North Dakota Law Review

Volume 79 | Number 3 Article 1

2003

Controversies in Divorce Mediation

Dennis P. Saccuzzo

CONTROVERSIES IN DIVORCE MEDIATION

DENNIS P. SACCUZZO*

I. INTRODUCTION

A. PROBLEM WITH TRADITIONAL APPROACHES TO DIVORCE

Divorce statistics are staggering. In 1867, the first year divorce statistics were collected, the total number of divorces in the United States was just less than 10,000–about .03 divorces per 1,000 people.[1] By 1967, the divorce rate had jumped 140 times to 4.2 divorces per 1,000 people, about 500,000.[2] By 1981, the number of divorces had more than doubled to 1.21 million, about 5.3 divorces per 1,000 people.[3] Because modern public policy recognizes divorce as a socially acceptable means of recording family relationships,[4] demographers estimate that approximately forty-five percent of all current marriages will end in divorce.[5]

The explosion in the numbers and prevalence rates of divorce has been a primary factor in overburdening the judicial system in the United States, with an attendant increase in public costs.[6] Indeed, matrimonial actions comprise more than half of all cases filed in the courts.[7]

Perhaps more serious than overcrowded courts are the numerous adverse consequences of divorce actions. Adjudication of a modern divorce extracts a heavy toll on the parties and their children. Financially, divorce proceedings often consume a large percentage of the parties' wealth, which causes both parties to suffer a reduced standard of living immediately after

---

* Dennis P. Saccuzzo is a Professor of Psychology at San Diego State University and an Adjunct Professor of Law at California Western School of Law in San Diego. He is a California Attorney and a California Licensed Psychologist.

1. Kenneth J. Rigby, *Symposium: Alternate Dispute Resolution*, 44 LA. L. REV. 1725 (1984) (citing C. VETTER, CHILD CUSTODY: A NEW DIRECTION 9 (1982)).

2. *Id.*

3. Rudolph J. Gerber, *Recommendation of Domestic Relations Reform*, 32 ARIZ. L. REV. 9, 10 (1990) (citing BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S. 87 (1989)).

4. *Id.*

5. *Id.* (citing Samuel H. Preston, *Estimating the Proportion of American Marriages That End in Divorce*, 3 SOC. METHODS & RES. 435 (1975)).

6. Rigby, *supra* note 1, at 1725.

7. Gerber, *supra* note 3, at 10.

the divorce.[8] Where custody is an issue, litigation costs on average in excess of $15,000.[9]

In addition to the financial cost is the emotional drain on the parties. Acrimony between the parties is unfortunate because often they need to maintain their relationship. As Rudolph J. Gerber has noted:

> Unlike a settlement in a tort case, where the parties usually never see each other again, parents in a divorce need to maintain a continuing relationship. The animosity of the adversarial process impedes that possibility. Uninhibited warfare inflames the passions of the litigants and often undermines the cooperation and communication needed for post-divorce parenting.[10]

Herein lies the problem with the adversarial model: it increases trauma and escalates conflict.[11] Traditional judicial proceedings typically end with bitterness and unresolved feelings.[12] Children often suffer the most in the "tug of war" between their parents.[13] Other problems of the traditional adversarial system include wasted energies, wasted expectations, and loss of confidence in the system.[14] It has been said that the traditional adversarial model "worsens rather than resolves modern marital disputes."[15]

B. NEED FOR ALTERNATIVES

Because of the costs associated with the traditional adversarial model, there has been a widespread call for alternatives.[16] Among these alternatives, perhaps none is more popular than mediation.[17] Indeed, courts in more than half of the states are authorized by statute to provide some form of mediation in divorce cases.[18]

---

8. *Id.* at 11.

9. *Id.*

10. *Id.* at 11.

11. *Id.* (citing Margaret S. Herrman et al., *Mediation and Arbitration Applied to Family Conflict Resolution: The Divorce Settlement*, 34 ARB. J. 17, 18 (1979)).

12. *Id.* at 12 (citing A. Milne, *Custody of Children in a Divorce Process: A Family Self-Determination Model*, 16 CONCILIATION CTS. REV. 1, 2 (1978)).

13. *Id.*

14. *Id.* at 13.

15. *Id.* at 14.

16. Rita Henley Jensen, *Divorce-Mediation Style*, 83 A.B.A. J. 54 (1997).

17. *Id.* at 56 (citing U.S. COMMISSION ON CHILD AND FAMILY WELFARE, October (1996)).

18. Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1404-10 (1995).

1. *Advantages of Divorce Mediation*

There are numerous advantages of divorce mediation over the traditional adversarial model. When divorcing parents mediate rather than litigate, they are less likely to bring postdivorce disputes back into the legal system.[19] The effectiveness of mediation in producing a final settlement is perhaps due to its recognition of the psychological and emotional aspects of divorce.[20] As Rudolph J. Gerber noted:

> Mediation allows an airing of emotional feelings, even if they are irrelevant. Thus, anger, humiliation, disappointment and betrayal can be vented, recognized and managed so that these feelings are safely released [and thus] do not later surface in the form of post-divorce litigation.[21]

Kenneth J. Rigby has identified over eighteen separate advantages to divorce mediation.[22] These advantages include opening communication between the parties, allowing parties to settle their own agreements, taking the divorce process out of the adversarial win or lose setting, reduced expense and quicker court processing, and diminished emphasis on fault finding.[23] In addition, mediation is conducted in private.[24] It also permits the airing of all grievances, aids the parties in resuming a working relationship, and reduces feelings of anger and injustice.[25] Mediation can also save money. According to one estimate, if mediation was universally available it could save taxpayers 9.6 million dollars per year in court costs and save litigants 88.6 million dollars per year in legal fees.[26]

2. *Overview of Controversies*

Despite its many advantages, divorce mediation is not without controversy.[27] Among the controversies is who should perform the mediation? For example, should divorce mediation be restricted to lawyers or should it be open to nonlawyers? A second major controversy concerns power im-

---

19. Jay Folberg, *Mediation of Child Custody Disputes*, 19 COLUM. J. L. & SOC. PROBS. 413, 425 (1985).

20. Gerber, *supra* note 3, at 16 (citing Florence W. Kaslow, *The Psychological Dimension of Divorce Mediation, in* DIVORCE MEDIATION: THEORY AND PRACTICE 83 (Jay Folbert & Ann Milne eds., 1988)).

21. *Id.*

22. Rigby, *supra* note 1, at 1744-45.

23. *Id.*

24. *Id.* at 1744.

25. *Id.* at 1744-45.

26. *Id.* (citing S. J. Bahr, *An Evaluation of Court Mediation: A Comparison in Divorce Cases With Children*, 2 J. FAM. ISSUES 39, 52 (1981)).

27. *Id.* at 1745.

balances.[28] It has been argued that divorce mediation may be dangerous, if not inappropriate, for women due to power imbalances. These imbalances are especially acute in the mediation of domestic violence. A third controversy involves ethical and professional standards of practice–what principles should guide the process of divorce mediation.

The purpose of this note is to survey these three major controversies in divorce mediation: who should perform the mediation, power imbalances, and ethical issues and standards. The discussion will begin with a brief overview of the definition and scope of divorce mediation. Then follows a brief discussion and analysis of each of these issues.

II. WHAT IS DIVORCE MEDIATION?

A. DEFINITIONAL APPROACHES

Mediation has been defined in the literature in various ways. According to Wendy Woods, mediation is "a voluntary process in which a neutral third party, without authority to impose a solution, helps the participants reach an agreement."[29] Thomas A. Bishop offers a similar definition of mediation: "Mediation is . . . a consensual process through which divorcing spouses negotiate the terms of their divorce with the help of a third party."[30] Rudolph J. Gerber provides a third example of how mediation has been defined:

> Mediation is a process in which a third party, the mediator, encourages the disputants to find a mutually agreeable settlement by helping them to identify issues, reduce misunderstandings, vent emotions, clarify priorities, find points of agreement, and explore areas of compromise.[31]

In all definitions of mediation, the following consensus emerges. First, the mediator's role is that of a neutral third party. Second, the mediator facilitates communication and understanding while guiding the parties to an agreement. Third, the parties, rather than an adjudicator as in a trial or arbitration, make their own decisions. Finally, the goal is a solution that meets the interests of all parties.[32]

---

28. *Id.*

29. Wendy Woods, *Model Rule 2.2 and Divorce Mediation: Ethical Guidelines or Ethics Gap?*, 65 WASH. U. L.Q. 223, 224 (1987).

30. Thomas A. Bishop, *Outside the Adversary System: An ADR Overview*, 14 SPG. FAM. ADVOC. 16 (1992).

31. Gerber, *supra* note 3, at 14.

32. ROGER FISHER ET AL., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 14 (1981).

B. THE SCOPE OF DIVORCE MEDIATION

Despite its long history as a method of dispute resolution, the use of mediation as an alternative to traditional adversarial approaches is a relatively recent phenomenon.[33] Nevertheless, mediation is in widespread use following a "flurry" of state legislative activity.[34] Today, the use of mediation is "widespread and growing."[35] More than half the states have passed legislation that provides for some form of mediation in divorce cases.[36]

Individual state laws vary widely. In Alaska, state law gives the courts broad discretion over mediation of divorce cases.[37] The Alaskan statute permits the judge to appoint the mediator but allows a preemptory challenge.[38] The parties may elect counsel.[39]

The North Dakota statute, by contrast, gives courts the option of ordering mediation at the parties' expense.[40] Courts then can appoint a mediator from an approved list.[41]

California law provides for mandatory mediation when child custody is contested in a divorce.[42] Mediators are appointed by the court and may include "professional staff of a family conciliation court, probation department, or mental health services agency, or may be any other person or agency designated by the court."[43] The California statute emphasizes the role of the mediator in "[equalizing] power relationships between the parties."[44] In addition, the mediator is to make "best efforts to effect a settlement."[45] The mediator has the authority to exclude counsel from the mediation process.[46]

With its broad scope and widespread use, mediation is a target of commentary, debate, and criticism. Given its potential advantages and the

---

33. Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1497 (1992).

34. *Id.* at 1498.

35. Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2141-42 (1993).

36. *See* notes 16-18 and accompanying text. The states are Alaska, Arizona, California, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Washington, West Virginia, and Wisconsin. McEwen, *supra* note 18, at 1404-10.

37. ALASKA STAT. §§ 25.20.080, 25.24.060 (Michie 2002).

38. *Id.* § 25.24.060(b).

39. *Id.* § 25.24.060(c).

40. N.D. CENT. CODE § 14-09.1-02 (1997).

41. *Id.* § 14-09.1-03.

42. CAL. FAM. CODE § 3170 (West 1994).

43. *Id.* § 3164(a).

44. *Id.* § 3162(3).

45. *Id.* § 3180(b).

46. *Id.* § 3182(a).

growing number of states making use of mediation, it would seem prudent to examine these controversies.

III. CONTROVERSY #1: WHO SHOULD PERFORM THE MEDIATION?

While most state laws call for qualified or approved mediators, only a few state laws actually provide specific guidelines or minimum qualifications. A Kansas statute specifies factors that courts can consider in selecting a mediator.[47] In choosing a mediator, the courts are required to consider whether there is an agreement for a specific mediator; the presence of conflict or bias; the mediator's knowledge of the Kansas judicial system and sources for referral; the mediator's knowledge of clinical issues, such as the psychology of families and the effects of divorce on children; and the mediator's training and experience.[48] There is no apparent mention of a particular type of training or provision for legal training.

Michigan statute requires mediators to be licensed to practice psychology or to have a master's degree in counseling, social work, or marriage and family counseling.[49] To be considered qualified, a Michigan mediator must have at least forty hours of classroom instruction and 250 hours of practical experience.[50]

There is little doubt that state law does not require mediators to be legally trained. Yet, the issue has been raised–should divorce mediation be a practice of law? On the other hand, some have argued that lawyers actually hurt the process and should be excluded.

Presently, both lawyers and nonlawyers serve as divorce mediators.[51] A major advantage of restricting mediation to lawyers is that lawyers are trained to specific standards, subject to supervision through the ABA and legislation, and guided by a set of professional ethics.[52] Such supervision and control affords some protection to the public. By contrast, there are few clear standards and presently no state licensing requirements for nonlawyer mediators.[53]

---

47. KAN. STAT. ANN. §§ 23-601 to -606 (2002).

48. *Id.* § 23-602(b).

49. MICH. COMP. LAWS. § 552-513(4)(a)(i) (1988).

50. *Id.* § 552-513(4)(a)(iii).

51. Andrew S. Morrison, *Is Divorce Mediation the Practice of Law? A Matter of Perspective*, 75 CAL. L. REV. 1093 (1987).

52. *Id.* at 1122-24.

53. *See supra* notes 33-47 and accompanying text.

According to Andrew Morrison, there are several reasons a consumer might prefer a lawyer mediator.[54] For example, a consumer might believe and expect that the mediator knows the law.[55] In addition, a consumer might believe he or she is getting and paying for the services of a lawyer. Another reason a consumer might prefer a lawyer is because he or she knows the lawyer has been licensed by the local bar.[56] In addition, a consumer might prefer a lawyer mediator because he or she expects that the lawyer is engaged in the practice of law and is therefore held to a higher standard.[57] Perhaps the most important reason for preferring a lawyer is that resolving and settling divorce disputes often requires a knowledge of the law.[58]

On the other hand, there are many arguments in favor of permitting nonlawyer mediators. For example, because the mediation process is non-adversarial, nonlawyers may actually be more qualified to serve in the mediator role.[59] Another argument in favor of nonlawyer mediation involves access to services. Nonlawyer mediation fills a gap where lawyer mediators are unavailable or where there is a lack of lawyers with sufficient training, experience, and interest in providing divorce mediation.[60]

There is a general consensus supporting the use of nonlawyer mediators.[61] Where a knowledge of the law is needed, a lawyer and another professional, such as a licensed psychologist, could collaborate in the mediation process.[62] However, according to Judy C. Cohn, when it comes to child custody disputes, mediation should be restricted "only" to lawyer mediators.[63] This is because a knowledge of the law is essential in such disputes and "the lawyer-mediator knows the legal system and knows the law."[64]

---

54. Morrison, *supra* note 51, at 1121-23.

55. *Id.* at 1121.

56. *Id.* at 1122.

57. *Id.* at 1123.

58. Marsha B. Freeman, *Divorce Mediation: Sweeping Conflicts Under the Rug: Time to Clean House*, 78 U. DET. MERCY L. REV. 67, 73-74 (2000).

59. Morrison, *supra* note 51, at 1115.

60. *Id.* at 1115-16.

61. Bobby Marzine Harges, *Mediator Qualifications: The Trend Towards Professionalism*, 1997 BYU L. REV. 687, 693-94 (1997) (noting that qualifications vary amongst the states but often include advanced degrees and specialized mediation training).

62. *Id.*

63. Judy C. Cohn, *Custody Disputes: The Case for Independent Lawyer-Mediators*, 10 GA. ST. U. L. REV. 487, 502 (1994).

64. *Id.* at 502.

Andrew Morrison has proposed, as a solution to the lawyer or nonlawyer debate, a "bifurcated system."[65] A bifurcated system would allow for both lawyer and nonlawyer mediators.[66] The bar would supervise lawyer mediators while nonlawyers would be supervised by another organization.[67] Such a system would protect the public while making clear the distinction between the two types of mediators.[68] It would then be up to each type of mediator to define when each might be preferable for any given case.[69]

A major problem with nonlawyer mediators is the lack of standard educational and licensing requirements. It is hard to imagine a single organization that would supervise groups as diverse as licensed psychologists, social workers, and marriage and family counselors. Each of these disciplines has its own educational requirements and licensing standards.[70] For maximum protection of the public, there should be uniform minimum requirements, accreditation of programs, and state licensing for nonlawyer mediators.

IV. CONTROVERSY #2: POWER IMBALANCES

A. PROCESS DANGERS FOR WOMEN: CUSTODY DISPUTES

One of the most serious criticisms of divorce mediation is that it may, in certain circumstances, disadvantage women.[71] According to Trina Grillo, mediation, or at least mediation involving custody disputes for divorcing women, provides no solution to the need for an alternative to the traditional adversarial model:

> [M]andatory mediation provides neither a more just nor a more humane alternative to the adversarial system of adjudication of custody, and, therefore, does not fill its promises. . . . [M]andatory mediation can be destructive to many women and some men because it requires them to speak in a setting that they have not chosen and often imposes a rigid orthodoxy as to how they should speak, make decisions, and be.[72]

---

65. Morrison, *supra* note 51, at 1124-25.

66. *Id.*

67. *Id.* at 1124.

68. *Id.*

69. *Id.* at 1125.

70. Dennis P. Saccuzzo, *Liability for Failure to Supervise Adequately Mental Health Assistants, Unlicensed Practitioners, and Students*, 34 CAL. W. L. REV. 115, 115-16 (1997).

71. Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1549 (1991).

72. *Id.* at 1549-50.

According to Grillo, a woman in mediation is under the handicap of strong social pressure and stereotypes.[73] If she is not cooperative, she is seen as vengeful and bitter.[74] If she does not put her own feelings aside, she is seen as greedy and ready to sacrifice her children as a tool against her husband.[75] If she does not compromise, she is seen as irrational.[76] One way to deal with issues such as these is to have a mediator who is aware of the issues and is able to empower the woman.[77] However, Grillo believes the potential pitfalls for women are great and require extremely careful handling if women are to avoid being taken advantage of in custody disputes.[78]

According to Margaret Brinig, divorce mediation can disadvantage women in custody disputes unless the mediator remains vigilant to certain critical issues.[79] Brinig argues that the divorce mediator must be conscious of power imbalances "brought about by the difference in men's and women's earning power and by physical abuse if present in the relationship."[80] Brinig contends, however, that given this awareness, mediation "remains a fair, as well as an inexpensive and time-saving, process for marriage dissolution."[81] Commentators such as Grillo and Brinig represent the view that power imbalances can be overcome with awareness.[82] Another view holds, however, that no amount of awareness can overcome the issue of power imbalances where domestic violence is involved.

B. CAN DOMESTIC VIOLENCE BE MEDIATED?

Of all the critics of divorce mediation, perhaps none are more vocal and adamant than opponents of mediation in domestic violence cases.[83] The potential risks of such mediation are recognized in state statutes such as that of Illinois.[84] By contrast, some states, most notably California, provide

73. *Id.* at 1555.
74. *Id.*
75. *Id.*
76. *Id.*
77. Fischer et al., *supra note* 35, at 2168-69.
78. Grillo, *supra* note 71, at 1550.
79. Margaret F. Brinig, *Does Mediation Systematically Disadvantage Women?*, 2 WM & MARY J. WOMEN & L. 1, 6 (1995).
80. *Id.* at 6.
81. *Id.*
82. *See supra* notes 71, 79.
83. Fischer et al., *supra note* 35, at 2165-66.
84. *See generally* ILL. COMP. STAT. ANN. 5/607.1(c)(4) (West 1992).

for mandatory mediation in custody disputes but have no provision for exclusion where domestic violence is present.[85]

Proponents of mediation in domestic violence cases argue that such mediation is not only faster and cheaper, but that it actually empowers parties because it involves them both in the resolution process.[86] Proponents also argue that mediation of domestic violence is less remote and impersonal than the court system, which has traditionally been unresponsive to battered women.[87] According to Kathleen Corcoran and James C. Melamed, mediation offers the following: the prospect of empowerment to the victim, rehabilitation of the batterer, and, as a model of constructive conflict resolution, an opportunity to end the cycle of violence.[88]

According to Corcoran and Melamed, four safeguards can neutralize the potential dangers of mediation of domestic violence. First, the victim's attorney or advocate must be present during the process to balance negotiating power.[89] Second, private caucuses can be used to encourage disclosures about intimidation or abuse and monitor the victim's safety.[90] Third, as a prerequisite to mediation, both the victim and abuser should be in counseling.[91] Finally, the mediator should take affirmative steps such as screening out unsuitable cases through the use of questionnaires and careful interviewing.[92]

Critics, by contrast, argue that victims of domestic violence should not have to negotiate for their physical safety.[93] Moreover, forcing victims to negotiate with their abusers communicates the message that domestic violence is not a crime.[94] Perhaps the most serious criticism of mediation of domestic violence comes from empirical studies that have revealed that battered women are even more likely to be abused after separation if they went through mediation rather than the traditional adversarial process.[95]

---

85. CAL. FAM. CODE § 3170 (West 1994).

86. Charles A. Bethel & Linda R. Singer, *Mediation: A New Remedy for Cases of Domestic Violence*, 7 VT. L. REV. 15, 32 (1982).

87. Kathleen O. Corcoran & James C. Melamed, *From Coercion to Empowerment: Spousal Abuse and Mediation*, 7 MEDIATION Q. 303, 311-12 (1990).

88. *Id.* at 311.

89. *Id.* at 312.

90. *Id.*

91. *Id.*

92. *Id.* at 313

93. Barbara Hart, *Gentle Jeopardy: The Further Endangerment to Battered Women and Children in Custody Mediation*, 7 MEDIATION Q. 317, 326-27 (1990).

94. Anne E. Menard & Anthony J. Salius, *Judicial Response to Family Violence: The Importance of Message*, 7 MEDIATION Q. 293, 298 (1990).

95. Desmond Ellis, *Post-Separation Woman Abuse: The Contribution of Lawyers as "Barracudas," "Advocates," and "Counselors,"* 10 INT'L J.L. & PSYCHIATRY 403, 408-10 (1987).

Karla Fisher and colleagues have severely criticized mediation of domestic violence cases on the grounds of an incompatibility between mediation ideology and practice for domestic violence cases.[96] According to these authors, there is a basic incompatibility between the practice of mediation and the culture of battering.[97] For example, these authors argue that while mediation is freely chosen, the culture of battering involves coercion for battered women, no technique can compensate for the impact of the battering experience, and most of the currently used screening protocols fail to adequately assess abuse or other elements of the battering culture.[98]

In general, the arguments against divorce mediation in the context of domestic violence are powerful. Can a mediator really protect a woman when she must return home with the abuser? What safeguards are there against coercion by the batterer throughout the process? While a caucus may provide limited protection, the mediator would be in a bind when a victim disclosed abuse during a caucus. Those who attempt to mediate such disputes should do so with a strong awareness of the pitfalls and empirical data. Moreover, states like California, which requires mandatory mediation of custody disputes without exclusions for domestic violence, should carefully rethink these policies.

V. CONTROVERSY #3: ETHICAL ISSUES AND STANDARDS

The potential conflicts and pitfalls of mediating domestic violence disputes raise the broader issue of mediator ethics. Unfortunately, there presently exists no universally accepted code of ethics or professional standards for mediators. Two obstacles to the development of such ethics and standards are that mediation has not been formally established as a profession and there are no definitive standards of competency.[99]

Commentators in the late 1980s noted that for lawyers, Rule 2.2 of the Model Rules of Professional Conduct is especially relevant.[100] Model Rule 2.2 specifies the conditions under which a lawyer may act as an intermediary between clients.[101] However, people who attempted to apply

96. Fischer et al., *supra* note 35, at 2142.

97. *Id.*

98. *Id.* at 2170-71.

99. KIMBERLEE K. KOVACH, MEDIATION: PRINCIPLES AND PRACTICE 272 (2d ed. 1994).

100. Woods, *supra* note 29.

101. MODEL RULES OF PROF'L CONDUCT R. 2.2 (1983) (hereinafter MODEL RULES). These conditions are (a) where the lawyer "consults with each client concerning the implication of the common representation," (b) "the lawyer . . . believes . . . that there is little risk of material prejudice to the interests of any of the clients," and (c) "[t]he lawyer reasonably believes that the common representation can be undertaken impartially." *Id.*

Model Rule 2.2 to the mediation process found the rule to be inadequate.[102] As Wendy Woods noted, "[T]he rule creates an 'ethics gap' . . . because it fails to recognize the alternative of non-representational divorce mediation."[103] Thus, in conducting divorce mediation, the attorney represents neither party. In fact, the parties are free to obtain their own counsel.

Woods notes that the absence of ethical standards is a problem, "Without a discernible ethical standard to guide their conduct, lawyers will be reluctant to undertake divorce mediation for fear of malpractice liability and disciplinary action."[104] Moreover, the absence of a universally accepted code of ethics and professional standards leaves nonlawyer mediators without guidance. Ultimately at risk is the public.

The absence of a code of ethics is a legitimate criticism of mediation in general and divorce mediation in particular. Consequently, efforts to develop such a code are welcome and badly needed.

Kimberlee K. Kovach has identified five major areas of ethical concern in mediation: conflicts of interest, impartiality, the role of the mediator versus self-determination, providing professional advice, advertising, and fees.[105] These areas are encompassed by a joint code drafted by the Society of Professionals in Dispute Resolution (SPIDR), the American Arbitration Association (AAA), and the American Bar Association (ABA).[106]

The present draft of the Joint Code contains nine major principles, each of which is followed by comments.[107] The standards themselves are intended to perform three major functions: to serve as a guide for the conduct of mediators, to inform the mediating parties, and to promote public confidence in mediation as a process for resolving disputes.[108] The nine basic principles cover self-determination, impartiality, and avoidance of conflicts of interest.[109] Also covered are standards of competence, confidentiality, and quality of process.[110] Finally, the Joint Code presents principles related to truth in advertising, disclosure of fees, and the obligation of mediators to improve the practice of mediation.[111]

---

102. Woods, *supra* note 29, at 230.
103. *Id.* at 231.
104. *Id.*
105. KOVACH, *supra* note 99, at 277.
106. *Id.* at 279.
107. JOHN D. FEERICK ET AL., JOINT CODE (1994) *in* KOVACH, *supra* note 99, at 375-81 (hereinafter JOINT CODE).
108. *Id.* at 375.
109. *Id.* at 376-77.
110. *Id.* at 377-79.
111. *Id.* at 379-81.

With varying state laws, there is an urgent need for a comprehensive code of ethics for mediators that would produce uniformity and to serve as a basis of sound professional practice. The need for standard ethics and professional standards is especially compelling given the diversity of professionals involved in the mediation process.

In the area of divorce mediation, professional ethics and standards can help protect the public. As previously indicated, members of the public are often unclear about the professional backgrounds of mediators.[112] To the extent that the public is misled or injured due to the lack of uniform standards, the entire process remains in some jeopardy. Given the potential promise of divorce mediation as one solution to the problems with the traditional adversarial model and the need for alternatives, it behooves all of those involved with the process to work toward the development of comprehensive ethics and professional standards, as well as specialization within disciplines and state licensing standards. With this change, divorce mediation can remain strong and vibrant in the twenty-first century.

112. *See supra* notes 48-61 and accompanying text.

***