

1983

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Recommended Citation

Egle, Gilbert R. (1983) "Divorce Mediation: An Innovation Approach to Family Dispute Resolution," *Land & Water Law Review*: Vol. 18 : Iss. 2 , pp. 693 - 711.

Available at: https://scholarship.law.uwyo.edu/land_water/vol18/iss2/10

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Egle: Divorce Mediation: An Innovation Approach to Family Dispute Resol
**DIVORCE MEDIATION: AN INNOVATIVE APPROACH
TO FAMILY DISPUTE RESOLUTION**

**I. DIVORCE AND THE TRADITIONAL ADVERSARIAL
MODEL OF REPRESENTATION**

In the past twenty years many powerful social movements have swept across this country. The American family has not escaped from these forces of change.¹ One of the most significant effects has been the obvious change in attitudes about the permanency of marital relationships. The dramatic increase in the number of divorces² is a prime example of this change. Viewed in the abstract, the rapid increase might be seen as merely another statistic of social evolution, but to the many individuals whose lives are substantially changed by divorce it represents much more.

Divorce is a process at best involving a time of change and personal readjustment. At its worst it can be an emotionally devastating experience.³ Adults who are forced to deal with divorce may experience any number of feelings and problems between these two extremes. In attempting to cope with these problems they may often find that the solutions thought to be workable by previous generations are no longer appropriate. One writer has said that “[C]ontemporary values and the reasonable or even unreasonable expectations of spouses (and nonmarital partners) are reshaping the law of marriage and divorce. . . . By court decision and statute we have loosened the bonds of matrimony and have changed the rules of the game.”⁴

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1. Fain, *Family Law—“Whither Now?”* 1 J. Div. 31, 31-33 (1977). In the article the author summarizes many of the forces which have had an enormous effect on the conceptualization of the American family during the past two decades. He specifically mentions: the decline in the influence of social institutions (i.e. churches and schools); the increased number of working women resulting from the expanding mobility, urbanization and industrialization of our society; changing values in sexual relations; growing economic independence which makes possible the use of non-family individuals to aid in child raising; and the advent of no-fault divorce statutes in many states.
2. Frank, Berman, and Mazur-Hart, *No Fault Divorce and the Divorce Rate: The Nebraska Experience—An Interrupted Time Series Analysis and Commentary*, 58 NEB. L. REV. 1, 5-7 (1978). The authors, using U.S. Vital Statistics, found that in the United States the divorce rate has risen from 2.2 divorces per thousand population in 1960, to 5.1 per thousand in 1977.
3. Perlberger, *Marital Property Distribution: Legal and Emotional Consideration*, 25 VILL. L. REV. 662, 663-64 (1980). Perlberger describes divorce as the death of a family unit. He suggests that in some cases the intense emotional feelings created by a divorce might be similar to those experienced by the loss, through death, of a close friend or relative. He proposes an analysis of the emotions generated in divorce similar to that expounded by E. Kubler-Ross in her now famous book, *On Death and Dying* (1969).
4. Freed and Foster, *Divorce in the Fifty States: An Outline*, 11 FAM. L.Q. 297 (1977).

With new rules, the game itself is changing and this in turn creates a need for new methods of dealing with the problems that arise.

This need is especially apparent where children are involved. The statistics demonstrating the impact divorce has on our children are no less than astounding. In this country in 1956 about 361,000 children were in some way affected by divorce each year. That figure has now increased to around one million per year. If the present trend continues, "children born in the past decade face a 45 percent chance of spending part of their lives with only one parent."⁵

Obviously, the lives of many people are being affected by the current trends in marriage and divorce. In the context of this changing social environment, the legal profession, through its necessary involvement in the divorce process, has also felt some of the effects of change. This comment will explore some of the problems that are visible in the present system of divorce representation and then examine in detail one alternative which is rapidly gaining recognition throughout the country.

The present system of divorce representation is generally an adversarial one. Essentially this means that in a divorce proceeding, family members may be required to assume conflicting stances in very personal and highly emotional issues.⁶ When this occurs, the adversarial approach often functions as a catalyst, intensifying the emotional aspects of the process and reinforcing the expression of a client's anger.⁷ That anger may be exhibited, in many instances, by a desire to punish or humiliate the other spouse.⁸ The negative effects of this system are especially detrimental in family dissolutions because, even though divorce in one sense is the end of a specific relationship, it is also a time of new beginnings.⁹ Although the parties will live separate lives in the future they

5. Simons, *The Invisible Scars of Children of Divorce*, 7 BARRISTER 14, 15 (1980).

6. Winks, *Divorce Mediation: A Nonadversary Procedure For The No-Fault Divorce*, 19 J. FAM. L. 615, 620-25 (1981).

7. Smith, *Non-Judicial Resolution of Custody and Visitation Disputes*, 12 U.C.D. L. REV. 582, 586 (1979).

8. *Id.*

9. Elkins, *A Counseling Model for Lawyering In Divorce Cases*, 53 NOTRE DAME LAW. 229, 230 (1977).

may often still find it necessary to communicate with each other.¹⁰ If the transitional period, of which the legal divorce is a part, could be conducted in a positive, rather than a neutral or negative fashion, the individuals involved could more readily establish a workable relationship that might dramatically ease the tension in post-divorce life.

In recent years the tension and emotional strain of the divorce process have been lessened to some degree by the almost universal enactment of no-fault divorce statutes.¹¹ A fairly recent survey of forty-five Nebraska district court judges generally supports this proposition. Two-thirds of those judges who responded to the survey felt that the new no-fault divorce statute led to a decrease in the animosity the parties feel toward each other.¹² However, it is also true that many other issues, such as property division, child custody, and visitation, continue to be the subjects of bitter struggles in the domestic relations courts of every state.¹³ One judge in the Nebraska survey also suggested that disputes over these collateral issues simply represent a movement of the battleground from the primary to the secondary issues.¹⁴ Obviously, if a person is looking for a fight, the adversarial system can easily provide one. But in divorces where the desire to fight is not an overriding factor, much of the anger and hostility can be avoided, even with regard to the collateral issues, if non-adversarial alternatives are available.

II. MEDIATION AS AN ALTERNATIVE

One viable alternative to the present adversarial system of divorce representation is the process of mediation. For many years mediation has been practiced in contexts such as labor disputes.¹⁵ In recent years its use has been expanded to a

10. The need for continued communication is especially important when children are involved, because children in a separating family need a continuity of relationship with each parent regardless of who gains legal custody. See Hancock, *The Power of the Attorney in Divorce*, 19 J. FAM. L. 235, 241-42 (1981).

11. See WYO. STAT. § 20-2-104 (1977). See also Freed and Foster, *Divorce in the Fifty States: An Overview*, 14 FAM. L.Q. 229 (1981) (discussion of the status of no-fault statutes in other states).

12. Frank, *supra* note 2, at 49-50.

13. Pickrell and Bendheim, *Family Disputes Mediation—A New Service for Lawyers and Their Clients*, 7 BARRISTER 27 (1980) [hereinafter referred to as Pickrell].

14. Frank, *supra* note 2, at 50-51.

15. See J. HAYNES, *DIVORCE MEDIATION* 7-8 (1981) for a comparison of labor and divorce mediation and an application of labor mediation methods to divorce practice.

number of other fields. For example, mediation has been found to offer an effective alternative to some criminal prosecutions.¹⁶ It has also been used with some success in the resolution of various community disputes.¹⁷ One of the most recent efforts, now in progress, is to adapt mediation for effective use in the domestic relations field.¹⁸ In general, this movement has been accepted and promoted with considerable enthusiasm. As a practical matter, mediation is a process a lawyer may find useful to assist clients in finding a more peaceful means of resolving hotly-contested emotional issues. But, for the attorney, it also represents some complicated ethical issues. The remainder of this comment is directed toward an explanation of the mediation process and an examination of its positive and negative aspects.

A. *The Basic Theory*

Quite basically, in mediation two parties,¹⁹ aided by an impartial third person called a mediator,²⁰ negotiate directly with each other. While this third person may be a lawyer²¹ he or she is not an advocate for either party, but for the mediation process itself.²² Instead of winning a case for one party, the major goal of the mediator is to aid the parties in carrying out rational, responsive and cooperative discussions aimed at reaching compromises on disputed issues.²³ By performing this function, the mediator will ideally be able to help the parties

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16. Rice, *Mediation and Arbitration as a Civil Alternative To The Criminal Justice System—An Overview and Legal Analysis*, 29 AM. U.L. REV. 17 (1979).
 17. Goldbeck, *Mediation: An Instrument of Citizen Involvement*, 30 ARB. J. (1975). See also McEwen and Maiman, *Small Claims Mediation In Maine: An Empirical Assessment*, 33 ME. L. REV. 237 (1981) (COMPREHENSIVE ANALYSIS OF THE USE OF MEDIATION IN SMALL CLAIMS courts).
 18. The Family Mediation Association was one of the first organizations to actively practice divorce mediation. It was founded by O. J. Coogler in Atlanta, Georgia in 1975. See O. J. COOGLER, *STRUCTURED MEDIATION IN DIVORCE SETTLEMENT* (1978).
 19. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 330 (1971). Fuller suggests that mediation is subject to intrinsic limitations and cannot generally be employed when more than two parties are involved. This, however, does not preclude the possibility that a divorce mediator might also want to interview a child in a custody dispute. See Herrman, McKenry and Weber, *Mediation and Arbitration Applied to Family Conflict Resolution: The Divorce Settlement*, 34 ARB. J. 17, 19 (1979) [hereinafter cited as Herrman].
 20. Stulberg, *When Three Is Not A Crowd*, 2 FAM. ADVOC., NO. 4, at 4 (Spring 1980) [hereinafter referred to as Stulberg].
 21. Pickrell, *supra* note 13, at 28. The authors stated: "A typical list of mediators may include attorneys and psychologists. The mediators will not function as attorneys or therapists, however, but as mediators. A mediator who is incidentally a lawyer must take off his legal hat during the mediation process." *Id.*
 22. Stulberg, *supra* note 20, at 4.
 23. Herrman, *supra* note 19.

arrive at a fair, workable and voluntary²⁴ settlement which will be more satisfactory to everyone involved.²⁵

In contrast to the tension and trauma created by the adversarial approach, mediation, through its capacity to reorient the parties towards each other,²⁶ creates an atmosphere in which the parties may solve their immediate disputes and at the same time lay a solid foundation for their future relationship. When a divorce is a congenial separation involving only two mature adults and where the obvious future circumstances will not demand cooperation between the parties, then the need to develop or keep the lines of communication open may not be a high priority. But in cases where issues are hotly contested or, perhaps more importantly, where children are involved, providing for future communication is of critical importance.

One study in California demonstrated the need for divorcing parents to be able to work cooperatively together after their separation.²⁷ The study examined divorce's negative effects upon children.²⁸ With time, some of the children were able to overcome these effects and continue their personal development in a fairly normal fashion. The researchers attributed this improvement to a number of factors, including the availability of outside support systems, such as schools, with teachers or others who were able to encourage the children; the ability of the children and parents to sever previous pathological parent-child relationships; and the absence of overt rejection or desertion by either parent.²⁹ The study reached the conclusion that the primary factor influencing the improvement of these children was their parent's

24. *Id.* at 20-21. "While settlements worked out by all parties to a divorce tend to be more humane, the process should be voluntary and not mandatory. A mandatory process could become just another obstacle for the divorcing couple to surmount in order to obtain the decree." *Id.*

25. Meroney, *Mediation and Arbitration of Separation and Divorce Agreements*, 15 WAKE FOREST L. REV. 467, 472 (1979) [HEREINAFTER REFERRED TO AS MERONEY].

26. Fuller, *supra* note 19, at 325. The author claims that the central quality of mediation is "its capacity to reorient the parties toward each other . . . by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another." *Id.*

27. Wallerstein, *Children Who Cope in Spite of Divorce*, 1 FAM. ADVOC. 2 (Summer 1978).

28. *Id.* at 2-5. Some of the negative effects children of divorce may suffer include: heightened anxiety and aggression, acute regression, fearfulness, sadness and other symptomatic behaviors. *Id.*

29. *Id.* at 39.

ability to maintain a separation between their anger at each other and the child's needs.³⁰

Often in the "emotionally charged atmosphere of a marital dispute [the parents] need assistance in distinguishing the child's best interests from their own natural possessory interest in the child."³¹ This emotionally created lack of objectivity may also influence any of the other decisions the parties must make. But when a mediator performs his or her function as an "agent of reality,"³² an atmosphere can be created where objectivity and fair dealing will be the rule.

The process of mediation is deliberately structured to develop or reopen the lines of communication. It is also an excellent means through which people, by negotiating with each other,³³ may objectively and constructively evaluate available alternatives and eventually arrive at an arrangement which is satisfactory and beneficial to both parents and children alike. The California study³⁴ indicates the important role such a cooperative effort may serve in ensuring the future well-being of the family members. Mediation, by design, looks toward that future by laying the basic groundwork for extended communication and cooperation.

B. Factors In Making The Choice To Mediate

Whenever mediation is used in a divorce or custody situation, the decision of the parties to enter mediation should be voluntary, not coerced.³⁵ Because mediation is a process in which the parties work together to solve their problems it can only be effective if both parties are willing to work actively

30. *Id.* at 4.

31. Spencer and Zammit, *Mediation - Arbitration: A Proposal For Private Resolution of Disputes Between Divorced or Separated Parents*, 1976 DUKE L.J. 911, 933.

32. Paterson, *The Agencies Which Can Help: Local Nongovernmental Organizations*, 29 BUS. LAW. 1017, 1024 (1974). In setting out the basic principles of mediation in a community business dispute, the author describes the mediator as an agent of reality with the duty to "increase the perception of each party to the other party's needs and to build a reality framework within which the parties can assess the costs and benefits of either continuing or resolving the conflict." *Id.*

33. In mediation the two parties sit down and talk face to face in an effort to work out their differences personally. This may be contrasted with a typical adversary situation in which the parties bargain through their attorneys.

34. See *supra* text accompanying notes 27-30.

35. See *supra* note 24.

toward an agreement.³⁶ In deciding whether or not to try to mediate a divorce settlement the attorney and client may find it helpful to consider the following factors.

An important initial consideration for the clients is that, for the most part, mediation is a non-judicial attempt to resolve family disputes.³⁷ Working outside the court system has several advantages. First, delays caused by crowded dockets³⁸ may force people to continue to cope with very difficult, unresolved situations until a court has time to consider their case. Mediation presents a quicker avenue for dispute resolution. The parties may set their own timetable and, to some extent, work at their own pace.³⁹ When a settlement is reached the parties will have a set of agreements to follow without having to wait for the court to decide each issue. In turn, this will help reduce the burden of litigation on the courts.⁴⁰

Another advantage to mediation is the independence with which the parties can thoughtfully tailor solutions to meet their particular needs. In the usual course of divorce proceedings, the judge decides delicate family issues. In some situations this may be entirely appropriate. But in other instances the parties might be concerned about the ability of a judge to identify with their particular value system. People whose lifestyles do not conform to what the judge sees as the American norm may certainly have a valid cause for concern with the power of a judge to decide the course of their lives based on only a few minutes of contact and subjective evalua-

36. See Pearson, *The Denver Custody Mediation Project*, 8 COLO. LAW. 1210, 1216-17 (1979). This article preceded the founding of the Denver Custody Mediation Project (DCMP). Pearson, the founder of the Project, discusses the characteristics of couples who may be successful in mediation. Basically, the parties need to reach an agreement to dissolve their marriage and subsequently exhibit a "medium range" of conflict intensity. The research seems to indicate that if the parties are involved in a conflict in which the level of conflict is either extremely high or extremely low then there will be no motivation to move towards resolution. In the medium ranges the parties will be well aware of the existing conflicts but may still be able to sit down with mediator assistance and talk to each other about them.

37. The term "non-judicial attempt" is used to emphasize the fact that the agreement which is reached results from the efforts of the parties themselves and not from a judicial decision. Of course the final agreement must be in conformity with the law and is still subject to judicial approval.

38. Smith, *supra* note 7, at 601.

39. See *infra* notes 74 and 75 and accompanying text discussing the time limitations of the mediation process.

40. Smith, *supra* note 7, at 601.

tion.⁴¹ To people who fall within this category, an opportunity to construct their own personalized settlement might be very attractive.

Research has also shown that mediation offers some direct personal benefits to the parties. Although additional long term study is necessary,⁴² the results currently available from one major comprehensive study suggest some very positive trends.⁴³

The research format for this study, called the Denver Custody Mediation Project (DCMP), entailed the examination of three groups of clients: (1) clients who participated in mediation; (2) a control group who participated only in the adversarial process; and (3) a group who were offered mediation but chose to proceed, instead, through the traditional litigation process.⁴⁴ The study evaluated these groups on the following issues: (1) agreement making; (2) satisfaction with both the process and with final decrees; (3) compliance and relitigation; (4) effects on parent-child interactions; and (5) savings in time and money.⁴⁵

The DCMP results show that mediation clients were by far more successful in reaching prehearing agreements than were the other two groups.⁴⁶ In addition, a vast majority of the mediation group were reportedly satisfied with the fairness of their agreement, while an opposite trend was reflected in the responses of the non-mediation clients.⁴⁷

Mediation was also shown to affect post-divorce family relationships. Specifically, a large majority of ex-spouses who

41. Meroney, *supra* note 25, at 469. Even if a judge is amenable to a variety of values, because of crowded dockets and the resulting pressure to move cases, he may not have the time to thoroughly examine a case. *Id.*

42. Pearson, *supra* 36, at 1215. Divorce mediation has only been actively promoted and practiced for the past eight years. To date there have only been a few efforts to analyze the process and its results. *Id.*

43. See generally, Pearson, Thoennes and Kooi, *Mediation of Contested Child Custody Disputes*, 11 COLO. LAW. 336 (1982).

44. Pearson and Thoennes, *Mediating and Litigating Custody Disputes: A Longitudinal Evaluation 5-6* (unpublished manuscript available in the University of Wyoming College of Law Library).

45. *Id.* at 7.

46. *Id.*

47. Pearson, *supra* note 43, at 342.

48. Pearson and Thoennes, *supra* note 44, at 9.

engaged in mediation reported that their subsequent relationship was no worse than strained. Only a minority of the other groups appeared to be even that optimistic.⁴⁸ Mediation's effect on parent-child relationships was apparent in that a significantly greater number opted for joint, rather than single parent custody.⁴⁹ The increased exercise of visitation rights by mediation clients⁵⁰ suggests that some of the benefits of mediation carry over to the children in the post-divorce era.

Compliance with mediated agreements was reported at a higher rate than for non-mediation groups.⁵¹ In addition, attempts to modify decrees soon after their issuance were much more common in the adversarial samples.⁵² However, longer term results vary from this trend and seem to indicate a possible equalization of this factor over time.⁵³

Finally, clients who were successful with mediation experienced some savings in both time and money. The greatest savings were experienced by clients who successfully mediated before any temporary orders were filed. By contrast, and with a note of caution, the group reported to have accrued the highest fees were those who unsuccessfully attempted to mediate and were then forced to resort to litigation.⁵⁴

Overall, the DCMP results tend to support the proposition that mediation has some concrete benefits to offer people who are able to successfully complete the process. In addition to avoiding the "escalation of hostilities" which often accompanies negotiations between attorneys,⁵⁵ mediation appears to be capable of producing more positive family relationships along with a healthier, happier living environment for both the parents and children involved.⁵⁶

Mediation also offers several advantages for attorneys. First, an attorney may find that the process is less stressful

49. *Id.* at 9-10. Usually, the joint custody arrangements worked out in this Project "recognize that both parents are fit and have legal responsibility for the care and upbringing of the children while delegating day-to-day care to the mother." *Id.* at 10.

50. *Id.* at 10.

51. *Id.* at 8.

52. *Id.*

53. *Id.* at 12-13.

54. *Id.* at 10-11.

55. Meroney, *supra* note 25, at 469.

56. Smith, *supra* note 7, at 601.

and more satisfying⁵⁷ than the traditional adversarial model. Instead of acting as a client's "warrior for victory,"⁵⁸ the attorney/mediator is able to function more as an "agent of resolution."⁵⁹ The attorney does not find himself representing "the raging emotional extremes" of a distraught client. Rather, he works toward a dissipation of the anger between the parties with the potential result being a calm and peaceful resolution.⁶⁰

Second, through the use of mediation, an attorney may find an increased ability to satisfy the client.⁶¹ Many times an attorney will handle a divorce for a client in the traditional manner and then find that the person goes elsewhere for assistance in other legal matters.⁶² The attorney's involvement in the hostilities of the adversarial process is often a source of client dissatisfaction.⁶³ Mediation is an alternative that will remove the attorney from this undesirable position and enable him or her to meet both the human and legal needs of the client more adequately. As a result, the attorney may find his divorce clients returning for assistance in other legal matters.

C. Putting Mediation Into Practice: The Mediation Process

During the short period of time in which efforts have been made to apply mediation to divorce settlements, several workable programs have been developed.⁶⁴ The following is an outline of the more important themes found in the various programs. An interested attorney or other potential mediator should feel free to take the basic structure and mold it to fit his or her own personal style.⁶⁵

57. Steinberg, *The Therapeutic Potential of the Divorce Process*, 62 A.B.A. J. 617, 620 (1976).

58. Mussehl, *From Advocate to Counselor: The Emerging Role of the Family Law Practitioner*, 12 GONZ. L. REV. 443, 444-45 (1976). (Discusses the emotional chaos which can result when the clients through their attorneys are forced to engage in an adversarial contest. In turn, the attorney must somehow cope with this highly emotional situation.)

59. Steinberg, *supra* note 57, at 617.

60. *Id.* at 620.

61. See Bahr, *Mediation is the Answer*, 3 FAM. ADVOC., No. 4, at 32 (1981) (study demonstrates a large degree of client satisfaction with mediated agreements).

62. Steinberg, *supra* note 57, at 618.

63. *Id.*

64. As a practical matter the reader should be aware of the various models which have been developed. To date these formats include: (1) the single lawyer mediator; (2) the single mental health professional mediator; (3) the lawyer/therapist interdisciplinary team; and (4) the structured mediation plan developed by O. J. Coogler. For a discussion and comparison of these various plans see, Silberman, *Professional Responsibility Problems of Divorce Mediation*, 7 FAM. L. REP. (BNA) 4001, 4001-07 (1981).

65. Freedom to adjust the structure may be somewhat limited by some ethical considerations. See generally *infra* notes 87-90 and accompanying text.

Initially each party must reach a voluntary decision to mediate. The mediator must also evaluate the parties to determine if the circumstances will allow for effective mediation.⁶⁶ After this preliminary step, the process continues with an orientation meeting. This first session should be used to explain the roles of each of the participants and the procedural ground rules to be followed in subsequent sessions. Depending on the particular mediator's practice these rules may be set forth in varying degrees of detail. For example, one structured mediation approach lists forty-five marital mediation rules covering nearly every possible aspect of the subsequent negotiations, from choosing the mediator to the final signing of the mediated divorce agreement.⁶⁷ Other models seem to follow a less detailed approach. The rules most mediators would consider necessary include a statement concerning the fee arrangement, a clause addressing the neutral role of the mediator and his or her inability to represent either party in any future litigation relating to mediated issues,⁶⁸ and a statement addressing the question of time limits for the overall process along with alternatives the parties may pursue if the mediation effort is ultimately unsuccessful.⁶⁹ In any given situation the mediator may want to expand this list to meet the parties' special needs. At this point, the basic rules and a list of the issues in dispute may be included in a document called a mediation agreement.⁷⁰ This document will be a sort of working contract which, when completed, will define the parameters of the mediation process.

Depending on the situation in each case, there may be some issues of immediate concern which need to be resolved at the initial meeting. These might include temporary child custody and support, temporary spousal maintenance, and payment arrangements for the mediation fees.⁷¹ On these issues, the parties should attempt to achieve functional

66. Pearson, *supra* note 36, at 1216-17. In making this decision the mediator should evaluate the parties' ability to interact, and the level of conflict which is present. As suggested in note 31 above, extremely high or low levels of tension and conflict will adversely affect the possibility of success. In these cases, it might be better to revert to the normal adversarial process or possibly refer the couple for appropriate marriage counseling.

67. COOGLER, *supra* note 18, at 117-29. The rules specifically define the roles of each of the parties and the basic procedure to be followed in the negotiation of a settlement.

68. Stulberg, *supra* note 20, at 5.

69. Herrman, *supra* note 19, at 20.

70. Stulberg, *supra* note 20, at 5.

71. Meroney, *supra* note 25, at 478.

agreements which will carry the individuals through the weeks required for complete mediation. However, it must be stressed that these are only temporary arrangements to be followed during the mediation process and will be subject to the final agreements which will be made in subsequent sessions.

Another aspect of the initial meeting deserves attention. The key to successful mediation is trust in the mediator.⁷² Therefore, from the start, the mediator must work to establish an atmosphere that will be conducive to the development of a trusting and confidential relationship between himself and each of the clients. Qualities which will aid a mediator in this endeavor include good listening and verbal skills, a sense of fairness, a creative approach to problem solving, a non-judgmental attitude, and lots of patience.⁷³

After the mediation agreement is drawn up and signed, the work of mediating a final settlement begins. This process may extend from two one-hour sessions to as many as ten hours of negotiations.⁷⁴ The time limits are not rigid. They will always vary depending on the number and complexity of disputed issues and the ability of the parties to work effectively together. One authority suggests, however, that if there has been little progress after ten hours, the mediation effort should be terminated.⁷⁵

During the actual mediation process it is advisable to address and resolve one issue at a time.⁷⁶ This will provide a basic structure for the negotiations and give the mediator a means of directing and controlling the course of the sessions. With

72. Pickrell, *supra* note 13, at 27. Because often the parties will have very little trust in each other, they want a mediator to be someone who will fully and fairly consider the situation and help them resolve their problems.

73. Stulberg, *supra* note 20, at 5.

74. Herrman, *supra* note 19, at 20. Generally, the parties are asked to contract for a minimum number of hours. Depending on the model employed this may be as little as one and one-half hours.

75. COOGLER, *supra* note 18, at 121. Section 20 of the Marital Mediation Rules suggests that in impasse may be declared if no agreement has been reached within ten hours. In the event that this occurs the parties may submit the remaining issues to arbitration. In the absence of such an arrangement they may be forced to resort to resolution through litigation. *Id.*

76. Herrman, *supra* note 19, at 20. If an impasse is reached on a single issue that issue may be submitted to arbitration as an alternative to leaving it unresolved. *See supra* note 75.

this basic framework the negotiations may continue toward the goal of reaching an agreement on each issue.⁷⁷

Throughout the meetings, the mediator's function is primarily to keep the clients' energies funneled in a constructive direction. Although his or her role⁷⁸ may vary, the mediator must remain impartial and objective⁷⁹ if a fair and workable settlement is to be achieved. If the mediation effort is successful, i.e., each of the disputes listed in the mediation agreement has been satisfactorily resolved, then a final settlement may be drawn up. This document will incorporate the specifics of each solution upon which the parties have agreed.⁸⁰ After the parties' initial approval, the agreement should be checked for legal sufficiency by an advisory attorney.⁸¹ If everything is satisfactory, the document may be redrafted into a separation agreement for submission to the court as an order.⁸²

D. Potential Problems And Conflicts

When the mediation process is implemented, two potential problems may arise of which an attorney should be aware. First, mediation work may appear to be contrary to the ethical mandate forbidding an attorney to represent conflicting interests.⁸³ In the context of mediation the Code of Professional Responsibility provides a solution to this problem. Ethical consideration 5-20 authorizes an attorney to serve as a mediator so long as he does not "thereafter represent in the dispute any

77. Often one of the major causes of divorce is a dispute over financial matters. See HAYNES, *supra* note 15, at 5. As a result it may be advisable to begin the mediation process by initially addressing financial issues.

78. Meroney, *supra* note 25, at 472. The author describes six roles a mediator may assume at various stages in the negotiation process. These basic roles are: (1) legitimizer—the mediator encourages the parties to recognize each other's right to disagree; (2) communicator—working to open lines of communication; (3) humanizer—breaking down stereotypes; (4) trainer—teaches the parties how to negotiate; (5) problem explorer—points out problems in each parties' position; (6) agent of reality—helps each party to become aware of his/her own needs and the needs of the other party. *Id.*

79. *Id.*

80. See Pickrell, *supra* note 13, at 28. The American Arbitration Association suggests that this agreement contain only the general terms of agreement which are then subjected to detailed redrafting by an independent attorney. *Id.* Other models such as those of the Family Mediation Association, (see COOGLER, *supra* note 18) and the Denver Custody Mediation Project, (see Pearson, Thoennes and Kooi, *supra* note 43) require considerable detail in the agreement. Both of these last two models directly involve attorneys in the negotiation process.

81. See *infra* text accompanying note 86.

82. Pickrell, *supra* note 13, at 28.

83. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105 (A) (1981).

of the parties involved.”⁸⁴ The rationale for this exception to the conflict of interest rule comes from the nature of the mediation process. An attorney mediator functions not as an advocate for either party but rather as an advocate for the process itself.⁸⁵ Following the code’s directive, the general practice in divorce mediation is for the mediating attorney to work with the parties until a settlement is reached. The mediator may then draft a proposed separation agreement or he may suggest that one or both of the parties retain independent counsel for the purpose of preparing this document. In any event, at this point it would be wise for the mediator to terminate his employment relationship with the parties and advise each of them to seek independent counsel to evaluate the fairness and legal aspects of the agreement and carry through the finalization of the divorce in court.⁸⁶ Generally, the original mediation agreement will address the issue of the mediator’s inability to continue working with the clients after an agreement has been reached. To emphasize the importance of avoiding even the appearance of a conflict of interest, at least one state bar ethics committee has imposed this as a condition which must be met before the attorney mediator’s function will be deemed appropriate.⁸⁷

An additional conflict-of-interest problem may also be encountered. Suppose, for example, that in a mediation session the parties appear to be resolving their disputes but it becomes obvious to the mediator that one party is being overpowered by the other and the agreements are really very unfair. This situation may create a serious dilemma for the attorney mediator. If the situation is allowed to remain as it is, the disadvantaged party may ultimately become very dissatisfied. But if the lawyer mediator steps in to correct the unfairness, he or she would theoretically be abandoning the mediator’s

83. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105 (A) (1981).

84. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-20 (1981).

85. See *supra* text accompanying note 22.

86. Herrman, *supra* note 19, at 20.

87. See Silberman, *supra* note 64, at 4002. The author lists four conditions which the Oregon Bar Committee requires be satisfied for mediation to be proper. The conditions the lawyer must meet are: “(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; (4) must not represent either or both parties in later legal proceedings.” *Id.*

neutral role. The import of this move would again be to thrust the attorney into a conflict of interest situation.⁸⁸

No clear-cut answer is available for this problem. Withdrawing could sometimes be detrimental to both the parties and to the attorney mediator. A better answer might be to gain prior written consent from the parties based on an extensive preliminary explanation of the potential unfairness the parties may encounter.⁸⁹ In contrast, the proposed Model Rules of Professional Conduct suggest that the lawyer's best alternative may be withdrawal if he or she reasonably believes that the matter cannot be resolved on terms compatible with either of the client's best interests.⁹⁰

Another potential problem involves the possibility that a mediator might be called as a witness in the subsequent litigation arising from the marital dispute. This problem raises a question concerning the maintenance of the confidential nature of the mediation process. Probably the best way to approach this problem is to incorporate a statement into the mediation agreement to the effect that the parties agree that "all matters discussed in mediation are confidential and that [the mediator] cannot be subpoenaed by either party to testify in a later action."⁹¹ This approach is taken by both the American Arbitration Association⁹² and Coogler's Family Mediation Association.⁹³ Essentially these agreements invoke the evidentiary privilege that excludes "evidence of conduct or statements made in compromise negotiations."⁹⁴ Since mediation is a form of negotiating a settlement this approach would suggest that any information discussed in the process may remain confidential.

Apparently, this tactic has provided sufficient protection for the programs now in operation. Although one writer has

88. See generally, Crouch, *Divorce Mediation and Legal Ethics*, 16 FAM. L. Q. 219, 240-43 (1982), for a more detailed discussion of this potential problem.

89. *Id.* at 237-39. Crouch suggests that even a waiver may not be sufficient to avoid the conflict. *Id.*

90. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2(c) (Proposed Final Draft 1981).

91. Note, *Family Law - Attorney Mediation of Marital Disputes and Conflict of Interest Considerations*, 60 N.C.L. REV. 171, 182 (1981).

92. Pickrell, *supra* note 13, at 28.

93. COOGLER, *supra* note 18, at 121-22.

94. FED. R. EVID. 408.

suggested that a confidentiality agreement may not be fully enforceable,⁹⁵ no subsequently litigated mediation cases were cited to support this proposition. As a result, it seems valid to assume that the policy of Rule 408 extends to “all statements made in the course of settlement negotiations”⁹⁶ and thus guarantees the confidentiality of the mediation process.

Confidentiality is essential to the development of the trusting relationship so necessary in family dispute mediation.⁹⁷ When a statement similar to that suggested above is included in the mediation agreement, confidentiality should be assured. This will, in turn, readily facilitate the honest communication the mediation process requires.

III. THE ATTORNEY AS A FAMILY DISPUTES MEDIATOR

The foregoing discussion is based on the assumption that it would be proper for an attorney to work as a mediator in the resolution of family disputes. However, the reader may be left with a question about the suitability of the training and skills of an attorney to perform such a function. It is true that an attorney who is interested in incorporating mediation into his practice may need additional training in order to become proficient in counseling and mediation skills.⁹⁸ But it is also true that, in general, lawyers represent one of the few professions qualified to offer this avenue of dispute resolution to their clients.

Many times the first step a person takes when faced with intense marital problems is to consult an attorney about the possibility of a divorce.⁹⁹ The motive for taking this step may

95. Note, *supra* note 91, at 182. The author argues that all information revealed in settlement negotiations is not always fully covered by the evidentiary exclusion. Instead the test suggested is whether “a statement is made hypothetically in order to effect a settlement or is intended to be an unconditional assertion.” *Id.* However, this test has basically been rejected by modern authorities. See *Hatfield v. Max Rouse & Sons Northwest*, 100 Idaho 840, 606 P.2d 944, 950 (1980); LOUISELL AND MUELLER, 2 FEDERAL EVIDENCE § 170, at 272-73 (1978).

96. *Hatfield v. Max Rouse & Sons Northwest*, 100 Idaho 840, 606 P.2d 944, 950 (1980) (emphasis in original). See also LOUISELL AND MUELLER, 2 FEDERAL EVIDENCE § 170, at 272-73 (1978).

97. See *supra* note 72 and accompanying text.

98. Pearson, Thoennes and Kooi, *supra* note 43, at 340-42. The results of the ongoing Denver Custody Mediation Project indicate that the two main ingredients necessary to be successful as a mediator are training and experience. *Id.* See note 106 below for information concerning available training opportunities.

99. Merder, *The Need for an Expanded Role for the Attorney in Divorce Counseling*, 4 FAM. L.Q. 280, 281 (1970).

vary with each individual. Some clients have reached a definite decision to seek a divorce, while others may have a variety of objectives disguised within their request for legal advice.¹⁰⁰ In any event, the divorce attorney must determine if a client really is seeking a divorce. As a result of this front line contact, the attorney who has mediation training will be in an ideal position to offer the mediation alternative to clients in appropriate cases. Granted, not every client will find the idea attractive. But, by encouraging¹⁰¹ interested clients to try mediation, the lawyer would be able to provide a very beneficial service and at the same time increase his or her ability to satisfy the client.

Another factor that adds to an attorney's suitability to work as a divorce mediator is the lawyer's extensive knowledge of the legal aspects of divorce. Although it will always be important to have a final agreement checked by independent counsel, it would be advantageous to have some legal expertise available throughout the negotiation process. An attorney's knowledge of the law, especially of such matters as tax and local property division principles, and his or her skill in drafting detailed legal documents, will facilitate the decision process, often eliminating the necessity to later rework or renegotiate potential legal problems in the final settlement.

A final consideration which will aid a legal practitioner in mediation is the lawyer's ability to function as a counselor. Attorneys generally do not receive training in psychological evaluation; nevertheless, in their everyday practice lawyers are consistently confronted with numerous situations requiring some sort of counseling ability.¹⁰² Although this may not make a lawyer a good counselor, it does provide him or her with a basis in many of the skills necessary to perform the role of a mediator.¹⁰³

100. *Id.* at 288. The author notes several reasons why a client may see an attorney about a divorce. These include: anger, attempts to manipulate others, pressure from some third party, and efforts to achieve financial gain. *Id.*

101. Pearson, Thoennes and Kooi, *supra* note 43, at 340. This study found that one of the key reasons people choose to mediate is their attorneys encourage them to try. It was also reported that those people who chose mediation were more satisfied with their experience than those who pursued a traditional adversarial approach. *Id.*

102. Shaffer, *Lawyers, Counselors, and Counselors at Law*, 61 A.B.A. J. 854 (1975). The author reports that the average lawyer spends as much as a third of his time in counseling related activities. *Id.*

103. Merder, *supra* note 99, at 288.

The importance of the lawyer's ability to counsel is currently being stressed in family law literature. Numerous writers¹⁰⁴ are beginning to suggest that more than the traditional skills of legal advocacy are necessary if the client is to be served properly. One such author has suggested that personal conflict problems are not primarily legal. Rather, "they are deep human problems in which the law is enmeshed. The legal problem must, of course, be resolved. But often its resolution does not alleviate the human problem and, sometimes the legal problem cannot properly be handled unless the human problem is solved."¹⁰⁵ If a lawyer is able to view a client's legal problem from this perspective, he or she may begin to develop a natural inclination toward the dispute resolution capabilities of mediation.

Training in counseling and mediation is readily available. Colleges and universities generally offer courses in counseling. Local mental health centers may provide another alternative. There are also a number of organizations around the country specializing in mediation instruction.¹⁰⁶

104. See, e.g., Elkins, *A Counseling Model for Lawyering in Divorce Cases*, 53 NOTRE DAME LAW. 229 (1977); Merder, *supra* note 99; Mussehl, *supra* note 58.

105. Goodpaster, *The Human Arts of Lawyering: Interviewing and Counseling*, 27 J. LEGAL EDUC. 5, 9 (1975).

106. Mediation training and information resources include:

- (1) Family Mediation Association
Training Division
2959 Piedmont Rd., N.E.
Atlanta, GA 30305
(provides training and membership information)
- (2) American Arbitration Association
Family Disputes Services
140 W. 51st Street
New York, NY 10020
(provides mediators at selected regional offices)
- (3) John M. Haynes, Ph.D.
School of Social Welfare
Health Sciences Center L 2093
SUNY
Stony Brook, NY 11790
(provides training information and videotape rental)
- (4) Denver Custody Mediation Project
Center for Policy Research
Denver, Colorado 80218
(provides information on mediation procedures and research results)
- (5) For a complete listing of all public and private sector divorce mediation services available throughout the country, see The Divorce Mediation Research Project, *Directory of Mediation Services* (1982) (available at University of Wyoming College of Law Library). This directory also contains a comprehensive listing of every organization or individual who indicated that they train others in divorce mediation.

IV. CONCLUSION

At this point, whether or not an attorney chooses to engage in mediation work is not as important as the fact that mediation is an alternative deserving serious consideration. The dramatic changes being experienced by the family today have created a strain upon the traditional methods of family law practice. Evolving values and new divorce laws are giving rise to a need for new and innovative means of handling family-related legal matters. Divorce mediation is one alternative now available to meet this need. Obviously it is not to be considered as a blanket solution to all marital disputes, but when it is applied in appropriate situations it will provide a process through which the hostility and tension of the adversarial approach may be avoided. In turn, the attorney, the clients, and their children will be able to experience the positive effects of a peaceful resolution procedure.

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