and outlines the procedures. She also lays the ground rules, which “typically cover the issues of mediator neutrality, full disclosure, confidentiality, best interests of the children, commitment to develop an equitable settlement, agreement not to participate in adversary legal procedures during mediation, and some statement about abiding by the final agreement.”⁵⁵ Fee arrangements should be finalized early in this phase, with each spouse contributing in some way to payment.⁵⁶

In deciding to mediate, the spouses in effect “agree to disagree.”⁵⁷ Thus, in the second phase the parties begin to define their respective needs and goals. Areas of controversy are outlined and goals for their resolution set.⁵⁸ The mediator focusses upon teaching the couple to listen actively to one another’s concerns and fears. This stage generally lasts from one to four sessions depending upon several factors including the extent and intensity of the emotional issues, the psychological readiness of each spouse to deal with the task of terminating the marital relationship, and the extent of agreement regarding important issues such as division of marital assets, child custody, and visitation.⁵⁹

The couple enter into active negotiations in the third phase. The mediator, a trained professional (individual or team),⁶⁰ assists in the process, but the couple reaches its own conclusions.⁶¹ Consultation of outside experts such as tax accountants, real estate appraisers, investment counselors, and actuaries can be invaluable during this phase.⁶²

In the final phase, a settlement agreement is prepared by the mediator, incorporating the conclusions reached by the couple and subject to their ratification. The duration of the mediation process is dictated by the needs of the couple. On the average, it takes between six and eight one-hour mediation sessions for a couple and mediator to work out a settlement.⁶³

⁵⁴Gold, *supra* note 9, at 12.

⁵⁵*Id.*

⁵⁶Gaughan, *supra* note 10, at 41. Lawyers’ mediation fees generally range from \$35.00 to \$145.00 per hour, depending largely upon where the attorney is located. Galante, *Private Mediation: The Lawyer as Peacemaker*, 4 L.A. LAW. 18, 19 (1981).

⁵⁷Pickrell & Bendheim, *Family Disputes Mediation — A New Service for Lawyers and Their Clients*, 18 LAW NOTES 73 (1982).

⁵⁸Gold, *supra* note 9, at 12.

⁵⁹*Id.*

⁶⁰See text accompanying note 64.

⁶¹Mediation is thus to be distinguished from arbitration. In mediation, the parties use the services of a mediator in an attempt to arrive at their own agreement. In arbitration, the decision is made for the parties by a designated arbitrator. In some jurisdictions the parties may opt for arbitration if mediation fails. Pickrell, *supra* note 57, at 73.

⁶²Gaughan, *supra* note 10, at 41.

⁶³Jenkins, *supra* note 47, at 32.

B. Models of Intervention

There are several models of mediation including the solo lawyer mediator, the solo mental health professional mediator, and the lawyer-mental health professional team.⁶⁴ The attorney practicing solo is frequently ill-equipped to recognize and deal with the psychological dynamics and needs of the divorcing family. On the other hand, the mental health professional, while psychologically aware, often has little understanding of the important legal issues involved. The team approach is one way of compensating for such shortcomings. Ideally, the team should be comprised of a man and a woman in order to avoid a situation in which one spouse feels outnumbered and overwhelmed.⁶⁵

The mental health professional, generally a social worker or psychologist, because of his orientation toward understanding and reducing hostility, can help with the emotional trauma that often interferes with a fair settlement or a healthy post-divorce adjustment. At the same time, he can assist the couple in understanding the emotional needs of their children and guide them in techniques of offering the necessary emotional support.⁶⁶ The lawyer helps the couple to analyze budget information, assess marital property, and review the children's and spouses' financial needs. Her role is to educate the couple regarding what a court might predictably decide in their case regarding particular issues as well as to carefully explore with them the tax consequences of the alternatives available to them.⁶⁷ Then, if the parties do agree to compromise their positions, the lawyer draws up the separation agreement outlining the various terms of the divorce. Depending upon the jurisdiction, she may then take the steps necessary to obtain a divorce judgment which incorporates the separation agreement.⁶⁸

If the goal is to deal with divorce in all of its aspects, emotional as well as legal, the team approach seems to be the preferable model. Ideally, one wishing to practice mediation on a solo basis should be qualified both as a mental health professional and as a lawyer. However, few practitioners would be willing or able, on a practical level, to go this far. A solo mediator could make liberal use of members of the other profession, thus achieving a similar result. Nevertheless, if we are to move away from the pitfalls of the adversarial system, lawyers wishing to practice solo mediation should be required at the very least to obtain a certain minimum of education regarding the psychological issues involved in family conflict resolution. Similarly, although

⁶⁴Silberman, *Professional Responsibility Problems of Divorce Mediation*, 16 FAM. L.Q. 107, 109 (1982).

⁶⁵See, e.g., Pearson & Thoennes, *The Benefits Outweigh The Costs*, 4 FAM. ADVOC. 26 (1982).

⁶⁶Herlick, *The Role of the Divorce Counselor in Divorce Proceedings*, 28 PRAC. LAW. 79, 81 (1982).

⁶⁷Fiske, *supra* note 46, at 18.

⁶⁸By the more popular view, the mediator should at this point refer the couple to independent counsel rather than handle the actual divorce herself. See Crouch, *The Dark Side Is Still Unexplored*, 4 FAM. ADVOC. 27, 34 (1982). However, assuming that divorce need not be adversarial (see text accompanying note 88), such a requirement should not be necessary in most instances. Nevertheless, it is always wise to obtain some form of independent review of the agreement prior to filing.

the mental health professional who serves as a mediator is not bound by the lawyer's Code of Professional Ethics,⁶⁹ he nonetheless "walks a tightrope between talking the couple through the issues and giving them legal advice. In the latter role the solo nonlawyer mediator runs the risk of engaging in the unauthorized practice of law, thus subjecting him (her) self to misdemeanor or contempt charges."⁷⁰

Whatever her professional orientation, an effective mediator must be able to listen closely and communicate well and must have good interpretive skills. A sense of fairness and the ability to empathize are also important.⁷¹ "In mediation one identifies issues, summarizes agreements already reached, makes suggestions and desperate jokes, serves coffee or Kleenex as the situation demands, and helps them focus on their common tasks."⁷² Such a role requires a high level of sensitivity and skill. As the field of divorce mediation expands, so will the availability of a class of experts known as divorce mediators. "There is not yet a defined profession of persons who combine a knowledge of the structure of divorce settlements with the needed therapeutic insights and conflict resolution abilities, but there will be, and very soon."⁷³

C. Ethical Considerations

There has been some concern within the legal system regarding whether lawyers can ethically practice divorce mediation. The concern seems mainly to focus on the area of private practice; court sponsored mediation has seemed more palatable.⁷⁴ In support of their positions, critics most often point to the prohibitions of Canon 5 of the Lawyer's Code of Professional Ethics,⁷⁵ which prevents representation of conflicting or potentially differing interests.⁷⁶

Although there are some exceptions to Canon 5,⁷⁷ representation of both spouses has traditionally been prohibited as inherently prejudicial.⁷⁸ With the advent of no fault divorce several bar associations have departed from this position. In Virginia, for example, a recent informal ethics opinion permits

⁶⁹See text accompanying note 74 for a discussion of ethical issues confronted by lawyers.

⁷⁰Silberman, *supra* note 64, at 123.

⁷¹Stulberg, *When Three Is Not A Crowd*, 2 FAM. ADVOC. 4, 5 (1980).

⁷²Fiske, *supra* note 46, at 18.

⁷³Gaughan, *supra* note 10, at 39.

⁷⁴Court-supervised or court-referred mediation has been initiated in several states. "See, e.g., Family Conciliation Unit, Ft. Lauderdale, Fla., Probate and Family Court (Norfolk and Middlesex County), Massachusetts; Domestic Relations Division, St. Paul, Minnesota . . ." Silberman, *supra* note 64, at 109 n.8.

⁷⁵Canon 5 states: "A Lawyer Should Exercise Independent Judgment on Behalf of a Client." Ethical Consideration 5-1 reads "The professional judgment of a lawyer should be exercised within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties." MODEL CODE OF PROFESSIONAL RESPONSIBILITY CANON 5 (1980).

⁷⁶*Id.*

⁷⁷For example, dual representation is permitted "in matters not involving litigation," according to Ethical Consideration 5-15. *Id.*

⁷⁸Silberman, *supra* note 64, at 109.

a single attorney to represent both spouses in drafting the agreement.⁷⁹ Moreover, the judiciary has shown increasing acceptance of this concept. In his Annual Report on the State of the Judiciary in 1982, Chief Justice Warren E. Burger strongly espoused the development of non-adversarial techniques of conflict resolution, citing divorce as a "prime candidate" for some form of arbitration process.⁸⁰ Also, a recent California case permitted dual representation if the spouses truly have no conflict of interest as long as there has been "full disclosure of all facts and circumstances that are necessary to enable the parties to make a fully informed choice regarding the subject matter of litigation, including the areas of potential conflict and the possibility and desirability of seeking independent legal advice."⁸¹

This position is consistent with Ethical Consideration 5-105(C),⁸² which states:

A lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.⁸³

Similarly, a New York Appellate Division Court in 1981 upheld a separation agreement drafted by a single attorney, emphasizing the parties' "absolute right" to be represented by the same attorney, again provided that there has been full disclosure.⁸⁴

Other jurisdictions, however, remain reluctant to accept divorce mediation. The Wisconsin State Bar Committee refused to permit an attorney to offer a mediation service in which he proposed to educate spouses regarding their legal rights, mediate disputes arising from their decision to divorce, draft their separation agreement, and process the divorce through the courts.⁸⁵ A Washington State Bar Committee reached a similar conclusion in 1980.⁸⁶

Still other states have made some progress, but not enough. The Ohio State Bar Ethics Committee, for example, recently ruled that dual representation would not adequately protect the parties' rights. Although a single lawyer may draft a separation agreement for the couple, she must make it clear that she is representing only one of the parties.⁸⁷ Such a stance again presupposes that

⁷⁹Va. St. B.A. Comm. on Legal Ethics, Informal Op. 296 (1977). See also, Gaughan, *supra* note 10, at 41.

⁸⁰Burger, *supra* note 21, at 33.

⁸¹Klemm v. Superior Court of Fresno County, 75 Cal. App. 3d 893, 901, 142 Cal. Rptr. 509, 514 (1977).

⁸²MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-105(C) (1980).

⁸³*Id.*

⁸⁴Levine v. Levine, 83 App. Div. 2d 606, 441 N.Y.S. 2d 299 (1981).

⁸⁵Silberman, *supra* note 64, at 114.

⁸⁶*Id.* at 113.

⁸⁷Ohio St. B.A., Formal Op. 30 (1975).

the divorce process must be an adversarial one, which is not necessarily true, and which in fact exacerbates the very conflicts of interest sought to be avoided.⁸⁸ An attorney trained in all aspects of divorce need not take sides. She can be an advocate for the family as a whole, recognizing the emotional and legal needs of individual members as they will impact upon the family as a unit. Marriage and family counselors have been doing this for years. Upon recognizing that one spouse is taking advantage of the other, the counselor is able to confront the issue without either spouse feeling that he is taking sides. He simply helps the couple to explore the needs, feelings and behaviors of each which are contributing to the problem and suggests possible alternative behaviors he knows to have been successful with other couples. If the mediator becomes aware of persistent overreaching by one spouse against the other she may at some point have to terminate the process and refer the couple to the more traditional methods of terminating marriage. This should be done with caution, however, and only after attempts are made to salvage the mediation situation, since "scuttling the mediation effort not only hurts the party who was dominant at that moment, but wastes the time, money, and effort of both parties."⁸⁹

In addition to adopting this type of strategy, conflict of interest problems can be avoided in other ways. The Professional Ethics Committees of several states⁹⁰ which have endorsed the mediation concept have incorporated various safe-guards for this purpose. The Oregon Bar Committee emphasizes that the lawyer does not represent *either* party, and imposes four conditions that must be satisfied before mediation by an attorney is appropriate:⁹¹

The lawyer (1) must clearly inform the parties that (s)he represents neither and they must both consent; (2) can give legal advice only to both parties in the presence of each other; (3) can draft the proposed agreement but must advise and encourage the parties to seek independent legal counsel; and (4) must not represent either or both parties in a later legal proceeding.⁹²

It has also been suggested that divorce mediation raises Canon 4⁹³ problems regarding the lawyer's duty to preserve the confidences of a client. Although such difficulties may arise in a situation where the lawyer has previously

inclusive, Revised Code. However a lawyer may represent one party to a dissolution and prepare the separation required by 3105.63, Revised Code, provided (1) the second party is made fully aware that the lawyer does not represent him/her, (2) that the second party is given full opportunity to evaluate his/her need for representation free of any potential conflict and to obtain his/her own counsel, and (3) each spouse consents, in writing contained in or attached to the separation agreement.
Id.

⁸⁸FAMILY L. REP. at 215.

⁸⁹Crouch, *supra* note 68, at 33.

⁹⁰*E.g.*, Massachusetts, Connecticut, Oregon, and New York. Silberman, *supra* note 64, at 111, 112, 117.

⁹¹*Id.* at 112.

⁹²Or. St. B.A. Comm. on Legal Ethics, Proposed Op. 70-46 (April 2, 1980).

⁹³Canon 4 provides: "A Lawyer Should Preserve the Confidences and Secrets of a Client." MODEL CODE OF PROFESSIONAL RESPONSIBILITY CANON 4 (1980).

represented one or both clients,⁹⁴ it need not be a problem where the couple comes to her for the first time. The mediator should inform the couple and have them agree that nothing said in mediation may be used in any subsequent legal action. The courts, of course, will need to cooperate in this. Several judges have already made it clear that they will not allow a mediator to be subpoenaed regarding any communication or other content of a mediation.⁹⁵ In less favorable jurisdictions, the mediator might argue that anything involved in the mediation process constitutes an attempt at settlement and is therefore excluded under the rules of evidence.⁹⁶

Despite such reservations, most bar associations have concluded that “the private attorney is not precluded by the Code of Professional Responsibility from serving as a divorce mediator.”⁹⁷ Indeed, support for divorce mediation may be found in Ethical Consideration 5-20, which states that:

A lawyer is often asked to serve as an impartial arbitrator or mediator in matters which involve present or former clients. He may serve in either capacity if he first discloses such present or former relationships. After a lawyer has undertaken to act as an impartial arbitrator or mediator, he should not thereafter represent in the dispute any of the parties involved.⁹⁸

As the New York City Bar Association stated: “The Code’s recognition that lawyers may serve as mediators . . . , as well as ethical aspirations which recognize a lawyer’s duty to assist the public . . . , make it inconceivable that the Code would deny the public the availability of non-adversary legal assistance in the resolution of divorce disputes.”⁹⁹ Significantly, the introduction to Section 5 of the ABA Proposed Model Rules of Professional Conduct specifically states that “[u]nder some circumstances a lawyer may act as an intermediary between spouses in arranging the terms of an uncontested separation or divorce settlement.”¹⁰⁰

D. *Promising Results*

Certainly, mediation is not for everyone. Couples who have been unable

⁹⁴Silberman, *supra* note 64, at 113.

⁹⁵See Fiske, *supra* note 46, at 21.

⁹⁶See Pickrell, *supra* note 57, at 74.

⁹⁷Fiske, *supra* note 46, at 16.

⁹⁸MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-20 (1980). See also Note, *Family Law — Attorney Mediation of Marital Disputes and Conflict of Interest Considerations*, 60 N.C.L. REV. 171, 179 (1981).

⁹⁹Fiske, *supra* note 46, at 17.

¹⁰⁰Note, *supra* note 98, at 180. Apparently, “some circumstances” exist when, under section 5.1:

(1) The possibility of adjusting the clients’ interests is strong; (2) Each client will be able to make adequately informed decisions in the matter; (3) There is little likelihood that any of the clients will be significantly prejudiced if the contemplated adjustment of interests is unsuccessful; (4) The lawyer can act impartially and without improperly affecting other services the lawyer is performing for any of the clients; and (5) The lawyer fully explains to each client the implications of the common representation, including the advantages and risks involved, and obtains each client’s consent to the common representation. *Id.*

to communicate with one another throughout their marriage will be unlikely to begin doing so in the mediator's office. Similarly, "couples with a need to fight one another; couples lacking any sense of common purpose; or those in which one spouse is opposed to the divorce" will be less likely to compromise on anything significant.¹⁰¹ Individuals who seek mediation are . . . "more likely to have a college education, a higher income and a professional occupation."¹⁰² Encouragement and referral by an attorney is an even more significant factor in whether men and women choose to mediate.¹⁰³

While mediation is not totally without its risks,¹⁰⁴ there can be no question as to its general value. In an extensive scientific study conducted by the Denver Custody Mediation Project,¹⁰⁵ court officials and staff in two metropolitan districts were asked to refer all suspected cases of contested child custody and visitation. Once referred, participants were randomly divided into two groups: one group was offered free mediation services, the other was not.¹⁰⁶ Results showed that couples who attempt to mediate are more likely to stipulate about custody and visitation arrangements than are those who proceed via the traditional adversarial method.¹⁰⁷ Moreover, spouses exposed to mediation tend to opt for joint custody arrangements much more often than do their adversarial counterparts.¹⁰⁸ Even when this does not occur, the mediating noncustodial parent engages in more visitation.¹⁰⁹ Couples who went through mediation had unconventional child support arrangements, such as sharing costs equally or figuring costs according to income proportions, compared with more traditional modes among adversarial couples.¹¹⁰

Mediation also has great potential for reducing congestion in divorce courts.

¹⁰¹Fiske, *supra* note 46, at 17. Of course, such characteristics do not automatically preclude successful mediation. They simply render the mediator's role more complex and difficult than might otherwise be the case. Gaughan, *supra* note 10, at 41.

¹⁰²Pearson, *supra* note 21, at 338.

¹⁰³In one study, 71% of individuals choosing to mediate said their lawyers had encouraged them to try, compared with 25% of the non-mediating individuals. *Id.* at 340.

¹⁰⁴There are four potential risks in divorce mediation:

- 1) Inequality of result, usually stemming from inequality in the bargaining power long since built into the relationship (and perhaps a cause of its dissolution).
- 2) Failure to reach agreement, with resulting hardening of positions.
- 3) The chance of reaching an agreement acceptable to the couple and the mediator but not to an independent attorney or to a judge, thereby requiring further negotiation.
- 4) The possibility of failure to understand all applicable tax considerations and the extent of one's legal rights, or the legal implications of certain aspects of an agreement, as fully as one might have if represented by counsel throughout a negotiated settlement or trial.

Fiske, *supra* note 60, at 18.

¹⁰⁵Pearson & Thoennes, *supra* note 65, at 26.

¹⁰⁶*Id.*

¹⁰⁷*Id.* at 28.

¹⁰⁸While 69% of mediation couples agreed to joint custody, only 7% of those not using mediation did. *Id.* at 32.

¹⁰⁹*Id.*

¹¹⁰*Id.*

The Denver study showed that successful mediation clients travel through the court system faster than do their adversarial counterparts.¹¹¹ Mediation clients are less likely to report problems with their court orders and more likely to report that their spouses are in total compliance.¹¹² This means less divorce relitigation which also reduces congestion. In addition, the cost of a mediated settlement is less than one obtained through litigation.¹¹³ In Los Angeles, for example, five sessions with a private mediator costs approximately \$1,000.00; a typical divorce costs approximately \$3,000.00.¹¹⁴

Finally, the Denver study found couples to be generally quite pleased with the mediation process.¹¹⁵ Regardless of whether or not mediation resulted in an agreement, individuals “typically reported that mediation helped them to better understand and communicate with an ex-spouse.”¹¹⁶ Interestingly, among couples for whom mediation had been deemed not successful, 81% stated that they would recommend it to a friend and 80% would pay for mediation services if they were no more costly than legal fees.¹¹⁷

CONCLUSION

As more and more Americans are being affected by divorce, attention to its psychological and social repercussions becomes crucial. The impact upon society of individuals isolated and alienated by divorce can be devastating. Moreover, overcrowding in our Domestic Relations court system has reached crisis proportions with professionals and consumers alike crying out for relief. The legal system has struggled to meet these challenges with relatively new concepts such as no fault divorce and joint custody. However, even these developments have left major gaps in our attempts to resolve the problems. Divorce mediation fills those gaps. It not only addresses the problems of alienation and overcrowding but also facilitates the use of the other innovations.

It is small wonder that divorce mediation has become increasingly accepted in this country in recent years. In 1980 Congress passed the Dispute Resolution Act recognizing mediation as a valuable process.¹¹⁸ The National Association of Conciliation Courts estimates that mediation services are now available in over forty states.¹¹⁹ Twenty-three states now use mediators in their courts and social service agencies.¹²⁰ “In the private sector, hundreds of individuals,

¹¹¹*Id.*

¹¹²*Id.*

¹¹³*Id.* at 28. See also Heymann, *supra* note 6, at 21.

¹¹⁴Clausen, *supra* note 7, at 45.

¹¹⁵See Pearson & Thoennes, *supra* note 65, at 30. “[T]wo thirds said they were highly satisfied and 93% said they would mediate again in the future or recommend mediation to a friend.” *Id.*

¹¹⁶*Id.* at 31.

¹¹⁷*Id.*

¹¹⁸Fiske, *supra* note 46, at 15.

¹¹⁹*Id.*

¹²⁰Clausen, *supra* note 6, at 45.

partnerships, and non profit organizations provide divorce mediation.”¹²¹ As of July, 1981 the Family Mediation Association numbered over 700 members.¹²²

The legal system is slowly beginning to heed the now-famous words of Abraham Lincoln: “Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser — in fees, expenses, and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man.”¹²³ It is time for those jurisdictions which are lagging behind to take the necessary steps to recognize and encourage the legal system’s most creative and promising solution yet to the problems of divorce in America.

VICTORIA E. SOLOMON, A.C.S.W.

¹²¹Pearson, *supra* note 21, at 337.

¹²²Foreman, *Divorce Mediation*, Boston Globe, July 20, 1981, at 29.

¹²³Fiske, *supra* note 46, at 15.

