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Mediation and Other Creative Alternatives to Litigating Family Law Issues

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MEDIATION AND OTHER CREATIVE ALTERNATIVES TO LITIGATING FAMILY LAW ISSUES

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I. TRENDS IN FAMILY LAW

An attorney who forsook matrimonial law in 1960 for municipal bond work, or something equally somnolent, would be thunderstruck upon his return to family law in 1985.[1] Accustomed to hiring investigators to prove adultery, intemperance, willful desertion, or mental cruelty, this jurisprudential Rip Van Winkle would find, to his chagrin, no fault divorce,[2] joint legal and physical custody,[3] short-term "rehabilitative" alimony,[4] and

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1. The authors are not being inadvertently sexist: whereas a sexually integrated family law bar exists today, in 1960 there were very few female attorneys, and only a miniscule number of them practiced matrimonial law.

2. The sole ground for divorce under Minnesota law is "an irretrievable breakdown of the marriage relationship." MINN. STAT. § 518.06(1) (1984). North Dakota Century Code § 14-05-03 includes "irreconcilable differences" among the traditional grounds for divorce. N.D. CENT. CODE § 14-05-03 (8) (1981). *See* Rummel v. Rummel, 265 N.W.2d 230, 235 (N.D. 1978) (the court is not required to make findings regarding the conduct or fault of the parties).

3. At least 30 states have some form of joint custody. Freed & Foster, *supra* note 2, at 417-21. *See also, e.g.,* MINN. STAT. § 518.17(3)(a) (1984). Section 518.17(3)(a) of the Minnesota Statutes provides that: "Upon adjudging the nullity of a marriage, or a dissolution or separation, or a child custody proceeding, the court shall make such further order as it deems just and proper concerning: (a) the legal custody of the minor children of the parties *which shall be sole or joint*. . . ." *Id.* (emphasis added).

4. *See* Freed & Foster, *supra* note 2, at 382-88. *See also, e.g.,* N.D. CENT. CODE § 14-05-24 (1981). Section 14-05-24 of the North Dakota Century Code provides as follows:

"equitable distribution" of assets,[5] including pension rights and professional practices and degrees. He would confront such an explosion in the number of divorces that many of the courts in which he would practice would now be employing full-time family court referees.[6]

The transformation in family law of the past twenty-five years gives rise to an either-or proposition about the remainder of the twentieth century: Either the changes that have taken place in the American family, and hence in the family law, have run their course, and we should expect several decades of stability without significant changes; or the no-change position is ahistorical, hopelessly naive, and, to coin a word, "epochocentric." The authors subscribe to the latter view.

It would be pointless to try to predict with precision or certainty the exact nature and shape of the changes to come, but the trend seems clear on at least one crucial dimension: The next few decades will witness the increasing development, evolution, and use of dispute resolution mechanisms other than court trials to dissolve marriages and to bring closure to custody disputes. For the reasons set forth below, the authors believe that mediation is the most viable of the potential alternative dispute resolution devices. It would be a mistake, however, to infer that the other options are inferior. The very availability of optional methods itself fulfills another likely family law trend — increasing the disputants' control of the process.

II. WHY ALTERNATIVE METHODS OF DISPUTE RESOLUTION?

The exploration of alternative methods of dispute resolution for family law matters is based on the premise that problems inherent in the present methods mandate the development and use

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> When a divorce is granted, the court shall make such equitable distribution of the real and personal property of the parties as may seem just and proper, and may compel either of the parties to provide for the maintenance of the children of the marriage, and to make such suitable allowances to the other party for support during life *or for a shorter period as to the court may seem just*, having regard to the circumstances of the parties respectively. The court from time to time may modify its orders in these respects.

Id. (emphasis added).

5. *See* Freed & Foster, *supra* note 2, at 379-81. *See also, e.g.*, N.D. CENT. CODE § 14-05-24 (1981). For the text of § 14-05-24 of the North Dakota Century Code, see *supra* note 4.

6. *See, e.g.*, MINN. STAT. § 484.65(7) (1984) (creating a Family Court Division of the District Court for the Fourth Judicial District).

of new or alternative systems. Thus, we must first analyze the problems in the current system of resolving family law disputes.

A. CRITICISMS OF THE TRADITIONAL PROCESS

Some critics argue that American divorce law is an historical anachronism,[7] a twentieth century legacy from ecclesiastical court precepts adopted by the newly independent states in the post-Revolutionary era. No-fault divorce has undercut the medieval assumptions about subordination of women and the non-dissolubility of marriage; yet the State, functioning in the place of the Church, still presumes to make a variety of intrusive decisions about divorcing families. These include whether a home-owner may live in his or her own house, and whether and how often a parent can see his or her own children. The State interfers by applying the adversarial notions from formalized civil procedure to an area deemed sufficiently disparate from other disputes that, as one observer puts it, "marriage has involved the only form of private contract in which the partners, in order to be released, had to secure permission of the court which maintained the right to decide whether or not dissolution of the marriage was justified."[8]

Most criticisms of the present adversarial and judicial systems of divorce, however, are aimed less at historical anomaly than at what the critics perceive as practical and philosophical weaknesses in divorce litigation. The criticisms include the following: The courts are clogged, making the process exasperatingly long;[9] divorces are expensive;[10] the system exacerbates rather than mitigates conflict between parties who have had intimate relationships and who, if they have children, will continue to be parents;[11] divorce law and procedure inappropriately apply principles and rules honed in the commercial arena to an emotionally-charged interpersonal context;[12] the divorce process launders marital linen in public;[13] and the system strips parents of

7. *See* Brown, *Divorce and Family Mediation: History, Review, Future Directions,* 20 CONCILIATION CTS. REV. 1 (1982).

8. *Id.* at 3.

9. *See, e.g.*, Folberg, *Divorce Mediation — A Workable Alternative,* in ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION 11 (1982).

10. *See generally* Flanders, *Divorce Mediation — A New Alternative,* 29 LA. B.J. 239 (1982) (mediation is potentially less expensive and faster than adjudication).

11. Meroney, *Mediation and Arbitration of Separation and Divorce Agreements,* 15 WAKE FOREST L. REV. 467 (1979).

12. Riskin, *Mediation and Lawyers,* 43 OHIO ST. L.J. 29 (1982).

13. Sander, *Varieties of Dispute Processing,* 70 F.R.D. 111 (1976).

their authority and confers power to make life-long decisions about their children upon strangers.[14]

Few would argue that these criticisms lack merit. The question is whether we can solve these problems by modifying the present system to develop special rules for family court matters, expedite divorce trials, render divorce trials less expensive, and protect the litigants' privacy, or whether something is so systemically wrong with litigating marital disputes that no amount of modification will remedy the problems.

Perhaps the question should be reversed, as Chief Justice Warren Burger has posed it, albeit declaratively: "[C]ourts should resolve only what can't be resolved in some other way . . . we must consider whether the court system is the best way to resolve many of the matters now handled in the adversary system."[15] Thus, assuming a *tabula rasa*, we ask what system or systems would most effectively resolve the needs of the marital disputants.

B. DESIRABILITY OF PRIVATE ORDERING

1. *Independence*

"Self-actualization" was a generic term of the 1970s for the various processes, activities, and therapeutic modes that promoted personal growth.[16] The term, though jargonistic and trendy, reflects an increasingly perceived need for individuals to take more control over and responsibility for their own lives. The mental health profession has long acknowledged personal autonomy as a therapeutic goal, and contemporary divorce therapy generally seeks to lessen the clients' dependence on their spouses, parents, and professional therapists.[17]

The contradiction between the goal of self-actualization and the reality of passive dependence upon lawyers and courts to solve divorce-related problems inevitably results in a crisis that every divorcing person must resolve. The ones who choose to transfer their dependency needs to their attorneys have a difficult time bringing closure to their divorces, and prolonged litigation postpones the feared disengagement with their spouses. Those who consciously choose independence as a psychological as well as

14. Spencer & Zammit, *Mediation — Arbitration: A Proposal for Private Resolution of Disputes Between Divorced or Separated Parents*, 1976 DUKE L.J. 911.

15. Lieberman, *A No-Lose Proposition*, NEWSWEEK, Feb. 21, 1983, at 14 (quoting Chief Justice Warren Berger).

16. *See* J. FOLBERG & A. TAYLOR, MEDIATION 76-77 (1984).

17. *See, e.g.*, B. FISHER, REBUILDING WHEN YOUR RELATIONSHIP ENDS (1981).

financial objective may begin to insist upon greater control over the legal aspects of the divorce as well.

As the public demand for greater personal involvement in the dissolution process increases, the practice of family law will have to change. For some clients, a more active role in the negotiating process may suffice. But for others, it will be important to generate options in addition to attorney-drafted settlement agreements and court trials conducted with unfamiliar and uncomfortable rules.

With close to half of all American marriages ending in divorce, the movement for private ordering of that process is likely to proceed with or without the leadership of the organized bar. It behooves both bench and bar to be on the cutting edge of this trend rather than to attempt to suppress it or to reluctantly follow a lay leadership frustrated with what the judicial system has wrought.

2. *Privacy*

American society has slowly been ejecting the government from its homes and bedrooms. On a continuum from private ordering[18] to government intrusion, divorce remains an area of high governmental coercion in intimate matters of citizens' private lives. The United States Supreme Court has discerned a penumbral right to privacy, at least with respect to child rearing,[19] procreation,[20] contraception,[21] abortion,[22] and cohabitation.[23] To be sure, every state still imposes restrictions upon who can marry by gender, age, relationship, mental capacity, and marital status.[24]

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18. *See* Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979). The concept of private ordering has been articulated by others using different phrases such as "[the] parties reach their own agreement," Rigby, *Alternative Dispute Resolution*, 44 LA. L. REV. 1725, 1743 (1984); "client autonomy," Friedman & Anderson, *Divorce Mediation's Strengths*, CAL. LAW., July 1983, at 36; and "control[ling] my private life myself," I. RICCI, MOM'S HOUSE/DAD'S HOUSE: MAKING SHARED CUSTODY WORK 149 (1980).

19. Pierce v. Society of Sisters, 268 U.S. 510 (1925).

20. Skinner v. Oklahoma, 316 U.S. 535 (1942).

21. Eisenstadt v. Baird, 405 U.S. 438 (1972).

22. Roe v. Wade, 410 U.S. 113 (1973).

23. Moore v. City of East Cleveland, 431 U.S. 494 (1977).

24. *See, e.g.*, UNIF. MARRIAGE AND DIVORCE ACT § 208(a), 9A U.L.A. 110 (1979). Section 208(a) of the Uniform Marriage and Divorce Act provides as follows:

> (a) The [_____] court shall enter its decree declaring the invalidity of a marriage entered into under the following circumstances:
>
> (1) a party lacked capacity to consent to the marriage at the time the marriage was solemnized, either because of mental incapacity or infirmity or because of the influence of alcohol, drugs, or other incapacitating substances, or a party was induced to enter into a marriage by force of duress, or by fraud involving the essentials of marriage;
>
> (2) a party lacks the physical capacity to consummate the marriage by sexual intercourse, and at the time the marriage was solemnized the other party did not know of the incapacity;

Yet every American jurisdiction has some form of no-fault divorce,[25] indicating a clear direction toward the private ordering of marital matters, including dissolution. However, courts still stand *in loco parentis* (in place of the parents) when it comes to child custody.[26] Although courts in fact rarely set aside a stipulation for marital dissolution absent patent unfairness, they do retain the power to thwart a mutual custody decision of the parents.[27]

The potential for post-dissolution arrangements adverse to minor children impels some residual judicial power to protect children. As Mnookin and Kornhauser have written, "to acknowledge this responsibility [for child protection], however, is not to define its limits."[28] Current mental health literature supports the contention that what is really in the best interest of the children are custodial arrangements that derive from consensual agreements.[29]

3. *Choice*

Mental health research will not in and of itself impel the generation of alternative dispute resolution mechanisms. A point worth emphasizing is that there are a variety of facets in the concept of "private ordering," and different alternative methods may respond to different needs of divorcing couples to exert greater control over the process. Some couples may want to control the content, others the forum, still others the procedure or the time of their divorce.

Most court-annexed alternative dispute resolution programs developed in response to the judiciary's complaint about clogged dockets. These programs have only incidentally accommodated the disputants' needs to find new ways to legally uncouple. A

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(3) a party [was under the age of 16 years and did not have the consent of his parents or guardian and judicial approval or] was aged 16 or 17 years and did not have the consent of his parents or guardian or judicial approval; or

(4) the marriage is prohibited.

Id.

25. For a discussion of no-fault divorce, see *supra* note 2 and accompanying text.

26. Rabuse v. Rabuse, 304 Minn. 460, 463, 231 N.W.2d 493, 495 (1975) ("[t]his power to protect infants is exercised by the state as an attribute of its sovereigny") (quoting Anderson v. Anderson, 260 Minn. 226, 230, 109 N.W.2d 571, 575 (1961)).

27. *See* N.D. CENT. CODE § 14-05-22 (1981) (the court may give such direction for the custody, care, and education of the children of the marriage as may seem necessary or proper); *Id.* § 14-09-06.1 (the best interests of the child is the determining factor in awarding custody); UNIF. MARRIAGE AND DIVORCE ACT § 402, 9A U.L.A. 197 (1979) (the court shall determine custody in accordance with the best interests of the child).

28. Mnookin & Kornhauser, *supra* note 18, at 957.

29. *Id.* at 956 (citing Note, *Lawyering for the Child: Principles of Represention in Custody and Visitation Disputes Arising From Divorce,* 87 YALE L.J. 1126, 1126-32 (1978)).

smorgasbord of options, each with certain advantages and each capable of solving some but not all of the problems identified with the adversary system, would be optimal. And there is no reason to think that the alternatives described here exhaust the possibilities. Others may very well emerge by the end of the century. It may, however, be quite disruptive, though ameliorative, to the traditional practice of family law if some or all of these alternatives are routinely available to divorcing spouses.

C. ALTERNATIVES

Western civilization has fashioned several alternatives to the adjudication of disputes: voting, self-help, coin-tossing, avoidance, administrative tribunals, ombudspersons, negotiation, arbitration, mediation, mini-trials, decision analysis, and "med-arb" (a hybrid of mediation and arbitration).[30] Voting, ombudspersons, and coin-tossing are not very useful for family law disputes. Family courts may utilize administrative processes by invoking the assistance of a social service welfare agency[31] as an adjunct to ligitation. Too many clients rely on either avoidance or self-help, to the annoyance of their attorneys. Negotiation is, of course, the current preference. Arbitration and mediation should not be discounted, however, and bear closer examination.

III. ARBITRATION

Arbitration is closer to private ordering than is the judicial system, but it too is an adjudicative option since it involves a third-party decision-maker. Arbitration differs from the judicial model in that the parties may select the decision-maker and may contract to define the scope of the substantive issues and procedural rules.[32] Arbitration is, in effect, a private court system which renders decisions that are enforceable in the public judicial system. Its decisions are final, since by statute and decision an arbitrator's

30. The list is a composite of one developed by F. Sander and one created by J. Wolf. *See* Sander, *supra* note 13, at 111-17; Wolf, *Alternative Dispute Resolution: One Perspective,* HENNEPIN LAW., May-June 1984, at 8.

31. *See* MINN. STAT. § 518.167(a) (1984) (the court may order an investigation and report from the county welfare agency or department of court services concerning custodial arrangements); N.D. CENT. CODE § 14-09-06.3 (1981) (the court may designate a qualified person or agency to investigate and report on custodial arrangements).

32. Much of this section first appeared in written materials prepared by Gary Weissman for Hamline Advanced Legal Education Seminar on Marital Dissolution. *See* G. Weissman, Alternatives to the Adversary-Judicial Model for Resolving Family Disputes (1983) (unpublished manuscript).

award will not be disturbed by the courts absent fraud or collusion.[33]

Arbitration emerged in the 1880s as a response to the complaints of businessmen frustrated by the congestion and formalism of judicial proceedings.[34] It is used extensively in labor and commercial law but only infrequently outside those areas.[35] Crowded court dockets prompted the use of mandatory non-binding arbitration for small and intermediate-sized claims in Philadelphia as early as 1952[36] and subsequently in at least eight states, the District of Columbia, and four federal districts.[37]

In 1984, the Minnesota Legislature enacted an enabling statute authorizing the judges in any state judicial district to promulgate rules, subject to the approval of the Minnesota Supreme Court, for mandatory nonbinding arbitration of civil

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33. *See* UNIF. ARBITRATION ACT § 12, 9 U.L.A. 140 (1985). Section 12 of the Uniform Arbitration Act provides as follows:

> (a) Upon application of a party, the court shall vacate an award where:
> (1) The award was procured by corruption, fraud or other undue means;
> (2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
> (3) The arbitrators exceeded their powers;
> (4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the contrary or otherwise so conducted the hearing, contrary to the provisions of Section 5, as to prejudice substantially the rights of a party; or
> (5) There was no arbitration agreement and the issue was not adversely determined in proceedings under Section 2 and the party did not participate in the arbitration hearing without raising the objection;
>
> but the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

Id. See also Papenfuss v. Abe W. Mathews Eng'g Co., 397 F. Supp. 165, 166 (W.D. Wis. 1975) (court should not overturn an arbitrator's award in the absence of serious misconduct); State *ex rel.* Sundquist v. Minnesota Teamsters Public & Law Enforcement Employees Union Local No. 320, 316 N.W.2d 542, 544 (Minn. 1982) (the general rule is that an arbitrator, in the absence of any agreement limiting his or her authority, is the final judge of both law and fact).

34. J. Pearson, An Evaluation of Alternatives to Court Adjudication, 4 (Jan. 15, 1983) (unpublished manuscript).

35. Sander, *supra* note 13, at 126.

36. J. Pearson, *supra* note 34, at 4-5.

37. Dosal, *Court Annexed Mandatory, Non-Binding Arbitration in Civil Cases,* (Dec. 1982), *reprinted in* HENNEPIN LAW., May-June 1984, at 8.

38. *See* Act of May 2, 1984, ch. 634, 1984 Minn. Laws 1976 (codified at MINN. STAT. § 484.73 (Supp. 1985)). The Act provides as follows:

> Subdivision 1. A majority of the Judges of a judicial district may authorize the establishment of a system of mandatory, nonbinding arbitration within the district to assist the court in disposing of any controversy existing between two parties which is the subject of a civil action.
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> Subd. 2. Judicial arbitration may not be used to dispose of matters relating to guardianship, conservatorship, or civil commitment, matters within the juvenile court jurisdiction involving neglect, dependency, or delinquency, matters involving termination of parental rights under sections 260.221 to 260.245, or matters arising under sections 518B.01, 626.557, or 144.651 to 144.652.

matters.[38] Such a plan has already been approved for the largest judicial district in the state, encompassing Hennepin County and Minneapolis, but its proposed rules exclude family law arbitration.[39] The judges in Minnesota's second largest judicial district, which includes Ramsey County and St. Paul, considered a plan that would have provided mandatory nonbinding arbitration exclusively for family law matters, which account for the majority of civil filings in that district, but they chose mandatory mediation instead.[40]

A. ARBITRABILITY OF FAMILY LAW MATTERS

At common law, many jurisdictions held any arbitration agreement unenforceable on the ground that they unconstitutionally usurped the courts' jurisdiction.[41] Since the enactment of the Federal Arbitration Act[42] and the adoption by various states of the Uniform Arbitration Act, however, public policy now clearly favors arbitrated settlements with only minimal judicial interference. As of 1982, only nine states prohibited enforcement of agreements to arbitrate future controversies.[43] In 1957, Minnesota became the first jurisdiction in the United States to adopt the Uniform Arbitration Act.[44] Even as early as 1943 Minnesota had affirmed the enforceability of agreements to arbitrate in the future,[45] and the Minnesota Supreme Court has consistently upheld arbitration agreements and awards since Minnesota's adoption of the Uniform Arbitration Act.[46]

> Subd. 3. Rules governing pleadings, practice, procedure, jurisdiction and forms for judicial arbitration shall be promulgated by a majority of the judges in the district, subject to the approval of the supreme court. The uniform arbitration act shall not be construed to apply to arbitration under this section except as otherwise provided in the rules of the judicial district.

Id.

39. Remele, *Hennepin County Adopts Mandatory Non-Binding Arbitration,* HENNEPIN LAW., March-April 1985, at 6, 6.

40. Interview with Gordon Griller, Ramsey County District Court Administrator (Dec. 17, 1984).

41. Meroney, *supra* note 11, at 473.

42. 9 U.S.C. §§ 1 to 208 (1982).

43. G. GOLDBERG, A LAWYER'S GUIDE TO COMMERCIAL ARBITRATION, 6 & n. 5 (2d ed. 1983). As of 1982, the following states refused to enforce agreements to arbitrate future disputes: Alabama, Kentucky, Mississippi, Montana, Nebraska, North Dakota, Vermont, and West Virginia. *Id.*

In 1985 the North Dakota Legislature amended § 32-04-12 of the North Dakota Century Code, thereby permitting the specific enforcement of arbitration agreements. *See* Act of March 31, 1985, ch. 373, 1985 N.D. Sess. Laws 1403.

44. *See* UNIF. ARBITRATION ACT, *Table of Jurisdictions Wherein Act Has Been Adopted,* 9 U.L.A. 1 (1985).

45. *See* Park Constr. Co. v. Independant School Dist. No. 32, 216 Minn. 27, 11 N.W.2d 649 (1943) (enforcing arbitration clause in contract for construction of athletic field).

46. *See, e.g.,* Dunshee v. State Farm Mut. Ins. Co., 303 Minn. 473, 228 N.W.2d 567 (1975) (Uniform Arbitration Act manifests the state's policy favoring arbitration for the informal, speedy, and inexpensive resolution of disputes).

Whether family law matters can successfully be arbitrated is as yet unclear. The Minnesota Uniform Arbitration Act provides that "[a] written agreement to submit *any* existing controversy to arbitration . . . is valid, enforceable, and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract."[47] Neither Minnesota's Supreme Court nor its court of appeals has yet confronted an arbitration issue in the family law area. The Minnesota Supreme Court has held that arbitrators cannot determine constitutional issues,[48] but arbitrators are otherwise empowered to decide the scope of the issues to be arbitrated.[49]

Although Minnesota's Uniform Arbitration Act expressly provides that the unavailability in court of a remedy fashioned by an arbitrator is not a basis for vacating the arbitration award,[50] the Minnesota Supreme Court has construed that section to reserve a right to challenge any question decided by the arbitrator.[51] Moreover, the court found that the enactment of the former Public Employee Relations Act represented a legislative intent that there be an exclusive remedy for public employee grievances, thereby excluding arbitration.[52] Arguing by analogy, one might contend

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47. MINN. STAT. § 572.08 (1984) (emphasis added).

48. *See* McGrath v. State, 312 N.W. 2d 438, 442 (Minn. 1981) (irrespective of the language in the arbitration agreement, the arbitrator has no authority to decide constitutional issues).

49. Atcas v. Credit Clearing Corp. of America, 292 Minn. 334, 340-41, 197 N.W.2d 448, 452 (1972) (if the intent of the parties regarding the scope of arbitration is reasonably debatable, the arbitrator initially determines the scope subject to judicial review pursuant to § 572.19 of the Minnesota Statutes).

50. MINN. STAT. § 572.19(1) (1984).

51. *See* Rosenberger v. American Family Mut. Ins. Co., 309 N.W.2d 305, 309 (Minn. 1981). In *Rosenberger,* the plaintiff was injured in an accident involving two uninsured motorcycles. *Id.* at 306-07. The plaintiff sought to recover uninsured motorist benefits under two policies of no-fault automobile insurance belonging to her stepfather. *Id.* at 307. The defendant insurer denied coverage, claiming that the plaintiff was not a resident of her stepfather's household and therefore was not covered under the policies. *Id.* Pursuant to an arbitration clause in the policies, the dispute was submitted to a panel of three arbitrators, who concluded that the plaintiff could not recover. *Id.* Plaintiff then moved the district court to vacate the award on the ground that the arbitrators had exceeded their authority in determining the residency requirement. *Id.* The district court concluded that the residency determination should be reviewed de novo, and found for the plaintiff. *Id.*

On appeal, the Minnesota Supreme Court found the question of residence the equivalent to a question of coverage. *Id.* at 308. Drawing on a previous decision in which the court found identical language to create a reasonable debate as to whether coverage was arbitrable, the court found the arbitration award reviewable de novo. *Id. See* Dunshee v. State Farm Mut. Auto. Ins. Co., 303 Minn. 473, 480, 228 N.W.2d 567, 572 (1975) (questions concerning coverage of insurance policies are reviewable de novo). Addressing defendant's contention that participation in the arbitration procedure estopped plaintiff from contesting the decision, the court held that objections relating to arbitration are preserved pursuant to § 572.19 of the Minnesota Statutes. *Rosenberger,* 309 N.W.2d at 309.

52. *See In re* Discharge of Johnson, 288 Minn. 300, 180 N.W.2d 184 (1970). In *Johnson,* the court stated it was of the opinion that:

> [B]y the enactment of the Public Employees Relations Act, the legislature has established as a matter of public policy the only way in which an employee of a village may assert a grievance against the latter. The legislature has not authorized a village under these circumstances to delegate its legislative authority, and hence the arbitration board exceeded its powers in making the award which had been filed herein.

that the marital dissolution statute prescribes an exclusive method for dissolving marriages.[53]

In New York, where many of the very few American judicial decisions on family law arbitration have arisen,[54] appellate courts have consistently approved the arbitration of alimony, child support, and property issues[55] and have waffled on the arbitration of custody and visitation. The first department of New York's Appellate Division, for example, decided in *Sheets v. Sheets*,[56] a 1964 case, that custody issues could be arbitrated, but the court reserved the power to set aside the custody decision in the interest of the child. The court of appeals subsequently cited *Sheets* with enthusiastic approval.[57] However, the second department of the appellate division continues to hold that agreements to arbitrate the custody of minor children are inappropriate.[58] As of January 1985, the court of appeals had not resolved the differences between the two appellate departments, either because no case presented itself or, more likely, because the court of appeals deems the two lines of decisions reconcilable by the residual power of the trial courts to review any arbitrated custody decision.[59]

At the turn of the century, Kentucky,[60] and more recently

Id. at 304-05, 180 N.W.2d at 187. *See also,* Public Employees Labor Relations Act, ch. 839 § 3, 1965 Minn. Laws 1557 (providing methods for conciliation of labor disputes involving public employees), *repealed by* Public Employees Labor Relations Act of 1971, ch. 33 § 17, 1971 Extra Sess. Minn. Laws 2733. Minnesota now provides a procedure for negotiation, mediation, and arbitration in labor disputes involving public employees. *See* MINN. STAT. §§ 179A.14 to 179A.16 (Supp. 1985).

53. *Compare* Public Employees Labor Relations Act, ch. 839 § 3, 1965 Minn. Laws 1557 (providing methods for conciliation of labor disputes involving public employees), *repealed by* Public Employees Labor Relations Act of 1971, ch. 33 § 17, 1971 Extra Sess. Minn. Laws 2733 *with* MINN. STAT. § 518.07 (1984) (venue for dissolution or legal separation proceedings).

54. *See generally* Spencer & Zammit, *supra* note 14, at 920.

55. *See, e.g.,* Robinson v. Robinson, 296 N.Y. 778, 71 N.E.2d 214 (1947); Sokolsky v. Sokolsky, 59 A.D.2d 600, 398 N.Y.S.2d 161 (1977); Grien v. Grien, 51 A.D.2d 543, 378 N.Y.S.2d 621 (1976).

56. 22 A.D.2d 176, 254 N.Y.S.2d 320 (1964).

57. *See* Schneider v. Schneider, 17 N.Y.2d 123, 246 N.E.2d 318, 269 N.Y.S.2d 107 (1966). In *Schneider,* the court of appeals quoted at length from *Sheets* and described that case as "a thorough and convincing opinion." *Id.* at ____, 216 N.E.2d at 309-11, 269 N.Y.S.2d at 109.

58. *See* Nestel v. Nestel, 38 A.D.2d 942, 331 N.Y.S.2d 241 (1972); Agur v. Agur, 32 A.D.2d 16, 298 N.Y.S.2d 772 (1969), *appeal dismissed,* 27 N.Y.2d 643, 313 N.Y.S.2d 866, 261 N.E.2d 903 (1970).

59. The slight shift of the second appellate department in 1979 supports the view that the two lines of decision are reconcilable. *See* State *ex rel.* Bruzzese v. Bruzzese, 70 A.D.2d 957, 417 N.Y.S.2d 763 (1979). In *Bruzzese* the court held that "it is axiomatic that an agreement as to custody may be upheld *only* after the agreement is subjected to the closest and most careful scrutiny and then *only if* enforcement of the [decision] is in the best interest . . . of the children . . . ." *Id.* at ____, 417 N.Y.S.2d at 765 (emphasis in original). Beneath all of the qualifications lies an acknowledgment of the validity of arbitration of custody agreements. Acceptance of the reconcilability of the two departments' decisions may have been signaled when Justice Breitel stated: "[I]n custody matters, courts will review the actions of arbitrators notwithstanding an agreement between the parents to settle the custody matter by arbitration . . . ." Port Washington Union Free Dist. v. Port Washington Teachers Ass'n, 45 N.Y.2d 411, ____, 380 N.E.2d 280, 285, 408 N.Y.S.2d 453, 458 (1978) (Breitel, J., concurring).

60. *See* Masterson v. Masterson, 33 Ky. L. Rptr. 1193, 60 S.W. 301 (1901) (award of alimony resulting from arbitration is enforceable).

Delaware,[61] have upheld the arbitration of monetary issues in divorce. But the one reported case in New Jersey unequivocally found that neither custody nor child support was arbitrable there.[62] Similarly, Louisiana does not permit the arbitration of custody matters.[63] And Wisconsin's Supreme Court, in language reminiscent of early twentieth-century case law that struck down arbitration in commercial litigation, views the arbitration of *any* family law matter as a usurpation of judicial power.[64] Evidently, no other American jurisdiction is currently using or considering arbitration in family law disputes.[65]

All of the court-annexed experiments in arbitration have been with mandatory nonbinding agreements. Although Michigan, Pennsylvania, Ohio, and New York have imposed financial disincentives for appealing arbitration awards, all of them permit a trial *de novo* on the merits if the nonprevailing party demands it.[66] Accordingly, even if those jurisdictions that have programs for mandatory nonbinding arbitration of civil cases extended the programs to family law matters, the question of the validity of arbitration might never arise because the programs are nonbinding.

Except in New York, litigation of the validity of the arbitration of family law matters when the parties voluntarily consent to be bound has been infrequent. In the New York cases, the parties, generally observant Roman Catholics and Orthodox Jews, had voluntarily submitted their custody disputes to binding arbitration by a co-religionist because they were concerned about the religious upbringing of their children when the noncustodial parent would have little or no postdecretal control. In each case the attorney for

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61. DuPont v. DuPont, 40 Del. Ch. 290, 181 A.2d 95 (1962) (agreement to arbitrate disputes involving education of children following separation is enforceable).

62. Wertlake v. Wertlake, 127 N.J. Super. 595, ____, 318 A.2d 446, 448 (Ch. Div. 1974). In *Wertlake,* the court noted that other jurisdictions uphold arbitration agreements involving alimony, support, custody, and visitation, yet declared that arbitration is ill-adapted for the delicate balancing of the factors imposing the best interest of the child. *Id.* at ____, 318 A.2d at 447-48. Concluding that custody and visitation questions are not subject to arbitration, the court stated: "Since the State is *parens patriae* to children, and since the support, education and welfare of children is the exclusive concern of the courts so that parties can make no permanent binding contract with respect to those matters, child support is not arbitrable." *Id.* at ____, 318 A.2d at 448 (citing A. LINDEY, SEPARATION AGREEMENTS AND ANTE-NUPTIAL CONTRACTS § 29-14 (1967)).

63. *See* Stone v. Stone, 292 So. 2d 686, 691 (La. 1974) (dicta); George Engine Co. v. Southern Shipbldg. Corp., 350 So. 2d 881, 887 (La. 1977) (dicta).

64. *See* Bliwas v. Bliwas, 47 Wis. 2d 635, 178 N.W.2d 35 (1970). In *Bliwas,* the court stated that spouses may not make any postnuptial agreements that "proscribe, modify, or oust the court of its power to determine the disposition of property, alimony, support, custody, or other manners. . . ." *Id.* at 639, 178 N.W.2d at 37.

65. J. Hagemeyer, State-by-State Survey of the Use of Arbitration/Mediation of Family Law Disputes (1983) (unpublished manuscript) (compiled for the Minnesota State Bar Association Family Law Section's Arbitration and Mediation Committee).

66. Dosal, *supra* note 37, at 36-37.

the nonprevailing party contended on appeal that the arbitration process itself was unlawful. If the Ramsey County, Minnesota judges had promulgated a plan for voluntary binding arbitration, the Minnesota appellate courts would have had to address the question of the validity of arbitration.

B. DESIRABILITY OF ARBITRATING DISSOLUTIONS

The advantages of arbitration are the privacy and informality of the proceedings, the malleability of procedures, the availability of a wide variety of remedies, the flexibility in the choice of forum, and the rapidity of obtaining a decision.[67] But arbitration has some decided disadvantages as well. For those unsatisfied with the arbitration result, a trial *de novo* combined with arbitration will increase time and costs. To the extent that there may be hidden assets, extensive discovery will increase formality, whereas relying on unsworn documents may raise ethical problems about safeguarding a client's interests.[68] Lastly, for those disputants to whom autonomy is the salient criterion, an arbitrator is as much an outside decision-maker as a referee or a judge. Some couples — those who highly value informality, speed, and confidentiality, but still desire an impartial umpire — are likely to choose arbitration. But the alternative dispute resolution method most likely to elicit popular support is mediation.

IV. MEDIATION

A. WHAT MEDIATION IS AND IS NOT

Arbitration and negotiation by attorneys are similar to litigation.[69] Arbitration is adjudication with a private judge, and negotiation entails two advocates, each seeking to make as few concessions as possible while bargaining within a framework of the court's likely decision in the event of trial. Mediation, though, is conceptually distinct.

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67. One study showed a drop in case delay in Philadelphia from 84 months to 48 months, and in the state of Washington from 12 months to 60 days, owing to the arbitration of civil disputes. J. Pearson, *supra* note 34, at 30.

68. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 6-4 (1979). Ethical Consideration 6-4 provides in part as follows: "Having undertaken representation, a lawyer should use proper care to safeguard the interests of his client. . . . In addition to being qualified to handle a particular matter, his obligation to his client requires him to prepare adequately for and give appropriate attention to his legal work." *Id. See also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1983). Rule 1.1 of the Model Rules of Professional Conduct provides as follows: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." *Id.*

69. *See* Riskin, *Mediation in the Law Schools,* J. LEGAL EDUC., 259, 259 (1984).

One of the clearest definitions of mediation is Kenneth Rigby's: "[M]ediation is a process to facilitate clarification of the issues, identify alternatives, reduce acrimony existing between the parties, assist the parties in resolving any controversy, and help the parties reach a mutual agreement."[70]

Unlike therapy, mediation is task-oriented. Unlike adjudication, mediation avoids assignment of blame. Unlike attorney-negotiated settlements, mediation does not require an adversarial protection of the client's turf. And, unlike all three, mediation discourages dependency upon professionals.[71]

B. HISTORY OF MEDIATION

We are just now beginning the second decade of mediation of family disputes, but the idea of mediation is quite venerable. The Federal Mediation and Conciliation Service (FMCS) has been operating in the labor relations arena since 1947, and before that, various groups, particularly the Chinese-Americans, Mormons, Quakers, and Jews, established mediational institutions to resolve disputes within their respective groups.[72] We can trace mediation in legal history back almost eight hundred years. The Magna Carta itself is the product of a truce mediated by Archbishop of Canterbury Stephen Langton on the meadow of Runnymede in 1215 between King John and the barons of England.[73]

Experimentation with custody mediation began in the public sector in 1973 in Los Angeles County, California; Dane County (Madison), Wisconsin; and Hennepin County (Minneapolis), Minnesota.[74] Mediation received a big boost at the 1976 Pound Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, where Chief Justice Warren Burger endorsed the idea of alternative dispute resolution techniques.[75]

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70. Rigby, *supra* note 18, at 1743.

71. *See generally* Fuller, *Mediation,* 44 S. CAL. L. REV. 305, 314-15 (1971); Folberg, *supra* note 9, at 13; Pearson, *Child Custody: Why Not Let the Parents Decide?,* JUDGES J., Winter 1981, at 4, 4.

72. Brown, *supra* note 7, at 1-2.

73. *See* L. WRIGHT, MAGNA CARTA AND THE TRADITION OF LIBERTY, 32-35 (1976).

74. McIsaac, *Mandatory Conciliation Custody/Visitation Matters: California's Bold Stroke,* CONCILIATION CTS. R., Dec. 1981, at 73, 73.

75. Address by Chief Justice Burger, National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (April 7, 1976), *reprinted in* 70 F.R.D. 83, 85 (1976). Chief Justice Burger stated as follows:

> It may be worth more than a footnote, and help us to gain perspective, to remember that when Pound spoke in this chamber many of the audience came from the downtown hotel by trolly cars that had just replaced the horsecars, and some perhaps came by horse and buggy. Where the parking meters now stand were hitching posts for horses. The horses and buggies are gone — even the trolley cars are gone —

The Conference spawned a task force chaired by Attorney General Griffin Bell, which in turn generated the federally-funded Neighborhood Justice Centers experiment.[76] This exploration all occurred in what Steven Zwickel calls the "early Bronze Age of Mediation."[77]

Today there are some 180 alternative dispute resolution programs (mostly mediation) in the United States and some 300 divorce mediation services.[78] Many of these programs are intended to resolve neighborhood disputes, landlord-tenant quarrels, bad check cases, and parent-teenager conflicts. Other programs are criminal diversion variants which involve the victims as well as the perpetrators. They have a variety of names, but the most common are Community Justice Centers, Night Prosecutor's Mediation Programs, and Neighborhood Justice Centers.[79] Mediation programs flourish in Scotland,[80] in Windsor, Ontario,[81] and in New South Wales, Australia.[82] Many programs like the Mediation Center for Dispute Resolution, a nonprofit organization in Minneapolis, encompass mediation of family disputes as well as of criminal, neighborhood, juvenile, and small claims matters.

C. ORGANIZATIONAL STRUCTURE OF PROGRAMS MEDIATING FAMILY DISPUTES

Mediation programs take a variety of forms. Some are university-connected, such as the one at the University of Massachusetts, which integrates workshops, research, the undergraduate law program, and actual mediation. It embraces both family matters and nonfamily matters such as fraternity disputes, internal employee union conflicts, business dissolutions, and sex harassment cases.[83]

> and men like Henry Ford, Louis Chevrolet, and the Wright Brothers have altered our lives dramatically. Yet we see that, fundamentally, the methods for settling disputes remain essentially what they were in that day.
>
> Perhaps what we need now are some imaginative Wright Brothers of the law to invent, and Henry Fords of the law to perfect, new machinery for resolving disputes.

Id.

76. J. Pearson, *supra* note 34, at 7.

77. *Alternative Dispute Resolution: Who's In Charge of Mediation?*, Discussion Series, TOPIC 2 - 1982, ABA Special Committee on Alternative Means of Dispute Resolution, 51 (panel discussion, Jan. 21, 1982) [hereinafter cited as TOPIC 2].

78. J. Pearson, *supra* note 34, at 8.

79. *Alternative Dispute Resolution: Bane or Boon to Attorneys?*, Discussion Series, TOPIC 1 - 1982, ABA Special Committee on Alternative Means of Dispute Resolution, i (panel discussion, Aug. 11, 1981) [hereinafter cited as TOPIC 1].

80. *Id.* at 55-56 (statement by J. Falsgraf).

81. *Id.* at 15 (statement by R. Weiss).

82. W. Faulkes, Mediation - Australian Style (June 1983) (materials submitted for the *National Institute for Family Dispute Resolution* Conference, Los Angeles).

83. TOPIC 2, *supra* note 77, at 58-64 (statement by J. Rifkin).

The Northwest Mediation Service is a non-profit organization in Seattle, which uses male-female mediation teams comprised of one attorney and one therapist. Twelve independent contractors — six lawyers and six therapists — constitute their staff. They report a success rate of between eighty to ninety percent and aver that their least successful couples are those referred to them by the King County Court under Washington's mandatory mediation program.[84]

Another nonprofit organization, the Christian Legal Society (CLS) in Albuquerque, New Mexico, offers a choice of arbitration or mediation. Its cases include both commercial and domestic matters. Because of their religious connection, the CLS mediators and arbitrators believe they can provide remedies unavailable in court, such as those relating to celebrations, covenantal relationship remedies, dinners, and worship services.[85]

Court-connected mediation programs of family disputes have expanded beyond Los Angeles, Madison, and Minneapolis. Occasionally, they have been effectuated by administrative order of the court (e.g., Broward County, Florida),[86] but more often by statute. California, for example, enacted in 1980 a law requiring mediation in all custody cases.[87] By procedures promulgated by the family court, custody mediation is an option in Hawaii and Washoe County (Reno), Nevada.[88] In Minnesota, custody disputes in Olmstead County (Rochester) are referred to mediation by informal agreement of the bench and family law bar;[89] in the Twin Cities metropolitan area, Anoka, Washington, Dakota, and Ramsey Counties have all followed the lead of Hennepin County in making custody mediation available, even though there is no clear authority to do so. They evidently rely on a broad construction of the Minnesota statute authorizing welfare "investigations" in custody matters.[90]

No one knows the actual number of private mediation services because there is no national registry and no licensing requirement

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84. N. Kaplan, Access to Affordable Services: The Role of Private Mediation, 4, 7 (June 1983) (materials submitted for the *National Institute for Family Dispute Resolution* Conference, Los Angeles).

85. TOPIC 2, *supra* note 77, at 50 (statement by L. Buzzard).

86. Admin. Order No. 79-25, 17th Jud. Cir., Broward County Fla. (Oct. 5, 1979).

87. *See* CAL. CIV. CODE § 4607 (effective Jan. 1, 1981).

88. Comeaux, *Procedural Controls in Public Sector Domestic Relations Mediation* in ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION, 79, 85 & n. 59 (1982).

89. Interview with Larry Downing, Fourth Annual Family Law Institute, Bloomington, Minn. (March 11, 1983).

90. Memorandum of R. Wycoff, former Director of Hennepin County Court Services (April 28, 1980) (explaining Hennepin County's reliance on the authority implied in § 518.167 of the Minnesota Statutes). *See also* MINN. STAT. § 518.167(1) (1984). Section 518.167(1) of the Minnesota Statutes provides as follows:

for mediators. Only a fraction of the private mediators are formally affiliated with either of the two national family mediation service groups: the Family Mediation Association and the Academy of Family Mediators. The Minnesota Mediation Council, for example, is affiliated with the Academy of Family Mediators,[91] but the Illinois Mediation Council is not.[92]

D. BENEFITS OF MEDIATION

Perhaps the chief advantage of mediation over the adversarial method of dispute resolution is that stated by Leonard Riskin: "Mediation tends to heal wounds, not just pay for the bandages."[93] Additional advantages most concisely and oft-stated by mediation advocates include the following:

1. Mediation opens communication between the divorcing parties.
2. Parties make their own agreements instead of having settlements imposed upon them by a third party.
3. The peaceful solution of conflicts helps to prevent problems from escalating.
4. The mediation process takes problems out of the adversarial win-lose setting of the court into a setting which is non-adversarial and neutral.
5. Solutions reached through mediation last longer because these solutions represent the views of both parties and are perceived as fair and acceptable over time.
6. Mediation is less expensive and quicker than court processing, especially of minor disputes.
7. Mediation helps the spouses identify the issues, reduce misunderstandings, vent emotions, clarify positions, find points of agreement, explore new areas of compromise, and ultimately negotiate an agreement.

In contested custody proceedings, and in other custody proceedings if a parent or the child's custodian requests, the court may order an investigation and report concerning custodial arrangements for the child. The investigation and report may be made by the county welfare agency or department of court services.

Id.

91. Telephone interview with Steven Erickson, President of the Minnesota Council of Family Mediators (Feb. 25, 1986).

92. Interview with Lee Howard, President of the Illinois Mediation Council (Dec. 19, 1984).

93. Riskin, *supra* note 69, at 261.

8. Mediation is conducted in private.
9. Mediation permits the airing of all grievances, not only those that are legally operative.
10. It is procedurally simple and more likely to lead to truth finding.
11. It is capable of dealing with the causes of problems, not just the problems.
12. It reduces the alienation of the litigants and opens communication between them.
13. It aids disputing parties in resuming workable relationships with each other.
14. It enhances the adjustment of children following separation or divorce by promoting parental cooperation, reinforcing parent-child bonds and encouraging visitation.
15. It reduces the anger, feelings of loss, sense of injustice and separation from their children that many non-custodial parents experience.
16. It promotes child support payment performance of fathers following divorce.
17. It reduces governmental interference in the ordering of marital and family affairs.
18. It diminishes the emphasis of fault-finding and blameworthiness.[94]

E. PROBLEMS WITH MEDIATION?

A survey of the literature of mediation indicates a list of criticisms of mediated divorces, all of which need to be analyzed and discussed.[95]

1. *Lack of Protection*

Critics fear that mediation carries a high risk that the parties will enter into enforceable contracts without full information about

94. Rigby, *supra* note 18, at 1744 (citing Bahr, *Mediation is the Answer*, 3 FAM. ADVOC. 32 (1981)); Barteau, *How to Create a Conciliation Court*, 2 FAM. ADVOC. 6 (1980); Crouch, *Divorce Mediation and Legal Ethics*, 16 FAM. L.Q. 219 (1982); Gaughan, *Taking a Fresh Look at Divorce Mediation*, 17 TRIAL 39 (1981); Pearson & Thoennes, *Mediation and Divorce: The Benefits Outweigh the Cost*, 4 FAM. ADVOC. 26 (1982); Silberman, *Professional Responsibility Problems of Divorce Mediation*, 16 FAM. L.Q. 107, 108, (1982); Winks, *Divorce Mediation: A Nonadversary Procedure for the No-Fault Divorce*, 19 J. FAM. L. 615, 634-35 (1981)).

95. *See* Crouch, *The Dark Side of Mediation*, FAM. ADVOC., Winter 1982, at 27-33; TOPIC 1, *supra* note 79, at 39 (statement by G. Kane); Diamond & Simborg, *Divorce Mediation Weaknesses*, 3 CAL. LAW. 37 (1983).

legal rights. This was a valid criticism in the original divorce mediation model developed by Coogler[96] which called for one "advisory attorney." But virtually all mediation programs, certainly all operating in Minnesota, have abandoned that model and strongly encourage, if not insist, that each mediating disputant retain his or her own counsel.

2. *Bureaucratization*

If mediation expands in the public sector, critics worry it will surely prompt the creation of a vast, new bureaucracy — civil service ratings, job descriptions, procedure manuals, and certification boards. Bureaucratization is, it seems, an inevitable concomitant of government programs, no matter how innovative they are initially. The bureaucratization argument is one of the most well-aimed arrows in the quivers of those who argue for private sector mediation.

3. *Economic Threat*

Some attorneys fear that successful mediations in the private sector may reduce clientele for the family law bar. If mediation is carried out in the public and nonprofit sectors, they argue, private attorneys may be obliged to subsidize their competition through taxes, which provide funds for government grants, and through donations to the United Way, whose grantees may also provide such services.

In point of fact, despite the growing popularity of mediation, there will be no shortage of clients who desire to resolve their marital disputes through traditional litigation or attorney negotiation. Those clients who do mediate their divorces will continue to need attorneys to advise them throughout the mediation process, to help with informal "discovery" of information, to provide asset valuation, and to draft settlement agreements with the concomitant tax and estate planning. Some attorneys may undergo training and become part-time mediators. Judge Frank Orlando of Ft. Lauderdale, who pioneered court-connected mediation in Florida, says that many Florida attorneys

96. *See* O. COOGLER, STRUCTURED MEDIATION IN DIVORCE SETTLEMENT 27-28 (1978). Coogler explains that mediation involving an impartial, advisory attorney results in an agreement that can be better understood and followed by the parties. *Id.* at 27. Moreover, advisory attorneys often "add a significant number of provisions, called 'boilerplate,' which were never considered by either the mediator or the parties, but which are designed to facilitate the postdivorce relationship between the parties and reinforce the specific agreements actually reached." *Id.* at 28.

worked against the proposed legislation authorizing mediation in Florida counties.[97] He pointed out, however, that attorneys in jurisdictions with actual mediation experience — in California, Oregon, and Arizona — now account for a majority of the mediation referrals.[98]

4. *Risk of Dominance*

It is likely that one member of the divorcing couple is more powerful, more knowledgeable, and has more resources. Critics fear that the goals of mediation are neither plausible nor likely to be achieved with such inequality of bargaining power. This is a serious issue in mediation. Mental health professionals have explained that, in addition to power and financial disparities, there are important emotional differences that affect the risk of dominance in mediation. Invariably, the initiator of the divorce experiences the emotional stages of dissolution (denial, anger, blame, loss, grief, helplessness, guilt, failure) before the noninitiator does.[99]

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97. Orlando, *Where and How - Conciliation Courts* in ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION 111, 119 (1982).

98. *Id.* Judge Orlando noted that many lawyers initially worked against the institution of a state-funded mediation program, but went on to state that "[w]ith the passage of time, more and more lawyers have seen the positive benefits that working with the program can have, especially when they see how well our mediators can defuse a highly emotional custody or visitation dispute." *Id.* at 119. Pointing out the similarities between the Florida experience and that of other jurisdictions utilizing court counseling and mediation programs, Judge Orlando went on to state:

> Attorneys in Arizona, California and Oregon seem to agree, since 55 to 65% of all referrals to court counseling in those states come from attorneys. In Fort Lauderdale, the first year we had our program, less than 5% of our cases were attorney referred. In the third year of the program, we are up to 30% and are increasing monthly.

Id. at 120.

99. *See, e.g.*, Brown, *The Emotional Context of Divorce: Implications for Mediation,* in ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION, 43, 43-49 (1982). Emily Brown tells us that:

> Each spouse goes through a very distinct emotional process in coming to terms with the end of the marriage. Although the process is somewhat similar for the initiator and the non-initiator, the two spouses are out of phase with each other. The initiator, who is in control of the timing of the separation, has also had the opportunity to do much of the "grief work" prior to the separation. This involves coming to terms with the loss of one's hopes for the relationship, as well as the loss of the relationship itself. Feelings of anger, guilt, and helplessness predominate during the grief process, and it is difficult to attend to anything else.
>
> The non-initiator spends the time prior to separation denying the impending separation or trying to find ways to prevent it. While the initiator often finds some relief in the separation, the non-initiator is hit with a "double-whammy." This person must deal with all the logistical and economic changes accruing from separation and must also begin dealing with rejection and grief. The non-initiator who is having difficulty accepting the reality of the separation, may comment that "she'll come to her senses," "she really doesn't mean this," or "he's always come back before, so I'll just wait him out." Once the non-initiator acknowledges the separation, that person begins grieving (or occasionally denies the grief for a time and later falls apart).

Id. at 43-44.

Depending upon the emotional stage each disputant is experiencing during the mediation, it is possible that the spouse who is temporarily the most "risk-averse" may make concessions he or she will later regret.[100]

Some feminists have also voiced doubts about the power redistribution in mediation and about mediation's growing popularity at the very time that women have demonstrated their ability to do well in the adversary system. A banner displayed at the April 1983, National Conference on Women in the Law in Washington, D.C., stated: "Mediation Hurts Women;" and NOW's Legal Defense Fund has prepared a *Feminists' Consumer Guide to Mediation*, published in the fall of 1983, warning women to be wary of divorce mediation.[101]

Similarly, in the spring of 1983, the Battered Women's Advocates Caucus of the 14th National Conference on Women and the Law adopted a resolution which, *inter alia*, declared that "[m]ediation is always inappropriate with respect to any issue (be it related to violence or not) where there has been *any* act or threat of violence against a woman or child."[102]

On the other hand, more recent feminist commentary on mediation suggests that, unlike the adversarial system that reinforces patterns of domination by the lawyer-client relationship, mediation focuses on female concerns of responsibility and justice and enabling people to decide for themselves instead of "helping people by deciding for them."[103] While most experienced mediators assert that one of the mediator's roles is to equalize the power imbalance, the real hedge against that risk will be the involvement of the attorneys retained by the disputants.

5. *Incompetence*

Without standards, training requirements, or licensure, anyone can call himself or herself a mediator and may harm people going through the emotional trauma of divorce. The absence of universally accepted standards has been a concern of everyone

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100. *See* Mnookin & Kornhauser, *supra* note 18, at 971. A "risk-averse" party, for example, would be "[a] parent who would accept an outcome of less than half-custody in order to avoid the gamble — the chance of losing the coin flip, and receiving no custody. . . ." *Id.*

101. G. Scott, Can the Starrlet Become a Class Act?, 7 (June 1983) (materials submitted for the *National Institute for Family Dispute Resolution* Conference, Los Angeles).

102. Res. 1, Battered Women's Advocates Caucus, 14th Nat'l Conf. on Women and the Law (Washington, D.C. Apr. 10, 1983).

103. Rifkin, *Mediation From a Feminist Perspective: Promise and Problems,* 2 LAW AND INEQUALITY 21, 21-31, 25 n. 21 (1984).

involved in the mediation movement. There is little agreement, however, on who should formulate the standards for mediators and whom those standards should exclude. Should mediators, for example, be licensed or accredited? Should there be a minimal amount of training, and, if so, who should certify the quality of the training upon which a would-be mediator relies in hanging out her or his shingle? Must mediators have either a law degree, a doctorate in psychology, or a masters in social work — or can laypersons with the right skills, instincts, and training be mediators despite the lack of academic credentials?

In 1984 two national organizations, the Association of Family and Conciliation Courts (AFCC) and the American Bar Association (ABA) each adopted a set of model standards of practice for mediators in family disputes.[104] Both sets of model standards address such issues as impartiality, unequal negotiating ability, full disclosure of assets, guidelines for initiating mediation, advice to the parties to seek independent counsel, confidentiality, conflict of interest, fees, and *ex parte* communication. Both mention that mediators should be qualified by experience and training, and the AFCC standards admonish mediators to participate in continuing education. Neither sets forth detailed criteria for mediator education and training.

The Academy of Family Mediators (a national organization of mediators) and the Mediation Center for Dispute Resolution (a Minnesota nonprofit organization) have each developed similar, yet distinct criteria for professional credentials and mediation-focused training. The Academy's standards are binding on members of the Academy, and the Mediation Center's standards are required of those who apply to mediate family law matters through the auspices of the Center.[105]

6. *False Promises*

Critics allege that mediation is not faster or less expensive than conventional dissolution methods. Some promoters of mediation

104. The AFCC model standards were developed in consultation with some 30 other organizations, including the American Psychological Association, the National Institute for Dispute Resolution, and the American Arbitration Association. *See Model Standards of Practice for Family and Divorce Mediation,* ARBITRATION TIMES, Fall 1984, at 45. The ABA standards, drafted by the Mediation Task Force of its family law section, were formally approved by the ABA House of Delegates on August 8, 1984. *See Standards of Practice for Lawyer Mediators in Family Disputes,* 18 FAM. L. Q. 363 (1984) (presentation of standards).

105. *See* Academy of Family Mediators, *Standards for Membership* 4-5 (1985); Memorandum from John Wolf to the Divorce Mediation Committee of the Mediation Center for Dispute Resolution, Dec. 6, 1983 (standards for Mediation Center Family and Divorce Mediator Panels).

have exaggerated its virtues. We now, however, have some rigorous research that supports the contention that mediation is more durable and satisfying to the disputants, even if it is not necessarily faster or less expensive than the adversarial model. The initial findings of the Divorce Mediation Research Project, co-sponsored by the Colorado Bar Association and the Piton Foundation, are as follows:

- eighty percent of those who mediated produce agreements (either during or after mediation) compared to fifty percent of those who never mediated;
- sixty-six percent of ex-spouses who successfully mediated report that the other spouse complies with the agreement compared to between thirty to forty-five percent of those whose attorneys negotiated stipulations or who went to trial;
- more than two-thirds of successfully mediated individuals were "highly satisfied" with the results;
- eighty-one percent of the mediation drop-outs were sufficiently satisfied with mediation, despite their failure, to recommend it to friends; only fifty-six percent of those who did not attempt mediation were satisfied with the terms of their final orders;
- thirteen percent of the couples who successfully mediated reported serious postdecretal problems compared to thirty to forty percent of both mediation drop-outs and those in the control group (who were never offered mediation).[106]

The research indicates that there were some, but not significant, monetary savings to those completing mediation.[107] Another research project, in Fairfax County, Virginia, yielded similar results — relatively insignificant financial savings but impressively high user satisfaction.[108]

The Colorado research includes a second round of follow-up interviews, which indicate that mediated agreements are much more durable; six percent of the mediated agreements generated

106. Pearson & Thoennes, *Divorce Mediation: Strengths and Weaknesses over Time,* in ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTIONS 51, 57-59 (1982). *See also* J. Pearson, *supra* note 34, at 20-30 (empirical findings on the satisfaction and success of mediation programs).

107. Pearson & Thonnes, *supra* note 106, at 62.

108. *See* Bahr, *Mediation is the Answer,* FAM. ADVOC., Spring 1981, at 32, 34-35. A study conducted in Fairfax County, Virginia determined a mean divorce cost of $2,423 per couple in non-mediated cases, while couples using private mediation services paid an average of $1,858 for a completed divorce. *Id.* at 34 & Table 1.

serious disagreements between the parties compared to thirty-three percent of the litigated and negotiated dissolution decrees.[109] The follow-up research also showed, however, that the mediation drop-outs were just as fractious as the nonmediated divorce couples, indicating that for those who leave mediation, the process is more costly and may only defer the postdecretal problems.[110]

7. *Self-interest*

Critics believe that mediators will urge *any* settlement rather than a *fair* settlement because they have a stake in the success of mediation. Mediators must guard against the tendency to suggest compromises where compromise will be unfair to one party. In properly conducted mediations, though, the parties and not the mediator make all of the decisions. The real safeguard must come from the disputants' separate attorneys, who should be involved early in the mediation process.

8. *Checks and Balances*

Critics argue that mediation lacks the checks and balances of the adversary system.[111] Further, where advocate-lawyers are involved, they are made to feel like "spoil-sports" if they suggest changes in the mediation agreement. The Coogler divorce mediation model lacked a system of checks and balances;[112] however, the post-Coogler model demands the hiring of separate private counsel.[113] Feedback from the family law bar has prompted Minnesota mediators to insist on attorneys' early involvement to promote checks and balances within mediation.

9. *Ethical Problems*

Ethical issues account for a substantial portion of writing,

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109. J. Pearson, *supra* note 34, at 27. Pearson noted:

> [A]t a long-term follow-up interview, 79% of successful mediation clients reported their spouse to be in compliance with the child and financial terms of the agreement and this was reported by 67% of adversarial respondents. While 33% of adversarial respondents reported that serious disagreements had arisen over the settlement, this was noted by only 6% of successful mediation clients.

Id.

110. Pearson & Thoennes, *supra* note 106, at 64-65.

111. *See* J. Pearson, *supra* note 34, at 39.

112. *See generally* O. COOGLER, *supra* note 96 (presenting an early divorce mediation model).

113. *See* Crouch, *Mediation and Divorce: the Dark Side is Still Unexplored*, 4 FAM. ADVOC. 27, 33-35 (1982); Brown, *supra* note 7, at 23.

lectures, and conversation among mediators. The salient ethical problems comprise two major issues and a number of minor ones.

a. *conflict of interest*

Though it is beyond dispute that an attorney may not represent both spouses in a contested dissolution action,[114] it is uncertain whether a lawyer-mediator violates professional obligations by providing legal information in a mediation session.

Although bar associations in some states, particularly Washington, New Hampshire, and Maryland, have found ethical violations, the trend, represented by New York, Massachusettes, Oregon, and West Virginia, is the other way.[115] Those bar associations in the developing majority have determined that mediation is not the practice of law and that mediators do not represent either party in a mediation. Rule 2.2 of the Minnesota Rules of Professional Conduct authorizes an attorney to serve as

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114. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105 (1974). Disciplinary Rule 5-105 provides in part as follows:

> (A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).
>
> . . . .
>
> (C) In the situation covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

Id. See also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1983). Rule 1.7 of the Model Rules provides as follows:

> (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.
>
> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Id.

115. *See* Wash. S.B.A. Prof. Resp. Comm. Informal Op. Item 385 (1980); N.H.S.B.A. Ethics Comm. (April 27, 1981) (proposed opinion); Md. S.B.A. Comm. on Ethics, No. 80-55A (1980); N.Y.S.B.A. Comm. on Prof. Ethics, Op. 258 (1972); Boston B.A. Comm. on Ethics, Op. No. 78-1 (1980); *see generally* Silberman, *Professional Responsibility Problems of Divorce Mediation,* 7 FAM. L. REV. 4001 (1981), *reprinted in* ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION 239, 244-49 (1982).

either an arbitrator or a mediator.[116] The attorney may not, however, represent either party subsequently in the action which they are presently disputing.[117] Although Rule 2.2 may not have contemplated divorce mediation, the Minnesota Professional Responsibility Board authorizes divorce mediation undertaken by lawyer-mediators so long as (a) no "advisory attorneys" give impartial advice during the mediation; (b) disputants mediating without having retained counsel are referred to bar-sponsored referral offices; (c) mediators maintain separate mediation and law offices; and (d) mediators avoid the unauthorized practice of law during mediation.[118]

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116. *See* MINNESOTA RULES OF PROFESSIONAL CONDUCT Rule 2.2 (1985). Rule 2.2 provides as follows:

> (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 client's consent to the common representation;
> (2) the lawyer reasonably believes that the matter can be resolved on terms compatible with the client's 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 interests 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 requests, or if any of the conditions stated in paragraph (a) is 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.

Id. The comment to Rule 2.2 states that "[f]orms of intermediation range from informal arbitration where each client's case is presented by the respective client and the lawyer decides the outcome, *to mediation*, to common representation where the client's interest [sic] are substantially though not entirely compatible." MINNESOTA RULES OF PROFESSIONAL CONDUCT Rule 2.2 comment (1985) (emphasis added).

117. *See* MINNESOTA RULES OF PROFESSIONAL CONDUCT Rule 2.2(c) (1985); *id.* Rule 1.12. Rule 1.12 provides in part as follows:

> (a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator or law clerk to such a person, unless all parties to the proceedings consent after disclosure.
> . . . .
> (c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:
> (1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and
> (2) written notice is promptly given to the appropriate tribunal to enable it to ascertain compliance with the provisions of this rule.
> (d) An arbitrator selected as a partisan of a party in a multi-member arbitration panel is not prohibited from subsequently representing that party.

Id.

118. Letter from Richard S. Reeves, then a staff attorney of the Lawyers Professional Responsibility Board, to William B. Henschel and Stephen K. Erickson (July 15, 1977).

b. *unauthorized practice of law*

Canon 3 of the Code of Professional Responsibility imposes the obligation upon attorneys to "[a]ssist in preventing the unauthorized practice of law."[119] The Disciplinary Rules require lawyers to refrain from aiding (1) a nonlawyer in the unauthorized practice of law (DR 3-101); (2) dividing fees with nonlawyers (DR 3-102); and (3) forming partnerships with nonlawyers to carry out activities comprising the practice of law (DR 3-103).[120]

If mediation is defined in a way that makes it separate and discrete from the practice of law, then many, but not all, of the questions about the unauthorized practice of law are moot. For instance, the line between giving legal information and providing legal advice is exceedingly thin, but marks the frontier between legitimate activity and unethical conduct. If a mental health professional co-mediating a divorce with an attorney suggests that the parties discuss their pensions when enumerating their assets, is that legal information or legal advice? If it is construed as legal advice, then the attorney may be assisting a nonlawyer in the unauthorized practice of law.

Similarly, if the attorney-mediator suggests options to avoid recapture of alimony tax deductions under the Domestic Relations Tax Reform Act, is that giving legal advice? If so, it too would run afoul of the proscription against attorneys practicing law while conducting mediations.

While some bar associations, like that of New Hampshire, have apparently decided that it is unethical for attorneys to be mediators at all,[121] others have viewed the involvement of non attorneys in mediation as the unauthorized practice of law.[122] The Stearns County (Minnesota) Bar Association's Family Law Committee, for example, sent a letter to one of Minnesota's private mediation services, asserting that its proposed mediation service in St. Cloud would constitute the unauthorized practice of law.[123] On

119. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 3 (1981).

120. *Id.* DR 3-101, -102, -103 (1981).

121. *See* New Hampshire Bar Association Ethics Committee, Op. 1983-4/4 (1983). The New Hampshire Bar Association Ethics Committee has stated that "[a] lawyer may not provide legal advice to both parties to a divorce action who seek his help through a mediation service. Parties to a divorce have such differing interests that full disclosure is insufficient to remedy the conflict of interest." *Id.*

122. *See* Ethics Committee of the Board of Professional Responsibility of the Supreme Court of Tennessee, Op. 83-F-39 (1983). Opinion 83-F-39 declares that "[d]ivorce mediation in which mediators assist the individuals to reach a mutually acceptable agreement involving the division of real and personal property, spousal support, child support, child custody and visitation rights constitutes the practice of law." *Id.*

123. Letter from Virginia Marso to Karen Irvin (Mar. 10, 1982).

the other hand, one long-time lawyer-mediator has recently suggested that a local bar association's interposition of ethical concerns to artificially restrain mediation services raises serious antitrust questions.[124]

The arrangements of business relations between lawyers and therapists who co-mediate could also present a problem. The Oregon Bar Association, which has a very liberal attitude toward mediation, has indicated that a mediation service could avoid the fee-splitting problem by formally allocating portions of each fee to the lawyer and nonlawyer mediators, rather than giving the impression each is sharing in a single fee.[125] But to preclude potential problems in that arena, the Northern California Mediation Service has created an elaborate structure of a private nonprofit organization, a for-profit business (neither of which has any employees), and a consulting firm which acts as an independent contractor to both organizations and pays its employee-mediators.[126]

c. *other ethical problems*

While no ethical issue is really "minor," there are some issues that have not received as much attention as have conflicts of interest and the unauthorized practice of law. Most have not been fully addressed by any bar association, and they are listed here merely as items for consideration.

1. Is there any such thing as a truly neutrally drafted instrument — and, if not, can a mediator memorialize the parties' agreement without advancing the interests of one over another?

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124. Address by Henry Ellson, *National Institute for Family Dispute Resolutution* Conference, Los Angeles (June 18, 1983).

125. *See* SILBERMAN, *supra* Note 115, at 269-70 (citing Or. B.A. Comm. on Legal Ethics, Pro. Op., No. 79-46 (1980)). The Oregon Bar Association Committee on Legal Ethics, when asked to rule on the propriety of a family mediation center comprised of four attorneys and four counselors, stated:

> There seems little question but that fees are split between the attorney and counselor who comprise a mediation team. However, there is no general pooling of fees for division by percentage. The actual mediators simply each take a specific amount from the hourly fee for the particular case in which they participated. In a strict sense the counselor is not sharing in the direct fruits of the attorney's work, but is being compensated for his own labor, and vice versa.

Id. at 270. The Committee went on to advise how lawyer and nonlawyer mediators may avoid fee-splitting problems in the future by declaring that "[t]he procedure whereby the attorneys and counselors bill separately for their time helps distinguish between the two professional roles and removes our concern about fee splitting." *Id.*

126. Explanation of Joel Shawn, Director of the Northern California Mediation Services, *National Institute for Family Dispute Resolution* Conference, Los Angeles (June 17, 1983).

2. Should a lawyer-mediator be proscribed from accepting employment, subsequently, from a party whose dissolution s/he helped mediate? If not, will that taint the judgment of such a mediator who is aware that one of the mediation parties, but not the other, is likely to require, and has the financial resources to pay for, legal services in the future?

3. Is an attorney-mediator, when functioning as a mediator, required to report child abuse under the child abuse reporting statute if such information is disclosed during mediation?[127]

4. Can an attorney for a client who has "successfully" mediated his or her dissolution counter-sign a stipulation in response to the client's request to "honor the mediation agreement" without bumping into Canon 5's admonition that "[a] lawyer should exercise independent professional judgment on behalf of a client?"[128]

Some commentators have suggested that the canons of professional responsibility ought not be made applicable to mediation since mediation is not the practice of law. Larry Gaughan, for instance, has suggested fourteen ethical principles for mediators based on cooperation rather than conflict.[129] "[T]he

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127. *See, e.g.*, MINN. STAT. § 625.556 (3) (a) (Supp. 1985). Section 626.556 provides in part:

> A professional or his [or her] delegate who is engaged in the practice of the healing arts, *social services*, hospital administration, psychological or psychiatric treatment, child care, education, or law enforcement who has knowledge of or reasonable cause to believe a child is being neglected or physically or sexually abused shall immediately report the information to the local welfare agency, police department or the county sheriff.

Id. (emphasis added).

128. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 5 (1979).

129. Gaughan, *An Essay on the Ethics of Separation and Divorce Mediation*, in ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION 321, 327-33, 335 (1982). Larry Gaughan suggests, as the most basic ethical principles for family mediation by attorneys, the following:

1. An attorney mediator should not mix mediation and law practice in the same case.
2. A lawyer mediator may discuss with a potential client in a preliminary and impartial way the implications of both mediation and representation.
3. Legal information is not legal advice and may be imparted by the mediator in proper situations.
4. The mediator should be sure that the parties understand his or her role and the mediation process.
5. A mediator should be as neutral and impartial as possible.
6. The mediator should avoid secret communications and pressure tactics.

problem with adversarial divorce settlements," Gaughan has written, "has been an excessive, rather than insufficient, focus upon the conflict of interest principle."[130] Would-be mediators must continue to assess this array of ethical questions.

F. ADDITIONAL ISSUES IN FAMILY LAW MEDIATION

1. *Who Should Mediate?*

Should mediators be attorneys, therapists, or laypersons? Should mediations be conducted by one person or two? Should mediators have a minimal amount of training? Should law school curricula include courses on mediation?[131]

The training question encompasses such issues as what should be taught, who should be taught, whether the training should be academic or experiential, the extent to which therapist-mediators should be taught substantive and procedural aspects of divorce law, and whether attorneys should be taught "body language" and the

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7. The confidentiality of mediation sessions should be protected by an agreement signed by the mediator as well as the couple.
8. The mediator should respect the autonomy of the couple.
9. Each spouse should have access to independent counsel at all times during the mediation.
10. A full and complete disclosure of property and other assets, income, deductions, liabilities, and present or projected monthly budgets is absolutely essential.
11. The mediator should always guard against any misuse of the mediation process by either party.
12. The mediator has an obligation to raise all of the issues relating to a complete and fair settlement.
13. The attorney(s) to whom an agreement is referred for drafting should always be independent of the mediator.
14. Every mediator should be a professional in the best sense of that term.

Id. at 327-33.

130. *Id.* at 334-35.

131. *See* Sacks, *Legal Education and the Changing Role of Lawyers in Dispute Resolution,* 34 J. LEGAL EDUC. 237 (1984). Professor Sacks, after noting the emphasis many law schools place on the litigation aspects of lawyering, states as follows:

> One cannot object to the successful development of training programs for the litigating lawyer. The question is rather one of emphasis. Do we, without meaning to do so, convey to students a misleading sense of the place that litigation in fact occupies in our system, and perhaps even a distorted perspective of the place it ought to occupy? I do not pretend to know. What troubles me is the feeling that our present emphasis on litigation in law school study is not a function of a rounded analysis of the place of litigation in the life of most practicing lawyers or in the provision of legal services generally, or in the development of new law.

Id. at 244. *See also* Green, *A Comprehensive Approach to the Theory and Practice of Dispute Resolution,* 34 J. LEGAL EDUC. 245 (1984).

Forty-seven law schools currently offer alternative dispute resolution in their curriculum. Riskin, *Mediation in the Law Schools,* 34 J. LEGAL EDUC. 258, 260 n. 3 (1984). Of these, "[t]he new CUNY Law School has taken the most dramatic step in this direction by including the study of mediation in three of its first-year courses, as part of an effort to thoroughly integrate mediation into the curriculum." *Id.* at 263.

emotional dynamics of divorce — as well as the standards and certification problems discussed above.[132]

Those who contend that two people — usually one male and one female, one a therapist and one an attorney — should co-mediate argue that co-mediation (1) shows divorcing spouses how a man and a woman can work together; (2) provides quality control and peer support; (3) allows for a division of labor in the mediation; and (4) avoids triangulation problems, since power, fairness, and betrayal by the opposite sex are usually issues in a divorce. Proponents of solo-mediation assert that co-mediation is too expensive, increases the number of relationships in mediation from three, with a solo mediator, to six, and is necessary only for the inexperienced.

2. *Should Mediation be Mandatory or Voluntary?*

Some mediation experts characterize mandatory mediation as "a contradiction in terms" since mediation is at root a consensual process.[133] Yet the jurisdictions that have made mediation mandatory, such as California, Washington, and Broward County, Florida, did so on the premise that once people were obligated to try mediation, most found it highly satisfying. Without endorsing mandatory mediation, the researchers in the field remain puzzled by the finding that in all areas of the country — in both family mediation and in other kinds of mediation — large percentages of those parties offered mediation in programs that are both cost-free and voluntary turn it down.[134]

3. *Should Mediation be Offered by the Courts, Private Agencies, or Both?*

Those who argue in favor of public mediation claim that if mediation is taken over by the private sector, it will be available

132. *See* Moore, Training Mediators for Family Dispute Resolution (June, 1983) (materials submitted for the *National Institute for Family Dispute Resolution* Conference, Los Angeles); Milne, Mediation Practice and Training Standards, (June, 1983) (materials submitted for the *National Institute for Family Dispute Resolution* Conference, Los Angeles).

133. *See* J. Pearson, *supra* note 34, at 18.

134. *Id.* at 15-16. A study conducted by Jessica Pearson reveals that half of the disputants offered free mediation services in custody and visitation matters in the Denver project rejected the offer, 30% of those referred to a Brooklyn center for mediation of felony disputes between acquaintances failed to appear and another 12% refused mediation outright, and the Neighborhood Justice Centers reported attrition rates as high as 60%. *Id.* Though the reasons for lack of participation in free mediation programs is uncertain, Pearson suggests the following possibilities: (1) lack of public education about alternatives to adjudication; (2) ambivalence of the legal community toward informal dispute resolution procedures; (3) use of existing neighborhood-based dispute resolution forums or avoidance techniques to resolve disputes; and (4) lack of coercion to which the disputant is subjected. *Id.* at 16-18.

only to the upper and upper-middle classes. They also contend that public mediation will be supervised, will assure competence, and will result in fewer litigated dissolutions.[135] Those who raise questions about, if not criticize, public mediation point out that public mediators only mediate custody and visitation issues even though in many instances the distinction between financial and custody issues is artificial.[136] The issue is complicated by the fact that in many jurisdictions, the public mediator makes a custody recommendation to the court if the mediation fails. Until recently at least, that was the pattern in the Twin Cities metropolitan area of Minnesota and is still true in all but two counties of California under the state's mandatory mediation plan.[137]

4. *Should Government Provide Incentives for Mediated Divorces?*

Michigan allows a fee discount if a mediated agreement is presented along with a petition for dissolution.[138] Alameda County,

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135. *See* Brown, *supra* note 7, at 22-24, 26.

136. *See* Mnookin & Kornhauser, *supra* note 18, at 962-63. Mnookin and Kornhauser maintain that the two elements — money and custody — are "inextricably linked for two reasons: over some range of alternatives, each parent may be willing to exchange custodial rights and obligations for income or wealth, and parents may tie support duties to custodial prerogatives as a means of enforcing their rights without resort to court." *Id.* The authors explain:

> Economic analysis suggests that a party may, over some range, trade custodial rights for money. Although this notion may offend some, a contrary assertion would mean that a parent with full custody would accept no sum of money in exchange for slightly less custody, even if the parent were extremely poor. Faced with such alternatives, most parents would prefer to see the child a bit less and be able to give the child better housing, more food, more education, better health care, and some luxuries. Suggesting the possibility of such trade-offs does *not* mean that the parent would be willing to relinquish all time with the child for a sufficiently large sum of money. Indeed, with a minimum level of resources, a parent may have a parallel minimum of custodial rights for the reduction of which no additional payment, however large, could be adequate compensation.

Id. at 964.

137. *See* McIsaac, *supra* note 74, at 73, 74. Los Angeles and Santa Clara Counties in California do not permit mediators to make recommendations to the court when mediation efforts fail. *Id.*

138. *See* MICH. COMP. LAWS ANN. § 600.2528(1)(f) (West Supp. 1985). Section 600.2528(1)(f) provides as follows:

> In the circuit court in a county having a population of less than 100,000 the following fees shall be paid to the clerk of the court:
>
> (f) Beginning July 1, 1983, in addition to the judgment fee provided in subdivision (d) or (e), before entry of a final judgment in an action for divorce or seperate maintenance where minor children are involved, or the entry of a final judgment in a child custody dispute submitted to the circuit court as an original action, 1 of the following sums, which shall be deposited by the county treasurer as provided in section 2530:
>
> (i) If the matter was contested or uncontested and was not submitted to domestic relations mediation or investigation by the office of the friend of the court, $30.00.
>
> (ii) If the matter was contested or uncontested and was submitted to domestic relations mediation, $50.00.
>
> (iii) If the matter was contested or uncontested and the office of the friend of the court conducted an investigation and made a recommendation to the court, $70.00.

Id.

California has an expedited calendar for mediated divorces and allows the dissolution pleadings to be filed on simplified forms. Colorado's dissolution statute authorizes a summary dissolution for divorces if the parties have mediated essential issues,[139] and, as an incentive to mediate, Middlesex County, Massachusetts requires detailed briefs from attorneys at pretrial conferences if no mediated settlement has been reached.[140]

5. *Would a Mediation-Arbitration Sequence be Reasonable?*

Some commentators have suggested that couples who reach an impasse in mediation should be able to arbitrate sticky points.[141] That apparently was part of the original model of the Family Mediation Association,[142] but after none of the first one hundred mediations proceeded to arbitration, that organization abandoned the plan.[143] Others think that the sequential combination should remain available so long as someone other than the mediator does the arbitration.[144]

Despite the seemingly inherent tension between the noncoercive, facilitative role of the mediator and the adjudicative function of the arbitrator, there are some who view med-arb (a sequential process in which the mediator changes hats and arbitrates the remaining, unmediated issues) as a practicable and workable alternative dispute resolution device.[145]

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139. *See* COLO. REV. STAT. § 14-10-120.3 (Supp. 1986). Section 14-10-120.3 provides in part as follows:

> (1) Final orders in a proceeding for dissolution of marriage may be entered upon the affidavit of either or both parties when:
> (a) There are no minor children of the husband and wife, and the wife is not pregnant, or the husband and wife are both represented by counsel and have entered into a separation agreement granting custody to one or both parents and setting out the amount of child support to be provided by the husband or wife or both; and
> (b) The adverse party is served in the manner provided by the Colorado rules of civil procedure; and
> (c) There is no genuine issue as to any material fact; and
> (d) There is no marital property to be divided or the parties have entered into an agreement for the division of their marital property.

Id.

140. *See* E. COMEAUX, A GUIDE TO IMPLEMENTING DIVORCE MEDIATION SERVICES IN THE PUBLIC SECTOR, 52 & n. 170 (1983).

141. *See* Meroney, *supra* note 11, at 477.

142. *See* O. COOGLER, *supra* note 96, at 116.

143. *See* Meroney, *supra* note 11, at 483.

144. Spencer & Zammit, *supra* note 14, at 930-38.

145. The Mediation Center for Dispute Resolution has already conducted a med-arb sequence in Minneapolis at the insistence of the parties' attorneys. Some private mediators agree that med-arb is a practicable alternative dispute resolution device. Interview with Stephen Erickson, Co-principal of Family Mediation Services, Minneapolis, Minnesota (Dec. 1, 1984).

G. How Might Attorneys Respond to Mediation?

Our professional experience reinforces the notion that disputes are to be resolved by the application of general rules of law. Leonard Riskin points out that quite different assumptions underlie mediation, such as notions of fairness, cooperation, and creative solutions unique to the disputants.[146] These different assumptions, according to Riskin, account for mediation's absence from an attorney's usual repertoire.[147]

If attorneys are to play a role in advancing the public policy of private ordering, then we should be familiar with mediation as an option for *some* clients under *appropriate* circumstances. We should forsake the intellectual arrogance that would seek to exclude nonlawyers from the growing profession of mediators, so long as the nonlawyers are well-trained and prepared. Yet, if attorneys fail to learn enough about mediation to make informed judgments about the standards, training, and work products of mediation, others will fill the vacuum.

As more separating and separated couples seek to mediate their divorces, an increasing number of attorneys will find clients who retain them after they have made the decision to mediate. Attorneys should continue to exercise their professional judgment in advising their clients about mediated agreements. It will be in the interest of both attorney and client for the attorney to be involved early on in the mediation process. Those who acknowledge the conciliatory facets of their personalities may wish to undergo training and become part-time mediators. We urge attorneys to accept the standing offer of many private mediators to observe a mediation whenever the mediating couple consents. As suggested recently by the chair of the American Bar Association's Mediation Committee, lawyers can respond to mediation in one of five ways: ignore it; stonewall it; live with it; join it; or improve it.[148]

V. OTHER ALTERNATIVE DISPUTE RESOLUTION METHODS

Arbitration and mediation are likely to be the alternatives of choice for most disputants and attorneys who opt for alternative

146. Riskin, *supra* note 12, at 44.

147. *Id.*

148. G. Friedman, Lawyer's Reaction to Family Law Mediation: Knee Jerk or Justified? 4 (1983) (materials submitted for the *National Institute for Family Dispute Resolution* Conference, Los Angeles).

dispute resolution methods. However, there are other, more esoteric, options available as well. Some of them would be appropriate for family law disputes.

A. MINI-TRIALS

Despite its misnamed sobriquet, a mini-trial is not an abbreviated trial. Rather, it is a specifically structured settlement device that shows both parties the strengths and weaknesses of their positions. Mini-trials first arose in 1977 in an extremely complex case in which Telecredit, Inc. contended that TRW, Inc. had infringed on Telecredit's patents on computerized charge authorization and credit verification devices.[149] Discovery had already cost each side hundreds of thousands of dollars when the attorneys negotiated a process for resolving the case inexpensively.[150] Each party's attorney presented his best case, in one-half day, using technical experts to flesh out the presentation.[151] Each side then had an opportunity to rebut the adverse party's presentation, followed by an open question-and-answer period.[152] A neutral "advisor" was hired to moderate the discussion, submit technical questions in advance to the expert witnesses, participate in the question-and-answer sessions, and revolve prehearing discovery issues.[153] If the parties had been unable to settle, the "advisor" was to render a nonbinding opinion regarding the strengths and weaknesses of each side.[154] The presentations were made to two top-management officials of each company, who achieved an outline for eventual settlement within one half-hour after the end of the mini-trial.[155]

In a family law matter, the presentation would be made to the husband and wife, who would then, for the first time, hear the case for the other side and have a glimpse of the expert testimony. The parties could agree to any procedural rules, but they would probably borrow certain notions from the *Telecredit* case. Some of the procedural rules the couple may consider include the following: limiting the scope of the advisor's power; disqualifying the advisor as a trial witness, expert, or consultant for either side in the event

149. Green, Marks, & Olson, *Settling Large Case Litigation: An Alternative Approach*, 11 LOY. L.A.L. REV. 493, 501 (1978).
150. *Id.* at 502-03.
151. *Id.* at 503.
152. *Id.* at 506.
153. *Id.* at 503-04.
154. *Id.* at 503.
155. *Id.* at 506.

that no settlement eventuated; protecting all statements, testimony, and evidence employed at the mini-trial from attack at trial; and jettisoning the rules of evidence.[156]

The mini-trial is a structured and very sophisticated variant of mediation in that no third party has coercive power to render a decision. But it also contains some aspects of arbitration, such as presentations by counsel, negotiated rules of evidence, expert witnesses, legal arguments, and structured, if truncated, discovery.[157] A mini-trial might work well where each party has potential risk on mixed issues of law and fact, such as tracing non-marital assets, ascertaining spousal interest in a closely held business, or valuing the contribution of one spouse to the advanced degree of the other. One of the attorneys in the *Telecredit* case estimated that the cost of the mini-trial was approximately one-tenth the projected cost of fully litigating the matter.[158] If the parties had not settled, virtually all of the mini-trial preparation would have been applicable to the necessary preparation of a regular trial.[159]

B. DECISION ANALYSIS

Decision analysis is a formalized cost-benefit method used by businesses to determine whether to take a particular matter to court.[160] John Wolf, former president of the Minneapolis-based Mediation Center for Dispute Resolution, suggests that the analysis so formulated could be easily converted to an alternative dispute resolution method.[161] If the parties could agree on the issues at stake, each could then carefully estimate the probable range of values of an award favorable to its side and could calculate the costs and risks of litigating rather than settling. The alternative dispute resolution method would consist of conducting settlement negotiations by confining arguments to differences in the cost-

156. *See id.* at 503-05 (procedural rules invoked by the parties in the *Telecredit* case).

157. Olson, *Dispute Resolution: An Alternative for Large Case Litigation,* HENNEPIN LAW., May-June 1984, at 14, 35.

158. *Id.* at 33.

159. *Id.*

160. Bodily, *When Should You go to Court?,* HARV. BUS. REV. May-June 1981, at 103, 103. Decision analysis is a technique employed by many companies to cut costs of litigation and damage awards through formulaic determination of the efficacy of a settlement and the dollar range acceptable to both parties. *Id.* at 103-04. As one advocate of the technique explains: "A typical decision analysis forcasts the probability of each possible outcome and estimates its financial costs or benefits. Alternative strategies are evaluated in terms of their financial impacts on the company." *Id.* at 104.

161. *See* Wolf, *supra* note 30, at 9. Wolf, who prefers the term "present value analysis" to "decision analysis," suggests that the procedure "be done by each party separately, with the option of focusing negotiations on differences in analysis. A third party advisor can, of course, also be employed." *Id.*

benefit analyses, or, alternatively, of presenting the analyses to a neutral third party advisor who would comment on the derivations and accuracy of each calculation, but who would not render any decision.[162]

In a family law context, a case with intricate property issues or inchoate property rights, such as stock options or unvested pensions or even a difficult spousal maintenance problem, might lend itself to negotiations shorn of rhetoric and focused on decision analysis. Such negotiations may impel a settlement, which would save money for both sides once the risks and costs became clear.

C. "MED-ARB"

The term "med-arb" (pronounced "meed-arb") is a contraction and combination of mediation and arbitration. It describes a process that should not be workable in theory but which may be quite effective in practice. Philosophically, mediation as a consensual process requires a neutral third-party who has no power but who employs his or her skills in reframing questions, generating new options, and balancing power to assist a couple in finding their own solutions.[163] An arbitrator, on the other hand, is contractually empowered by the parties to make decisions for them. In theory, then, to mix the two roles is to contaminate the functions of both the mediator and the arbitrator. But many experienced mediators have discovered that in actual practice, some couples who genuinely want to dissolve their marriages amicably and have mediated all but one or two difficult issues would prefer to have the mediator, whom they trust, break the deadlock rather than begin anew with another stranger.[164] For those couples who reject mediation out of fear that a failure to resolve all questions will merely cost them time and money in addition to large legal fees for litigation, med-arb will guarantee finality because the parties determine when to end mediation.

D. FOUR-PARTY CONFERENCES

A four-party conference is simply a meeting of the parties and their lawyers. Attorneys routinely convene such conferences to bring closure to settlements. It can, however, be used for

162. *Id.*
163. J. FOLBERG & A. TAYLOR, *supra* note 16, at 239.
164. Interview with Stephen Erickson, Co-principal of Family Mediation Services of Minnesota (Dec. 1, 1984).

creative dispute resolution if the attorneys are so inclined. Typically, in a divorce, settlement negotiations comprise serial conversations from client to lawyer to opposing counsel to adverse spouse and back again. In the process each client can become more entrenched and more convinced that his or her spouse is stubborn, unreasonable, and unfair. Although the attorneys are advocates, not mediators or arbitrators, they can utilize a four-party conference to generate solutions in a way that accommodates the needs and concerns of both parties. Not only is the process more efficient and less expensive than the sequential transmission method, it also fosters a more active role for the disputants. It fits the "private ordering" criterion for any client for whom personal autonomy is an important consideration.

VI. WHY NO QUEUES?

If alternative dispute resolution is such a good idea for family law matters, why is there such a small demand for it? The authors could find no record of an arbitrated divorce, mini-trial, or decision analysis employed anywhere in the Midwest. The authors know of only one med-arb in Minnesota, and that was in a postdecretal matter.[165] Despite a flourishing of trained mediators in such places as Minneapolis, St. Paul, Chicago, and Portland, reports from all four cities indicate that the supply of mediators greatly exceeds the demand by couples to actually mediate their divorces.[166]

The reason for the discrepancy is apparently attributable to the opposition of the family law bar. Virtually every person whose marriage dissolves seeks an attorney, but few attorneys recommend that their clients attempt mediation. Some explicitly oppose mediation, and an uncertain, but large, number sabotage mediated agreements by insisting that certain crucial provisions be deleted.

At some point, an attorney may commit malpractice by failing to advise his or her client of the alternative methods for getting divorced. In the meantime, only the creative attorneys are either using or recommending such options. No one method is likely to suit everyone. We best serve our clients by presenting all of the options, along with our reasoned opinion about the advantages and disadvantages of each method.

165. Survey conducted by co-author Weissman under the auspices of the Mediation Center for Dispute Resolution.

166. Interviews with Lee Howard, president of the Illinois Mediation Council (Dec. 19, 1984); Marilyn McKnight, president of the Minnesota Mediation Council (Jan. 8, 1985); and Susan Isaacs, therapist-mediator in Portland, Oregon (Jan. 4, 1985).