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Mediation and Wyoming Domestic Relations Cases - Practical Considerations, Ethical Concerns and Proposed Standards of Practice

Frank Gibbard

Fred Hartmeister

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MEDIATION AND WYOMING
DOMESTIC RELATIONS
CASES—PRACTICAL
CONSIDERATIONS, ETHICAL
CONCERNS AND PROPOSED
STANDARDS OF PRACTICE

Frank Gibbard
Fred Hartmeister*

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* Messrs. Gibbard and Hartmeister are Staff Attorneys at the Wyoming Supreme Court. Both graduated from the University of Wyoming College of Law in 1990.
The opinions expressed in this article are those of the authors, not of the Wyoming Supreme Court.

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I. INTRODUCTION

Divorce . . . is a matter of the heart and of the law. The strong emotional forces accompanying the dissolution of an existing family relationship require more delicately wrought measures than can be provided in a court-imposed solution. Mediation can help educate parents about each other's needs and the needs of their children and can provide a personalized model for dispute resolution both at the time of divorce and in the future, should circumstances change or differences arise. Mediation can help parents learn to work together, isolate the issues to be decided and realize that cooperation can be of mutual advantage.¹

In 1991, Wyoming joined a growing number of states² in adopting legislation providing for mediation as an alternative method of dispute resolution.³ The Wyoming Mediation Act⁴ defines "mediation"⁵ and other related terms,⁶ imposes general rules for confidentiality⁷ and privilege,⁸ and provides mediator immunity from civil liability for good faith acts or omissions.⁹

In keeping with the spirit of Wyoming's Mediation Act, the Wyoming Supreme Court amended Rule 40, Wyoming Rules of Civil Procedure (Wyo. R. Civ. P. 40), to include alternative dispute resolution (ADR) procedures.¹⁰ The court stated that it had determined it was

1. Jay H. Folberg, *Mediation of Child Custody Disputes*, 19 COLUM. J.L. & Soc. PROBS. 413, 418-19 (1985) (footnotes omitted).

2. See, e.g., COLO. REV. STAT. §§ 13-22-301 to -311 (1989); OKLA. STAT. tit. 12, §§ 12-1801 to -1813 (Supp. 1992); OR. REV. STAT. §§ 36.100 to .210 (1991).

3. WYO. STAT. §§ 1-43-101 to -104 (Supp. 1991).

4. *Id.* See APPENDIX A for the complete text of Wyoming's Mediation Act.

Prior to adoption of the Wyoming Mediation Act, several Wyoming statutes already provided for dispute resolution alternatives to traditional litigation in certain situations. See WYO. STAT. § 40-17-101 (Supp. 1991) (automobile consumers must first avail themselves of a manufacturer's informal dispute settlement procedure before pursuing other remedies, if such procedure exists and is in compliance with federal law); WYO. STAT. §§ 11-41-101 to -110 (1989) (Agriculture Mediation Service Act); WYO. STAT. §§ 11-19-106 to -108 (1989) and § 11-28-108 (1989) (provides for arbitration in certain farm-related claims); WYO. STAT. §§ 1-36-101 to -119 (1988) (Wyoming's version of the Uniform Arbitration Act); and WYO. STAT. §§ 27-10-105 to -107 (1991) (provides an arbitration procedure to resolve disputes between public employers and fire fighters).

5. WYO. STAT. § 1-43-101(a)(ii) (Supp. 1991).

6. *Id.* § 1-43-101(a).

7. *Id.* § 1-43-102.

8. *Id.* § 1-43-103.

9. *Id.* § 1-43-104.

10. Order Amending Rule 40, W.R.C.P. for the Adoption of Rules for Alternative Dispute Resolution Procedures, 812-817 Wyoming Reporter XIX (1992) (Adopted by the Wyoming Supreme Court on August 2, 1991 and effective October 29, 1991—sixty days after publication in the Pacific Reporter advance sheets) [hereinafter Order Amending Rule 40].

Wyo. R. Civ. P. 40, as amended and previously adopted by the Wyoming Supreme Court, was readopted without change on December 20, 1991. At that time the Court considered and, with some revision, adopted by Court order the proposed Revised Wy-

"necessary and proper to establish rules for alternative dispute resolution procedures as an optional method for parties to use in lieu of judicial resolution of disputes . . .,"¹¹ and thus created subsections (b) through (f) to Rule 40.¹² These recent legislative and judicial actions govern mediation procedures in the broad arena of Wyoming civil litigation.¹³

The purpose of this article is to provide a brief conceptual overview of mediation¹⁴ in the domestic relations context.¹⁵ The article examines what effect the new Wyoming statutes and rules may have within the narrow context of divorce, child custody, visitation, support and property settlement issues in domestic relations cases.¹⁶ This, in turn, raises a number of questions regarding the practicality and current viability of domestic mediation in Wyoming.¹⁷ A primary objec-

oming Rules of Civil Procedure as recommended by the Permanent Rules Advisory Committee—Civil Division. See Order Adopting the Revised Wyoming Rules of Civil Procedure, as filed with the Clerk of the Wyoming Supreme Court (December 20, 1991).

11. Order Amending Rule 40, *supra* note 10.

12. See APPENDIX B for the relevant amendments to Wyo. R. Civ. P. 40.

13. Wyoming's recent statutory and rule changes providing for mediation explicitly do not preclude the use of other forms of alternative dispute resolution (ADR). Nor do the statutes and rules suggest that a single, uniform mediation procedure be followed in all cases. The use of different types of mediation procedures or other ADR techniques may be appropriate depending on the circumstances in a particular case. Wyo. R. Civ. P. 40(f) recognizes other possible choices for ADR procedures including arbitration and summary jury trials.

14. See generally NANCY H. ROGERS & RICHARD A. SALEM, A STUDENT'S GUIDE TO MEDIATION AND THE LAW § 1.04 (1987).

15. By 1990, more than one-half of the states have adopted legislation providing for various types of ADR in domestic cases. John R. Price & Kendall Woods, *Legislation on Dispute Resolution*, A.B.A. STANDING COMMITTEE ON DISP. RESOL. 116-17 (1990). For examples of legislation from neighboring states, see COLO. REV. STAT. § 14-10-129.5(1)(c) (1987); MONT. CODE ANN. § 26-1-811 (1991) and §§ 40-3-101 to -127 (1991); NEB. REV. STAT. §§ 29-2901 to -2920 (1991); UTAH CODE ANN. § 30-3-16.2 (1989).

16. This article is not intended to present and thus does not discuss non-domestic relations situations where mediation might be appropriate.

17. Many of the questions raised are answered within this article. However, the authors acknowledge that the unpredictability and uncertainty connected with a relatively new and untested process leaves other questions unanswered. For the most part, these questions will remain unanswered until enough Wyoming attorneys become convinced that mediating a divorce or other domestic issue offers significant potential benefits to both the divorcing parties and the attorneys themselves. The gains of going ahead and mediating must be perceived as being greater than the costs (financial and otherwise) of resolving domestic issues through the traditional adversarial process. Researchers have summarized the role of the legal profession in this regard as follows:

[W]e find that despite professional enthusiasm for divorce mediation and the rapid recent proliferation of public and private mediation services, voluntary programs typically fail to attract large numbers of clients. Although divorce mediation is somewhat more attractive to better-educated individuals, who are traditionally more receptive to new ideas, the use of divorce mediation programs remains tied to the attitudes of the legal community. Individuals whose attorneys are ambivalent or opposed to mediation are very reluctant to try it. This underscores the importance of obtaining the support and cooperation of attorneys in developing and popularizing mediation.

Jessica Pearson & Nancy Thoennes, *Divorce Mediation: An Overview of Research Results*, 19 COLUM. J.L. & SOC. PROBS. 451, 479 (1985) (footnotes omitted).

tive of this article is to encourage members of the Wyoming Bar to recognize appropriate cases for mediation and to further explore how and when voluntary domestic mediation might best be utilized.¹⁸ In this regard, the article emphasizes potential ethical concerns and concludes by recommending statewide adoption of uniform standards of practice for Wyoming mediators. Ideally, this article presents an introductory discussion of legal and ethical issues indigenous to the mediation process and is intended to provide a greater appreciation for both the potential effectiveness as well as the likely drawbacks of mediating domestic relations cases.¹⁹

II. DOMESTIC MEDIATION DEFINED

One commentator defines mediation as "a cooperative process through which the parties themselves fashion a mutually acceptable resolution to their dispute with the help of a neutral third party. Mediation is essentially a negotiation process that seeks a convergence among the parties rather than the polarization that characterizes liti-

Only when mediation has been attempted in a significant number of Wyoming domestic relations cases will evidence become available to ascertain the viability and practicality of the process.

18. The 1992 Wyoming Legislature recently considered but failed to introduce a proposed mediation bill sponsored by the Select Committee on Health Care. As proposed, the bill would have implemented pre-trial nonbinding mediation procedures for most civil cases. H.B. 34, 51st Leg., Spec. & Budg. Sess. (1992). Entitled "Mandatory Nonbinding Mediation," the proposed bill would have allowed a district court judge to assign civil cases for mediation prior to trial if the case did not involve a prayer for equitable relief and if mediation "is in the best interests of justice." *Id.* The bill also would have required the presiding judge to assign the case for mediation upon the stipulation of all parties. It would appear that the title of the bill was somewhat misleading since the proposed bill provided certain exceptions when mediation would not be mandatory.

It is recognized that statutorily-imposed mandatory mediation would require a new set of pretrial procedures and practices for Wyoming lawyers. Extensive discussion of the complexities and potential drawbacks of mandatory mediation is, however, beyond the scope of this article. However, for commentary critical of mandatory mediation in the domestic context, see generally Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991) [hereinafter Grillo]. The author concludes:

Although mediation can be useful and empowering, it presents some serious process dangers that need to be addressed, rather than ignored. When mediation is imposed rather than voluntarily engaged in, its virtues are lost. More than lost: mediation becomes a wolf in sheep's clothing. It relies on force and disregards the context of the dispute, while masquerading as a gentler, more empowering alternative to adversarial litigation. Sadly, when mediation is mandatory it becomes like the patriarchal paradigm of law it is supposed to supplant. Seen in this light, mandatory mediation is especially harmful: its messages disproportionately affect those who are already subordinated in our society, those to whom society has already given the message, in far too many ways, that they are not leading proper lives.

19. Although this article identifies and briefly discusses various "model" procedures for conducting a mediation, *infra* note 40, it is not intended as a primer on how to conduct a domestic relations mediation. Nor is it intended to promote mediation as a panacea for the varied problems in traditional adversarial domestic relations dispute resolution.

gation.”²⁰ Divorce mediation²¹ is similarly defined as “an attempt at mutual problem solving in which couples try to reach agreement on all of the issues in the primary areas of dispute in a divorce: property settlement, child custody and support, and spousal maintenance.”²² Although mediation is sometimes confused with other forms of alternative dispute resolution such as conciliation²³ and arbitration,²⁴ it is

20. Kenneth R. Feinberg, *Mediation—A Preferred Method of Dispute Resolution*, 16 PEPP. L. REV. S5, S7 (1989).

21. “Domestic mediation” and “divorce mediation” are used interchangeably in this article. For purposes of clarification, however, “divorce mediation” can be read narrowly to only include mediation connected with the actual divorce proceeding whereas “domestic mediation” may include pre-divorce, divorce and post-divorce attempts at mediation.

22. Steven C. Bowman, Comment, *Idaho’s Decision on Divorce Mediation*, 26 IDAHO L. REV. 547, 553 (1990) (citing AM. JUR. 2d, New Topic Service: *Alternative Dispute Resolution* 15-16 (1985)).

23. Conciliation:

contemplate[s] a process during which the spouses have one or more conferences with someone usually referred to as a counselor, [and] the assumption is that the spouses are to discuss their marital differences in the presence of and with the participation of the counselor. The function of the counselor is to use the techniques developed in psychology or psychiatry or similar disciplines in such a fashion as to cause them to resume marital life together or, failing that, perhaps to cause them to agree on such matters as property, support and custody of children.

HOMER H. CLARK, JR., 2 THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES, § 15.12, at 154 (2d ed. 1987) [hereinafter CLARK].

Professor Clark identifies a fundamental problem with attempting either voluntary or involuntary conciliation in a divorce proceeding:

When the parties have reached the point of seriously considering divorce, it is usually too late for counseling or conciliation to succeed in saving the marriage. To be really effective, a conciliation program should be made available to spouses long before divorce is contemplated, but of course that would require a very large expenditure of public funds. On consideration of all these factors, one is led to be skeptical of any very ambitious claims for conciliation, although it may help some couples either to save their marriages or to reduce the material and psychological damage of their divorces.

Id. at 155-56 (footnotes omitted).

WYO. STAT. § 1-43-101(a)(ii) (1988) incorporates “reconciliation, settlement, compromise or understanding” in its definition of “mediation.” Unlike a number of other states, however, Wyoming neither mandates nor provides statutory authority for voluntary pre-divorce conciliation. See generally CLARK, *supra* note 23.

24. Arbitration “occurs when the parties to a controversy agree to submit it to an impartial third person for a decision based upon evidence and argument.” CLARK, *supra* note 23, at 165. Unlike mediation (where the parties are ultimately responsible for developing the agreement, if any, which results from the mediation process), an arbitrator has responsibility for making a final recommendation or decision. Depending on the nature of the parties’ arbitration agreement, the arbitrator’s decision may be either advisory or binding. ROGERS & SALEM, *supra* note 14, § 1.03. Consequently, selection of an arbitrator is probably more important than the selection of a mediator since the arbitrator generally has a much greater influence on the end result.

State courts have said that arbitration is a “favored remedy” in resolving domestic issues. For example, in *Flaherty v. Flaherty*, 477 A.2d 1257, 1262 (N.J. 1984), the New Jersey Supreme Court cited numerous advantages of domestic arbitration including: reduced court congestion, the opportunity for resolving sensitive matters in an informal and private setting, reduced trauma and anxiety (as opposed to marital litigation), and minimized polarization of the parties. The court reserved its role as *parens patriae* with regard to the children involved and indicated it would be guided by the traditional “best interests of the child” principle. These same conditions and potential advantages would seem to apply equally well in the domestic mediation context.

distinctly different in both its intended purpose and methodology.

III. THE DOMESTIC MEDIATION PROCESS

A. *The Parties*

Conceptually, domestic mediation generally involves either a married couple actively seeking a divorce²⁵ or a divorced couple attempting to mediate a divorce-related issue such as modification of child custody or visitation.²⁶ The couple voluntarily involve an impartial mediator or team of mediators chosen by mutual agreement of the parties to assist in deciding on and drafting a formal written agreement which disposes of all substantive issues.²⁷ Mediation sessions are usually held in a location away from the courthouse and at some point in time preceding a district court judge's active participation in the case. If a mediated agreement is reached, it is reduced to writing and presented to the district court for final approval.²⁸ In this sense, a successful voluntary mediated divorce does not differ significantly from the end result in an amicable and uncontested, judicially-supervised divorce proceeding in which the parties stipulate to the disposition of all divorce issues including custody, support, and property.²⁹

There is, however, an important distinction between contested divorces and mediated divorce proceedings when minor children are involved in the familial relationship. For example, when children are in-

25. Regardless of whether or not the divorcing couple submits to voluntary mediation, grounds of "irreconcilable differences in the marital relationship" are the primary basis for which a Wyoming divorce may be granted. WYO. STAT. § 20-2-104 (1987).

26. See generally Russell M. Coombs, *Noncourt-Connected Mediation and Counseling in Child-Custody Disputes*, 17 FAM. L.Q. No. 4, 469 (1984); Linda K. Girdner, *Adjudication and Mediation: A Comparison of Custody Decision-Making Processes Involving Third Parties*, 8 J. Div. No. 3/4, 33 (1984-85); see also 2 FAM. MEDIATOR (No. 2, Mar.-Apr. 1982) (reporting former U.S. Supreme Court Chief Justice Burger's recommendations that child custody matters be resolved by alternative means of settlement such as mediation or arbitration rather than through the courts).

27. ANN M. HARALAMBIE, *HANDLING CHILD CUSTODY CASES* § 4.01 (1983).

28. The parameters of court enforcement of mediated agreements are an unsettled question in many jurisdictions. Steven Weller, *Court Enforcement of Mediated Agreements: Should Contract Law be Applied?*, 31 JUDGES' J., 13 (Winter, 1992). Weller suggests that judicial enforcement under traditional principles of contract law may have some drawbacks due to: the potential for lack of mutual assent; the possibility of the mediator unduly influencing one or both of the parties; and, the difficulty in challenging a mediated agreement on the basis of its formation due to statutorily imposed confidentiality. *Id.* at 14-16. Weller proposes adoption of a rule governing judicial review of mediated agreements which might alleviate some of these problems. *Id.* at 39. See generally Appelt v. Appelt, 768 P.2d 596 (Wyo. 1989) (divorcing couple agreed to divide marital property and then memorialized that agreement in a document presented to the district court for inclusion in the divorce decree); Foster v. Foster, 768 P.2d 1038 (Wyo. 1989) (discusses the district court's constitutional and statutory obligations to conduct an on-the-record independent review of the evidence and findings supporting a court commissioner's recommendation in a domestic relations case).

29. CLARK, *supra* note 23, at 163. See also Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

volved in a traditional court-supervised divorce proceeding, the "best interest of the child" is the paramount standard which guides most judicial decision making.³⁰ Although children are generally not given "party" status in judicially-supervised contested divorce proceedings,³¹ their interests are foremost in the court's thoughts.

On the other hand, children whose parents rely on domestic mediation to resolve divorce issues may not receive the same attention and protection as children whose parents obtain an adjudicated divorce.³² Several commentators have noted that the exclusion of children from mediated divorce proceedings may result in a less-than-favorable long-range outcome for children.³³ Even though a judge is required to approve a mediated settlement agreement, it does not necessarily follow that the judge will be as well-informed and familiar with the children's interests as a judge would be in an adjudicated proceeding.³⁴ This raises a critical question as to whether a mediator is or should be responsible for guaranteeing that a mediated settlement agreement protects the children's interests.

On one hand, married parents are permitted wide latitude in making decisions about their children's "best interests." The argument follows that divorce should not necessarily give rise to third-party interference with parental decision-making.³⁵ On the other

30. See, e.g., WYO. STAT. § 20-2-112(b) (Supp. 1991); WYO. STAT. § 20-5-104(a)(ii) and (iv) (1987).

31. Wyoming does not require appointment of a guardian ad litem in a divorce proceeding. *Rowan v. Rowan*, 786 P.2d 886, 889 (Wyo. 1990); see also *Moore v. Moore*, 809 P.2d 261 (Wyo. 1991) (defining the role of a guardian ad litem as an advocate for the child).

32. By definition under Wyoming Statutes section 1-43-101(a)(iv) (Supp. 1991), a child is not "rendered mediation services by a mediator . . . with a view to obtaining mediation services" and thus is not a "party to the mediation." *Id.*

33. See, e.g., Gary Paquin, *Protecting the Interests of Children in Divorce Mediation*, 26 J. FAM. L. 279 (1987-88); Martin Guggenheim, *The Right to be Represented but not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U.L. Rev. 76 (1984).

34. While not intended to cast aspersions on the efforts and dedication of Wyoming's district court judges, the simple fact remains that crowded court dockets impose practical constraints on the amount of time a judge is likely to spend reviewing a mediated settlement agreement. Consequently, there is some risk that the "best interests of the children" may not receive a thorough judicial review when both parents present the court with a settlement agreement. See generally Folberg, *supra* note 1, at 434-35.

35. Professor Folberg suggests that courts should not have any authority to interfere with parental decisions regarding custody if the parents can agree with each other as to proper disposition. He summarizes:

Some readers may be alarmed by the suggestion to allow divorcing parents to resolve custody issues without judicial review and may argue that the state has a responsibility for the children beyond encouraging the speedy, private settlement of disputes between parents. The state, however, under the well-developed doctrine of *parens patriae*, has a responsibility for the welfare of children only when parents cannot agree or cannot adequately provide for them. Divorce mediation begins with the premise that parents love their children and are best able to decide how, within their resources, they will care for them.

* * *

hand, a deteriorating, highly emotional and/or contentious relationship between divorcing or divorced parents is often not conducive to rational thought. Assuming that a mediated settlement agreement will receive minimal scrutiny by an approving court, the counter-argument can thus be made that, in the absence of a guardian *ad litem*, only the mediator can ensure that children's interests are protected.³⁶

B. The Mediator(s)

A variety of professionals from a number of different disciplines may participate in domestic mediation.³⁷ Psychologists, family therapists, counselors, social workers and attorneys may all be involved in mediating domestic disputes and each may serve in the role of mediator either individually or as a member of a co-mediator team.³⁸ The mediation process varies considerably depending upon the experience of the mediator(s) and the format adopted for the mediation sessions.³⁹ A variety of mediation "models" exist which may be used in resolving an appropriate domestic dispute.⁴⁰

When both parents love their children and are able to agree on how to provide for them after divorce, it is presumptuous and intrusive to allow a third party, whether a judge or a child development expert, to determine if the parents' custody, support and care agreement is adequate for their own children. A mediated agreement is much more likely than a judicial decision to match the parents' capacity and desires with the child's needs.

Folberg, *supra* note 1, at 437-38 (footnotes omitted).

Wyoming's 1989 adoption of statutory child support guidelines raises an important question of whether a district court could ever justify approval of a mediated settlement agreement which deviates from the guideline dollar amounts. WYO. STAT. §§ 20-6-301 to -306 (1991). WYO. STAT. § 20-6-302(b) states that "[a] court may deviate from the child support guidelines established by W.S. 20-6-304 if it issues a written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case." This statute would appear to prohibit judicial acceptance of child support amounts in a mediated agreement absent at least some review of the underlying circumstances.

36. See HARALAMBIE, *supra* note 27, § 4.02; see generally Janet Maleson Spencer & Joseph P. Zammit, *Mediation-Arbitration: A Proposal For Private Resolution of Disputes Between Divorced or Separated Parents*, 1976 DUKE L.J. 911 (1976).

37. HARALAMBIE, *supra* note 27, § 4.03; see also the related discussion, *infra* notes 106-111 and accompanying text.

38. HARALAMBIE, *supra* note 27, § 4.03; see also Bowman, *supra* note 22, at 554-57.

39. CLARK, *supra* note 23, at 164. Under optimal conditions, mediating a relatively simple single-issue domestic dispute could be accomplished in a single mediation session. For example, it is possible an agreement between a custodial and non-custodial parent scheduling the next year's calendar for child visitation might be accomplished in a single session. It is unlikely, however, that a single mediation session would suffice to resolve the multiple issues involved in a complicated divorce case.

40. See, e.g., Feinberg, *supra* note 20, at S6-S20 (Feinberg Mediation Procedure); CLARK, *supra* note 23, at 164 (Structured Mediation); Spencer & Zammit, *supra* note 36, at 930-38 (Mediation-Arbitration model); Susan M. Brown, *Models of Mediation, DIVORCE AND FAMILY MEDIATION* 49-52 (James C. Hansen & Sarah Childs Grebe eds., 1985) (Therapeutic Model); JOAN BLADES, *FAMILY MEDIATION* 111-25 (1985) (Co-mediation).

C. *The Mediation Process*

In simplest terms, mediating a domestic relations case will usually include the following stages:⁴¹

1. Initial Communication: the mediator⁴² will confer with both parties to establish a convenient time for an initial appointment.⁴³

2. First Session: the mediator begins by welcoming the parties and then attempts to establish credibility by explaining the ground rules for the proceedings.⁴⁴ Depending on the issues at stake and the parties' familiarity with mediation, the mediator may need to demystify certain aspects of the process. After visiting with the parties and determining such things as the complexity of the issues and the emotionalism of the parties, the mediator must decide whether these particular parties and their issues are appropriate for mediation.⁴⁵ The mediator should stress the necessity for full consent and disclosure,⁴⁶ and explain the importance of confidentiality.⁴⁷ Similarly, the mediator should discuss his/her role as a neutral third-party⁴⁸ and clarify the objectives for conducting the mediation. Finally, allocation of costs for mediator reimbursement should be discussed and agreed to if not provided for in some other fashion.⁴⁹

41. One feature of the mediation process is that no two mediations are ever conducted in exactly the same way. Mediation depends on flexibility. It is a dynamic process created by the relationships between the parties and each other, the parties and the mediator, and the strategic decisions the mediator and the parties make during the course of mediation. Consequently, thinking of the mediation process in terms of "stages" is simply one way of conceptualizing the process as a whole. See also ROBERTA S. MITCHELL & SCOT E. DEWHIRST, *THE MEDIATOR HANDBOOK*, (1990) (a mediator training guide which adopts a seven-stage mediation model).

42. Though phrased in terms of a single mediator, the same process will probably not vary significantly if co-mediators are employed.

43. Patricia L. Winks, *Divorce Mediation: A Nonadversarial Procedure for the No-Fault Divorce*, 19 J. FAM. L. 615, 635 (1980-81).

44. *Id.*

45. HARALAMBIE, *supra* note 27, § 4.04.

46. Winks, *supra* note 43, at 635; CLARK, *supra* note 23, at 165.

47. ROGERS & SALEM, *supra* note 14, § 2.04[B]; see also CLARK, *supra* note 23, at 165.

48. ROGERS & SALEM, *supra* note 14, § 2.04[B].

49. WYO. R. CIV. P. 40(d) states that in court-assigned mediations in which a suit has been filed, a person other than an active judge serving as a mediator:

shall be compensated from available public funds for services performed in a particular case at a rate of not less than \$50.00 per hour. The person to be compensated shall submit to the clerk of the supreme court a statement of fees for services rendered, together with the report required by subsection (e).

WYO. R. CIV. P. 40(d).

In situations where a case has not been filed in court but has been accepted for settlement conference or mediation by the parties, a \$15.00 filing fee is required to be paid to the Clerk of the Supreme Court if the parties seek to utilize the Court's list of potential mediators. Mediator compensation in those cases is arranged by agreement between the parties and the mediator and must be paid by the parties within 30 days of receipt of the mediator's statement. *Id.*

By letter dated February 10, 1992, Wyoming Supreme Court Justice G. Joseph Cardine notified the district court judges in the state that the court was imposing a \$300.00 cap on

Next, both parties are encouraged to make separate, uninterrupted statements outlining their concerns and feelings.⁵⁰ Depending on the emotional levels involved and the possible reluctance of one or both parties to be candid, it may be necessary to meet separately or caucus with the parties to fully identify all problems and concerns.⁵¹ The mediator attempts to prioritize issues, encourages a bargaining and communicative relationship, and stresses the common points upon which the parties might reach agreement.⁵²

3. Follow Up Sessions: generally, domestic mediation sessions are not conducted in marathon fashion. Instead, they are scheduled on a weekly basis to last for one to two hours each.⁵³ As long as unresolved issues remain but the parties mutually agree that progress is being made, it is feasible to continue meeting on a regular basis.

4. The Written Agreement: as progress is made, the mediator summarizes areas of common understanding and assists the parties in drafting a final written agreement.⁵⁴ The complexity of the written agreement will vary depending on the nature of the legal issues involved.⁵⁵ It is always advisable to have both parties seek independent legal advice before final agreement is reached unless both parties were fully represented by counsel throughout the course of the mediation proceedings.⁵⁶ This holds true regardless of whether or not the mediator is an attorney.⁵⁷ Even if the parties fail to reach a final agreement it may be possible to salvage the positive results of mediation by having the parties stipulate to the agreed-upon issues.⁵⁸

D. Potential Advantages of Mediation for the Parties

Various commentators have written about the values and merits of mediation in general, and domestic mediation in particular.⁵⁹ Pro-

the amount that the court will reimburse mediators for expenses and services in future mediations. The court imposed the cap due to the rapid depletion of the \$9,000 amount provided by the 1991 Wyoming Legislature to fund the ADR program. In his letter, Justice Cardine, who also serves as Chairman of the Wyoming Supreme Court's Alternative Dispute Resolution Committee, reminded the judges that all mediator services had been provided pro bono when the state's ADR program was begun and he implied that a return to that standard might be necessary in the future.

Commentators have discussed the importance of adequate public funding for ADR programs. See, e.g., Frank E.A. Sander, *Paying for ADR*, A.B.A. J. 105 (Feb. 1992).

50. ROGERS & SALEM, *supra* note 14, § 2.04[C].

51. *Id.*

52. Winks, *supra* note 43, at 635-37.

53. CLARK, *supra* note 23, at 164.

54. ROGERS & SALEM, *supra* note 14, § 2.04[E].

55. *Id.*

56. See *infra* notes 170-172 and accompanying text.

57. Winks, *supra* note 43, at 635. In fact, encouraging the parties to seek outside legal counsel prior to signing a final agreement is probably even more critical from a liability standpoint when the mediator is an attorney. See *infra* notes 170-172 and accompanying text.

58. ROGERS & SALEM, *supra* note 14, § 2.04[E].

59. See, e.g., Jay H. Folberg, *Divorce Mediation—A Workable Alternative*, re-

ponents have compiled a lengthy list of advantages which include: mediation's informality,⁶⁰ flexibility,⁶¹ and voluntary, non-binding nature;⁶² the fact that, at least in theory, mediation is less disruptive and leads to more amicable post-crisis relationships;⁶³ a better record of voluntary compliance with mediated agreements than with judicially-imposed solutions;⁶⁴ the value of self-determination;⁶⁵ the reduced likelihood of relitigation;⁶⁶ less delay than in the traditional judicial process;⁶⁷ and the claim that mediation is cost-effective and thus cheaper than traditional adversarial litigation.⁶⁸

E. Potential Disadvantages of Mediation for the Parties

Although the list of perceived disadvantages to mediating a domestic dispute is not as lengthy as the list of advantages, the qualitative significance should not be overlooked.⁶⁹ Depending upon the circumstances in any particular case, potential disadvantages may include: the possibility of unequal bargaining power as between the parties;⁷⁰ the potential that if mediation fails, the position of the parties will harden; the need for refinements in professional standards, mediator training and licensing procedures;⁷¹ and significant dispute as to whether mediation is truly more cost-effective and less expensive

printed in JUDITH AREEN, *CASES AND MATERIALS ON FAMILY LAW*, 706-07 (2d ed. 1985):

Mediation can educate the parties about each other's needs and provide a personalized model for dispute resolution, both now and in the future should circumstances change or differences arise.

* * *

This advantage of mediation exists, in part, because mediation is less bound by rules of procedure and substantive law, as well as certain assumptions or norms, that dominate the adversarial process. The ultimate authority in mediation belongs to the parties themselves and they may fashion a unique solution that will work for them without being strictly governed by precedent nor concerned with the precedent they may set for others.

* * *

Parents should have the first opportunity to meet the needs of their children and continue the maintenance of family ties without state interference.

* * *

The legal system is not well able to supervise or enforce the fragile and complex interpersonal relationships between family members that continue even after most divorces.

60. Feinberg, *supra* note 20, at S8-S9.

61. *Id.* at S9-S10; Steven T. Knuppel, Comment, *Promise and Problems in Divorce Mediation*, 1 J. DISP. RESOL., 128 (1991) [hereinafter Knuppel].

62. Feinberg, *supra* note 20, at S7.

63. Bowman, *supra* note 22, at 558.

64. *Id.*

65. *Id.*

66. *Id.*

67. Knuppel, *supra* note 61, at 128.

68. Feinberg, *supra* note 20, at S10-S12.

69. CLARK, *supra* note 23, at 163.

70. ROGERS & SALEM, *supra* note 14, § 6.03; Bowman, *supra* note 22, at 559.

71. John A. Fiske, *Divorce Mediation: An Attractive Alternative to Advocacy*, 20 SUFFOLK U. L. REV. 55, 62 (1986).

than traditional adversarial litigation.⁷²

F. The Current Status of Domestic Mediation in Wyoming

A random, informal and decidedly unscientific survey of attorney members of the Wyoming State Bar's Panel of Mediators and a similar survey of members of the Wyoming State Bar indicates that there has been little movement toward expanding the use of mediation in the domestic relations context.⁷³ Although almost all of the attorneys from both groups that were surveyed knew of the new Wyoming statutes and rules governing mediation, not a single respondent from the Panel of Mediators indicated actual experience as a mediator in a domestic case. In addition, none of the Bar respondents had experience representing clients who had attempted domestic mediation. Even though these results are by no means conclusive, it is clear that domestic mediation has not yet been widely embraced in Wyoming. Most of the attorneys interviewed did, however, express interest in the process and enthusiasm for its potential.

Comparable results were also observed in the use of mediation in the first six months since the inception of the Wyoming Supreme Court's mediation program in August, 1991.⁷⁴ In that period, 17 final

72. For an excellent critique of mediation in the domestic context, see CLARK, *supra* note 23, at 162-74.

Mediation has been the subject of extensive commentary during the 1980's, most of it emphasizing mediation's assumed benefits, much of it superficial rather than critical or analytical.

* * *

The continued currency of these cliches is puzzling in view of the well established fact that even before the advent of mediation a very large proportion of divorce cases were uncontested, the function of the courts in such cases being merely to approve arrangements already worked out by the parties and their lawyers.

* * *

It also seems clear that a full disclosure of material information by both spouses is essential to effective mediation, but the available writing on mediation leaves largely unclear just how intervention by the mediator is permissible in order to ensure a full disclosure (with examples).

Id. at 162, 165 (footnotes omitted).

Professor Folberg also raises several excellent points about the possible downside to domestic mediation. He states, "[t]he very elements that make divorce mediation so appealing and provide its advantages over the adversarial model also create certain dangers and raise substantial issues not yet resolved." Folberg, *supra* note 59, at 707. The unresolved issues he discusses include: the difficulty in weighing and blending emotional feelings with legal rights and obligations; the fact that mediation does not provide the precise checks and balances that are the principal benefit of the adversarial process; and the concern that many, including mental health professionals, attorneys and judges, may not be eager to relinquish their traditional roles during tight economic times in the growing divorce industry. *Id.* at 707-08.

73. Between December, 1991 and February, 1992, the authors informally contacted various attorney members of the Wyoming State Bar's Panel of Mediators as well as members of the Wyoming State Bar for their input and thoughts regarding the use of mediation in domestic relations cases.

74. With financial assistance from the Wyoming legislature, the Wyoming Supreme Court created a settlement conference and mediation program concurrently with its adoption of amended Wyo. R. Civ. P. 40, in August, 1991. See *supra* note 10.

reports and bills for reimbursement were submitted to the Clerk of the Supreme Court pursuant to Wyo. R. Civ. Pro. 40(d).⁷⁵ Not one of the 17 cases involved an attempt at mediating a domestic dispute. In fact, it appears that all 17 cases involved settlement conferences rather than mediation.⁷⁶

Consequently, it is far too early to determine whether or not domestic mediation is a practical alternative to traditional adversarial adjudication in Wyoming domestic relations cases. All that can be said with certainty is that domestic mediation does not appear to have been widely accepted to date and more results are needed before valid predictions can be made as to its viability and potential for future use in Wyoming. However, because of the potential benefits of mediation in the domestic context and the likelihood that mediation will be used with greater frequency in the future, the significant role of ethical concerns as they relate to members of the Wyoming Bar are examined to illustrate potential problems.

IV. ETHICAL CONCERNS

A. Background

In an early, path-breaking article,⁷⁷ attorney Richard E. Crouch discussed the "tough ethical issues" which face an attorney⁷⁸ involved in mediation. Crouch perceived ethical problems for the attorney who sought to fulfill the aspirations of mediation within the ethical parameters of the legal profession. He chiefly criticized the concept that the attorney-mediator can "represent" both parties and still manage to be "neutral" as between them.

Crouch pointed out that the ostensibly neutral attorney-mediator is often caught in the dilemma of whether to let a weaker party to the

75. Interview with Jerrill Carter, Clerk of the Wyoming Supreme Court, in Cheyenne, Wyo. (Feb. 27, 1992); see also *supra* note 49.

76. In each of the 17 cases the person conducting the "settlement conference" submitted a written *recommendation* to the parties, to the assigning court, and/or to the Wyoming Supreme Court at the conclusion of the ADR session. By definition, mediation would not entail a mediator making a recommendation but, rather, would only involve the mediator in assisting the parties to draft a written agreement reflecting the common understanding reached by the parties. While a mediator could submit a written *report* detailing the results and degree of successfulness of the mediation, by definition such a report would not constitute a *recommendation* to either the parties or the supervising court. The report of disposition required under Wyo. R. Civ. P. 40(e) only requires that the Clerk of the Wyoming Supreme Court be notified as to whether or not the parties reached a settlement; it does not require disclosure of any sensitive or confidential information.

77. Richard E. Crouch, *The Dark Side is Still Unexplored*, 4 FAM. ADVOC. 27 (1982).

78. This article deals with ethical difficulties which face the individual attorney who mediates a domestic relations dispute. There are, of course, other models involving more than one attorney, co-mediators, or an attorney-therapist team. See *supra* note 40. The ethical concerns raised by these other models are beyond the scope of this article.

mediation freely choose to be a victim of exploitation, or to alert that party to overreaching. The attorney may not be prepared to face the tough ethical choices which go with advising one party to terminate an unbalanced mediation or allowing a compromise to develop that is not entirely fair to both parties.⁷⁹ The quandary intensifies when one considers the attorney-mediator's own (possibly unconscious) desire, for personal or financial reasons, to keep a tenuous mediation process from breaking down.

Crouch criticized the concept of "dual representation," which is found in much of the "rhetoric" favoring divorce mediation.⁸⁰ He noted that the dual representation concept often leads to the erroneous assumption that the attorney-mediator represents the interests of each party to the mediation against the other. However, mediation by an impartial attorney has nothing to do with "representation" in this sense. The lawyer who mediates is more akin to an impartial umpire and discussion leader than an advocate. To avoid confusion, Crouch suggested that the attorney inform the parties to the mediation that no attorney-client relationship has been formed and that the mediation service is not that which a lawyer in the adversarial system traditionally provides.⁸¹ Nevertheless, even with a disclaimer, the parties may still seek, and initially expect to receive, the modern mediation alternative plus the traditional lawyer-client relationship.⁸²

Crouch's article identifies two of the most serious ethical concerns which face the attorney-mediator: (1) conflicts of interest between the participants, and (2) the conflict between "fairness" and "neutrality" in mediation. To some extent, these concerns overlap. Each concerns the attorney's duties to the mediation participants and to the mediation process. Each highlights the more basic paradigmatic predicament of how an attorney's ethical duties when mediating differ from those imposed in the traditional adversarial context. This section focuses on these dilemmas, and offers some possible solutions for Wyoming attorneys.

B. The Conflict-of-Interest Problem

The ethical duties of a Wyoming attorney who practices law are measured by the familiar standards contained in the Wyoming Rules of Professional Conduct (Rules). The Rules establish the attorney's obligations to the client and to the justice system in a variety of practice situations.⁸³ Therefore, the Rules are a logical starting-place for

79. *Id.* at 33.

80. *Id.*

81. *Id.* at 34.

82. *Id.*

83. Section 8 of the preamble to the WYOMING RULES OF PROFESSIONAL CONDUCT (1986) states in part:

In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's re-

an inquiry into the conflict-of-interest problem.

1. Wyoming Rule of Professional Conduct 1.7

The attorney-mediator who seeks guidance from the Rules will very quickly run into the general conflict-of-interest rule, Rule 1.7. The first part of the Rule states that:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless: (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each client consents after consultation.⁸⁴

If divorce mediation is "representation" of both parties, this rule sounds its death knell. Even if consent is given by both parties, the lawyer who "represents" one party to a divorce mediation will very rarely face a situation where it is reasonable to believe that the interests of the other participant, also his or her client, are not "adversely affected" by the representation.⁸⁵ This is one reason that the traditional ethical rule which prohibited representation of both spouses in a divorce proceeding survives, even in an age of no-fault divorce.⁸⁶

Unfortunately for divorce mediation, Rule 1.7 does not define under what circumstances a representation is created. The Scope to the Rules states that "for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists."⁸⁷ At present, Wyoming has no authority defining the divorce mediator's role as non-representational. The ethical danger for the attorney-mediator is that an attorney-client relationship may be created by implication.⁸⁸ Thus, the attorney-mediator could unintentionally run afoul of Rule 1.7 by "representing" opposing parties whose interests cannot reasonably be protected by one attorney. Possible solutions to this problem are discussed later in this section.

sponsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living. The Rules of Professional Conduct prescribe terms for resolving such conflicts.

84. *Id.*, Rule 1.7(a).

85. See *infra* notes 91, 96-98.

86. Nancy J. Moore, *Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy*, 61 TEX. L. REV. 211, 247 (1982) [hereinafter Moore]. See also, Linda J. Silberman, *Professional Responsibility Problems of Divorce Mediation*, 16 FAM. L.Q. at 107, 109-10 (1982): "[R]epresentation of both spouses in a matrimonial action has traditionally been viewed as being so inherently prejudicial that dual representation is always prohibited."

87. WYOMING RULES OF PROFESSIONAL CONDUCT, Scope (1986).

88. *Adger v. State*, 584 P.2d 1056, 1060 (Wyo. 1978). Whether such a representation is created depends on the facts and circumstances of each case. *Chavez v. State*, 604 P.2d 1341, 1346 (Wyo. 1979), *cert. denied*, 446 U.S. 984 (1980).

2. Wyoming Rule of Professional Conduct 2.2

One might think that Rule 2.2 of the Wyoming Rules of Professional Conduct, concerning "intermediation," would supply an answer to the conflict-of-interest problem. It appears to be drafted with dispute resolution proceedings conducted by a single attorney in mind. However, in the case of divorce mediation, Rule 2.2 fails to solve the conflict-of-interest problem raised in Rule 1.7 or to give the attorney pertinent, applicable ethical guidance in how to conduct a divorce mediation.⁸⁹ Rule 2.2 brings attorney-conducted "intermediation" under professional discipline by governing the attorney's conduct when he mediates between clients. However, the rule probably does not even apply to divorce mediation. Furthermore, commentators who *have* attempted to apply Rule 2.2 to divorce mediation have roundly criticized its "dual representation" approach.

Does rule 2.2 apply to create binding rules for divorce mediation? The probable answer is "no." Several factors support this conclusion. First, the rule does not appear to have been drafted with divorce mediation in mind. The Kutak Commission, which drafted Model Rule of Professional Conduct 2.2,⁹⁰ included a provision for divorce mediation in some of the early drafts of commentary to Rule 2.2, but deleted it from the final version.⁹¹ This suggests an intent of the drafters to exclude divorce mediation from Rule 2.2.

Second, the official commentary to Rule 2.2 notes that the rule does not apply when the lawyer acts as an arbitrator or mediator between parties who are *not* the lawyer's clients.⁹² As will be discussed

89. WYOMING RULES OF PROFESSIONAL CONDUCT Rule 2.2:

(a) A lawyer may act as intermediary between clients if: (1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each clients' consent to the common representation; (2) the lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interest of any of the clients if the contemplated resolution is unsuccessful, and (3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

(b) While acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

(c) A lawyer shall withdraw as intermediary if any of the clients so request, or if any of the conditions stated in paragraph (a) is [sic] no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

90. Adopted in Wyoming as WYOMING RULES OF PROFESSIONAL CONDUCT Rule 2.2 in 1986.

91. Andrew S. Morrison, *Is Divorce Mediation the Practice of Law? A Matter of Perspective*, 75 CAL. L. REV. 1093, 1143 (1987), citing Silberman, *supra* note 86, at 121 [hereinafter Morrison].

92. The Official Commentary states as follows:

[t]he Rule does not apply to a lawyer acting as arbitrator or mediator between or

below, the only truly practical and ethical way an attorney can conduct divorce mediation is by this "non-representational approach." Divorce mediation conducted without representation is thus expressly excluded from Rule 2.2. Instead, Rule 2.2 contemplates a scheme of "common representation" in which the attorney represents *both* parties to the mediation.⁹³

Third, Rule 2.2 prohibits "intermediation" when the mediation involves "contentious negotiations."⁹⁴ Divorce mediation probably qualifies *per se* as "contentious negotiation" which bars mediation under Rule 2.2.⁹⁵

Commentators and bar opinions which have considered whether a common representation approach, such as that contained in Rule 2.2, should apply to divorce mediation have been sharply critical of common representation⁹⁶ because of the ethical difficulties involved in "representing" both parties to the mediation.⁹⁷ The protections built into Rule 2.2 will usually not be sufficient to resolve the inherent conflict-of-interest problems which common representation presents. In a common representation, the lawyer theoretically owes *both* parties a duty of confidentiality⁹⁸ and loyal and diligent representation.⁹⁹ These

among parties who are not clients of the lawyer, even where the lawyer has been appointed with the concurrence of the parties. In performing such a role the lawyer may be subject to applicable codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association. WYOMING RULES OF PROFESSIONAL CONDUCT Rule 2.2, Official Commentary.

93. "A lawyer acts as intermediary under this Rule when the lawyer represents two (2) or more parties with conflicting interests." *Id.*

94. *Id.*

95. Morrison, *supra* note 91, at 1141. There has been some discussion, however, of whether divorce proceedings involve an actual, or only a potential conflict of interest. See, e.g., *Developments in the Law: Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1311 (1981) for a discussion of "actual" versus "potential" conflict in the divorce situation. For an argument that absence of "conflict-in-fact," without more, does not justify joint representation. See Moore, *supra* note 86, at 250.

96. See, e.g., Richard E. Crouch, *Divorce Mediation and Legal Ethics*, 16 FAM. L.Q. 219, 235 (1982) (notes commentators and bar associations which have taken the position that divorce mediation is inappropriate because of the high level of conflict). Moore, *supra* note 86, notes that for this same reason, mediation has won only "reluctant" approval from bar associations. See also Wendy Woods, Comment, *Model Rule 2.2 and Divorce Mediation: Ethics Guideline or Ethics Gap?*, 65 WASH. U.L.Q. 227 n. 27 (1987); Leonard L. Riskin, *Toward New Standards for the Neutral Lawyer in Mediation*, 26 ARIZ. L. REV. 329, 341-42 (1984).

97. Note also, as previously mentioned, *supra* note 84 and accompanying text, that WYOMING RULE OF PROFESSIONAL CONDUCT Rule 1.7 permits dual representation if the risk of adverse effect is minimal and the parties consent to the representation. Divorce mediation will rarely, if ever, meet the first of these criteria.

98. "Common-representation" divorce mediation also creates a problem with attorney-client privilege. Because privileged information has been discussed in front of the "adverse" party, the privilege is waived if the divorce is later contested. See Moore, *supra* note 86, at 233, n.223, and authorities cited therein. This problem has been addressed in Wyoming by WYO. STAT. § 1-43-103 (Supp. 1991). See *supra* note 8.

99. The Official Commentary to Rule 2.2 states that "[c]ommon representation does not diminish the rights of each client in the client-lawyer relationship. Each client has the right to loyal and diligent representation. . . ."

duties conflict when the parties' interests are as diametrically opposed as in most divorce situations. The difficulties this conflict poses for the attorney have been recognized in the statement that the attorney "owes no actionable duty to an adverse party emanating from the zealous representation of his own client"¹⁰⁰ and that any infringement on this rule "results in an irreconcilable conflict of interest working extreme violence to the adversarial system as we know it."¹⁰¹ Although divorce mediation is not part of the "adversarial system as we know it," the attorney who chooses to follow established ethical principles still faces the conflict created by an undivided duty of loyalty to each of his "clients."

Therefore, Rule 2.2 does not resolve the conflict-of-interest problem the attorney faces when mediating a domestic relations dispute. The "common representation" scheme in Rule 2.2 is clearly inappropriate for the divorce mediation context.

C. Possible Solutions to the Problem

At least two solutions to the conflict-of-interest problem have been proposed. First, it has been proposed that mediation not be considered the practice of law subject to the Rules at all, and second, that the attorney who mediates not be considered to "represent" the parties.

1. Exempt Mediation by an Attorney from the Rules

It has been proposed that if mediation were excluded from the practice of law, or otherwise exempted from the Rules, this might solve the conflict-of-interest problem contained in Rule 1.7.¹⁰² How-

100. *Brooks v. Zebre*, 792 P.2d 196, 201 (Wyo. 1990). The facts alleged by the plaintiffs in this case, which was decided on summary judgment for the defendant, show the dangers under existing ethical principles for the non-represented party in a contractual transaction. These alleged facts were as follows: Brooks was a widow with little business acumen who was under a great deal of stress after her husband died. Zebre represented the Arambels, neighbors of Mrs. Brooks, who sought to lease the Brooks' ranch with an option to purchase. Zebre met with Brooks and the Arambels and prepared a lease contract for the ranch, without the attorney for the estate being present. After the contract was later declared unconscionable and was rescinded, Brooks and the Bank, co-trustees of the Brooks' marital trust, sued Zebre for breach of his ethical duties to Brooks as an adverse party. The Wyoming Supreme Court held that no cause of action for negligence exists against an attorney for an adversary, and that no private cause of action in favor of a non-client exists for violations of attorney disciplinary rules. *Id.*, at 201. Justice Urbigkit dissented. He characterized the contractual transaction as non-adversarial because only one attorney directed the events; "[s]ince Zebre undertook to advise, direct and control the negotiations, he assumed responsibility to both parties." *Id.*, at 221 (Urbigkit, J., dissenting).

101. *Id.*

102. See Sandra E. Purnell, Comment, *The Attorney as Mediator—Inherent Conflict of Interest?*, 32 UCLA L. REV. 986, 1015 (1985) [hereinafter Purnell]; Morrison, *supra* note 91, at 1120. Morrison does not take the position that mediation should not be considered the practice of law; in fact, quite the contrary. However, his article

ever, divorce mediation seems so closely related to other functions conducted by attorneys that the Rules should probably apply.

Several factors support the position that no blanket exemption from the Rules should be made for divorce mediation. First, the attorney utilizes many of the same skills which are required in ordinary law practice when performing the two basic functions of a mediator: (1) facilitating communication between the parties to help them reach an agreement, and (2) making substantive contributions to the decision-making process.¹⁰³ Second, it is unlikely that an attorney who mediates will conduct the mediation without reference to his or her knowledge of family law. Indeed, a principal advantage of having an attorney involved in divorce mediation is that the parties will be able to negotiate with full knowledge of the legal issues involved in divorce.¹⁰⁴ Finally, as previously noted,¹⁰⁵ the member of the public who comes to an attorney, even when that attorney is acting as a mediator, expects to receive the services of an attorney. While the attorney-mediator cannot offer "joint representation," to meet public expectations, he or she should at least be bound by the ethical standards of his or her profession.

For the reasons given, mediation conducted by an attorney should be considered the practice of law. This raises another concern: is the practice of divorce mediation by a non-attorney the unauthorized practice of law?¹⁰⁶ This is a thorny question, particularly since mental-health professionals have been performing divorce mediation for years.¹⁰⁷

Policy reasons certainly militate against barring non-lawyers from

can be read to suggest that if divorce mediation is not the practice of law, this might solve the conflict-of-interest problem under the Rules.

It should be noted that an attorney must comply with some disciplinary standards even outside the practice of law. See, e.g., WYOMING RULES OF PROFESSIONAL CONDUCT Rule 8.4, Official Commentary, which states that lawyers holding positions of public or private trust assume legal responsibilities going beyond those of other citizens. See also DISCIPLINARY CODE FOR THE WYOMING STATE BAR, RULE II, which states that an attorney has a duty to conduct him or herself according to the standards imposed upon members of the bar, both personally and professionally.

103. These functions are identified in Purnell, *supra* note 102, at 1004-05.

104. See Moore, *supra* note 86, at 252-53 (1982).

105. Crouch, *supra* note 77. Morrison, *supra* note 91, at 1114-15, identifies values which drive the inquiry into whether an attorney is engaged in the practice of law. The chief concern is whether an attorney's conduct should be made to conform to the applicable code of legal ethics. Supervision, in the case of mediation, protects the public from danger that the practice of mediation will inadequately protect the interests of the participants. It also protects the reputation of the local bar and the legal profession. Morrison concludes that these values favor seeing divorce mediation as the practice of law.

106. RULES OF THE SUPREME COURT OF WYOMING PROVIDING FOR THE ORGANIZATION AND GOVERNMENT OF THE BAR ASSOCIATION AND ATTORNEYS AT LAW OF THE STATE OF WYOMING (BAR RULES) 11(b) (1989): "Only active members of the Wyoming State Bar shall engage in the practice of law within this state . . ."

107. For a discussion of the Single Mental Health Professional Mediator, see Silberman, *supra* note 86, at 123-28.

performing divorce mediation. The particular training which a mental-health professional brings to the mediation is often beneficial to the participants' understanding of themselves and their dispute. Furthermore, the attorney may benefit from the participation of mental-health professionals in mediation in the form of a lawyer-therapist team. If such a team arrangement is ethically permitted, the therapist can often express understanding of a participant's emotions and feelings, which the lawyer is not trained to do and may not be comfortable doing.¹⁰⁸ Even working alone, the mental-health professional can use his or her training to help the parties reach a mutually-acceptable agreement.¹⁰⁹

One commentator suggests that although the relevant values favor seeing an attorney's conduct in mediating a divorce as the practice of law subject to professional discipline, other relevant values favor permitting divorce mediation by non-attorneys.¹¹⁰ Divorce mediation by an attorney could be treated as the practice of law, but the same mediation by a layperson would not be unauthorized practice of law. The non-attorney mediator could be licensed and trained to deal with legal issues which are incidental to the divorce mediation process.¹¹¹ Settlement agreements drawn up by a non-attorney mediator could receive mandatory review by a licensed attorney or by a district court. The advantage of this suggested approach is that it preserves the best of both worlds: the attorney who mediates is treated as an attorney, but the mediator from another profession is not.

In any case, an attorney who mediates a divorce is practicing law, and no exception should be made. Making divorce mediation something besides the practice of law is an inadequate solution to the conflict-of-interest problem. However, it contains the seed of a promising idea: that the attorney-mediator should be treated differently than the attorney-practitioner with respect to certain ethical obligations. This idea will be developed further in Section V on the proposed Standards of Practice.

2. Declare Mediation "Non-Representational"

The conflicts in the divorce context have led many commentators on divorce mediation to propose a non-representational model in which the attorney represents neither party.¹¹² As noted above, this

108. Forest S. Mosten & Barbara E. Biggs, *The Role of the Therapist in the Co-Mediation of Divorce: An Exploration by a Lawyer-Mediator Team*, 9 J. DIVORCE 27, 31 (1985).

109. Silberman, *supra* note 86, at 127.

110. Morrison, *supra* note 91, at 1155. The values Morrison identifies are (1) ensuring the adequate ability of the practitioner; (2) ensuring the morally sound character of the practitioner; (3) guaranteeing the opportunity for responsible supervision over the process; and (4) maximizing the availability to the public of efficient services.

111. Silberman, *supra* note 86, at 128.

112. See, e.g., Crouch, *supra* note 96, at 225.

type of mediation is expressly excluded from the terms of Rule 2.2.¹¹³

Yet, the "non-representational" model presents several ethical difficulties of its own.¹¹⁴ First and foremost, because the attorney-client relationship is not created, the attorney is left with little ethical guidance from the Rules to govern his or her conduct. Second,¹¹⁵ each party to the mediation may erroneously believe that the attorney represents his or her interests. One suggestion for resolving this problem is the use of an appropriate disclaimer by the attorney which instructs the parties that he or she represents neither of them.¹¹⁶ This use of disclosures is discussed further in Part V of this article.

Another ethical difficulty is presented when the attorney gives independent legal advice to one of the parties, or favors the "weaker" party over the "stronger."¹¹⁷ Even if the attorney's participation is non-representational, this does not mean that he or she will not face difficulties in establishing the boundaries of impartiality. This conflict will be discussed further in the next section.

D. Neutrality versus Fairness

A concept central to the theory and practice of mediation is that the mediator strives to be neutral as between the parties.¹¹⁸ Although Rule 2.2 attempts to avoid obvious conflicts of interest and appears to be oriented toward prevention of structural bias, the rule has very little to say about the attorney's duty to maintain a neutral attitude throughout the course of the mediation. Also, Rule 2.2 does not address the difficult conflict between neutrality and fairness which so often arises in mediation of interpersonal disputes like divorce.

Christopher W. Moore describes the conflict between neutrality and fairness in mediation, as follows:

By far the most difficult problem mediators face regarding power relationships is the instance in which the discrepancy between the

113. See the Official Commentary to Rule 2.2, *supra* note 92.

114. These difficulties are discussed in more detail in Morrison, *supra* note 91, at 1120-25.

115. Crouch, *supra* note 77, at 34.

116. Crouch, *supra* note 96, at 227. Crouch expresses some doubts about the efficacy of such disclaimers if they are nothing but a "litany of legal rights and obligations of the parties topped off with a written separation agreement."

117. The terms "strong" or "weak," as used in this article, refer to a party's ability to use the mediation process to achieve his or her goals. Interpersonal style is relevant only as it affects this outcome. Consequently, one must use terms like "weaker" and "stronger" advisedly. A party who seems compliant rather than aggressive is not necessarily the "weaker" party to the mediation.

When dealing with mediation participants from a different culture or ethnicity, the mediator should be aware of cultural norms concerning expression of strong feeling which may differ from those of the his or her own culture. See, e.g., CAROL TAVRIS, *ANGER: THE MISUNDERSTOOD EMOTION* (1982).

118. Sara Cobb & Janet Rifkin, *Practice and Paradox: Deconstructing Neutrality in Mediation*, 16 L. & Soc. INQUIRY, 35, 35 (Winter 1991).

strength of means of influence is extremely great. The mediator, because of his or her commitment to neutrality and impartiality, is ethically barred from direct advocacy for the weaker party, yet is also ethically obligated to assist the parties in reaching an acceptable agreement.¹¹⁹

One commentator identifies three sources of unequal bargaining power: (1) one party may have insufficient financial resources to pursue a contested divorce; (2) the emotional vulnerability of a partner may undercut the give-and-take process of mediation; and (3) one party may be more anxious to settle, for whatever reason.¹²⁰ The commentator concludes that "if one party is at a disadvantage, whether it be emotionally, financially, or otherwise, the mediation will likely not achieve its purposes."¹²¹

Indeed, strict neutrality may have an adverse effect in divorce mediation: the mediator who is "strictly neutral" may believe him or herself to be ethically bound not to favor a party whose rights are being trampled by the mediation process, even where the result offends the mediator's sense of fairness. A self-imposed blindness to differences between the parties in empowerment and negotiating style, if not addressed in the mediation process, can lead to injustice for the less adversarially-minded party.¹²²

However, power imbalances between the mediating parties are inevitable.¹²³ To what extent does this impose on the attorney-mediator a duty to supervise the mediation process to insure a "fair" or "just" result? It is noteworthy that a "fair" result, if "fairness" means equality, would not necessarily be assured if the parties went to court. A property settlement by the court, for example, might be "unequal"¹²⁴ or "disparate,"¹²⁵ so long as it was not "unjust or inequitable."¹²⁶

119. CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS* 281-82 (1987).

120. Knuppel, *supra* note 61, at 131-32.

121. *Id.* at 132.

122. See Grillo, *supra* note 18, at 1603. For this reason, mediation may not be appropriate at all in certain types of domestic disputes, such as custody mediation where one spouse or the children have been physically abused by the other spouse. See Barbara J. Hart, *Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation*, 7 *MEDIATION Q.* 317 (1990).

123. "It is only in rare cases that each of the parties have similar applicable knowledge and abilities." Leonard L. Loeb, *Introduction to the Standards of Practice for Family Mediators*, 17 *FAM. L.Q.* 451, 452 (1984).

124. See *Barbour v. Barbour*, 518 P.2d 12, 16 (Wyo. 1974). The husband contested the trial court's division of the marital property. He received some property, while the wife was awarded the "home place." Some of the property was acquired with assistance from the wife's parents. The husband argued that under the decree, he would receive 40.6 percent of the parties' assets, and the wife, 59.4 percent. The Wyoming Supreme Court did not agree with his calculations, but stated that even if they were correct, it could not be said that the trial court abused its discretion in making the property settlement in the way it did.

125. See *Cross v. Cross*, 586 P.2d 547, 549 (Wyo. 1978) (statute requiring just and equitable division of property could be complied with even by disparate property division when all statutory factors are taken into account).

Courts do not normally concern themselves with the relative empowerment of the parties who appear before them. It must be asked whether the mediator has a greater duty than does the divorce court to insure a fair result.

The mediator may claim that he or she is held to a higher standard than the court because of the goals and aspirations of the mediation process. However, one of these aspirations must surely be to facilitate the parties in reaching *their goals for the mediation*. Isn't the essence of neutrality in the mediation context not to force the mediator's own viewpoint on the parties? If the parties are willing to agree to an "unfair" agreement, is it not paternalistic for the mediator to exercise a veto power over what the parties have chosen?¹²⁷

The answer appears to require a compromise between allowing the parties to reach an agreement which suits them and balancing the parties' strengths. It must be remembered that the mediator's principal duty is to assure the integrity of the mediation process, rather than to strive for a particular result. This may require "empowering" the weaker party to assure that both parties have an equal opportunity to participate in the mediation.¹²⁸ In cases where one party is abusing the mediation, the attorney may even need to advise the other party to terminate the mediation. However, if the parties have reached an "unfair" but legally valid settlement after a mediation with "integrity," the mediator has done his or her job and should not second-guess the parties' agreement.

Neither Rule 1.7 nor Rule 2.2 is of much help to the attorney-mediator who seeks to conform his or her conduct to ethical guidelines. A model in which the attorney represents neither party to the mediation, while still problematic, is preferable to Rule 2.2's "common representation" approach. In conducting the mediation, the attorney-mediator must strike a balance between personal neutrality and advocacy for the less-adversarial party. Supplementary rules, perhaps binding on attorney-mediators and non-attorney mediators alike, are needed to set out the mediator's duties to the mediating parties.

V. THE STANDARDS OF PRACTICE

Part IV of this article discussed a few of the ethical implications of attorney-conducted divorce mediation. The Rules of Professional Conduct were shown to be inadequate when applied to the divorce

126. Wyo. Stat. § 20-2-114 (1987) states in part: "In granting a divorce, the court shall make such disposition of the property of the parties as appears just and equitable"

127. For the view that a mediator who seeks a "fair" result may violate his or her duty of neutrality, see Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85, 86-87 (1981).

128. Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1, 14-15 (1981).

mediation context. However, this does not mean that the attorney-mediator must be left without ethical standards by which to guide his or her conduct during the mediation. The American Bar Association has recognized the particular needs of the divorce mediation practitioner and has addressed them in proposed standards of practice. At the present time, Wyoming has not adopted these standards, but could do so as a special supplement to the Rules of Professional Responsibility.

In August, 1984, the House of Delegates of the American Bar Association approved the Standards of Practice for Lawyer Mediators in Family Disputes (Standards).¹²⁹ The Preamble to the Standards sets forth the requirements the delegates felt necessary for family mediation to succeed: (1) the mediator must be qualified by "training, experience, and temperament;" (2) the mediator must be impartial; (3) the participants must reach decisions voluntarily; (4) the decision must be made on sufficient factual data; and (5) each participant must understand the information on which decisions are reached.¹³⁰

The precatory language of the preamble hopefully prevents the overall aims of the section from being lost in the technical requirements of the Standards. As one commentator notes,

By listing these qualities in a preamble, the Section has expressed its belief that for the process to be ethical, its promises must be kept. Thus, a mediation which is not truly consensual, or which produces decisions not based on information and understanding, or decisions not voluntarily made, would be below the Standards.¹³¹

A. *Standard I: Duty of Disclosure*

The first standard requires the mediator to describe the process of mediation to the parties before they reach an agreement to mediate. Specifically, the mediator should describe the difference between mediation and other means of conflict resolution to the participants.¹³² Whereas the Wyoming Rules of Professional Conduct require only that the attorney "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation,"¹³³ the Standards require the attorney to inform the participants about the process of the mediation itself, and specifically about certain key areas of concern. Thus, the mediator must inform

129. Morrison, *supra* note 91, at 1144.

130. ABA STANDARDS OF PRACTICE FOR LAWYER MEDIATORS IN FAMILY DISPUTES, Preamble (1984) [hereinafter STANDARDS OF PRACTICE].

131. Thomas A. Bishop, *The Standards of Practice for Family Mediators: An Individual Interpretation and Comments*, 17 FAM. L.Q. 461, 463 (1984).

132. STANDARDS OF PRACTICE, *supra* note 130, at Standard I-A.

133. WYOMING RULES OF PROFESSIONAL CONDUCT Rule 1.4(b)(1986).

the parties that he or she will make suggestions for the parties to consider, but that all decisions are to be made by the participants themselves;¹³⁴ that either the participants or the mediator has the right to suspend or terminate the process at any time;¹³⁵ that each participant should employ independent legal counsel for advice throughout the mediation process;¹³⁶ that the mediator cannot represent either or both of them in a marital dissolution or in any legal action;¹³⁷ that the mediator may meet alone with either of them or with any party during the course of the mediation;¹³⁸ and that emotions [of the parties] play a part in the decision-making process.¹³⁹ The detailed requirement of specific disclosure recognizes the participants' crucial involvement in the success of the mediation, and the mediator's role to enlighten the parties rather than hide behind the "legal persona."¹⁴⁰ It also attempts to defuse any unreasonable expectations the parties may have of the mediation.

Additional disclosure requirements involve feedback from the participants as part of the mediation process. The mediator and the participants must agree on the mediator's duties and responsibilities.¹⁴¹ The mediator must seek an agreement with the participants which spells out under what circumstances the mediator will meet alone with either party or with third parties.¹⁴² The mediator must also elicit from the parties a confirmation that each understands the connection between his or her own emotions and the bargaining process.¹⁴³

Finally, Standard I requires the mediator to explain the fee for the mediation.¹⁴⁴ This parallels Wyoming Rules of Professional Conduct Rule 1.5(b), which requires the attorney to communicate the basis or rate of his or her fee.¹⁴⁵ Standard I-F also provides that it is "inappropriate for the mediator to charge a contingency fee or to base the fee on the outcome of the mediation process."¹⁴⁶ Obviously, a mediator cannot condition his or her fee on a measure of success for one party, without violating his or her duty of impartiality to the other

134. STANDARDS OF PRACTICE, *supra* note 130, at Standard I-C.

135. *Id.* at Standard I-A.

136. *Id.* at Standard I-C.

137. *Id.*

138. *Id.* at Standard I-H.

139. *Id.* at Standard I-I.

140. See generally James R. Elkins, *The Legal Persona: An Essay on the Professional Mask*, 64 VA. L. REV. 735 (1978).

141. STANDARDS OF PRACTICE, *supra* note 130, at Standard I-D.

142. *Id.* at Standard I-H.

143. *Id.* at Standard I-I.

144. *Id.* at Standard I-F. Compare the provisions of amended Wyo. R. Civ. P. 40(d), see *supra* note 49.

145. WYOMING RULES OF PROFESSIONAL CONDUCT Rule 1.5(b) (1986): "When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client before or within a reasonable time after commencing the representation."

146. STANDARDS OF PRACTICE, *supra* note 130, at Standard I-F.

party. More importantly, this rule plays an important part in preventing overreaching in the mediation process. By detaching the mediator from a financial stake in the success of the mediation, the rule assists him or her in terminating mediation if it becomes necessary.

On the subject of terminating the mediation, Standard I-E states that the mediator "has a continuing duty to assess his or her own ability and willingness to undertake mediation with the particular participants and the issues to be mediated."¹⁴⁷ The mediator must terminate mediation if it appears that "one of the parties is not able or willing to participate in good faith."¹⁴⁸

B. Standard II: Confidentiality

Standard II provides that the mediator "shall not voluntarily disclose information obtained through the mediation process without the prior consent of both participants."¹⁴⁹ The provisions of this standard complement the new Wyoming Statutes on mediation. Whereas the standard makes no provisions for disclosures necessary in furtherance of the mediation process,¹⁵⁰ section 1-43-102 of the Wyoming Statutes expressly provides that: "[a]ny communication is confidential if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the mediation process or those reasonably necessary for the transformation of the communication."¹⁵¹ Whereas Standard II is nearly silent about the substantive law of privilege,¹⁵² Wyoming Statutes section 1-43-103 explicitly sets forth its parameters (see Appendix A for text of the statute).¹⁵³

C. Standard III: Impartiality

Standard III is perhaps the most important of the Standards in relation to the ethical issues raised thus far in this article. It simply states that "[t]he mediator has a duty to be impartial."¹⁵⁴ Standard III-A further provides that "[t]he mediator shall not represent either party during or after the mediation process in any legal matters. In the event the mediator has represented one of the parties beforehand,

147. *Id.* at Standard I-E.

148. *Id.*

149. STANDARDS OF PRACTICE, *supra* note 130, at Standard II.

150. Compare WYOMING RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1986), which exempts from non-disclosure those disclosures "that are impliedly authorized in order to carry out the representation."

151. WYO. STAT. § 1-43-102 (Supp. 1991); see 1991 Wyo. Sess. Laws ch. 217, § 2.

152. The Standard Subsections hint at privilege in their requirement that the mediator notify the participants immediately if he or she is called upon to testify, so that the participants may seek to quash the process. Standard II-B. Standard II-C further provides that the mediator notify the participants of his or her inability to bind third parties to an agreement not to disclose information furnished during the mediation *in the absence of any absolute privilege.*

153. WYO. STAT. § 1-43-103 (Supp. 1991).

154. STANDARDS OF PRACTICE, *supra* note 130, at Standard III.

the mediator shall not undertake the mediation."¹⁵⁵

This important provision erects a barrier between the attorney's law practice and his or her mediation practice. It makes explicit the concept that the attorney involved in mediation represents neither party. However, it also makes clear that in the interest of mediator neutrality some conflict-of-interest principles remain applicable. The subsections of Standard III explain that the mediator must be "impartial" as between the mediation participants. In response to the question of whether impartiality means passive neutrality or active balancing of power, Standard III-C provides that "[t]he mediator's task is to facilitate the ability of the participants to negotiate their own agreement, while raising questions as to the fairness, equity and feasibility of proposed options for settlement."¹⁵⁶ Thus, considerations of neutrality and fairness are both addressed, in much the same manner as was previously suggested in Part IV. This compromise method appears to be the best approach anyone has developed thus far for dealing with the impartiality problem.

The problem of the "best interests of children" in mediation was raised earlier in Part III of this article. Standard III-D requires the mediator to ensure that the participants consider fully the best interests of the children.¹⁵⁷ If the mediator does not believe that the proposed agreement protects the children's best interests, the mediator must notify the parties of his or her belief.¹⁵⁸ This provision is important for two reasons: first, because as noted earlier, the children are usually not parties to the mediation and the mediator must be aware that their best interests may differ from those of the mediation participants; and second, because any court order accepting the parties' agreement requires a finding that it operates in the children's best interests.

Standard III-E provides that the mediator may communicate with either party alone or with any third party to discuss mediation issues only if he has the consent of the mediation participants.¹⁵⁹ This prohibition on *ex parte* contacts is similar to that required of judges by the Wyoming Code of Judicial Conduct.¹⁶⁰ However, in the case of mediation, the element of "consent of the parties" assumes a much larger role in determining when the mediator may speak with a single party or the party's attorney.

155. *Id.* at Standard III-A.

156. *Id.* at Standard III-C.

157. *Id.* at Standard III-D.

158. *Id.*

159. *Id.* at Standard III-E.

160. THE WYOMING CODE OF JUDICIAL CONDUCT, Canon 3, part A.7 (1990) states in part that "[a] judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding" except under certain, narrowly-defined circumstances.

D. Standard IV: Disclosure of Information

In order for the mediation process to be an effective alternative to the adversarial system, there must be some mechanism by which the information which is normally disclosed in discovery is made available to the participants. Standard IV requires the mediator to insure that this information is developed in the mediation.¹⁶¹ Additionally, it requires the mediator to "promote the equal understanding of such information before any agreement is reached."¹⁶² Thus, the mediator plays the role of explaining relevant information to the parties that their lawyers or a judge might have played in the adversarial system.

Standard IV also requires the mediator to "assure that the participants have a sufficient understanding of appropriate statutory and case law as well as local judicial tradition."¹⁶³ The mediator is to provide this assurance by recommending to the participants that they seek independent legal representation before reaching an agreement.¹⁶⁴ The duty of informing the parties that they should seek outside counsel is more thoroughly discussed in Standard VI.

E. Standard V: Termination of Mediation

In Part IV, D of this article, the mediator's duty to protect the mediation process by empowering the "weaker" party was briefly discussed. Standard V sets out detailed rules which inform the mediator how to protect the integrity of the process.

Standard V-A provides that the mediator may suspend or terminate mediation if he or she believes that the participants are unable or unwilling to "meaningfully participate" in the process, or that a reasonable agreement is unlikely.¹⁶⁵ The text does not define what a "reasonable" agreement is, or how it differs from a "fair" agreement. The best reading of this requirement seems to be that if one or both parties' positions are so polarized that a reasonable compromise is unlikely, the mediator may suspend or terminate mediation.

Standard V-B provides that the mediator insure that the parties understand fully the implications and ramifications of all the available options.¹⁶⁶ This would seem to require the attorney-mediator to explain to each party their legal rights. The mediator may also have a duty to explain the tax consequences of the suggested agreement.

The attorney contemplating mediation may ask whether an attorney-mediator who fails to advise the parties of some legal entitlement

161. STANDARDS OF PRACTICE, *supra* note 130, at Standard IV.

162. *Id.* at Standard IV-B.

163. *Id.* at Standard IV-C.

164. *Id.*

165. *Id.* at Standard V-A.

166. *Id.* at Standard V-B.

may be liable for malpractice. As noted earlier, Wyoming's new statutes provide for mediator immunity for civil liability for good faith acts or omissions.¹⁶⁷ Also, since the Standards require the attorney-mediator to refer the participants to independent counsel,¹⁶⁸ and since the attorney-mediator does not represent either of the parties, the answer would seem to be "no." This resolves a serious dilemma of the common representation approach: the attorney-mediator had to advise his or her client of the entitlements due the client, but could not ethically do so if it injured the other party to the mediation.

Standard V-C requires the attorney-mediator to "assure a balanced dialogue" and to attempt to defuse any "manipulative or intimidating negotiation techniques" used by either participant.¹⁶⁹ These actions by the attorney-mediator serve to protect the integrity of the mediation, discussed above in Part IV of this article.

F. Standard VI: Independent Counsel

Standard VI provides that the mediator "has a continuing duty to advise each of the mediation participants to obtain legal review prior to reaching any agreement."¹⁷⁰ This requirement is a logical concomitant of the non-representational approach. Since the mediator does not represent the parties, the parties need to obtain independent counsel to protect their individual interests. Standard VI recognizes that the mediator cannot insist that each party have individual counsel,¹⁷¹ but it requires the mediator to strongly recommend to the parties that each employ independent counsel throughout the mediation process.¹⁷² It is questionable whether this is always a desirable practice, since the cost of the mediation will be greatly increased if each party employs his or her own attorney in addition to the attorney-mediator. It seems more realistic to require only that each party obtain counsel to review the written agreement reached via the mediation process. Most importantly, this Standard puts responsibility for the legal consequences of the final agreement on the parties and their independent counsel rather than on the mediator.

G. Enforcement of the Standards

If the Standards are adopted, a provision should be included to the effect that the Standards will be enforced by the Bar Disciplinary Committee in order to give them enforceable effect under professional discipline.

167. See *supra* note 9.

168. See discussion of Standard VI, *infra*.

169. *Id.* at Standard VI-C.

170. STANDARDS OF PRACTICE, *supra* note 130, at Standard VI.

171. *Id.* at Standard IV-D.

172. *Id.* at Standard VI-A.

Experience with the "Code of Professional Responsibility for Arbitrators of Labor-Management Disputes" (Labor Arbitration Code) in the labor arbitration context suggests that the Standards of Practice are not likely to be effective unless a clear-cut enforcement procedure is provided. Although aggrieved parties can seek redress for Labor Arbitration Code violations with the National Academy of Arbitrators' Committee on Professional Responsibility and Grievances, in the more than thirty years of the Code's existence, only *one* formal action has ever been filed with the Committee.¹⁷³ This may be attributed to the Labor Arbitration Code's failure to provide for an effective procedure for handling complaints within the Code itself.¹⁷⁴

To avoid confusion, the Standards of Practice, if adopted, should explicitly provide for attorney discipline by the disciplinary committee. The following sentence might be added to Rule 8.4 of the Wyoming Rules of Professional Conduct:

[It is professional misconduct for a lawyer to:]

(g) violate the Standards of Practice for Lawyer Mediators in Family Disputes when engaged in domestic relations mediation.

In summary, the Standards of Practice are a thorough, useful and carefully considered attempt to define and resolve ethical issues relating to divorce mediation. They deal with the problem of conflict of interest by adopting a non-representational approach. They deal with the conflict between neutrality and fairness by providing for both impartiality and effective mediator input into the mediation process. Wyoming should adopt the Standards as a special supplement to the Rules of Professional Responsibility. Enforcement of the ethical violations of the provisions should be assigned to the Bar Disciplinary Committee. A modified version of the Standards might be made applicable to non-attorney mediators through a special licensing program.

VI. CONCLUSION

Mediation presents an opportunity to resolve certain aspects of domestic disputes outside the traditional, adversarial system. Domestic disputes are often characterized by the existence of highly emotional and/or contentious relationships between the parties and the complexities created therefrom. While mediation will not completely eliminate the role of the judiciary in domestic cases, it may serve to reduce acrimony between the parties and minimize the time and dollars spent to reach a workable resolution.

It is recognized that this article raises questions about domestic mediation that it does not answer. No apologies are made for doing so.

173. See Joseph Krislor, *Disciplining Arbitrator Misconduct: Should the Academy Adopt the Judicial Machinery?*, 41 LABOR L.J. 431, 432 (1990).

174. *Id.* at 433-34.

Mediation has potential as an alternative form of non-adversarial dispute resolution, and, in some ways, is particularly appropriate in the domestic relations context. However, before that potential can be tapped, unresolved practical and ethical questions must be addressed. Only then can mediation become a truly useful and viable dispute resolution alternative in Wyoming.

The Wyoming Legislature and Wyoming Supreme Court have recently taken modest affirmative steps to facilitate the development of and encourage the use of mediation practices. Within the narrow field of domestic mediation, however, the potential for serious ethical problems concerning conflicts of interest and neutrality has not yet been confronted. The Wyoming Rules of Professional Conduct do not provide answers to all of the possible dilemmas created for the Wyoming attorney-mediator. Consequently, Wyoming should consider adopting the Standards of Practice for Lawyer Mediators in Family Disputes. Further, the Wyoming State Bar should assist in enforcing the Standards adopted and in informing Bar members and the citizens of Wyoming of the merits and drawbacks of divorce mediation.

APPENDIX A: WYOMING MEDIATION ACT

WYO. STAT. § 1-43-101 (1991) provides:

(a) As used in this act:

(i) "Communication" means any item of information disclosed during the mediation process through files, reports, interviews, discussions, memoranda, case summaries, notes, work products of the mediator, or any other item of information disclosed during the mediation, whether oral or written;

(ii) "Mediation" means a process in which an impartial third person facilitates communication between two (2) or more parties in conflict to promote reconciliation, settlement, compromise or understanding;

(iii) "Mediator" means an impartial third person not involved in the conflict, dispute or situation who engages in mediation;

(iv) "Party to the mediation" means a person who is involved in the conflict, dispute or situation and is rendered mediation services by a mediator or consults a mediator with a view to obtaining mediation services;

(v) "Representative of the mediator" means a person employed by the mediator to assist in the rendition of mediation services;

(vi) "Representative of the party" means a person having authority to obtain mediation services on behalf of the party to the

mediation or to the act on advice rendered by the mediator;

(vii) "This act" means W.S. 1-43-101 through 1-43-104.

WYO. STAT. § 1-43-102 (1991) provides:

Any communication is confidential if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the mediation process or those reasonably necessary for the transmission of the communication.

WYO. STAT. § 1-43-103 (1991) provides:

(a) A party to the mediation has a privilege to refuse to disclose and to prevent all mediation participants from disclosing confidential communications.

(b) The privilege under this section may be claimed by a representative of the party or by a party, his guardian or conservator, the personal representative of a deceased party, or the successor, trustee or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the mediator may claim the privilege but only on behalf of the party. The mediator's authority to do so is presumed in the absence of evidence to the contrary.

(c) There is no privilege under this section if any one (1) of the following conditions is met:

- (i) All the parties involved provide written consent to disclose;
- (ii) The communication involves the contemplation of a future crime or harmful act;
- (iii) The communication indicates that a minor child has been or is the suspected victim of child abuse as defined by local statute;
- (iv) The communication was otherwise discoverable prior to the mediation;
- (v) One of the parties seeks judicial enforcement of the mediated agreement.

WYO. STAT. § 1-43-104 (1991) provides:

Mediators are immune from civil liability for any good faith act or omission within the scope of the performance of their power and duties.

APPENDIX B:

RULE 40 WYOMING RULES OF CIVIL PROCEDURE

Rule 40, WYOMING RULES OF CIVIL PROCEDURE, provides:

Rule 40. Assignment of cases for trial or alternative dispute resolution.

* * *

(b) *Limited assignment for alternative dispute resolution.* — The court may, or at the request of all parties shall, assign the case to another active judge or to a retired judge, retired justice, or other qualified person on limited assignment for the purpose of invoking nonbinding alternative dispute resolution methods, including settlement conference and mediation. By agreement, the parties may select the person to conduct the settlement conference or to serve as the mediator. If the parties are unable to agree, they may advise the court of their recommendations, and the court shall then appoint a person to conduct the settlement conference or to serve as the mediator. A settlement conference or mediation may be conducted in accordance with procedures prescribed by the person conducting the settlement conference or mediation. A mediation also may be conducted in accordance with the following recommended rules of procedure:

(1) Prior to the session, the mediator may require confidential *ex parte* written submissions from each party. Those submissions should include each party's honest assessment of the strengths and weaknesses of the case with regard to liability, damages, and other relief, a history of all settlement offers and counteroffers in the case, an honest statement from plaintiff's counsel of the minimum settlement authority that plaintiff's counsel has or is able to obtain, and an honest statement from defense counsel of the maximum settlement authority that defense counsel has or is able to obtain.

(2) Prior to the session, a commitment must be obtained from the parties that their representatives at the session have full and complete authority to represent them and to settle the case. If any party's representative lacks settlement authority, the session should not proceed. The mediator may also require the presence at the session of the parties themselves.

(3) The mediator may begin the session by stating the objective, which is to seek a workable resolution that is in the best interests of all involved and that is fair and acceptable to the parties. The parties should be informed of statutory provisions governing mediation, including provisions relating to confidentiality, privilege, and immunity.

(4) Each party or attorney may then make an opening statement stating the party's case in its best light, the issues involved, supporting law, prospects for success, and the party's evaluation of the case.

(5) Each party or attorney may then respond to the other's presentation. From time to time, the parties and their attorneys may confer privately. The mediator may adjourn the session for short periods of time. After a full, open discussion, the mediator may summarize, identify the strong and weak points in each case, point out the risks of trial to each party, suggest a probable verdict or judgment range, and suggest a fair settlement of the case. This may be done in the presence of all parties or separately. If settlement results, it should promptly be reduced to a writing executed by the settling parties. The mediator may suggest to the parties such reasonable additions or requirements as may be appropriate or beneficial in a particular case.

(c) Registry of names. — The clerk of the supreme court shall maintain a registry of the names of retired judges and justices and other qualified persons who are available to accept limited assignments of cases under this rule.

(d) Fees and costs. — For those cases filed in court and assigned for settlement conference or mediation, the parties shall pay no additional fee or costs. A person other than an active judge conducting a settlement conference or serving as a mediator shall be compensated from available public funds for services performed in a particular case at a rate of not less than \$50.00 per hour. The person to be compensated shall submit to the clerk of the supreme court a statement of fees for services rendered, together with the report required by subsection (e).

Settlement conference or mediation is available under this rule to persons regardless of whether suit has been filed. For those cases not filed in court, but having been assigned and accepted for settlement conference or mediation, a filing fee of \$15.00 shall be paid to the clerk of the supreme court. Compensation for services in these cases shall be arranged by agreement between the parties and the person conducting the settlement conference or serving as the mediator, and that person's statement shall be paid within 30 days of receipt by the parties.

(e) Report of disposition of cases. — A report as to whether a settlement conference or mediation pursuant to this rule resulted in settlement shall be submitted by the person conducting the settlement conference or serving as the mediator to the clerk of the supreme court within 15 days of final disposition.

(f) Other forms of alternative dispute resolution. — Nothing in this rule is intended to preclude the parties from agreeing to submit their dispute to other forms of alternative dispute resolution, including arbitration and summary jury trial.